

Legal Aid Fights for Justice. We Fight for Them.



January 14, 2024

Chief Justice Patricia Guerrero and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Family Violence Appellate Project and Bay Area Legal Aid, Petitioners, vs.
Superior Courts of California, Counties of Contra Costa, Los Angeles, Santa Clara,
and San Diego

Dear: Chief Justice Patricia Guerrero and Associate Justices

The Legal Aid Association of California (“LAAC”) submits this amicus curiae letter¹ urging the Court to GRANT the Petitioners’ request for a writ of mandate and/or prohibition providing the relief requested in the Petition. LAAC supports the arguments made by Petitioners Family Violence Appellate Project (“FVAP”) and Bay Area Legal Aid (“BayLegal”).

Statement of Interest

LAAC’s interest in this matter stems from the direct impact the Petition has on LAAC’s work and that of its member organizations. LAAC is a statewide membership association of over 100 non-profit public interest law organizations, all of which provide free civil legal services to or systemic advocacy on behalf of low-income persons and communities throughout California. The Petitioners FVAP and BayLegal are two of our members, along with Community Legal Aid

¹ CRC 8.500(g)(1).

SoCal, as counsel. The mission of LAAC—itself a non-profit—is to provide an effective and unified voice for its members on issues of concern to the statewide justice community. LAAC member organizations provide legal assistance to people throughout California in all kinds of cases, from public benefits to access to healthcare to housing stability.

Legal aid nonprofits, LAAC's members, are directly serving the communities of Californians most severely impacted by the inability to access a record as described in the Petition. They serve marginalized, low-income, and other communities who are already disadvantaged in the legal system. As Petitioners make clear, this population is subject to many discrete impacts that include, but are not limited to, having to decline appellate assistance to those without a record to being prevented from pursuing a client's interests. While the experiences described by the Petitioners indicate what they and their clients (as well as unrepresented litigants in their service areas) deal with, these experiences are not limited to them. These are widespread issues that impact not just the member Petitioners, but all of our members and the communities they serve across the state. The inability to access a record has become a system crisis across California's court system. The repercussion of the crisis on Petitioners is clear and representative of the impact on our membership at large: Not having a record obstructs legal aid's ability to increase access to justice and close the justice gap.

Advocating for laws and policies that increase access to justice is a core part of LAAC's mission and our work with and on behalf of our members. For years, LAAC has advocated to ensure that low-income and other marginalized litigants have access to a verbatim record, and thereby an understanding of their case and an ability to appeal, whether they can afford to have one produced or not. LAAC was an amicus curiae on both levels of appeal in *Jameson v.*

Desta,² articulating many of the same issues as articulated in the Petition. LAAC and the legal aid community are invested in this issue because it is so critical to the ability of legal aid to serve communities as well as ensure self-represented litigants who cannot access legal aid can navigate an already confusing, complex civil legal system.

LAAC members have signed on to this letter, and their statements of interest are provided at the end of this letter after the signature, along with the organization names.

I. Reasons Why This Petition Should be Granted

This Petition should be granted for all of the reasons enumerated in the Petition: The current situation is constitutionally untenable. There is an ongoing violation of procedural due process and Equal Protection for low-income and other disadvantaged litigants as well as the separation of powers doctrine. California Code Section 69957 inhibits courts from ensuring equal access to justice and blocks them from exercising their constitutional duties therein.³ This creates a two-tiered system by allowing those who can afford a court reporter to access a record while denying it to others, thereby directly impacting the clients of legal aid and low-income and other marginalized communities. As the voice for legal aid in our state, this letter focuses on the access-to-justice context and the ways in which access to a record is a critical part of minimizing the justice gap and ensuring equal access to the courts.

According to the California Access to Justice Commission, Judicial Council survey responses from late 2023 and early 2024 indicate that greater than one million hearings and trials occurred in unlimited civil, family, and probate cases during which the Superior Courts did not give

² *Jameson v. Desta*, 5 Cal.5th 594 (2018).

³ Gov. Code § 69957.

litigants a way to generate a transcript of their proceedings.⁴ Across all three case types (unlimited civil, family, and probate), more than 70% of litigants did not get access to an official record, and more than 90% for unlimited civil specifically.⁵ For example, in Los Angeles County alone, over 525,000 proceedings have occurred without a verbatim record.⁶

Essentially, there is a “constitutional crisis”⁷ in California’s court system—the lack of access to verbatim recordings of proceedings, including for the low-income clients that are represented by legal aid or appear in court as unrepresented litigants. The numbers objectively and unequivocally paint a picture of a lack of access. It is undebatable that there is a massive deficiency within the system, one perpetuated by an outmoded and unconstitutional statute, Section 69957, and a scarcity of court reporters. It is time, as the Petition describes, to uproot this unconstitutional, ineffective system and give litigants what they need, deserve, and is their right.

a. The Context: Access to Justice in California

An overarching access-to-justice crisis in our state is the critical context for the ongoing problem of access to a record. Lack of access to one more piece of the judicial puzzle escalates the systemic inaccessibility of the court system and legal help in our state. The “justice gap” is such that 55% of all Californians face at least one civil legal issue in a year, but they receive

⁴ CALIFORNIA ACCESS TO JUSTICE COMMISSION, ISSUE BRIEF: ACCESS TO THE RECORD OF CALIFORNIA TRIAL COURT PROCEEDINGS (2024) (data is from January 1, 2023 to June 30, 2024).

⁵ *Id.*

⁶ *Court Reporter Crisis Dashboard*, Superior Court of California, County of Los Angeles (Aug. 15, 2024), <https://lascpubstorage.blob.core.windows.net/cpw/LIBSVCCcommunications-42-CourtReporterCrisisDashboard.pdf>.

⁷ *See, e.g.,* Milt Policzer, *A constitutional crisis?*, Courthouse News Service (Aug. 26, 2024), <https://www.courthousenews.com/a-constitutional-crisis/>.

inadequate or no legal assistance for 85% of their legal issues.⁸ Interconnected with this lack of access to legal help is the fact that most people in the civil legal system are self-represented.⁹

In California, there are around 5,089 eligible clients based on income (at or below 200% of FPL) per every one full-time legal aid attorney in California.¹⁰ This means most people who need help cannot get it: Legal aid organizations in California estimate that they are able to fully serve about 30% of problems presented to them.¹¹ What this amounts to is a situation where most people either do not seek or cannot get the help they need. One more impediment—the inaccessibility of verbatim records—only exacerbates the situation for legal aid service providers, their clients, and the unrepresented individuals going through the system.

b. Accessing a Verbatim Record is Challenging for Low-Income and Other Marginalized Litigants

Whether due to cost constraints or the complexities of the process of getting a court reporter, many low-income and self-represented litigants are unable to access a court reporter to produce the record they need. Generally, they need to not only go through the process to ensure a court reporter is present (despite scarcity), they would also need to acquire the official transcript (through a fee waiver system or by purchasing it). First, an individual must request a free reporter (which they may not know they can do or how to do), and then they have to wait to see if they can get one. But, because of the scarcity of court reporters, this might mean waiting and waiting, including having to decide whether to keep waiting or forgo their right to a reporter. At

⁸ THE STATE BAR OF CALIFORNIA, THE CALIFORNIA JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF CALIFORNIANS 6–7 (2019).

⁹ See, e.g., Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 GEORGETOWN J. ON LAW & POL. 355 (2020).

¹⁰ 2023, on file with LAAC calculated using US Census data and data from grantees of the State Bar of California.

¹¹ State Bar of California, *supra* note 8.

that point, only if they made it through all that and a reporter is available and present, they must jump through more hoops and paperwork to acquire the actual transcript.

The problem persists even after *Jameson*.¹² *Jameson* was decided in 2018 and held that there must be a way for self-represented and low-income litigants to have access to an official record.¹³ The Supreme Court wrote at that time: “[A]n official court reporter, *or other valid means to create an official verbatim record for purposes of appeal*, must generally be made available to in forma pauperis litigants upon request.”¹⁴ What we are seeing play out in reality, however, is that no such reporter is being provided, nor are any alternative means to create a record being allowed. The barriers to access remain, with the most prominent simply being the lack of available court reporters. The Court wrote in *Jameson* of the “crucial importance that the presence of a court reporter currently plays in the actual protection of a civil litigant's legal rights and in providing such a litigant equal access to appellate justice in California.”¹⁵ Post-*Jameson*, rather than seeing the meaningful change to access that the court intended, low-income and self-represented litigants continue to face insurmountable obstacles to accessing a record.

All of these impediments simply make it that much harder for litigants to access a record, favoring those who can afford to pay. This, ultimately, impacts not just a litigant’s ability to understand what even happened in their case, but also their ability to appeal, both of which are essential to their participation in the legal process. “Providing an official record,” wrote the Commission on the Future of California’s Court System in *Report to the Chief Justice*, “is

¹² *Jameson*, *supra* note 2.

¹³ *Id.*

¹⁴ *Id.* at 599.

¹⁵ *Id.* at 608.

essential to equal access, transparency, and fundamental fairness.”¹⁶ As the Petition lays out, this is a critical due process, constitutional issue that transcends politics and legislative restrictions on other ways to deliver transcripts to those who need them.

II. The Current Solution of Hiring (and Failing to Hire) Court Reporters Is Not Fixing the Problem of the Inaccessibility of Verbatim Records

There are two main reasons this problem persists. The current combination of (a) an undeniable and unfixable court reporter shortage and (b) outdated restrictions on electronic recording enables the current crisis in the court system that is, namely, the inability of low-income litigants to have access to what litigants with money are able to get: a verbatim record of their proceedings. The fact that there are too few court reporters to get the job done is not debatable.¹⁷ Simply put: There need to be court reporters (or another option) in order for low-income litigants to have access to the record that they need to understand their case and appeal if needed be. The other option, one long foreclosed due to politics and lobbying, is the expanded use of electronic recording to produce a verbatim transcript.

The immediate solution, it would seem, would be more funding and more incentives for court reporters, but this has failed to get staffing up even close to where it would need to be.¹⁸ Getting more court reporters has long been presented as the sole solution to ensuring more people (or all people) are provided with a record. However, money and funding has not fixed the problem. Beginning in 2021, the Legislature and Governor started providing trial courts with \$30 million

¹⁶ COMMISSION ON THE FUTURE OF CALIFORNIA’S COURT SYSTEM, REPORT TO THE CHIEF JUSTICE (2017).

¹⁷ See, e.g., Superior Court of California, County of Los Angeles, *supra* note 6.

¹⁸ *Id.*

annually to try to hire more certified court reporters, to little avail.¹⁹ As can be seen in Los Angeles, abundant funding has been poured into this strategy.²⁰ This is not working and continuing to pretend like it will only delay fixing this protracted problem of access to a record. It is a waste of court funding that could go to fixing other issues with the court system. But, this is not the only solution to the problem.

a. Electronic Recording Can Help Bridge the Gap Immediately

Electronic recording is the other solution to ensuring equal access to a record despite ability to pay. In California, however, current law restricts the use of electronic recording to generate an official certified verbatim record of trial court proceedings, as an alternative to a court reporter, to limited civil actions (those involving claims under \$25,000) and criminal proceedings involving misdemeanors or infractions.²¹ *Jameson* included some limited discussion of electronic recording, primarily pertaining to the recommendations from the Commission on the Future of California’s Court System’s report,²² but it does position it as the other, cost-effective solution to the recording issue.²³ Even back in the 1990s, electronic recording was considered “a reliable, cost-effective alternative to stenographic court reporting.”²⁴ The pandemic brought on a massive overhaul of the technological infrastructure in the court system, diminishing the argument that there would be a need for large-scale investment in electronic recording systems

¹⁹ Cheryl Miller, *Bill to Allow Electronic Recording in Civil Cases Dies in California Legislature*, The Recorder (Jan. 19, 2024), <https://www.law.com/therecorder/2024/01/19/bill-to-allow-electronic-recording-in-civil-cases-dies-in-california-legislature/?slreturn=20241114152959>; see also *Orange County Superior Court Statement on Court Reporter Shortage Crisis in California*, Orange County Bar Assoc., <https://www.ocbar.org/All-News/News-View/ArticleId/6376/Orange-County-Superior-Court-Statement-on-Court-Reporter-Shortage-Crisis-in-California>.

²⁰ Superior Court of California, County of Los Angeles, *supra* note 5.

²¹ See, e.g., *Jameson*, *supra* note 2, at FN 2, 10, 17.

²² COMMISSION ON THE FUTURE OF CALIFORNIA’S COURT SYSTEM, *supra* note 16.

²³ See, e.g., *Jameson*, *supra* note 2, at FN 2, 10, 17.

²⁴ COMMISSION ON THE FUTURE OF CALIFORNIA’S COURT SYSTEM, *supra* note 16.

at this time. Most other states already use electronic recording, with California being an outlier.²⁵

Ultimately, LAAC is not partisan per se on the issue of whether court reporters or electronic recording are preferable: We recognize that court reporters can be called the “gold standard,” in many ways. Critically, the debate of which is best is, to us, a less central debate than to the main one at hand: Whatever the delivery method, low-income litigants deserve, and have a right to, a verbatim record of their case. If a litigant has a human court reporter provide the service, that is a welcome result that we highly support; if a litigant has an electronic recording to produce the record, that is also a welcome means to what is necessary, which is the production and availability of a record no matter ability to pay. In sum, what matters is all litigants have access to what is rightfully theirs (a record), not how the creation of that record is completed, and the current system abridges and denies that process.

b. Attempted Legislative Fixes Are Not Enough

Over the years, there have been many attempts to change the legislative framework that prohibits expanded use of electronic recording, but that has proven futile due in part to the lobbying prowess of those interested in keeping the status quo even to the detriment of low-income court users.²⁶ This includes SB 662, co-sponsored by FVAP and LAAC, which did not make it out of the Senate Appropriations Committee earlier this year due, in large part, to

²⁵ See, e.g., Lee Suskin & James McMillan, *Making the Record Utilizing Digital Electronic Recording*, NATIONAL CENTER FOR STATE COURTS (2013), https://www.ncsc.org/__data/assets/pdf_file/0021/17814/09012013-making-the-digital-record.pdf. See also Joseph Darius Jaafari & Nicole Lewis, *In Court, Where Are Siri and Alexa?*, THE MARSHALL PROJECT (Feb. 14, 2019), <https://www.themarshallproject.org/2019/02/14/in-court-where-are-siri-and-alexa>.

²⁶ COMMISSION ON THE FUTURE OF CALIFORNIA’S COURT SYSTEM, *supra* note 16.

politically-influential unions representing court reporters.²⁷ It would have allowed for electronic recording when a court reporter was unavailable for *any* civil case.²⁸ The is just one of the many failed attempts to make legislative change indicates the power of the unions representing court reporters makes it untenable to believe that this problem can be fixed via a bill.²⁹ Thus, as the Petition describes, it is time for the Court to take up this constitutional denial of due process and access to a verbatim record, including in order to exercise a right to appeal.

III. Conclusion

As the *Jameson* Court wrote: “[T]he absence of a verbatim record of trial court proceedings will often have a devastating effect on a litigant's ability to have an appeal of a trial court judgment decided on the merits.”³⁰ Above all, the most important element on this is not how a record is produced, just that the record is actually furnished and accessible to everyone who needs one, as per *Jameson* and the California Constitution. What is happening now is an unequal playing field, where those who can afford a court reporter can get one to create their official record and those who cannot afford it get nothing, thereby creating a two-tiered system.³¹ The people impacted are those already disadvantaged by the court system, the individuals and families that legal aid serves, or that go unrepresented, exacerbating the access-to-justice crisis. There is an

²⁷ SB 662 (Rubio) (2023-2024).

²⁸ *Id.*

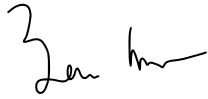
²⁹ See, e.g., SB 662, Senate Appropriations Comm. (2023), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB662#. The Committee’s analysis points to AB 1834 (Wagner, 2015) and AB 251 (Wagner, 2013), both of which would have permitted electronic recording in family law cases when a court reporter was unavailable. Neither made it out of the Assembly Judiciary Committee. Before this, it is important to note that, in 2008, the Legislative Analyst's Office recommended electronic reporting be phased in over five years. Commission on the Future of California’s Court System, *Report to the Chief Justice* 248 (2017). AB 803 (Wagner) from 2011 similarly sought to increase implementation of electronic recording by beginning with 20 percent of California Superior Courts, but this failed to get out of the first policy committee. *Id.*

³⁰ *Jameson*, *supra* note 2.

³¹ CALIFORNIA ACCESS TO JUSTICE COMMISSION, *supra* note 4.

easy fix, in overturning a detrimental code section that inhibits immediately and simply allowing for a system that works for all.

Respectfully Submitted,



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SBN: 312934

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Organizations signing on to this letter:

California Rural Legal Assistance

Los Angeles Center for Law and Justice

Neighborhood Legal Services of Los Angeles County

National Health Law Program

Impact Fund

Statements of interest:

California Rural Legal Assistance:

California Rural Legal Assistance, Inc. (CRLA) was founded in 1966 to be a world-class nonprofit law firm for those who cannot afford to pay a private attorney. Through 17 offices

statewide, CRLA provides no-cost legal services and education to tens of thousands of rural, low-income Californians and litigates cases that benefit even more people. A key component of our advocacy is to address often insurmountable linguistic barriers faced by our clients, who use a variety of Indigenous languages of Latin America, Punjabi, Arabic, Hmong, Spanish, American Sign Language, and many other languages used across rural California.

Los Angeles Center for Law and Justice:

The Survivor Justice Center is a nonprofit law firm with a mission to secure justice for survivors of domestic violence, sexual assault, and human trafficking and empower them to create their own futures. LACLJ provides free legal services, including representation and other extensive services to survivors throughout Los Angeles County. LACLJ represents survivors in family and immigration court and the court reporter shortage has made it impossible to appeal some cases and caused unnecessary delays in trials for low-income vulnerable litigants.

Neighborhood Legal Services of Los Angeles County:

Neighborhood Legal Services of Los Angeles County (“NLSLA”) is a nonprofit legal aid agency that provides free legal assistance to nearly 160,000 individuals and families throughout Los Angeles County every year. Our advocates specialize in areas of the law that disproportionately impact people living in poverty, including affordable housing and eviction defense, support for domestic violence survivors and their children, access to public benefits, access to healthcare, worker and consumer rights, and employment and training. Core to NLSLA's mission is ensuring access to justice for all litigants, especially those in marginalized and low-income communities.

The ability to obtain a verbatim record of court proceedings, as Petitioners are seeking to ensure here, is a critical component of that meaningful access.

National Health Law Program:

For more than fifty years, the National Health Law Program (NHeLP) has engaged in legal advocacy on behalf of limited-income people, people with disabilities, older adults, and children. NHeLP's litigation includes class action litigation on behalf of individuals who are being harmed by ongoing government practices, including practices that limit their access to courts, and practices that violate the Medicaid Act and the Americans with Disabilities Act. NHeLP is interested in the issues raised by this case.

Impact Fund:

The Impact Fund is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights cases brought under federal, state, and local laws, including cases challenging limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.