**No. S288176**

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

**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,**
*Respondents,*

**LEGISLATURE OF THE STATE OF CALIFORNIA,**
*Real Party in Interest.*

# APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
AND
# PROPOSED BRIEF OF *AMICUS CURIAE* ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**

**Other Authorities**

## APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.487(e) of the California Rules of Court, proposed *amicus curiae* respectfully request leave to file the accompanying proposed *Amicus Curiae* brief in support of Petitioners.

## INTERESTS OF *AMICUS CURIAE* [1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. The ACLU and its affiliates share a longstanding commitment to advance efforts to ensure equal access to the courts and justice for all Californians. They have appeared before this Court as direct counsel and *amicus curiae* in numerous cases involving equal protection and the rights of low-income litigants. (See, e.g., *In re Humphrey* (2021) 11 Cal.5th 135; *Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 904.)

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[1] Pursuant to Rules 8.487(e)(5) and 8.200(c)(3), *amicus* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

This case concerns whether Government Code Section 69957, which prohibits electronic recording in most civil cases, violates the California Constitution. Petitioners have persuasively argued that the application of the statute to deny low-income litigants access to verbatim recording presents a host of constitutional problems. In their petition, Petitioners contend that Section 69957 violates equal protection, but that the statute must be assessed under rational basis review except in cases where the statute burdens litigants' ability to vindicate fundamental rights, which requires strict scrutiny. *Amicus* files this brief to explain why Section 69957 more broadly violates California's equal protection guarantee: Because the right to meaningful appellate review is itself fundamental, the statute must overcome—and cannot survive—strict scrutiny in all its applications.

For these reasons, *amicus* respectfully requests leave to file the accompanying proposed brief.

Dated: April 4, 2025

Respectfully submitted,

*/s/ Lauren M. Davis*

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## BRIEF OF *AMICUS CURIAE*

## INTRODUCTION

The challenged statute at issue here, Government Code Section 69957, prohibits electronic recording in the majority of civil cases. As the demand for court reporters continues to rise amidst a simultaneous decline in the number of certified court reporters, Section 69957 effectively prevents most civil litigants from obtaining verbatim recordings of their proceedings. When a court hearing occurs without a verbatim recording, the litigant is permanently deprived of a trial record and therefore cannot adequately argue legal error in their cases. Thus, in practice, those who cannot afford to hire a private court reporter all-too-often are forced to forfeit their right to appellate review. In the fourth quarter of 2023 alone, this deprivation occurred in 215,460 of the 294,600 cases in which electronic recording was not permitted—nearly three-quarters of cases.[2]

This Court's intervention is particularly important because of the fundamental and consequential nature of the right to appellate review under this state's Constitution. Absent this Court's prompt intervention, litigants will continue to be subjected to a scheme that offers appellate review for those with means to hire private court reporters and effectively forecloses

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[2] (California Access to Justice Commission, *Issue Paper: Access to the Record of California Trial Court Proceedings* (2024) p. 6 ("Access to Justice Rpt.") https://static1.squarespace.com/static/6493852d5789f82c67c661a4/t/6736686d9ee62639df5fa5dc/1731618927089/Access+to+the+Record+of+CA+Trial+Court+Proceedings.pdf [as of Apr. 3, 2025].)

that right for those without the same financial resources. That wealth-based disparity cannot be squared with California's constitutional guarantee of equal protection.

## ARGUMENT

### I. Government code section 69957 violates the California Constitution's equal protection guarantee.

Under the California Constitution's equal protection guarantee, a person may not be "denied equal protection of the laws." Cal. Const., art. I, § 7. Where the Court determines that a statute subjects a subgroup to differential treatment based on poverty, and that differential treatment or classification impinges on a fundamental right, this Court applies strict scrutiny review. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 614-15 (*Serrano I*).) To survive strict scrutiny, the government must show that it has a compelling interest in the challenged statute and that the statute is necessary to achieve that interest. (*Ibid.*) Here, Section 69957 creates a wealth-based classification that burdens the fundamental right to appellate review. It therefore should be assessed, and ultimately struck down, under strict scrutiny.

#### A. Section 69957 creates a classification based on wealth.

Under Section 69957, those with financial means have access to verbatim court recordings and therefore have the record by which to initiate meaningful appellate review. (See Petn. at p. 21.) On the other hand, those without financial means have only illusory access to appellate review. (See *ibid*; see also *Jennings v. Super. Ct. of Contra Costa County* (1967) 66 Cal.2d 867, 876

[holding that a right at issue was "illusory" where the litigant was not provided a reasonable opportunity to exercise that right].)

To explain further, the current statutory scheme prohibits courts from using electronic recording in unlimited civil proceedings. (Gov. Code, § 69957.) Litigants who can afford to pay a private court reporter—which typically costs $2,580 per day for a deposition and $3,300 per day for a trial—are unaffected by section 69957's prohibition. (See Access to Justice Rpt., *supra*, at p. 13.) In light of the diminishing pool of certified court reporters, however, litigants who cannot afford to hire a private court reporter are left without any record of their trial proceedings. (See Petn. at pp. 22-28.) Because a direct appeal is based on legal error ascertained from the trial court proceedings, litigants effectively lose their right to appeal without a verbatim record. (See *id.* at pp. 21-22.) Meanwhile, litigants who can afford a court reporter maintain their access to the vital function of appellate review. (See *id.* at p. 65.)

Such a wealth-based classification cannot be squared with California's constitutional guarantee of equal protection. (See *Serrano I*, *supra*, 5 Cal.3d at p. 597.) This Court has long recognized that "statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society" are constitutionally suspect. (See *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281.)[3]

[3] Although this Court has not held that poverty is a suspect class for all purposes, it has recognized that the poor "share many characteristics of other 'insular minorities' who may not be

In *Serrano,* for example, this Court held that a school-financing scheme that created wealth-based disparities between schools in different communities implicated equal protection. (See *Serrano I*, at pp. 592-596; see also *Serrano v. Priest* (1976) 18 Cal.3d 728, 760 (*Serrano II*) [declaring a new iteration of a school-financing scheme unconstitutional and reasoning that a fiscally neutral system would make "educational opportunity depend on factors other than the wealth of the district."].) Similarly, in *Myers*, this Court struck down statutes limiting Medi-Cal funding for abortions as unconstitutional because the "restrictions on Medi-Cal funds . . . singled out poor women and [] subordinated *only their* constitutional right of procreative choice to the concern for fetal life." (*Myers*, *supra*, at p. 281, italics added.)[4]

That reasoning is instructive here. Like the statutory schemes in *Serrano* and *Myers*, Section 69957 creates a two-track justice system directly tied to wealth. The statute's restrictions, in other words, "subordinate[] only" low-income litigants' right to meaningful appellate review by depriving them of verbatim recordings of trial court proceedings. (See *Myers*, *supra*, 29 Cal. 3d

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adequately protected from discriminatory treatment by the general safeguards of the legislative process." (*Ibid.*; see also, e.g., *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18 [holding that sex is properly considered a suspect classification under the California Constitution and that required close scrutiny]; Rose, *The Poor As A Suspect Class Under the Equal Protection Clause: An Open Constitutional Question* (2010) 34 Nova. L.Rev. 407, 421.)

[4] *Myers* was not an equal protection case, but it relied on "equal protection analysis" and precedent in reaching its holding. (See *id.* at pp. 281-282.)

at p. 281.) Those wealthy enough to pay for the creation of these recordings are entirely unaffected by Section 66957's prohibition. Thus, those with financial means are afforded a layer of judicial review that is effectively denied to low-income litigants. (See Petn. at pp. 13-14.)[5]

### B. The statute's wealth-based classification burdens the fundamental right to appellate review.

Classifications based on wealth are invalid when, as here, they interfere with fundamental rights and interests. (See, e.g., *Griffin v. Illinois* (1956) 351 U.S. 12, 18; *Douglas v. People of State of Cal.* (1963) 372 U.S. 353, 357-58; *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 670; *Gebert v. Patterson* (1986) 186 Cal.App.3d 868, 876.) To determine whether a fundamental right is at issue, this Court looks to whether the asserted interest finds support in the "history, [] traditions, and [] conscience of our

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[5] Respondents suggest that for "administrability" purposes the Court should limit relief in this case to only those people who have applied for and secured a fee waiver as contemplated in *Jameson*. However, crafting relief in this manner would result in a 3-track justice system which would continue to deny the right to appellate review to millions of Californians who do not qualify for fee waivers and simultaneously cannot afford a court reporter. (See California Lawyers Association Amicus Letter, *Family Violence Appellate Project v. Superior Court*, No. S288176 (Cal. Supreme Ct., filed Dec. 5, 2024), at pp. 4-5.) To explain further, relief crafted in this manner would create three separate classes: (1) litigants who qualify for and secure fee waivers, (2) litigants who can afford to pay for a private court reporter, and finally (3) litigants who do not qualify for and secure fee waivers, but are unable to afford a private court reporter.

people." (*Dawn D. v. Super. Ct. (Jerry K.)* (1998) 17 Cal.4th 932, 940.) As part of that inquiry, this Court often considers California history and case law, as well as federal precedent. (See e.g., *People v. Olivas* (1976) 17 Cal.3d 236, 248-49.) Here, each of these sources point toward the fundamental nature of the right to appellate review in California. (See Petn. at pp. 70-71 & fn. 79.)

**1. The right to appellate review is deeply rooted in California's history.**

The right to appellate review and its error-correcting function is vital to fairness and is deeply rooted in California's legal history. Indeed, in some of its earliest decisions, the Court discussed the right of appeal and explicitly recognized the "fundamental nature of the right to appeal." (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 796; *Scott v. Super. Ct. of Yolo County* (1887) 73 Cal. 11, 12 [discussing the plaintiff's right to appeal when dissatisfied with a judgment].)

This Court has expressly identified the origins of the right to appeal and discussed its vital importance in California's founding documents. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 95-116.) In *Powers*, the Court analyzed the use of the term "right of appeal" as it was used in the 1849 and 1878-1879 constitutional debates, concluding that the term meant "a right to some effective procedural vehicle by which to invoke the constitutionally conferred appellate jurisdiction." (*Id.* at p. 104; see also *Jameson v. Desta* (2018) 5 Cal.5th 594, 608 [explaining that "the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have his or her claims of trial court error

resolved on the merits by an appellate court"].) *Powers* further noted that the California Supreme Court in the 1850s, like the 1849 Constitutional Convention delegates, "viewed the 'appellate jurisdiction' provision of the 1849 Constitution as conferring or implying a 'right of appeal' " and recognized that the legislature could not "impair the exercise of the appellate power." (*Id.* at p. 98; see also *Ex parte Smith* (1907) 152 Cal. 566, 569 [debates of a constitutional convention are useful for "informing ourselves historically of the evil which [a constitutional provision] was intended to guard against, or the benefit to be secured].)

**2. State and federal legal precedent affirm the fundamental nature of appellate review.**

Consistent with the fundamental nature of the right to access appellate review, this Court has long recognized that low-income civil litigants must have "the ability to obtain meaningful access to the judicial process in a great variety of contexts." (*Jameson, supra,* 5 Cal. 5th at p. 604.) Indeed, the Court has an "inherent discretion to facilitate an indigent civil litigant's equal access to the judicial process" even when statute does not facilitate such access. (*Id.* at p. 605. [describing the "long line" of decisions upholding access to the judicial process].)

United States Supreme Court precedent also supports the conclusion that the right to meaningful appellate review is fundamental. While the high court has never held, as a matter of federal constitutional law, that "the States are *required* to establish avenues of appellate review," it has described as "fundamental" that "once established, these avenues must be kept

free of unreasoned distinctions that can only impede open and equal access to the courts." (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310, italics added; see also *Ross v. Moffitt* (1974) 417 U.S. 600, 607 [holding that the *Griffin* line of cases "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."].) Thus, the high court has held that where states grant the right to appeal, like California does, they may not "bolt the door to equal justice." (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 110, quoting *Griffin, supra*, 351 U.S. at p. 24.) Although these cases concerned the right to appeal in the criminal context, civil cases likewise have outcomes that materially impact fundamental rights, such as to property and privacy, that may be overturned were they reviewed on appeal. (See *Griffin, supra,* at p. 19 ["to deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside]".)[6]

**3. The practical importance of appellate review points to its fundamental nature.**

Finally, the right to appellate review is fundamental because it is a uniquely vital procedural safeguard in our judicial system. As the American Bar Association recognizes, appellate review is a

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[6] That there are statutes fleshing out the right to appeal does not mean the right is not fundamental. Numerous fundamental rights are implemented by statute and regulation. (See e.g., 16 Witkin, Summary of Cal. Law (11th ed. 2024) Juvenile, § 646 ["[a] number of fundamental rights are provided to minors in wardship proceedings by statute and implemented by the Rules of Court"].)

"fundamental element of procedural fairness." (3 ABA, Jud. Admin. Div. (1994) *Standards Relating to Appellate Courts* § 3.10 at p. 18.) For one, appellate review plays an outsized role in reducing error: state appellate courts reversed the underlying judgment in whole or in part in approximately one-third of cases. (Burke Robertson, *The Right to Appeal* (2013) 91 N.C. L.Rev. 1219, 1243.)

Appellate review also serves critical functions of developing and refining legal principles and "increasing uniformity and standardization in the application of legal rules." (See *id*. at p. 1225; see also Chemerinsky, *Decision-Makers: In Defense of Courts* (1997) 71 Am. Bankr. L.J. 109, 128 [binding appellate precedents allow for consistency and efficiency and "foster fairness and equity among litigants"].)

Additionally, appellate review "mak[es] justice 'visible' through the reasoned opinion." (Phillips, *The Appellate Review Function: Scope of Review* (1984) 47 Law and Contemporary Problems 1, 2.) Practically speaking, litigants rely on appellate opinions to understand precedent and assess their own likelihood of success in litigation. (See e.g., ABA, *How Courts Work* (2021) Steps in a Trial, Appeals [7] ["appellate courts often issue written decisions, particularly when the decision deals with a new interpretation of the law, establishes a new precedent, etc."].) Absent appellate decisions, which require verbatim recordings,

[7] https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals/ (as of Apr. 3, 2025)

litigants lose the opportunity to better understand the court's decisions. Over time, this can result in in decreased transparency and loss of trust in the judiciary. (See e.g., Conference of State Court Administrators, *Courting Public Trust and Confidence: Effective Communication in the Digital Age* (2022) p. 15[8] ["[c]ourts should make court processes as transparent as possible so the average person can witness the judicial system in action.].)

* * * * *

In sum, history, precedent, and practice all point to the same conclusion: The right to access meaningful appellate review is a fundamental right. And because Section 69957 creates a wealth-based classification that burdens the exercise of the fundamental right to appellate review, strict scrutiny applies. (See Petn. at p. 70-71; see also *Serrano I*, *supra*, 5 Cal.3d at p. 614-15 [holding that strict scrutiny applied to the case because it involved a classification based on the suspect class of wealth and impacted a fundamental interest].) In short, though the State "need not equalize economic conditions," it cannot prevent low-income persons from securing appellate review altogether. (*Griffin, supra,* 351 U.S. at p. 23 (Frankfurter, J. concurring).)

### C. Section 69957 fails strict scrutiny.

A wealth-based classification that interferes with fundamental rights must be subjected to "strict and searching scrutiny." (*Serrano II, supra,* 18 Cal.3d at p. 766.) Under that test,

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[8] https://cosca.ncsc.org/__data/assets/pdf_file/0020/86015/COSCA-Policy-Paper-Courting-Public-Trust.pdf (as of Apr. 3, 2025)

the State bears the burden of establishing "not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*Olivas, supra*, 17 Cal.3d at p. 243, original italics, citing *Serrano I, supra,* 5 Cal.3d at p. 597.) Here, because a fundamental interest is at stake, the State must show that a compelling interest justifies Section 69957 *and* that its wealth-based classification is necessary to further that compelling interest. It cannot.

To the extent that the government suggests that Section 69957 serves the compelling interest of ensuring that high-quality records of court proceedings are created, *amicus* agree that it is of the utmost importance that litigants have access to verbatim recordings of their hearings. Section 69957, however, does nothing to further that interest; to the contrary, it *hampers* it. (See *Keenan v. Super. Ct. of Los Angeles County* (2002) 27 Cal.4th 413, 417.) Simply put, prohibiting courts from using electronic recording where no other option is available undermines whatever interest the government may have in ensuring that high-quality records of court proceedings are available. (See Petn. at p. 21.) In fact, the current legislative scheme results in *no* verbatim record created in over 1 million hearings per year in the state of California—a result that cannot be squared with any government interest.[9]

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[9] (California Access to Justice Commission, *Press Release for Access to the Record of California Trial Court Proceedings Report* (Nov. 18, 2024) p. 3. https://static1.squarespace.com/static/6493852d5789f82c67c661a4/t/673b6d57fce20c1d6422de0b/1731947864000/Access+to+the+Record+Report++press+release.pdf [as of Apr. 3, 2025].)

To the extent there are concerns about the accuracy of electronic recordings, the State could—as have other jurisdictions—upgrade electronic recording where necessary.[10] (see *Frontiero v. Richardson* (1973) 411 U.S. 677, 690 [the United States Supreme Court explained that administrative convenience was insufficient justification on its own when analyzing statues under heightened scrutiny noting "the Constitution recognizes higher values than speed and efficiency"].) The shortage of court reporters is not limited to California; it is a problem for courts across the country.[11] To address this access-to-justice gap, two-thirds of states and federal courts have permitted electronic recording to create verbatim records. Thus, electronic recording can serve as a feasible alternative to achieve the government's purpose. (Access to Justice Rpt., *supra,* at p. 16.*)* For example, in

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[10] To *amici*'s knowledge, however, Respondents have not expressed that the quality of electronic recording is a concern. In fact, to the contrary, Respondent Los Angeles County Superior Court has reported that it successfully hears appeals more than 500 times per year using verbatim records created by electronic recording. (Los Angeles County Superior Court, *General Order re Operation of Electronic Recording Equipment for Specified Proceedings Involving Fundamental Liberty Interests in the Absence of an Available Court Reporter* (Sept. 5, 2024) p. 6.)

[11] (See Ducker Worldwide & National Court Reporters Association, *2013-2014 Court Reporting Industry Outlook Report: Executive Summary* (2014) p. 5 ["decreased enrollment and graduation rates for court reporters, combined with significant retirement rates, will create by 2018 a critical shortfall projected to represent nearly 5,500 court reporting positions."] https://www.ncra.org/docs/default-source/uploadedfiles/education/schools/2013-14_ncra_-industry_outlook-(ducker)8ef018c4b8ea486e9f8638864df79109.pdf?sfvrsn=c7a531e2_0 [as of Apr. 3, 2025].)

response to budget reductions mandated by the state legislature, Utah discontinued the use of all court reporters in 2009 bar only the exception that litigants in capital cases retain the option to hire contracted court reporters. The Kentucky Supreme Court has also adopted alternative means of obtaining verbatim recording, recognizing video recordings as the official record of a case on appeal. (Conference of State Court Administrators, *Digital Recording: Changing Times for Making the Record* (Dec. 2009) at p. 13.)

In short, the scheme created by Section 69957 does not advance the interest of creating high-quality verbatim recordings. It therefore cannot withstand strict scrutiny review. (See *Olivas*, *supra*, 17 Cal.3d at p. 255.)

### D. In the alternative, Section 69957 fails rational basis review.

Even if this Court considers Petitioners' claim under rational basis review, Section 69957 likewise fails to meet constitutional muster. (See Petn. at pp. 69-70.) When an Equal Protection Clause challenge is reviewed under rational basis, the law is presumed constitutional if there is both a rational relationship between a disparity in treatment and a legitimate government purpose. (*People v. Hardin* (2024) 15 Cal.5th 834, 847.)

Here, Section 69957 is unconstitutional because there is no rational relationship between the wealth-based disparity it creates and any legitimate government purpose. Notably, the legislature's justification for barring electronic recording is

unclear. But labor groups representing court reporters have asserted that electronic recording is an inferior method of creating a verbatim recording.[12] Even assuming the legislature concurs, this does not justify a complete bar on such recording. Rather than facilitating access to high-quality records, that bar instead means that low-income litigants cannot obtain a verbatim recording *at all*, let alone an imperfect recording. Therefore, there is no conceivably rational relationship between the government's interest in facilitating access to verbatim recording and the current statutory scheme. (See Petn. at pp. 60-61.)

## II. This Court should exercise its authority to protect low-income litigants' constitutional rights.

Absent this Court's intervention, low-income litigants will continue to have their cases heard without a verbatim recording, rendering many permanently foreclosed from accessing meaningful appellate review. Judicial Council survey data from 2024 suggests that litigants in over 70 percent of proceedings in the over one million unlimited civil, family, and probate cases conducted in a year will have had no access to an official record. (Access to Justice Rpt., *supra*, at p. 1.) This amounts to thousands of additional litigants each day who have hearings without verbatim recordings. (See *ibid.;* see also *Industrial Welfare Com. v. Super. Ct.* (1980) 27 Cal.3d 690, 699 [exercising

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[12] (Sundaram, *Electronic Recording in Family Courts Fails to Advance in California Legislature*, S.F. Public Press (Jan. 26, 2024) https://www.sfpublicpress.org/electronic-recording-in-family-courts-fails-to-advance-in-california-legislature/ [as of Apr. 3, 2025].)

original jurisdiction "in view of the large number of employees affected"].)

### A. This Court should not defer to the ordinary appellate process.

*Amici* supporting Respondents suggest that this Court should wait to intervene and allow the ordinary appellate process to take its normal course. (Service Employees International Union California State Council, et al. Amicus Letter, *Family Violence Appellate Project v. Superior Court*, No. S288176 (Cal. Supreme Ct., filed Dec. 16, 2024), at pp. 8-10 ("SEIU Letter").) But that process is not an adequate alternative to this Court's intervention for at least two reasons.

*First*, without a single definitive answer from this Court, superior courts throughout the state will reach a variety of conclusions, resulting in a patchwork of rules governing access to appellate review. For example, at least two counties have implemented orders giving judicial officers discretion to allow electronic recording where it is currently prohibited by Section 69957, recognizing that the application of Section 69957 cannot be squared with judges' duty to protect litigants' constitutional rights. (Petn. at p. 16.) As is, a litigant's ability to access verbatim recording, and by extension appellate review, depends on whether they live in one of the at least two counties with such an order or one of many counties without one. And given the discretion afforded to judges to permit electronic recording in the counties that allow it, similarly situated litigants in the *same* superior court may still be treated differently with respect to verbatim

recordings. (See *ibid.*) [13]

*Second*, time is of the essence: once a litigant has a hearing in which no verbatim recording is made, there are *no* means by which to recover the record.[14] Should this Court defer to the typical appellate process and wait for the issue to make its way through the court system over the course of several years, many thousands of additional litigants will have had hearings without access to verbatim recording and will be irreversibly harmed. (See Petn. at p. 48; see *Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 808 [exercising original jurisdiction because delay would result in daily exacerbation of existing pollution issue]; see also *Industrial Welfare Com., supra,* 27 Cal.3d at p. 699 [exercising original jurisdiction where the issue at stake in the case impacted a large number of litigants].)

The growing shortage of court reporters only adds to the urgency, because the increased vacancies in court reporter positions in California's superior courts means that the percentage of litigants without access to a verbatim recording will only increase absent this Court's immediate intervention. (Access to Justice Rpt., *supra*, at pp. 7-8.) And contrary to *amici* SEIU's

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[13] This Court is ultimately responsible for oversight of California's judicial system. (Petn. at p. 49.) Thus, it is also this Court's responsibility to intervene when lower courts, by virtue of statute or otherwise, are acting in a manner that violates Californians' constitutional rights. (*Id.* at p. 52.)

[14] (See Judicial Branch of California, *Shortage of Court Reporters in California* (Mar. 2025) https://courts.ca.gov/shortage-court-reporters-california [as of Apr. 3, 2025] [since April 2023, there have been 1,518,805 hearings with no verbatim record].)

contention, the fact that this issue was not raised to or addressed by the courts sooner does not diminish the urgent need for this Court to protect future litigants' right to appellate review. (SEIU Letter at p. 12.)

### B. This Court has an obligation to act regardless of what the Legislature decides.

Nor can this Court defer to the legislature to cure the constitutional violation. The legislature has repeatedly failed to act when presented with the opportunity to resolve this access to justice crisis. In January 2024, for example, a bill that would have allowed electronic recording in civil cases in which it is currently prohibited died in committee.[15] The legislature has also attempted to remedy the issue by authorizing an annual grant of $30 million to increase the number of certified reporters in family and civil cases. (*Ibid.*) Yet the crisis continues to be exacerbated each day as more litigants participate in hearings with no access to verbatim recording. (See *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 945 [this Court recognized that "prompt judicial action" was essential where a potential application of statutory language would result in constitutional violations, though the legislature could have acted to modify the statute at issue].)

*Amici* SEIU contests Petitioners' assertion that there is nothing further respondent superior courts can do to meet their constitutional obligations. (See SEIU letter at p. 7.) But whether

[15] (Sundaram, *supra.*)

individual courts or the legislature *can* act is not dispositive. (See *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 903 (Lucas, J. concurring) ["As the Supreme Court of California, we are the final arbiters of the meaning of state constitutional provisions"].) This Court should first and foremost consider the permanent harm caused to litigants by any delay in acting to protect litigants' access to verbatim recording and appellate review.

. . . . .

In sum, Section 69957's prohibition on electronic recording violates the California Constitution's Equal Protection Clause and thus should be struck down as applied. This Court is the appropriate body to remedy this constitutional crisis under which thousands of low-income litigants each day lose their fundamental right to appellate review.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the petition for writ of mandate.

Dated: April 4, 2025

Respectfully submitted,

*/s/ Lauren M. Davis*

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## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amicus Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 4,812 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File *Amicus Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: April 4, 2025

Respectfully submitted,

*/s/ Lauren M. Davis*

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## PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On April 4, 2025, I served the attached,

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** AND **PROPOSED BRIEF OF *AMICUS CURIAE* ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONERS**

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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*Service pursuant to California Rules of Court Rule 8.29(c)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 4, 2025, in Fresno, California.

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Sara Cooksey, Declarant