No. S288176

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FAMILY VIOLENCE APPELLATE PROJECT and BAY AREA LEGAL AID,

Petitioners,

v.

SUPERIOR COURTS OF CALFIORNIA, COUNTIES OF CONTRA COSTA, LOS ANGELES, SANTA CLARA, and SAN DIEGO,

Respondents,

LEGISLATURE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CALIFORNIA CONSTITUTION SCHOLARS SUPPORTING NO PARTY

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Under Rule of Court 8.520(f), David A. Carrillo and Stephen M. Duvernay (collectively, *amicus* California Constitution Scholars) request leave to file the attached *amicus curiae* brief according to the Court's February 19, 2025 order to show cause in this matter. *Amicus* certifies under Rule of Court 8.520(f)(4) that no party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief.

Amicus are California constitution scholars who seek to aid this Court in resolving an issue of state constitutional interpretation presented here; we are academics affiliated with the California Constitution Center, a nonpartisan academic research center at the University of California, Berkeley, School of Law. The University of California is not party to this brief.

The proposed brief will assist the Court by addressing the core issue: Does the prohibition on electronic recording of certain proceedings in Government Code section 69957(a) violate the California constitution when an official court reporter is unavailable and a litigant cannot afford to pay a private court reporter? *Amicus* is interested in this question because it raises an important issue of California constitutional law regarding the balance of power between the judicial and legislative branches in the context of regulating recordings of court proceedings. *Amicus* argues that although judicial and legislative authority intersect in this

procedural context, when due process and equal protection are impaired the judicial duty to safeguard constitutional standards becomes paramount.

Respectfully submitted,

Dated: April 4, 2025

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AMICUS CURIAE BRIEF

I. Summary of argument

Judicial and legislative authority intersect in the procedural context of recording court proceedings. Ordinarily that overlap requires the courts to accept some statutory regulation. But when due process and equal protection are impaired through legislative inaction the judicial duty to protect constitutional rights requires the courts to exercise their inherent power to regulate their proceedings. The judiciary can and should do so here by reading Government Code section 69957 as directory to the extent it impairs due process and equal protection.

The courts have power and responsibility for delivering due process and treating litigants equally. When made aware of injustice resulting from a procedural statute, the judiciary's own duty to provide constitutionally adequate processes is implicated. Courts have both a constitutional power to enforce individual process rights against the state, and a constitutional duty to deliver due process in judicial proceedings. Here, that includes the "critical" duty to ensure litigants can create an adequate record to enable review of claims on appeal.[1] But existing law creates a due process trap: it creates appellate rights, and requires a transcript to litigate an

[1] *Camacho v. Super. Ct. (2023) 15 Cal.5th 354*, 389; *see also Association for Los Angeles Deputy Sheriffs v. Super. Ct.* (2019) 8 Cal.5th 28, 39 (Fourteenth Amendment's due process guarantee imposes on states certain duties consistent with their sovereign obligation to ensure that justice shall be done and a fair trial be had).

appeal, but restricts electronic transcription despite the well-known unavailability of official reporters.

That forces trial courts to deny indigent litigants use of electronic transcription, and forces appellate courts to reject their appeals for providing inadequate records. This denies equal access to indigent litigants by depriving them of a fair opportunity to be heard. Yet California's statutory grants of appellate review create a right of equal access to the courts, and so the appellate process "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[2] Courts can meet that duty by formulating rules of procedure where justice demands it.[3] Thus, courts are duty-bound to ensure a proper record is created — by allowing indigent litigants to use electronic transcription — and may do so by court rule.

II. Due process requires verbatim recording of proceedings

Appellate courts have constitutional jurisdiction, and litigants have statutory rights to appeal. But parties cannot appeal a judgment without a record. So a law that defeats a party's ability to create a record defeats appellate jurisdiction, which impedes a meaningful right to appeal. This denies due process.

[2] *March v. Mun. Ct.* (1972) 7 Cal.3d 422, 427.

[3] *Adamson v. Super. Ct.* (1980) 113 Cal.App.3d 505, 509 (citing *Addison v. State* (1978) 21 Cal.3d 313, 318–319).

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.[4] This is an aspect of the constitutional right of access to the courts for all persons.[5] A meaningful appeal involves challenging the ruling below, and a transcript is an essential element of such challenges: without a transcript, a party forfeits arguments that insufficent evidence supports the trial court judgment.[6] Preventing indigent litigants from creating electronic transcripts denies them due process and nullifies their right to appeal.

Barring electronic transcripts also defeats constitutional appellate jurisdiction. The California constitution gives the Court of Appeal appellate jurisdiction when superior courts have original jurisdiction.[7] Appellate jurisdiction includes "the power to review and correct error in trial court orders and judgments."[8] And a party has at least statutory rights to an appeal.[9] Trial courts cannot interfere

[4] *Mathews v. Eldridge* (1976) 424 U.S. 319, 333; *Randone v. Appellate Dep't* (1971) 5 Cal.3d 536, 550.

[5] *Cal. Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 338–339.

[6] *See, e.g.*, *Jameson v. Desta* (2018) 5 Cal.5th 594, 609 (appellant has burden of overcoming presumption of correctness by affirmatively showing error on an adequate record); *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 (an appellant cannot challenge sufficiency without oral proceedings transcript), disapproved on other grounds by *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611.

[7] Cal. Const., art. VI, § 11.

[8] *Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 668.

[9] *Skaff v. Small Claims Ct.* (1968) 68 Cal.2d 76, 78 (legislature has complete control over the right to appeal); *Lavine v. Jessup* (1957) 48 Cal.2d 611, 613 (no judgment

with those statutory rights of appeal.[10] But an appellant cannot challenge the sufficiency of the evidence to support a judgment when there is no transcript of the oral proceedings.[11] And a procedure that prevents parties from creating a proper appellate record defeats the Court of Appeal's constitutional jurisdiction because without a transcript the appellate body has nothing to review.[12] In short, a system making it impossible for indigent appellants to secure a transcript both defeats jurisdiction and the right to appeal. That denies due process and impairs a core judicial power.

III. Equal protection requires equal access to verbatim recordings

An indigent party is entitled to a transcript at no cost; otherwise the law would discriminate based on wealth. This Court has been "particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society."[13] And it has viewed wealth as a suspect class in the context of a fundamental right like access to justice.[14] The need for a transcript

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or order is appealable unless expressly made so by statute).

[10] *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 933 (trial court erroneously deprived party of right to appeal by refusing to perform a plain duty to provide settled statement); *MacDonald v. Super. Ct.* (1977) 75 Cal.App.3d 692, 696–97.

[11] *See, e.g.*, *Aguilar*, 21 Cal.4th at 132 (defendants elected not to provide a reporter's transcript of the trial proceedings and so had no basis for arguing insufficient evidence supported judgment below).

[12] *See, e.g.*, *In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498 (party failed in duty to provide appelate court with adequate record and inadequacy of the record alone was a basis for dismissing appeal).

[13] *Comm. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281.

[14] *Serrano v. Priest* (1971) 5 Cal.3d 584, 597–604 (holding that wealth is a suspect

applies to indigent parties in both criminal and civil cases. In criminal cases the due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review.[15] In civil cases the requirement arises from the right of equal access held by in forma pauperis litigants.[16] Yet by failing to provide an exception for in forma pauperis litigants, Government Code section 69957 effectively deprives such litigants of equal access to the appellate process that their in forma pauperis status was intended to afford.[17] That denies a class defined by its wealth a record of sufficient completeness and thus an adequate appellate review. That denies equal protection of the law.

IV. Faced with legislative inaction the courts must respond

Because the courts have a sua sponte duty to ensure that due process is served, citing the legislature's policy-making prerogative and walking away is not an option here. Being mindful of the respective branch powers, this Court properly gave the legislature notice and an opportunity to exercise its power as the state's primary policy making body. Yet the legislature has declined to resolve the statutory

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classification); *Jameson,* 5 Cal.5th at 614 (recognizing the "fundamental judicial policy of affording equal access to the judicial process to all persons without regard to their economic need," citing *Martin v. Super. Ct.* (1917) 176 Cal. 289, 297).

[15] *People v. Reese* (2017) 2 Cal.5th 660, 663; *People v. Rogers* (2006) 39 Cal.4th 826, 857–858.

[16] *Jameson*, 5 Cal.5th at 622.

[17] *Id.*

problem, refused to make a substantive response, and rejected even its designation as real party. Being unable to force legislative action, the judiciary is now the only state actor that can solve this problem.[18]

This is because California courts themselves have created a Catch-22 for indigent civil litigants by barring them from electronic recording when official reporters are unavailable. For the indigent it obviously is inadequate to permit them to hire their own stenographer.[19] The law cannot both give the appellant the burden of providing an adequate record *and* deny ready means to make that record. Nor could courts of justice enforce such a law without turning from liberty's guardian into its enemy.

An initially benign legislative act can become baneful over time, requiring reform. As the creative element and the policy maker, the legislature is the first and primary source of that reform.[20] But extended legislative inaction to remedy its act can allow a malignant procedure to intensify from mere inconvenience to a constitutional malady. After some time, and after seeking legislative cures to no

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[18] *Mandel v. Myers* (1981) 29 Cal.3d 531, 539 (courts may not compel the legislature to enact a statute or appropriate funds).

[19] *See Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1124 (Mosk, J., dissenting) (skewering as cruel hypocrisy "neutral" laws against the indigent: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.")

[20] *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 62 Cal.4th 486, 498 (enacting laws is core legislative power); *Retired Employees Ass'n of Orange Cnty., Inc. v. Cnty. of Orange* (2011) 52 Cal.4th 1171, 1185 (legislature's principal function is to make laws that establish policy); *Nougues v. Douglass* (1857) 7 Cal. 65, 70 (describing the legislature as the "creative element" of government).

avail, there remains only one remedy: the courts must exercise their own powers and act to preserve due process and equal access.

V. Courts have the power to act here

This Court can use its constitutional branch powers and inherent judicial powers to grant relief here by directing the Judicial Council to promulgate a new rule of court. As courts of record established by the California constitution, California courts have both constitutional powers and also the inherent power of a court to control its process.[21] A court created by the state constitution has powers of self-preservation and removing all obstructions to its successful and convenient operation because "it is part of and belongs to one of the three independent departments set up by the Constitution."[22] California's charter sets up its courts without any special limitations, so those courts have "all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government."[23]

As for inherent powers, it is well established that a court has inherent authority to fairly and efficiently administer the judicial proceedings before it.[24] These inherent powers to control judicial proceedings encompass whatever is necessary and appropriate to ensure the prompt, fair, and orderly administration of

[21] *In re Reno* (2012) 55 Cal.4th 428, 522 (superseded by statute on other grounds).

[22] *Millholen v. Riley* (1930) 211 Cal. 29, 33–34.

[23] *Brydonjack v. State Bar of Cal.* (1929) 208 Cal. 439, 442.

[24] *People v. Engram* (2010) 50 Cal.4th 1131, 1146.

justice.[25] This is so even where existing law defines party rights but the statute grants no workable means for exercising them.[26] Indeed, a court has a *responsibility* to fairly and efficiently administer the judicial proceedings before it.[27] These inherent judicial powers are derived from the state constitution and are not confined by or dependent on statute.[28]

These powers depend on no legislative grant; they exist because they are necessary to the orderly and efficient exercise of jurisdiction. For example, a court has broad power to maintain orderly proceedings,[29] to control litigation before it,[30] to control its processes,[31] and to prevent unfair results — including by waiving statutory requirements.[32] And courts have inherent equity, supervisory, and administrative powers.[33] These powers all flow from the inherent and constitutional powers held by the judiciary as a branch of state government.

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[25] *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 276.

[26] *People v. Super. Ct.* (Morales) (2017) 2 Cal.5th 523, 532.

[27] *Engram*, 50 Cal.4th at 1146.

[28] *Walker v. Super. Ct.* (1991) 53 Cal.3d 257, 267.

[29] *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 389.

[30] *Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 Cal.App.3d 1108, 1116–1117.

[31] *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 148.

[32] *Venice Canals Resident Home Owners Ass'n v. Super. Ct.* (1977) 72 Cal.App.3d 675, 680.

[33] *Bauguess v. Paine* (1978) 22 Cal.3d 626, 635.

These are core discretionary powers that the legislature cannot invade. Beyond the usual interdependence between branches, "there must come a point beyond which the judicial department must be allowed to operate unhampered by legislative restriction," and rather than ascribing to the legislature the intent to invade core judicial powers a troublesome statute's provisions must be held directory.[34] Assuming that section 69957 was not intended to unconstitutionally invade core discretionary judicial branch powers, then this Court is free to act by rule — because the statute must be read to permit that, else it unconstitutionally inhibits judicial action by rule.

A new rule of court is squarely within this Court's province. The legislature is not the state's sole source of policy, law, or rules — courts can make them too. Courts make substantive law by developing the common law.[35] And California's judicial branch makes policy and rules through the Judicial Council.[36] Trial courts also possess inherent rulemaking authority.[37] These are fundamental inherent equity, supervisory, and administrative powers, which exist to insure the orderly

[34] *Lorraine v. McComb* (1934) 220 Cal. 753, 756–57.

[35] *In re Cindy L.* (1997) 17 Cal.4th 15, 27 (common law power of the judiciary to develop new hearsay exceptions); *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.

[36] Cal. Const. art. VI, section 6(d); *Camacho*, 15 Cal.5th at 395 (Judicial Council is the policy and rulemaking body of the courts).

[37] *Elkins v. Super. Ct.* (2007) 41 Cal.4th 1337, 1351–1352.

administration of justice.[38] That's in addition to rulemaking authority granted by statute.[39]

Of course, trial courts cannot adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or with the higher law.[40] But that only bars *local* courts from creating their own rules in conflict with statewide statutes. As a branch of government California's judiciary has the inherent discretion to facilitate an indigent civil litigant's equal access to the judicial process even when the relevant statutory provisions omit an exception for needy litigants.[41] So this Court may, through the Judicial Council, adopt a statewide rule of procedure that overrides a statute when necessary to preserve equal access and due process.

It's true that the legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions.[42] But it is "equally true that those constitutional powers may not be so restricted by unreasonable rules as to virtually nullify them."[43] Thus, the legislature may regulate judicial operations, so long as

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[38] *Rutherford v. Owens–Illinois, Inc.* (1997) 16 Cal.4th 953, 967.

[39] *Id*. *See* Code Civ. Proc. §§ 128, 177, 575.1; Gov. Code § 68070(a) ("Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.").

[40] *Elkins*, 41 Cal.4th at 1351.

[41] *Jameson*, 5 Cal.5th at 605.

[42] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 840.

[43] *Briggs v. Brown* (2017) 3 Cal.5th 808, 850 (quoting from *In re Shafter-Wasco Irr.*

their efficiency is not thereby defeated or materially impaired.[44] It is best then to think of the legislature and the judiciary as having *concurrent* authority over courtroom procedure.[45] And when the legislature prescribes a procedure that is found to "substantially impair the constitutional powers of the Courts or practically defeat their exercise," then the legislature has exceeded its own power and the regulation is invalid.[46] In that case, as here, courts can use their inherent and constitutional powers to make a new rule of procedure as necessary to preserve due process and equal access.

That California courts have this inherent rule-making power is confirmed by both law and experience. This Court has often held that power to make reasonable rules and regulations — a power inherent in the courts — "is not open to question."[47] And this Court has used that power to effect just results, most often when (as here) the legislature has failed or refused to act.[48] Fear of using that power and causing one separation-of-powers violation while trying to avoid another will often give this

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Dist. (1942) 55 Cal.App.2d 484, 487).

[44] *Walker*, 53 Cal.3d at 267; *Millholen*, 211 Cal. 29 at 34.

[45] *People v. Bunn* (2002) 27 Cal.4th 1, 14 (it is well understood that the branches share common boundaries and no sharp line between their operations exists).

[46] *Brydonjack*, 208 Cal. at 444.

[47] *Barton v. State Bar of Cal.* (1930) 209 Cal. 677, 680.

[48] *See, e.g.*, *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 602 (independent judicial authority to impose attorney fees unaffected by fact that legislature historically set attorney dues amount); *Wilson v. Eu* (1992) 1 Cal.4th 707 (acting on redistricting after legislature failed to act); *Legislature v. Reinecke* (1973) 10 Cal.3d 396 (same).

Court pause. But not here. Instead, the operative principle is the pragmatic California approach to the separation-of-powers principle.[49] That view favors common-sense problem solving over devotion to principle. At times that benefits the legislature, giving it leeway to crowd judicial powers.[50] Here it applies to pemit the judiciary to exercise its rule-making power to solve an urgent access-to-justice problem and ensure that justice is done.

When a statutory provision evolves to work a procedural injustice and the legislature fails to take remeial action it is a court's responsibility to create a remedy. This Court can do so here by reforming Government Code section 69957 to read as directory to the extent due process requires.

VI. The statute should be reformed to read as directory

This Court has long held in reserve a common-sense tool of statutory interpretation to reform statutes to avoid constitutional infirmity and outright invalidation.[51] Under this well-established rule a statute must be construed, if reasonably possible, to avoid a serious constitutional question.[52] In cases like this,

[49] *In re Paguirigan* (2001) 25 Cal.4th 1, 7–8.

[50] *Brydonjack*, 208 Cal. at 443 (legislature can regulate the bar without defeating the judiciary's inherent powers).

[51] *People v. Sandoval* (2007) 41 Cal.4th 825, 844 (superseded by statute on other grounds); *Kopp v. Fair Pol. Practices Comm'n* (1995) 11 Cal.4th 607, 641 and 643 ff. (collecting cases)).

[52] *Engram*, 50 Cal.4th at 1161.

where a literal reading would invade core judicial powers, the solution is to read the statute as directory. The best modern example of this is *Briggs v. Brown*.

In *Briggs* this Court reviewed several decisions that found statutes with language usually construed as mandatory to be, on reflection, directory.[53] *Briggs* and the cases it described did so because otherwise those courts would have invalidated the statutes as unreasonable limitations on constitutional judicial powers. Those decisions relied on the rules favoring statutory construction to avoid absurd or unjust results and to uphold a statute's constitutionality when reasonably possible. In such cases courts can forgo an interbranch conflict, and maintain the separation of powers, by holding that the offending regulation is merely directory:

> [O]ur case law establishes that while the Legislature has broad authority to regulate procedure, the constitutional separation of powers does not permit statutory restrictions that would materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion. Repeatedly, for over 80 years, California courts have held that statutes may not be given mandatory effect, despite mandatory phrasing, when strict enforcement would create constitutional problems.[54]

For example, this Court reformed a statute to be directory in *In re Friend*, where it adopted a narrower reading of "successive" habeas petitions because doing so avoided serious constitutional doubts.[55] Just so, *People v. Engram* held that a statute could not mean to remove judicial discretion to hear any civil matter because

[53] *Briggs*, 3 Cal.5th at 851

[54] *Id.* at 854.

[55] *In re Friend* (2021) 11 Cal.5th 720, 741.

that "clearly would defeat or at the very least materially impair the court's fulfillment of its constitutional obligation.[56] If the statute in *Le Francois v. Goel* were meant to limit a court's ability to reconsider its own rulings, that would directly and materially impair and defeat the court's most basic function, so the law could not be read to mean such a thing.[57] And this Court did much the same in *Martin v. Superior Court*, where the opinion's response to an obvious injustice created by a literal statutory reading amounted to "the legislature could not have meant such an unjust result."[58]

Indeed, at times this Court's reform was so substantial that it "rewrote" the statute to conform it to constitutional principles.[59] And in *Bollinger v. National Fire Ins. Co.* this Court held that it "is not powerless to formulate rules of procedure where justice demands it," that it would "adapt rules of procedure to serve the ends of justice," and adopted a general equitable rule that operated independently of a statute's literal wording.[60] All this to avoid the constitutional conflict inherent in striking a statute for violating the separation of powers.

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[56] *Engram*, 50 Cal.4th at 1161.

[57] *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.

[58] *Martin*, 176 Cal. at 296 (the quotation is our paraphrase of the court's conclusion that the legislature could not have intended to forbid poor suitors from prosecuting actions in courts of record).

[59] *Kopp*, 11 Cal.4th at 647 (describing *In re Edgar M.* (1975) 14 Cal.3d 727).

[60] *Bollinger v. National Fire Ins. Co. of Hartford, Conn*. (1944) 25 Cal.2d 399, 409; *see Addison*, 21 Cal.3d at 318.

So too here. A literal reading of this statute would make it unconstitutional, and courts may reject such constructions when they lead to absurd results.[61] Instead, we should read section 69957 to prohibit electronic recording *unless justice requires otherwise*. This best serves the public interest in being afforded access to justice, resolving controversies on the merits, and fair proceedings. Surely the legislature would prefer that its constituents be afforded due process with a generous reading of a statute over a strict reading that requires courts to do unjust acts. Interpretation must be reasonable, after all.[62] And the legislature is presumed to intend its laws to be constitutional.[63] It would be anomalous to read this statute otherwise.

Reform is available to remedy a constitutional defect by rewriting statutory language when doing so is more consistent with legislative intent than a result that would require outright invalidation.[64] Doing so here would not defy the apparent legislative intent behind section 69957, which seeks to balance a preference for live stenography against the harms of doing without verbatim reporting. The key is the unavailability of an official reporter: the legislature rationally could have meant to discourage courts from preferring electronic recording over an *available* official

[61] *Cal. Charter Schools Ass'n v. Los Angeles Unified School Dist.* (2015) 60 Cal.4th 1221, 1237.

[62] Civ. Code § 3542.

[63] *People v. Garcia* (2017) 2 Cal.5th 792, 804 (presumption that the legislature did not intend to infringe constitutionally protected liberties or usurp power constitutionally forbidden it).

[64] *Kopp*, 11 Cal.4th at 643.

reporter, but it could not have meant for courts to be powerless to craft a remedy when an official reporter is *unavailable*.

Having that power creates a responsibility to deploy it here. For every wrong there is a remedy, and if the legislature will not act then this Court must.[65] The judiciary is charged with ensuring equal access to the courts, and making that access meaningful at times requires courts to use their inherent powers to excuse statutory burdens and devise alternative procedures.[66] Failing to act on the compelling facts here would mean surrendering power to remedy future unjust procedures. Nearly a century ago this Court warned its future counterparts that California courts "should maintain vigorously" all their inherent and implied powers.[67] This is such a case. Declining to reform the statute here would concede legislative power to make court access unequal, and to make appellate jurisdiction illusory — and to make the courts powerless to respond.

VII. The Rules of Court can provide a remedy

This Court should direct the Judicial Council to amend Rule of Court 2.952(a) to read:

> This rule applies when a court has ordered proceedings to be electronically recorded on a device of a type approved by the Judicial Council or conforming to specifications adopted by the Judicial Council. *A trial court may order any proceeding to be so recorded when the interests of justice so require and an official reporter is unavailable, Government Code section 69957 notwithstanding.*

[65] Civ. Code § 3523.

[66] *Jameson*, 5 Cal.5th at 605.

[67] *Brydonjack*, 208 Cal. at 442.

In its decision this Court could note that as written section 69957 does not bar using electronic recording; on the contrary, it codifies trial court discretion to use electronic recording in specified circumstances. Nor does the provision in subdivision (a) that courts "shall not" use electronic recording "in circumstances not authorized by this section" prevent courts from using electronic recording for indigent civil litigants. The legislature could not have so intended — only the plainest declaration of legislative intent should be construed as a legislative attempt to constrain the fundamental judicial policy of affording equal access to the judicial process to all persons without regard to their economic need.[68] And if the legislature had so intended, that would violate the state constitution. Just as the rules adopted by the Judicial Council under California constitution article VI, section 6 must not be inconsistent with statutory law, that statutory law must not be inconsistent with constitutional liberty.[69] Reading section 69957 to be directory to the extent justice requires does no violence to the statute — it saves the statute from being unconstitutional. The legislature could not have intended otherwise.

[68] *Jameson*, 5 Cal.5th at 614.

[69] *People v. Hall* (1994) 8 Cal.4th 950, 960 (council may not adopt rules that are inconsistent with the governing statutes); *Jacob B. v. Cnty. of Shasta* (2007) 40 Cal.4th 948, 961 (if statute conflicted with California constitution it obviously would have to yield).

This is a reasonable interpretation of the statute.[70] Reading it literally would eliminate an established right, which would be unreasonable.[71] Instead, construing the law as directory is prudential, because judicial restraint counsels against the alternative of invalidating it on separation-of-powers grounds if another resolution exists.[72] This Court may hesitate to reform a statute, but it is even more reluctant to construe it as violating the California constitution if any other possible construction exists.[73] Interpreting this statutory provision as directory rather than mandatory solves the problem while avoiding such serious constitutional questions.

The reform remedy is proper and available here. California courts, in exercising their authority over the common law, may craft remedies for constitutional violations.[74] And courts have equitable authority to enforce their judgments, being mindful of other branch prerogatives, and tailoring the remedy to be least disruptive.[75] Consequently, the reform remedy is available under either a separation-of-powers, due process, or an equal protection analysis. Legislative action may limit the extent of equitable relief a court may grant — up to the point of impinging on the exercise of fundamental judicial powers.[76] Beyond that point,

[70] Civ. Code § 3542 (interpretation must be reasonable).

[71] *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049.

[72] *Elkins*, 41 Cal.4th at 1357.

[73] *People v. Trujeque* (2015) 61 Cal.4th 227, 256.

[74] *Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 325.

[75] *Butt v. State of California* (1992) 4 Cal.4th 668, 695–96.

[76] *Kraus v. Trinity Mgmt. Servs., Inc.* (2000) 23 Cal.4th 116, 131.

it is well-established that courts possess an inherent power to adopt procedures that promote due process rights.[77] And in framing a remedy for an equal protection violation, courts have wide discretion.[78] This Court should use its constitutional and inherent rule-making power to reform section 69957 statute so it may function in a constitutional manner.

VIII. Conclusion

This Court could well be concerned about creating one separation of powers problem while dodging another. Not so: the overriding principle should be to protect the people's access to justice, which is a fundamental element of individual liberty. Protecting that liberty is the purpose of having separated powers.[79] It would be absurd to deny the poorest access to justice in the name of protecting their liberty. Securing that freedom must be the higher purpose here. If this Court cannot remedy these constitutional violations, then its power is for naught.[80] And if the legislature dislikes this statutory interpretaion, it has the power to correct any errors.[81]

[77] *Citizens Utilities Co. v. Super. Ct.* (1963) 59 Cal.2d 805, 812–813.

[78] *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280, 305–307.

[79] *Buckley v. Valeo* (1976) 424 U.S. 1, 122.

[80] *See Moore v. Super. Ct.* (2010) 50 Cal.4th 802, 833 (Moreno, J., dissenting).

[81] *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 577.

Respectfully submitted,

Dated: April 4, 2025

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 4,859 words as counted by the Microsoft Word software program used to prepare this brief.

Dated: April 4, 2025

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CERTIFICATE OF SERVICE

I, Stephen M. Duvernay, hereby certify as follows:

I am an active member of the State Bar of California, and I am not a party to this action. My business address is 701 University Avenue, Suite 106, Sacramento, California 95825, and my electronic service address is steve@benbrooklawgroup.com.

On April 4, 2025, I caused the foregoing document to be served as follows:

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