No. S288176

IN THE
SUPREME COURT OF CALIFORNIA

FAMILY VIOLENCE APPELLATE PROJECT and BAY AREA LEGAL AID,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTIES OF CONTRA COSTA, LOS ANGELES, SANTA CLARA, and SAN DIEGO,
Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICUS CURIAE BRIEF

The Norton Law Firm PC
*Josephine Petrick (SBN 280233)
jpetrick@nortonlaw.com
Matthew Liscovitz (SBN 334381)
mliscovitz@nortonlaw.com
Ashley Nakai (SBN 340579)
anakai@nortonlaw.com
300 Frank H. Ogawa Plaza, Ste. 450
Oakland, CA 94612
510-906-4900

ATTORNEYS FOR AMICI CURIAE

PROF. ERWIN CHEMERINSKY; PROF. ZACHARY D. CLOPTON; PROF. KELLEN R. FUNK; PROF. MYRIAM GILLES; PROF. HELEN HERSHKOFF; PROF. DALIÉ JIMÉNEZ; PROF. AMALIA D. KESSLER; PROF. MARIN K. LEVY; PROF. LUKE NORRIS; PROF. CLAIRE JOHNSON RABA; PROF. JUDITH RESNIK; PROF. TANINA ROSTAIN; PROF. LAUREN SUDEALL; PROF. JUSTIN WEINSTEIN–TULL

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Amici curiae are law professors who teach and write about the function and role of state and federal courts. Because Amici have substantial expertise in the history, practices, and workings of courts, Amici submit this brief in the hope of being of assistance to this Court in its deliberation. The following amici curiae respectfully request leave to file the accompanying brief.[1]

Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law at UC Berkeley Law.

Zachary D. Clopton, Professor of Law at Northwestern Pritzker School of Law.

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[1] Institutional affiliations are listed for identification purposes only; views expressed are those of the individuals.

Kellen R. Funk, Michael E. Patterson Professor of Law at Columbia Law School.

Myriam Gilles, Paul R. Verkuil Chair in Public Law at Cardozo Law School.

Helen Hershkoff, Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law.

Dalié Jiménez, Professor of Law at University of California, Irvine.

Amalia D. Kessler, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies & Professor (by courtesy) of History; Director, Stanford Center for Law & History; and Associate Dean for Advanced Degree Programs at Stanford Law School.

Marin K. Levy, Professor of Law at Duke Law School.

Luke Norris, Professor of Law at University of Richmond School of Law.

Claire Johnson Raba, Assistant Professor of Law at University of Illinois Chicago Law.

Judith Resnik, Arthur Liman Professor of Law at Yale Law School.

Tanina Rostain, Agnes Williams Sesquicentennial Professor of Justice Innovation at Georgetown University Law Center.

Lauren Sudeall, David Daniels Allen Distinguished Chair of Law, Vanderbilt Law School.

Justin Weinstein–Tull, Professor of Law, Sandra Day O'Connor College of Law, Arizona State University.

No party or counsel for a party in the pending action authored the proposed amicus brief in whole or part or made a monetary contribution intended to fund the preparation or submission of the brief. Other than counsel for Amici, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief. Amici and their counsel express their gratitude to Yale Law School students Anna Selbrede and Jack Sollows for their excellent research assistance.

Dated: April 4, 2025

THE NORTON LAW FIRM PC

/s Josephine K. Petrick
Josephine K. Petrick
Attorneys for Amici Curiae

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

This original writ proceeding stems from the shortage of court reporters in California. California superior courts—defined as "courts of record" by the California Constitution, art. VI, § 1—have the constitutional and common law duty to keep accurate, contemporaneous records of proceedings. Yet, as the superior courts informed this Court, "[e]very day, *thousands of hearings* take place in which no verbatim record can be made unless electronic recording is permitted." (Response to Order to Show Cause, at p. 5.) In 2024, California's Access to Justice Commission published its study of the problem; in the State's superior courts, more than one million hearings occur every year without verbatim records of what transpired.[2]

One source of the problem is that too few court reporters are employed to staff all the trial courtrooms; another is that a California statute requires the use of certified shorthand reporters and, in most cases, forbids electronic recording of court proceedings. (See Gov. Code, § 69957, subd. (a).) For litigants who have the financial capacity to retain court reporters, records can be made. But for many litigants of low or moderate incomes,

[2] California Access to Justice Commission, Issue Paper: Access to the Record of California Trial Court Proceedings (2024), available at <https://bit.ly/CAJC-record-access>; see *Jameson v. Desta* (2018) 5 Cal.5th 594, 598, fn. 2, 608, fn. 10.

hiring private reporters is not possible. The result is that proceedings to which they are parties have no verbatim records.

While not all courts in judicial systems are "courts of record," the California Constitution defines its superior courts as "courts of record." (Cal. Const., art. VI, § 1.) This categorization requires them to keep contemporaneous, accurate records of proceedings. Yet given the shortage of personnel, as interpreted, the California statute that requires court reporters undermines superior courts' constitutional and common law duties to maintain complete, accurate records of their proceedings.

The California Constitution's definition of superior courts as "courts of record" reflects the importance of recorded proceedings. Hundreds of years of practice and law in many jurisdictions aim to ensure that what transpires in courts is knowable to the parties, the public, and appellate courts. Verbatim records generate a shared account that becomes the touchstone for the parties in cases and, if questions are raised, thereafter about the decisions made. If appeals are taken, verbatim recording is critical for reviewing courts to be able to discharge their duties based on an accurate understanding of the proceedings below.

As California law recognizes, court reporters are a central method for obtaining accurate accounts. In addition, and due to changes in technology, when reporters are not available, transcription can be had at low costs. The result is that courts can, without burdening their budgets, enable litigants of whatever means to have recorded proceedings. California

superior courts must have the flexibility to fulfill their constitutional and common law obligation as "courts of record" through reliable, accessible, and cost-effective means.

ARGUMENT

I. Courts of record have the constitutional and common law duty to keep accurate records of proceedings.

Courts of record have a long history. Blackstone defined them as courts whose "acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the record of the court, and are of such high and supereminent authority that their truth is not to be called in question." (3 William Blackstone, Commentaries on the Laws of England (1768) p. 24 ("Blackstone").) While parchment is no longer commonplace, the aspiration remains to ensure court proceedings can be verified and provide "perpetual memorial and testimony'." Today's methods include paper, transcriptions, and electronic modes of recording. These options are reflected in contemporary definitions of a "court of record" as an adjudicatory body that memorializes its proceedings through various means. Black's Law Dictionary explains that a "court of record" is "required to keep a record of its proceedings. The court's records are presumed accurate and cannot be collaterally impeached."[3]

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[3] Black's Law Dictionary (12th ed. 2024), "court of record"; see, e.g., *id.*, "of record" ("(Of a court) that has proceedings taken down stenographically or otherwise documented court of record."); 20 Am.Jur.2d (2025) § 8 ("A court of record is a court

As Jack Weber explained in his exploration of the Medieval English history of judicial records, the risk of a "false record" was real. (Jack K. Weber, *The Power of Judicial Records* (1988) 9 J. Legal Hist. 180, 181–182 (*Power of Judicial Records*).) Written materials gained primacy over oral accounts that could be tainted by self-interest. (*Id.* at pp. 180–186.) Over time, the status of being a court of record became an honor. (*Id.* at pp. 186–191.) "Incontrovertibility" was Weber's term for the impact of records that were accurate accounts. (*Id.* at p. 187.) Having such verifiability shored up the authority of the courts.

Recordation did not only serve the interests of courts and litigants; it also enabled the public to learn about what had transpired. The obligation to make records intersected with insistence on open courts. Jeremy Bentham argued the utility of public access when he observed: "Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial." (Jeremy Bentham, *Rationale of Judicial Evidence*, in John Bowring, 6 The Works of Jeremy Bentham (1843), pp. 573, 582.) State constitutions around the United States echo that point, providing that "all courts shall be open." (Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture* (2012) 56 St.

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whose proceedings are perpetuated in writing and must be recorded."); accord 21 C.J.S. Courts § 8; 16 Cal.Jur.3d Courts § 11 ("A court of record is one whose proceedings are of such a nature and are contemporaneously recorded in such a manner as to achieve a dignity and reliability not accorded the proceedings of other tribunals.").

Louis U. L.J. 917, 939; see, e.g., Ala. Const., art. I, § 13; Cal. Const., art. I, § 3; Mo. Const., art. I, § 14.)

In the United States, a North Carolina decision from 1825 explained that the judgments of courts of record were to be accorded a presumption of truth—unless vacated on appeal—to promote "the common security and peace" and to deter parties from attempting to relitigate disputes that have been settled. (*Bain v. Hunt* (1825) 10 N.C. 572, 575.) Drawing support from the common law and from ancient Roman and French civil law, the *Bain* court reasoned that the concept of res judicata depends on knowing what transpired. Confidence in judgments flowed from the ability of courts of record to provide such an accounting. (*Id.* at pp. 576–577.) In addition to judgments, the *Bain* court emphasized the importance of recording the "proceedings" in courts of record. (*Ibid.*)

In 1868, this Court explained the utility of courts of record when it adopted their common law definition in *Hahn v. Kelly* (1868) 34 Cal. 391, overruled in part on other grounds by *Belcher v. Chambers* (1897) 53 Cal. 635.) The *Hahn* Court upheld a superior court judgment against an extra-record attack: "the record of a Court of superior jurisdiction imports absolute verity, and cannot, therefore, be collaterally impeached from without." (34 Cal. at p. 402.) This Court described proceedings in courts of record, which were to be "conducted with solemnity and deliberation, and in strict conformity with established modes,

. . . and above all, they are taken down and made a matter of record at or about the time they transpire." (*Id.* at pp. 409–410.)[4]

Justice Sawyer, writing separately, traced the history of "the record" at common law and reiterated that "it is only the record, technically so called, that imports absolute verity[.]" (*Hahn, supra*, 34 Cal. at p. 424 (Sawyer, J., specially concurring), citing 3 Henry John Stephen, Commentaries on the Laws of England, p. 583; Blackstone, *supra*, at p. 24; 2 Alexander Burrill, Law Dictionary and Glossary, Tit. "Record.")

In 1879, California amended its constitution to enshrine the *Hahn* Court's recognition of the purpose and function of courts of record. (*Adolph M. Schwartz, Inc. v. Burnett Pharmacy* (1931) 112 Cal.App.Supp. 781.) The phrase "courts of record" remains in the California Constitution today. (Cal. Const., art. VI, § 1.) Thus, while not all courts in every jurisdiction are "courts of record,"[5] the superior courts of California are, per the

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[4] Following *Pennoyer v. Neff* (1878) 95 U.S. 714, this Court in *Belcher, supra*, 53 Cal. 635, disapproved *Hahn* to the extent that it precluded collateral attacks on a judgment based on lack of jurisdiction. The *Belcher* Court's overruling of *Hahn* was limited to the jurisdictional question; it did not address or otherwise undermine *Hahn*'s discussion of the role and nature of courts of record.

[5] For example, in some states, certain limited jurisdiction courts and administrative tribunals are not courts of record. (See *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094 [administrative tribunals are not courts of record so corporations may represent themselves]; *People v. McClusky* (N.Y.Crim.Ct. 1966) 49 Misc.2d 782 [268 N.Y.S.2d 209, 211] [traffic court lacked stenographer and was not

state's Constitution, "courts of record." (Cal. Const., art. VI, § 1; see *Gordon v. Justice Court* (1974) 12 Cal.3d 323, 332.)

Many courts across the United States continue to underscore the importance of courts to be "of record."[6] The U.S. Supreme Court has also affirmed the role courts of record play in various contexts. For example, in *Spratt v. Spratt* (1830) 29 U.S. 393, 407–408, that Court concluded that immigration naturalization proceedings needed to take place in courts of record; when the "judgment is entered on record as the judgment

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a court of record]; *Granda v. City of St. Louis* (E.D. Mo., Apr. 13, 2006, No. 4:04CV1689MLM) 2006 WL 1026978, at p. *2 [municipal courts are not "courts of record" under Missouri law], aff'd (8th Cir. 2007) 472 F.3d 565; 21 C.J.S. Courts § 8 [collecting authorities].) In most jurisdictions, appeals are available to a general jurisdiction court "of record," which does memorialize proceedings. (Alexandra Natapoff, *Criminal Municipal Courts* (2021) 134 Harv. L.Rev. 964, 980.)

[6] See, e.g., *Padilla v. Torres* (N.M. 2024) 548 P.3d 31, 37–38; *People v. Rodriguez* (Colo. 2005) 112 P.3d 693, 706 (en banc); *United States v. Gilbert* (6th Cir. 1993) 990 F.2d 916, 917; *In re Interest of D.M.B.* (Neb. 1992) 481 N.W.2d 905, 913; *In re Interest of R.A.* (Neb. 1987) 410 N.W.2d 110, 115, disapproved on other grounds in *In re Interest of J.S., A.C., & C.S.* (Neb. 1987) 417 N.W.2d 147; *Palmer v. Superior Court In & For Maricopa County* (Ariz. 1977) 560 P.2d 797, 798; *Gordon, supra*, 12 Cal.3d at p. 332; *DeKalb County v. Deason* (Ga. 1965) 144 S.E.2d 446, 448; *Herren v. People* (Colo. 1961) 363 P.2d 1044, 1046 (en banc); *Page v. Turcott* (Tenn. 1943) 167 S.W.2d 350, 354; *State v. Allen* (Ohio 1927) 159 N.E. 591, 591; *State v. Scott* (Wyo. 1926) 247 P. 699, 707; *Naro v. State* (Ala. 1924) 101 So. 666, 667; *Hutkoff v. Demorest* (N.Y. 1886) 10 N.E. 535, 537; *The Thomas Fletcher* (C.C.S.D. Ga. 1884) 24 F. 481, 482; *Pringle v. Woolworth* (1882) 90 N.Y. 502, 507–508; *Hoehne v. Trugillo* (1869) 1 Colo. 161, 162; *Ex parte Cregg* (C.C.D. Mass. 1854) 6 F.Cas. 796, 796.)

of the court," it confirms its validity. In sum, because having a record served the needs of disputants, the court system, and the public, it became embedded in common and constitutional doctrine, and it retains vitality today. An iconic example is the discussion of the requirements of procedural due process by the U.S. Supreme Court in *Goldberg v. Kelly* (1970) 397 U.S. 254, 260, 266–267, which required that a record be made at hearings addressing termination of benefits.

II. Generating verbatim recordings fulfills the essential function of courts of record to provide accurate information, promoting accountability for what transpired.

The saliency of a stenographic verbatim record emerged in the nineteenth century; some accounts point to the recordation of the entirety of the Lincoln–Douglas debates and a high-profile murder case tried by Abraham Lincoln. (See Edward O. Burke, *Stenographer to History* (Jan. 2019) 55-Jan Ariz. Atty. 30, pp. 30–31.) Moreover, verbatim transcripts were used in equity as requisite for chancery appeals; witness testimony was included in the record to facilitate the appellate court's review of the facts, and its absence required reversal and retrial. (See *Conn v. Penn* (1820) 18 U.S. 424, 428; *New Orleans v. United States* (1831) 30 U.S. 449, 449; Erwin N. Griswold & William Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 Harv. L.Rev. 483, 487 & fn. 18 [in chancery appeals, "all oral testimony was to be set forth verbatim."].) More of the history of early chancery courts' record-making practices is described in Amalia D. Kessler, Inventing American Exceptionalism: The Origins of

American Adversarial Legal Culture, 1800–1877 (2017) pages 27–34, and Kellen Funk, *Equity's Federalism* (2022) 97 Notre Dame L.Rev. 2057, 2063–2064 & fn. 29, 2072.

Following the unification of courts of law and equity, the U.S. Supreme Court stated that "the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other." (*Pennington v. Gibson* (1853) 57 U.S. 65, 77.) This equitable tradition continues to influence modern appellate practice, as discussed in Aaron–Andrew P. Bruhl, *Law and Equity on Appeal* (2024) 124 Colum. L.Rev. 2307, 2335–2336. Benjamin B. Johnson explained in *The Origins of Supreme Court Question Selection* (2022) 122 Colum. L.Rev. 793, 820, that the record in equity appeals had to include verbatim transcripts of testimony to facilitate appellate courts' review of the facts. Thus, verbatim recording became prevalent in state and federal courts of record. (See David W. Louisell & Maynard E. Pirsig, *The Significance of Verbatim Recording of Proceedings in American Adjudication* (1953) 38 Minn.L.Rev. 29, 30 <https://scholarship.law.umn.edu/mlr/1100> (*Significance of Verbatim Recording*); see also, e.g., *Morrow v. Norton* (Cal. 1894) 38 P. 953, 953; *People v. Ward* (1895) 105 Cal. 652, 657; *Yeager v. Atchison, T. & S.F.R. Co.* (Iowa 1895) 62 N.W. 672, 672.)

The explanation is practical and straightforward. Recording testimony and interactions of judges, lawyers, and parties permits making a " 'permanent record, and thus assist[s] in the administration of justice in both civil and criminal cases.

The lawyers depend upon the report in the future progress of [a] case, and a translation thereof furnishes th[e] court its only means of determining disputed questions as to the record.' " (*Significance of Verbatim Recording, supra*, 38 Minn.L.Rev. at p. 32, quoting *State v. Perkins* (Iowa 1909) 120 N.W. 62, 64, and citing *Harris v. State* (Wyo. 1916) 153 P. 881, 882–883; see also *Cressey v. Gretton* (1314) in Bolland, Year Books of Edward II, Vol. XVIII, 8 Edward II (Selden Society 1920) pp. 120, 128 <https://archive.org/details/publicationslist37seld/page/n623> ["[H]e proffereth matter of record, while you bring forth naught but your wind."], cited in *Power of Judicial Records, supra*, 9 J. Legal Hist. at p. 186 & fn. 48.)

Verbatim transcripts can be useful for resolving disagreements at the trial level about what was said or agreed to, and what remains disputed. Indeed, many kinds of disputes entail repeated trips to the trial court, and parties and the court need to know specifically what took place. Transcripts are also essential to appellate review. Full accounts of proceedings play critical roles as well in the interaction between state and federal systems. For example, in the context of the "independent and adequate state ground doctrine" for U.S. Supreme Court review and for collateral review through federal habeas corpus, federal judges need to know what happened in state courts to assess whether federal judges should address an issue. (See *Matheson v. Branch Bank of Ala.* (1849) 48 U.S. 260, 261; Michael G. Collins, *Reconstructing* Murdock v. Memphis (2012) 98 Va.L.Rev.

1439, 1461; *Coleman v. Thompson* (1991) 501 U.S. 722, 739; 28 U.S.C. § 2254(d)–(e).)

Transcripts matter—as is illustrated by a decision by the U.S. Supreme Court, which held that federal constitutional law required, in the context of the loss of parental rights, that the state enable the litigant who was appealing and who could not afford the fees, to obtain a verbatim transcript. (See *M.L.B. v. S.L.J.* (1996) 519 U.S. 102.) After a divorce, Melissa Lumpkin Brooks' ex-husband asked the Mississippi courts to terminate her rights as a mother so his new wife could adopt Ms. Brooks' two young children. (*Id.* at p. 108; Judith Resnik, *Equality's Frontiers: Courts Opening and Closing* (2013) Yale L.J. Online 243, 249 <https://www.yalelawjournal.org/pdf/1140_fx33wftb.pdf> (*Equality's Frontiers*).) Ms. Brooks lost at trial. (*M.L.B.*, *supra*, at pp. 107–108.) The trial judge's order stated "without elaboration" that Brooks' ex-husband had met his burden to show abandonment or neglect proof by clear and convincing evidence, but the order had not described the evidence "or otherwise reveal[ed] precisely why [she] was decreed, forevermore, a stranger to her children." (*Id.* at p. 108.)

Brooks sought to appeal, but she could not afford to pay the $2,352.36 for a transcript, and Mississippi law did not provide for appellate fee waivers. (*Id.* at pp. 108–109.) As Justice Ginsburg, writing for the majority, explained, "only a transcript can reveal . . . the sufficiency, or insufficiency, of the evidence to support" such an order. (*Id.* at pp. 121–122.) The Court held that the fundamental importance of the right to parent, coupled with the

absolutism of the termination order that was supposed to be predicated on clear and convincing evidence, meant that—without state support—people without resources would not be able to obtain appellate review. (*Id.* at pp. 110–128.)

Thereafter, when the Mississippi courts reviewed the case with the benefit of the transcripts, they gave Ms. Brooks relief. (See *M.L.B. v. S.L.J.* (Miss. Ct. App. 1999) No. 97-CA-00929-COA, affd. (Miss. 2000) 806 So.2d 1023; *Equality's Frontiers, supra*, 122 Yale L.J. Online at p. 250 & fn. 25.) As the Mississippi Supreme Court noted, Ms. Brooks expressed her commitment to her children; she said "she loved [her] children and wanted to be able to visit with them and talk with them on the phone." (*M.L.B., supra*, 806 So.2d at p. 1025.) With the verbatim transcript before it, the state court held that the ex-husband had not established neglect or abandonment by clear and convincing evidence, and Ms. Brooks was accorded rights to visit. (*Id.* at p. 1029.)

M.L.B. built on *Griffin v. Illinois* (1956) 351 U.S. 12, 19 (plur. opn. of Black, J.), a criminal case explaining that verbatim records were indispensable to the appellate process and that, given that litigants with resources could obtain transcription, equal protection and due process required that indigent criminal defendants had to have the access to appellate remedies as did resourced defendants. (See *M.L.B., supra*, 519 U.S. at pp. 110–113.) The Court applied *Griffin* in *Entsminger v. Iowa* (1967) 386 U.S. 748, 751–752, holding that an indigent criminal defendant was denied adequate and effective review on appeal where his

court-appointed attorney failed to include complete trial transcripts in the record. In 1993, the Court recognized that verbatim transcripts were "'indispensable to the appellate process'" in a case holding that a court reporter was not entitled to absolute immunity from damages when years went by and the reporter had not produced a transcript of a federal criminal trial. (*Antoine v. Byers & Anderson, Inc.* (1993) 508 U.S. 429, 437, citation omitted.) This Court and many other authorities have likewise recognized that verbatim transcripts are essential to effective appellate review. (See *Jameson, supra*, 5 Cal.5th at p. 608 [detailing how the lack of a verbatim record of proceedings will often be fatal to an appeal]; *Significance of Verbatim Recording, supra*, 38 Minn.L.Rev. at pp. 39–43 [same]; Lauren Sudeall, *Reclaiming Equality to Reframe Indigent Defense Reform* (2013) 97 Minn.L.Rev. 1197, 1224–1225, 1236 [detailing *Griffin*, *Entsminger*, and *M.L.B.*'s importance to securing equal access to appellate courts]; cf. Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course* (2007) 34 Fordham Urb. L.J. 1325, 1352–1353 [discussing the need for equal access to court procedures].)

This Court and many others have explained the importance of verbatim transcripts to a range of proceedings in courts of record. For example, in *Gordon*, *supra*, 12 Cal.3d at pp. 328–329, this Court held that a criminal defendant's right to a fair trial encompassed the right to stand trial before a judge trained in the law, not a non-attorney justice of the peace. This Court observed that "an appeal from a justice court judgment is particularly

inadequate to guarantee a fair trial since justice courts are not courts of record (Cal. Const., art. VI, § 1), and thus no transcript is ordinarily made of the original proceeding. If there is no transcript an appeal would be based solely upon a statement of the case settled or prepared by the non-attorney judge himself." (*Id.* at p. 332.)

Other jurisdictions have likewise recognized that a verbatim transcript is necessary to ensure a fair trial and have often tied this requirement to the purpose and proper functioning of courts of record. In 2024, the New Mexico Supreme Court relied on dictionary and common law definitions of the term "courts of record" to interpret a statute establishing courts of record as requiring a transcript for appeal. (*Padilla, supra*, 548 P.3d at pp. 37–38.) The New Jersey Supreme Court requires child-custody and parenting-time arbitrations to record all testimony verbatim because "[i]t is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial." (*Fawzy v. Fawzy* (N.J. 2009) 973 A.2d 347, 480–481.) The Colorado Supreme Court recited in 2005 that when courts not of record do not provide adequate transcriptions of proceedings, in the event of a dispute, trial de novo would be required in a superior court of record. (*Rodriguez, supra*, 112 P.3d at p. 706–707.) The Colorado Supreme Court did so as well in another lawsuit in which it held that failure in criminal case to make verbatim recording of trial required a new trial. (*Herren, supra*, 363 P.2d at p. 1046.)

Yet more examples are available. Nebraska Supreme Court decisions addressing the sufficiency of the record in juvenile proceedings have explained that verbatim transcripts are required because such proceedings take place in courts of record. (*In re D.M.B., supra*, 481 N.W.2d at p. 913 ["Juvenile court judges are reminded that juvenile courts are courts of record and that a verbatim record of all proceedings is required."]; *In re R.A., supra*, 410 N.W.2d at p. 115 ["[J]uvenile courts are courts of record and are not free to shield their actions behind a cloak of secrecy by failing to make a verbatim record of the evidentiary proceedings before them."].)

These authorities relied on older precedents requiring courts of record to keep detailed, accurate, contemporaneous records. (See, e.g., *DeKalb County, supra*, 144 S.E.2d at p. 448 [Georgia Supreme Court held that courts of record must maintain "a precise history of a suit from its commencement to its termination"]; *Allen, supra*, 159 N.E. at p. 592 [Ohio Supreme Court described the common-law definition of a record as "a precise history of a suit from its commencement to its termination, including the conclusions of law thereon drawn by the proper officer for the purpose of perpetuating the exact state of facts."]; *Hoehne, supra*, 1 Colo. at p. 162 [Colorado Supreme Court, drawing on Blackstone, held courts of record must keep

detailed "transcript[s] of the record"; "[a] mere minute or memorandum of a proceeding is not a record."].)[7]

In sum, verbatim recordings permit a complete account of what transpired. The knowledge of court proceedings is important at the time, in related trial-level proceedings, and thereafter for litigants, court personnel, the public, and for scholars committed to understanding the work of courts. (*Significance of Verbatim Recording, supra*, at pp. 33–35, 38–39; *Gordon, supra*, 12 Cal.3d at p. 332; see Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data* (2024) 76 Stan.L.Rev. 893, 913–916 [verbatim transcripts capture essential data about judicial decision-making, promoting transparency, accountability, and equal access to justice]; Tanina Rostain, *Access to Justice As Access to Data* (2024) 119 Nw. U. L.Rev. 5, 21 [calling for greater transparency in state and local courts]; Justin Weinstein–Tull, *The Structures of Local Courts*

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[7] The need for accuracy and transcription is not limited to courts of record. Thus, some have proposed that "[a]ll judicial proceedings should be recorded, regardless of whether a court is recognized in law as a 'court of record'." (Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for State Courts, *Principles On Fines, Fees, And Bail Practices*, (Dec. 2017), Principle 3.1, Proceedings, available at <https://www.ncsc.org/~/media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>), cited in The Arthur Liman Center for Public Interest Law (Yale Law School), *Who Pays, Fines, Fees, Bail, and the Cost of Courts*, Twenty-First Annual Liman Colloquium (2018), p. I-12, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165674>.)

(2020) 106 Va.L.Rev. 1031, 1073 [outlining problem of lack of verbatim transcripts at the local court level].)

The doctrine reflects that verbatim records "go to the philosophic roots of judicial administration in the United States." (*Significance of Verbatim Recording, supra*, at p. 33.) Further, in the United States and elsewhere, verbatim records reflect "distrust of concentration of power." (*Id.* at p. 43.) Thus, in the United States, it "is not surprising to find in a constitutional system which emphasizes the judiciary as a check upon the arbitrary exertion of executive and legislative powers, such correlative restraints upon the judiciary itself as are implicit in the verbatim record." (*Ibid.*) Amalia Kessler explained the dual purpose of proving facts and bolstering the political legitimacy of courts. (Amalia D. Kessler, *The Political Functions of (Premodern) Courts and Procedure and Questions of Comparative Method* (2019) 37 Law & Hist. Rev. 937, 938.) Moreover, some have proposed using technologies, such as televised proceedings, to expand public access to court proceedings. The hope is that allowing people to observe directly what transpires will foster greater understanding and confidence, thereby enhancing the legitimacy of courts. (Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court* (2017) 101 Judicature 14.)

III. New technologies enable courts of record to fulfill their duty to keep verbatim records without undue costs to court systems.

Technologies now exist that make verbatim records inexpensive. Electronic recording of court proceedings, which is

widely available, enables courts to discharge the obligations that accompany being a court of record without diverting resources from other court services. This State's Futures Commission reported, as of 2017, forty-seven states permit courts of record electronically their proceedings. (Com. on the Future of California's Court System, Report to the Chief Justice (2017) pp. 244–246 ("Futures Commission Report") <http://www.courts.ca.gov/documents/futures-commission-final-report.pdf>, cited with approval in *Jameson, supra*, 5 Cal.5th at pp. 598, fn. 2, 618, fn. 17.) Likewise, this Court recognized in *Jameson* that "[a] number of other states have addressed the significant financial cost associated with the use of court reporters by authorizing courts to utilize electronic recording as a means of generating an officially recognized verbatim record of trial court proceedings that can be relied upon on appeal. [Citation.]" (5 Cal.5th at p. 598, fn. 2.)

Some states have done so for decades. The Florida Supreme Court concluded in the mid-1990s that "[s]ome type of record must be created to protect a litigant's right to ultimate review by a judge. We find that electronically recording the . . . proceeding and preserving that recording for future access sufficiently protects a litigant's rights[.]" (*In re Family Law Rules of Procedure* (Fla. 1995) 663 So.2d 1049, 1052, order clarified (Fla. 1996) 667 So.2d 202.) Given that "some type of record must be created to protect a litigant's right to ultimate review by a judge[,] . . . electronically recording . . . and preserving that recording for future access sufficiently protects a

litigant's rights[.]" (*Ibid.*) Electronic recording has been used in federal courts since 1982. (Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 56, § 401, subd. (a), amending 28 U.S.C. § 753(b).) The requirements are that "[e]ach session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim[,]" and permits the recording to be accomplished "by shorthand, mechanical means, or electronic sound recording, or any other method," the last of which is subject to regulation and judicial discretion. (28 U.S.C. § 753(b).) One court explained that "it is the duty of the court, not the attorneys, to meet" the verbatim recording requirement. (*United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504, 1530; accord, e.g., *Herren, supra*, 363 P.2d at p. 1046.)

Electronic means can provide a variety of modes to record information. In 2017, the Commission on the Future of California's Court System described an ideal digital courtroom recording system as one that includes tools for capturing evidence, video conferencing, courtroom recording, microphones, and cameras. (Futures Commission Report, *supra*, at p. 264.) Of course, questions of installation and quality control exist. To use equipment requires Judicial Council approval and oversight. (Gov. Code, § 69957, subd. (c); Cal. R. Ct. 2.952, 2.954.)

Concerns about providing recordings relate to both the fiscal stability of the courts and the resources of the litigants. *M.L.B.* is illustrative of a larger body of law addressing the challenges people with limited resources face in court. Many scholars have examined doctrines, statutes, rules, and practices

that have developed to mitigate (with varying degrees of success) these issues. (See Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020* (2020) 98 N. Carolina L.Rev. 102; Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket* (2016) 65 Emory L.J. 1531; Claire Johnson Raba & Dalié Jiménez, *Pay to Plead: Finding Unfairness and Abusive Practices in California Debt Collection Cases* (2023) pp. 41–44 <https://ssrn.com/abstract=4611756>; Luke Norris, *Procedural Political Economy*, 66 William & Mary L.Rev. (forthcoming 2025).) Moreover, legislatures and courts have sought to lessen economic barriers, especially in light of the asymmetrical resources of many disputants. (See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation* (2000) 148 U. Pa. L.Rev. 2119, 2132–2133.)

In the context of verbatim recording, this Court has cited research forecasting "substantial cost savings" that could be obtained by employing digital recording in trial court proceedings. (*Jameson, supra*, 5 Cal.5th at p. 618, fn. 17, citing Futures Commission Report, *supra*, at p. 247; see also *id.* at p. 598, fn. 2 [acknowledging the "considerable potential benefits, both economic and otherwise," of using "recent technological advances in digital recordings of court proceedings" "for parties, courts, and the judicial system as a whole"], citing Futures Commission Report, *supra*, at pp. 238–251.) In 2017, the Commission on the Future of California's Court System estimated that allowing electronic recordings in courtrooms could

save courts up to 85% of the cost—saving the State millions of dollars—and that was in the pre-COVID era. (*Id.* at p. 247.)

Today, most courts have much of the infrastructure to support electronic recording of proceedings, which would likely further reduce the cost to courts to electronically record proceedings. The many states that have adopted electronic recording report significant savings after introducing electronic recordings of proceedings. (See, e.g., Futures Commission Report, *supra*, pp. 245–246.)[8]

The challenges of financing are relevant to these innovations. As this Court put it, a superior court's "legitimate financial considerations must be carefully weighed against the potential impairment of a needy litigant's right to equal access to justice." (*Jameson*, *supra*, 5 Cal.5th at p. 619.) Identifying ways to sustain court operations without imposing undue burdens on litigants is a central concern nationwide. Using inexpensive technologies is one of many ways to enable courts to provide accurate records of proceedings while promoting equal access to justice. (*Supra*, §§ I–II; cf. *Jameson, supra*, 5 Cal.5th at p. 619.) Because of available technologies, these concerns can be

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[8] Additionally, emerging technology enables verbatim transcriptions to be digitally produced without electronically recording. (Matthew Guay, *The Best Transcription Services*, *N.Y. Times–Wirecutter*, Oct. 3, 2024 <https://www.nytimes.com/wirecutter/reviews/best-transcription-services/>.) It remains unresolved whether the use of such software in court proceedings would violate California's statutory prohibition on electronic recording. (Gov. Code, § 69957, subd. (a).)

addressed effectively. Courts of record should fulfill their duty to provide contemporaneous, verbatim recordings of proceedings—whether through court reporters or, if unavailable, through electronic recordings.

Maintaining accurate, contemporaneous records of proceedings is a constitutional and common law mandate for courts of record. That obligation is grounded in the utility of verbatim records for all participants and for courts. From Medieval times to now, "incontrovertibility"—getting the information "right"— has been key to promoting transparency, accountability, and the fair administration of justice.

CONCLUSION

Amici respectfully submit that granting the relief sought in the petition is amply warranted.

Dated: April 4, 2025

Respectfully submitted,

THE NORTON LAW FIRM PC

s/Josephine K. Petrick
Josephine K. Petrick
Attorneys for Amici Curiae

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.486, 8.487, 8.204(c))

The text of this petition consists of 5,889 words as counted by the Microsoft Word for Microsoft 365 MSO version 2025 word processing program used to generate this petition.

Dated: April 4, 2025

Respectfully submitted,

THE NORTON LAW FIRM PC

s/Josephine K. Petrick
Josephine K. Petrick
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Jacob Bedwell, am over 18 years of age and not a party to this action. My business address is 300 Frank H. Ogawa Plaza, Ste. 450, Oakland, CA 94612. I hereby certify that on April 4, 2025, I caused the following documents:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICUS CURIAE BRIEF

to be served on the parties below:

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Attorney General of California Rob Bonta
State of California Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

By Electronic Mail: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the electronic service portal on the Attorney General's website as directed by the Attorney General and Bus. & Prof. Code §§ 17209 & 17536.5. I did not receive, within a reasonable period of time, after the

transmission, any electronic message or other indication that the transmission was unsuccessful.

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, at Oakland, California.

/s/ Jacob Bedwell
Jacob Bedwell

Service List

Family Violence Appellate Project, Petitioner

Sonya Diane Winner
Covington & Burling, LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
Ellen Yoon-Seon Choi
Covington & Burling LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105

Sarah Geneve Reisman
Katelyn Nicole Rowe
Erica Embree Ettinger
Community Legal Aid SoCal
2101 North Tustin Avenue
Santa Ana, CA 92705

Bay Area Legal Aid, Petitioner

Brenda Star Adams
BAY AREA LEGAL AID
1735 Telegraph Avenue
Oakland, CA 94612

Superior Court of Contra Costa County, Superior Court of Los Angeles County, Superior Court of Santa Clara County, Superior Court of San Diego County, Respondents

Mark R. Yohalem
Wilson Sonsini Goodrich & Rosati PC
953 East Third Street, Suite 100
Los Angeles, CA 90013

The Legislature of the State of California, Real Party in Interest

Robin B. Johansen
Olson Remcho LLP
1901 Harrison Street, Suite 1550
Oakland, CA 94612

Attorney General of California Rob Bonta

State of California Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814