IN THE SUPREME COURT OF CALIFORNIA

BARRY S. JAMESON,
Plaintiff and Petitioner,

v.

TADDESE DESTA,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D066793

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

CALIFORNIA ACADEMY OF APPELLATE LAWYERS
*JON B. EISENBERG (NO. 88278)
PRESIDENT, 2016-2017
509 TUCKER ST.
HEALDSBURG, CALIFORNIA 95448
(707) 395-0111
jeisenberg@horvitzlevy.com

CALIFORNIA ACADEMY OF APPELLATE LAWYERS
AMICUS CURIAE COMMITTEE
MARGARET A. GRIGNON, CHAIR (NO. 76621)
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LAURIE J. HEPLER (NO. 160884)
MICHAEL G. COLANTUONO (NO. 143551)
ORLY DEGANI (NO. 177741)

CALDWELL LESLIE & PROCTOR, PC
ALBERT GIANG (NO. 224332)
725 S. FIGUEROA ST., 31ST FLOOR
LOS ANGELES, CA 90017
(213) 629-9040
giang@caldwell-leslie.com

GIBSON, DUNN & CRUTCHER LLP
MICHELE L. MARYOTT (NO. 191993)
BLAINE H. EVANSON (NO. 254338)
CAROLYN S. SMALL (NO. 304938)
3161 MICHELSON DR.
IRVINE, CA 92612
(949) 451-8000
CSmall@gibsondunn.com

ATTORNEYS FOR AMICI CURIAE
CALIFORNIA ACADEMY OF APPELLATE LAWYERS; BEVERLY HILLS BAR ASSOCIATION; INNER CITY LAW CENTER, LEGAL AID ASSOCIATION OF CALIFORNIA; LEGAL AID FOUNDATION OF LOS ANGELES; LOS ANGELES CENTER FOR LAW AND JUSTICE; LOS ANGELES COUNTY BAR ASSOCIATION; PUBLIC COUNSEL; NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY; PROF. ERWIN CHEMERINSKY; PROF. DAVID MARCUS; PROF. JUDITH RESNIK; PROF. LOUIS S. RULLI; WESTERN CENTER ON LAW AND POVERTY

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IN THE SUPREME COURT OF CALIFORNIA

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

Private court reporter appearance fees should not be a barrier to access to the California state appellate courts for litigants who cannot afford to pay such fees. Amici curiae believe they can assist the Court in resolving this case by presenting the views of local and specialty bar organizations, legal aid providers, and academics who have devoted time to helping to ensure access to justice for indigent and unrepresented litigants, and by discussing points not addressed in the parties' briefs. For these reasons, the following amici curiae respectfully request leave to file the accompanying brief.

California Academy of Appellate Lawyers is a nonprofit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate practice

and procedures designed to ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

Beverly Hills Bar Association (BHBA) is a voluntary bar association with more than 5,000 members, many of whom live or work in the Beverly Hills and Century City areas of Los Angeles County. BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public. Its core mission includes facilitating access to legal services. BHBA has often appeared as amicus curiae to address important questions before this Court.

Inner City Law Center (ICLC) is a full-time provider of legal services which has been serving the poorest and most vulnerable individuals and families in Los Angeles since 1980. Founded on the basic principle that every human being should be treated with dignity and respect at all times, ICLC provides free legal representation and social service advocacy to more than 2,000 homeless and working poor clients each year. ICLC is recognized in particular for its expertise in housing issues, veterans' benefits, and homelessness prevention.

Legal Aid Association of California (LAAC) is a statewide membership association of 85 nonprofit public interest law organizations, all of which provide free civil legal services to low-income persons and communities throughout California. Its members provide high-quality legal services to California's low-income and underrepresented populations, serving approximately

270,000 clients each year. The mission of LAAC is to be an effective and unified voice for legal aid on issues of concern to its members and the statewide justice community.

Legal Aid Foundation of Los Angeles (LAFLA) is a frontline law firm which has provided civil legal services to poor and low-income people in Los Angeles County for more than 85 years. With six neighborhood offices, three Domestic Violence Clinics and four Self Help Legal Access Centers, LAFLA serves diverse communities and is the first place thousands of poor people turn to when they need legal assistance for a crisis that threatens their shelter, health and livelihood. LAFLA's Supporting Families Working Group advocates provide direct legal and case management services to survivors of domestic violence/intimate partner abuse and their families, including direct representation at the trial and appellate court levels.

Los Angeles Center for Law and Justice (LACLJ) is a nonprofit legal aid organization which fights for the rights of vulnerable families and advocates for a more just legal system. LACLJ has been providing free legal services and advocacy to low income residents of Los Angeles County and their families for 40 years. Attorneys at LACLJ provide in-depth individualized legal services, including representation in court, through the following four programs: (1) Domestic Violence; (2) Teen Legal Advocacy; (3) Immigration; and (4) Access to Justice.

Los Angeles County Bar Association (LACBA) is one of the largest local voluntary bar associations in the country. In addition to meeting the professional needs of its members, LACBA actively

promotes the administration of justice, access to the legal system, and the role of lawyers in facilitating both. LACBA has a large and active Access to Justice Committee, which joins this application.

Neighborhood Legal Services of Los Angeles County (NLSLA) is one of the largest nonprofit law firms in California, recognized statewide and nationwide as a premier legal services organization. NLSLA's staff of more than 100 advocates and support personnel offer legal services in many areas of poverty law, including family law, housing, immigration, healthcare, employment, and public benefits. NLSLA serves thousands of low-income Los Angeles County residents annually in its three offices, five courthouse-based self-help centers, the Eviction Assistance Center based in the Los Angeles Superior Court Stanley Mosk Courthouse, three medical-legal partnership projects, monthly clinics, and community engagement events.

Professor Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law.*

Professor David Marcus is the 1885 Society Distinguished Scholar, and Professor of Law, at the University of Arizona James E. Rogers College of Law.*

Professor Judith Resnik is the Arthur Liman Professor of Law at Yale Law School.*

Professor Louis S. Rulli is the Practice Professor of Law and Clinical Director at University of Pennsylvania Law School.*

*Institutional affiliation for identification purposes only.

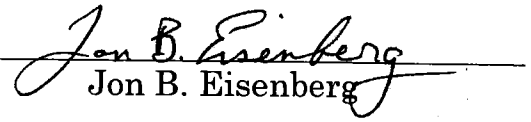
Public Counsel is the nation's largest pro bono law firm. Founded in 1970, Public Counsel strives to achieve three main goals: foster economic justice by providing individuals and institutions in underserved communities with access to quality legal representation; protect the legal rights of disadvantaged children; and represent immigrants who have been the victims of torture, persecution, domestic violence, trafficking, and other crimes. Through a pro bono model that leverages the talents and dedication of thousands of attorney and law student volunteers, along with an in-house staff of more than 75 attorneys and social workers, Public Counsel annually assists more than 30,000 families, children, immigrants, veterans, and nonprofit organizations and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy.

Western Center on Law and Poverty is the state support center for California's neighborhood legal aid offices. For many years, Western Center has monitored access to court issues statewide and has advocated for enforcement of the fee waiver statutes in the Legislature and in the courts. (See, e.g., *Cruz v. Superior Court* (2004) 120 Cal.App.4th 275.)

No party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Other than the amici curiae, their members, or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

July 28, 2016

CALIFORNIA ACADEMY OF APPELLATE LAWYERS
JON B. EISENBERG
MARGARET A. GRIGNON
ROBIN MEADOW
ROBERT S. GERSTEIN
DENNIS A. FISCHER
ROBIN B. JOHANSEN
LAURIE J. HEPLER
MICHAEL G. COLANTUONO
ORLY DEGANI
CALDWELL LESLIE & PROCTOR, P.C.
ALBERT GIANG
GIBSON DUNN & CRUTCHER LLP
MICHELE L. MARYOTT
BLAINE H. EVANSON
CAROLYN S. SMALL

By: 
Jon B. Eisenberg

Attorneys for Amici Curiae
CALIFORNIA ACADEMY OF APPELLATE LAWYERS; BEVERLY HILLS BAR ASSOCIATION; INNER CITY LAW CENTER, LEGAL AID ASSOCIATION OF CALIFORNIA; LEGAL AID FOUNDATION OF LOS ANGELES; LOS ANGELES CENTER FOR LAW AND JUSTICE; LOS ANGELES COUNTY BAR ASSOCIATION; PUBLIC COUNSEL; NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES; PROF. ERWIN CHEMERINSKY; PROF. DAVID MARCUS; PROF. JUDITH RESNIK; PROF. LOUIS S. RULLI; WESTERN CENTER ON LAW AND POVERTY

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

INTRODUCTION

Despite having obtained three reversals of judgments against him, indigent pro per appellant Barry S. Jameson saw his case founder not on the merits, but on his inability to afford a court reporter's appearance fees. This brief urges that private court reporter appearance fees must not be a barrier to appellate court access for persons who cannot afford to pay them. A reporter's transcript, for which a settled statement is rarely an adequate substitute, can be essential to appellate review. The superior court in this case abused its discretion in adopting a policy that effectively puts appellate justice beyond reach of Californians of modest means.

At issue in this case is a policy of the San Diego Superior Court stating that "[o]fficial court reporters are not normally available in civil, family, or probate matters," and "[p]arties, *including those with fee waivers*, are responsible for all fees and costs related to court reporter services" that litigants arrange privately. (Super. Ct., San Diego County, Form ADM-317 <http://goo.gl/fhtXKF> [as of July 26, 2016], emphasis added, boldface omitted.) Private court reporter appearance fees can be considerable. In 2012, the per diem rate for court reporters was $735 in San Francisco and $764 in Los Angeles. (McEvoy, *Shrinking court reporter staffs bring changes to civil litigation*, Daily J. (Mar. 15, 2012).)

Similar policies have recently proliferated throughout California. Because of steep decreases in court funding, most of California's superior courts, like the San Diego Superior Court, no longer provide official reporters for most civil proceedings—even for indigent litigants who have obtained fee waivers. (Impellizzeri, *BYO Court Reporter* (Sept. 2013) Cal. Lawyer 10, 11 <http://www.nxtbook.com/nxtbooks/dailyjournal/calilawyer_201309/index.php?startid=11> [as of July 26, 2016].)

In the present case, the Court of Appeal held that Jameson, an indigent prisoner prosecuting a civil action for alleged negligent medical treatment who had obtained a fee waiver (Gov. Code, § 68631), was precluded from raising evidentiary issues on appeal from a judgment of nonsuit after plaintiff's opening statement because he was unable to pay the appearance fee of a private court reporter and thus could not obtain a transcript of oral proceedings in the superior court. (Typed opn. 17, citing *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.) In the Court of Appeal's view, Jameson's financial circumstances did not mitigate the requirement of an adequate record on appeal. (See typed opn. 3 ["While this court is sympathetic to the plight of litigants like Jameson whose incarceration and/or financial circumstances present such challenges, the rules of appellate procedure and substantive law mandate that we affirm the judgment in this case"].)

The Court of Appeal's decision would effectively preclude persons of modest means from appealing adverse rulings where no official court reporter is available, solely because they cannot afford a private court reporter's appearance fee. However, "the right to

effective appellate review cannot be permitted to depend entirely on the means of the parties." (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 9, fn. 3 (*Obrecht*).) This Court should reverse the Court of Appeal's decision to ensure that the courthouse doors remain open to Californians regardless of their economic status.

ARGUMENT

I. PERSONS OF MODEST MEANS ARE LOSING ACCESS TO THE CALIFORNIA COURTS.

California residents of modest means face daunting obstacles to accessing the state's court system. According to a report by the California Commission on Access to Justice:

> California has by far the largest low-income population of any state. Since 1980, California's population has increased 40 percent while the number of Californians in poverty has increased by 60 percent. [¶] Poverty affects vulnerable populations and women disproportionately. One of every five children in our state is poor. . . . [¶] . . . In 2000, approximately 7.5 million Californians had incomes higher than the maximum eligibility limit for federally funded legal aid and yet their incomes were lower than the state's median income. [¶] . . . The result is that the majority of Californians do not have the resources to obtain legal representation for the myriad legal problems affecting them every year, such as divorce, child support, child custody, domestic violence, loss of housing and employment, and discrimination.

(Cal. Com. on Access to Justice, *Action Plan For Justice* (Summary ed. 2007) <http://goo.gl/s1vJlO> p. 2 [as of July 26, 2016]; see also

Rhode, *Access to Justice: An Agenda For Legal Education and Research* (2013) 62 J. Legal Educ. 531, 531 ["For decades, bar studies have consistently estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet"].)

Most low-income Californians wishing to litigate have no choice but to go it alone. In 2007, "[m]ore than 90 percent of the 450,000 people . . . who use[d] self-help programs in California earn[ed] less than $2,000 per month." (Jud. Council of Cal., Admin. Off. of Cts., *Handling Cases Involving Self-Represented Litigants: A Benchguide For Judicial Officers* (2007) p. 1-2 <http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf> [as of July 26, 2016].) In 2009, "California tallied 4.3 million people in civil litigation without the assistance of lawyers." (Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism* (2012) 56 St. Louis U. L.J. 917, 974.) And the problem of lack of access is not limited to the poor. "It is not only low-income communities that are priced out of the current civil justice system. Millions of moderate-income Americans suffer untold misery because legal protections that are available in principle are inaccessible in practice." (Rhode, *Access to Justice: Connecting Principles to Practice* (2004) 17 Geo. J. Legal Ethics 369, 372 (*Access Principles*).)

Indigent litigants' reduced ability to afford litigation is frequently exacerbated by their greater need to access the courts and for assistance in doing so. "Not only do the poor experience more legal difficulties than the average American, their problems

often assume special urgency. . . . The poor and near-poor are also less likely to have the education, skills, and self-confidence to handle legal problems effectively without assistance." (*Access Principles, supra,* 17 Geo. J. Legal Ethics at p. 377.)

Appellant Jameson exemplifies hundreds of thousands of Californians forced to navigate the civil courts without assistance because they cannot afford counsel. Assistance is particularly warranted when indigent plaintiffs like Jameson manage on their own to reach trial on the merits against a represented defendant. (See typed opn. 2 ["In three separate prior appeals, this court reversed judgments in favor of Desta, and remanded the matter for further proceedings"].) And contrary to Desta's suggestion that "this issue should be left to the Legislature" (ABOM 45), this Court plays a leading role in ensuring meaningful access to the justice system. (Conference of Chief Justices, Conference of State Court Administrators, Resolution 5 (2015) p. 1 <https://goo.gl/VQHR5u> [as of July 26, 2016] ["the Judicial Branch has the primary leadership responsibility to ensure access for those who face impediments they cannot surmount on their own"].)

II. PRIVATE COURT REPORTER FEES MUST NOT BE A BARRIER TO APPELLATE COURT ACCESS FOR LITIGANTS WHO CANNOT AFFORD TO PAY THEM.

The Legislature has declared it the policy of California that all should have "access to the courts without regard to their economic means," and that "California law and court procedures

should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees." (Gov. Code, § 68630, subd. (a).) The Judicial Council has similarly declared that "[p]roviding access to justice for self-represented litigants is a priority for California courts," and that "[c]ourt programs, policies, and procedures designed to assist self-represented litigants . . . at all stages must be incorporated and budgeted as core court functions." (Cal. Rules of Court, rule 10.960(b).)

For nearly a century, this Court has made clear that any rule that "has the practical effect of restricting an indigent's access to the courts because of his poverty . . . contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis." (*Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165, citing *Martin v. Superior Court* (1917) 176 Cal. 289, 293-297; see also *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648 [unfettered court access " 'is an important and valuable aspect of an effective system of jurisprudence' "].) As the Chief Justice recently observed:

> [T]he true measure of our commitment to justice, fairness, the rule of law, equality cannot be measured by how we treat the rich, the powerful, the privileged, the respected amongst us. . . . [T]he true measure of our commitment to justice is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.

(Jud. Council of Cal., Cantil-Sakauye, C.J., State *of the Judiciary March 2016: Address to a Joint Session of the California*

Legislature (Mar. 8, 2016) <http://www.courts.ca.gov/34477.htm> [as of July 26, 2016], citing Stevenson, Just Mercy (2014) p. 18.)

Yet in denying appellate review to Jameson, the Court of Appeal wrote that "[t]his case aptly demonstrates that civil justice is not free." (Typed opn. 3.) One can scarcely imagine a worse message to the people of California. This Court has admonished that local court rules and policies should not have the effect of "diminishing litigants' respect for and trust in the legal system." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1367 (*Elkins*).) "Courts must earn the public trust." (*Id.* at p. 1369, citing Cal. Stds. Jud. Admin., § 10.17(b)(5)(A), (B).) Courts do not foster public respect and trust by pronouncing that appellate justice is only for those who can pay for it.

III. A REPORTER'S TRANSCRIPT CAN BE ESSENTIAL TO APPELLATE COURT ACCESS.

Desta asserts that a reporter's transcript "is not needed in the large majority of appeals" and that there is only "a very limited number of cases (primarily, lengthy trials) in which an indigent plaintiff cannot effectively appeal without a reporter's transcript." (ABOM 33.) Quite to the contrary, "[i]n numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided." (*Foust v. San Jose Constr. Co.* (2011) 198 Cal.App.4th 181, 187.) Absent a record of the oral proceedings, an appellant:

- Cannot challenge the sufficiency of the evidence to support the judgment (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132);
- Cannot challenge the superior court's reasoning to show that a discretionary ruling was an abuse of discretion (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259);
- Risks the inability to demonstrate record support for an argument or to show that issues were preserved for appeal (*Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 575-576);
- May be unable to demonstrate a reasonable probability that the result would have been different absent the error, so as to establish the prejudice required for reversal (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136); and
- Loses the benefit of the presumption under rule 8.163 of the California Rules of Court that a partial record includes all matters material to deciding the issues raised, with the result that the appellate court will presume the opposite—that an absence of error would have been shown by the unreported oral proceedings (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992).

This is true even where, as here, the appeal is from a judgment of nonsuit following the plaintiff's opening statement. At least three times since 2003, the Courts of Appeal have affirmed such judgments for want of a reporter's transcript. (*Carter v. James*

(Feb. 26, 2009, B206089) 2009 WL 485396, at p. *2, fn. 3 [nonpub. opn.] [absence of reporter's transcript meant trial court was assumed to have been correct in stating that appellant had made a dispositive admission during opening statement]; *Carlson v. Frilot* (Mar. 26, 2003, F038517) 2003 WL 1562627, at p. *1 [nonpub. opn.] [absence of reporter's transcript meant "we have an inadequate record to review plaintiff's claim"]; *Schuster v. Milestone* (Mar. 14, 2003, H023268) 2003 WL 1194090, at p. *3 [nonpub. opn.] [absence of reporter's transcript meant "we are unable to verify" claim that appellant properly provided overview of case or confined remarks to limited aspects of case].)[1]

IV. A SETTLED STATEMENT IS RARELY AN ADEQUATE SUBSTITUTE FOR A REPORTER'S TRANSCRIPT.

Desta argues this Court should affirm the Court of Appeal's judgment because Jameson did not attempt to present a record of the oral proceedings by way of a settled statement pursuant to rule 8.137 of the California Rules of Court. According to Desta, a settled statement would have been "a viable method for obtaining

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[1] We cite these unpublished decisions not in reliance on them as authority (which would violate rule 8.1115(a) of the California Rules of Court) but only to show the frequency with which the Courts of Appeal have affirmed judgments of nonsuit following plaintiff's opening statement for want of a reporter's transcript. (See generally *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 113 [appellant properly cited unpublished opinion to demonstrate situation in which ordinary costs in FEHA case were substantial].)

meaningful appellate court review" (ABOM 3) and "a perfectly acceptable alternative" to a reporter's transcript (ABOM 49).

But the fact that a settled statement may adequately serve an appellant's needs in some cases does not excuse the denial of a reporter's transcript in other cases—surely the majority—where the settled statement cannot serve as an adequate substitute for a reporter's transcript. "[W]here the parties are not in agreement, and the settled statement must depend upon fading memories or other uncertainties, it will ordinarily not suffice." (*In re Armstrong* (1981) 126 Cal.App.3d 565, 573 (*Armstrong*).) "[T]he absence of a verbatim record [of oral proceedings] can preclude effective appellate review, cloaking the trial court's actions in an impregnable presumption of correctness regardless of what may have actually transpired." (*Obrecht, supra,* 245 Cal.App.4th at p. 9, fn. 3 [commenting "[w]e are deeply troubled by the [Santa Cruz Superior Court's] policy of conducting all family matters without a reporter unless a reporter is engaged by one or both parties at their own expense"].)

Thus, the theoretical possibility of producing a record of oral proceedings by way of a settled statement provides no sure path around the barrier to appellate justice erected by the local superior court policy at issue here.

V. A COURT REPORTER'S STENOTYPE NOTES CAN BE USED TO HELP PRODUCE A MEANINGFUL SETTLED STATEMENT.

If there *is* a possibility that a settled statement could adequately replace a reporter's transcript, its suitability might very well turn on the availability of a court reporter's *untranscribed stenotype notes*. The law is well settled that, even absent a reporter's transcript, the trial judge may refer to the reporter's untranscribed stenotype notes to resolve disputes on a motion for settled statement. (*Western States Const. Co. v. Municipal Court* (1951) 38 Cal.2d 146, 148-149; *Mooney v. Superior Court* (2016) 245 Cal.App.4th 523, 532; see also *Eisenberg v. Superior Court* (1956) 142 Cal.App.2d 12, 19-20 [judge can resolve disputes by having reporter read aloud from notes at hearing on motion].)[2]

Thus, even when a court reporter has not produced a transcript, the stenotype notes from which a transcript would otherwise be prepared can be useful—even critical—in preparing a settled statement. (*Armstrong, supra,* 126 Cal.App.3d at p. 573 ["had a phonographic reporter's services . . . been requested and available . . . , the uncertainties of the disputed settled statement would probably have been resolved by a simple reference to the reporter's untranscribed notes"]; see also *Herick v. Municipal Court*

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[2] For an exemplar of stenotype notes as compared with plain English, see Cal. Off. Crt. Reporters Assn., *Read / Write Like a Court Reporter* <http://cocra.org/pages/careers-students/read-write.html> [as of July 26, 2016].

(1970) 8 Cal.App.3d 967, 974 [judge has "the right to have the reporter read relevant portions of his notes" at hearing on settled statement motion].)

For this reason, Desta is wrong in contending that any error here was harmless because Jameson "almost certainly would not have" been able to pay for a reporter's transcript even if a reporter had been present. (ABOM 55.) Had a court reporter attended the oral proceedings, the reporter's stenotype notes might later have been used to produce a meaningful settled statement that would be an adequate alternative to a reporter's transcript.

VI. A SUPERIOR COURT'S ADOPTION OF A POLICY THAT ERECTS A BARRIER AGAINST PERSONS OF MODEST MEANS OBTAINING COURT REPORTERS CONSTITUTES AN ABUSE OF DISCRETION.

In civil litigation by or against indigent prisoners, California courts have enunciated an *abuse of discretion* standard to effectuate the right of access to the courts. (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 207; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1483-1484 ["a trial court has discretion to choose among" various remedies "in safeguarding a prisoner litigant's right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests"].) Amici curiae submit that this standard should extend to *all* indigent civil litigants—not just prisoners—and that any local superior court policy that has the effect of depriving indigent litigants of meaningful appellate review

is invalid as inconsistent with state law and policy. (See *Elkins, supra,* 41 Cal.4th at p. 1351 ["A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law"].)

Where, as here, an indigent litigant has obtained a fee waiver, it is an abuse of discretion for the superior court to categorically refuse either to provide an official court reporter or to extend the fee waiver to a private court reporter's appearance fee when the consequence is to preclude meaningful appellate review. That is the effect of the superior court policy at issue in the present case. This Court should keep appellate justice accessible to Californians of modest means by disapproving the San Diego Superior Court's local policy and others like it.

CONCLUSION

For the reasons explained above, and for those set forth in Jameson's briefs on the merits, this Court should reverse the Court of Appeal's judgment.

July 28, 2016

CALIFORNIA ACADEMY OF APPELLATE LAWYERS
JON B. EISENBERG
MARGARET A. GRIGNON
ROBIN MEADOW
ROBERT S. GERSTEIN
DENNIS A. FISCHER
ROBIN B. JOHANSEN
LAURIE J. HEPLER
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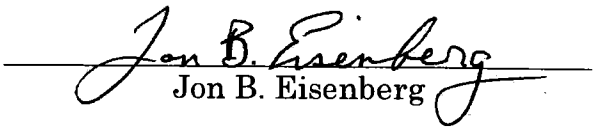
CALDWELL LESLIE & PROCTOR, P.C.
ALBERT GIANG
GIBSON DUNN & CRUTCHER LLP
MICHELE L. MARYOTT
BLAINE H. EVANSON
CAROLYN S. SMALL

By: 
Jon B. Eisenberg

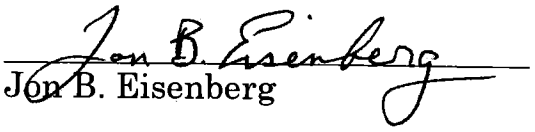
Attorneys for Amicus Curiae
CALIFORNIA ACADEMY OF APPELLATE LAWYERS; BEVERLY HILLS BAR ASSOCIATION; INNER CITY LAW CENTER, LEGAL AID ASSOCIATION OF CALIFORNIA; LEGAL AID FOUNDATION OF LOS ANGELES; LOS ANGELES CENTER FOR LAW AND JUSTICE; LOS ANGELES COUNTY BAR ASSOCIATION; PUBLIC COUNSEL; NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY; PROF. ERWIN CHEMERINSKY; PROF. DAVID MARCUS; PROF. JUDITH RESNIK; PROF. LOUIS S. RULLI; WESTERN CENTER ON LAW AND POVERTY

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 3,037 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: July 28, 2016



Jon B. Eisenberg

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On July 28, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 28, 2016, at Encino, California.

Millie Cowley

Millie Cowley

SERVICE LIST
Jameson v. Desta
Case No. S230899

Michael J. Shipley Sierra Elizabeth Joseph M. Anderson Kirkland & Ellis LLP 333 South Hope Street Los Angeles, CA 90071	Attorneys for Petitioner Barry S. Jameson
James J. Wallace, II Russell M. Mortyn David Ozeran La Follette, Johnson, De Haas, Fesler & Ames 501 West Broadway, Suite 800 San Diego, CA 92101	Attorneys for Respondents Taddese Desta
Kenneth R. Pedroza Cole Pedroza LLP 2670 Mission Street, Suite 200 San Marino, CA 91108	Attorneys for Respondents Taddese Desta
California Court of Appeal Fourth Appellate District, Div. One 750 B Street, Ste. 300 San Diego, CA 92101-8196	Case No. D066793 [Served through TrueFiling]
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