Case No. **S230899**

IN THE SUPREME COURT OF CALIFORNIA

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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
Affirming a Judgment of the Superior Court of San Diego County
The Honorable Joel M. Pressman
Superior Court No. GIS9465

PETITIONER BARRY S. JAMESON'S REPLY BRIEF

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Just as Petitioner Barry Jameson was filing his Opening Brief in this case, the Sixth District of the Court of Appeal issued an opinion in *In re Marriage of Obrecht* (2016) 245 Cal. App. 4th 1. *Obrecht*—a family law dispute—was filed in a superior court with a "no official court reporters" rule essentially identical to the San Diego Superior Court policy currently before the Court. Finding that appellant had forfeited a claim of error because he could not provide a record on appeal, the court eloquently remarked:

> We are deeply troubled by the trial court's policy of conducting all family law matters without a reporter unless a reporter is engaged by one or both parties at their own expense. . . As illustrated by this case, the absence of a verbatim record can preclude effective appellate review, cloaking the trial court's actions in an impregnable presumption of correctness regardless of what may have actually transpired. Such a regime can raise grave issues of due process as well as equal protection in light of its disparate impact on litigants with limited financial means. The practice becomes all the more troubling when viewed in combination with the statewide prohibition against privately recording court proceedings "for any purpose other than as personal notes." (Cal. Rules of Court, rule 1.150(d).) Perhaps the time has come at last for California to enter the twentieth (sic) century and permit parties to record proceedings electronically in lieu of the far less reliable method of human stenography and transcription. *Until that day, however, we believe the right to effective appellate review cannot be permitted to depend entirely on the means of the parties.*

Id. at p. 9 n.3 [emphasis added; "(sic)" in original].

The Presiding Justice's observation could not be more true. California law protects and has long protected the right to judicial recourse, including the right of all litigants, rich or poor, to appeal adverse trial court decisions. It was against this backdrop

that the Legislature enacted section 68086, subdivision (b) of the Government Code, waiving court reporters' fee for indigent litigants. The San Diego Superior Court's policy of categorically denying official reporters failed to respect that central norm of the justice system by shutting out indigent litigants like Mr. Jameson from the appellate courts, and was therefore an abuse of discretion and an unlawful court rule.

Desta's arguments otherwise are unavailing. He argues that the trial court did not abuse its discretion because it made a rational choice to prioritize its fiscal difficulties over Jameson's "illusory" right of access. According to Desta, because indigents like Jameson often face substantial obstacles to success, even without access to a court reporter, any rule ensuring the creation of a trial record is a wasteful expenditure of resources. That argument, however is without support in morality, much less the law or the facts.

In a similar vein, Desta also argues that the trial court's policy is permissible because it only causes the forfeiture of *some* indigents' appeals. Of course, this court has never found that a barrier to access must be universal in order for it to be worthy of challenge.

Desta further disputes the existence of a constitutional right a free court reporter. Jameson, of course, has not argued that such a right exists—only that the constitutional concerns implicated warrant solicitude of the nature of his access rights as a matter of statutory and common law. And he also argues that Jameson was required to attempt to proceed by settled statement

to permissibly appeal the trial court's procedural error. But that argument too is without support. Nor do any of Desta's other arguments carry the day.

Thus, as addressed below and in the Opening Brief, the Court should reverse the judgment of the Court of Appeal and remand so that Jameson can have the trial he has been seeking for over fourteen years.

I. The Superior Court Abused Its Discretion by Failing to Take any Meaningful Measures to Ensure Jameson's Access to the Appellate Process.

Desta's Answering Brief discusses at some length various decisions of federal and state courts addressing the rights of indigent litigants to obtain fee waivers or free copies of trial court transcripts for use on appeal. (*See* Respondent's Answer Brief (RAB) 14–21.[1]) Despite his lengthy exegesis, however, he refuses to grapple with general legal proposition Jameson advances in the opening brief: When statutes or rules of court afford discretion to a trial court in crafting its procedures, that discretion must be exercised with solicitude for the rights of indigent and imprisoned litigants to access the courts. (Petitioner's Opening Brief (POB) 17–18.) Nor does Desta address that proposition's logical corollary: That a trial court that takes *no measures at all*

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1 Although the discussion addresses a half dozen Court of Appeal opinions *In re Marriage of Obrecht* (2016) 245 Cal. App. 4th 1, 9 n.3—addressed in the Introduction, *supra*—was not one of them.

to ensure access for indigents necessarily abuses the discretion afforded it. (*See id.* at p. 19.)[2]

Instead of contesting or even addressing the validity or application of these rules, Desta offers three related excuses for why the trial court needn't have done anything to ensure that Jameson had an adequate opportunity to create a trial record for appeal.

First, Desta suggests requiring a trial court to take measures to ensure the creation of an adequate oral trial record would be an "illusory" right. (RAB 30.) According to Desta, because indigent pro se litigants face other impediments that make it extraordinarily difficult for indigent plaintiffs to prevail, Jameson has no "meaningful 'access to justice'" anyway. So it was perfectly rational for the trial court to decline to expend any of its indisputably taxed resources in support of a futile endeavor. (*Id.* at p. 31.).

Second, Desta points out that it is only in "a very limited number of cases (primarily lengthy trials) in which an indigent plaintiff cannot effectively appeal without a reporter's transcript." (*Id.* at p. 33.) He suggests that meaningful access does not

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[2] Desta's brief spends nine pages discussing the essential facts and holdings of a dozen cases. (RAB 14–23.) Tellingly, it does not cite, much less attempt to distinguish, the cases cited in the opening brief addressing the requirement that trial courts exercise their discretion in favor of protecting the right to access. (See POB 17–20 [discussing *Wantuch v. Davis* (1995) 32 Cal.App.4th 786 and *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468.) and collecting various other cases standing for the same general proposition in a footnote].)

require a court reporter because "only a small percentage of appeals would even be affected, [as] a transcript is not needed in the large majority of appeals." (*Id.* at p. 33.)

And third, Desta asserts that the right of access to the courts entails only a "right to participate" and *not* a "right to prosecute the action effectively." In doing so, he Desta tries to draw a distinction between waivers of court fees and affirmatively providing services to indigents.

None of these arguments has any merit.

A. That a Favorable Decision from this Court Will Not Remove Every Obstacle to Meaningful Access by Indigent Litigants Is Not an Appropriate Basis to Affirm.

The primary argument raised in Desta's brief is that because indigent *pro se* plaintiffs like Jameson face various other obstacles in prosecuting their cases—such as an inability to pay for counsel, expert witnesses, and transcription costs—the trial court's failure to afford any opportunity to create a record of oral proceedings for appeal leaves him no worse off in terms of meaningful access to the courts. (RAB 24–37.) Indeed:

> [T]here is no meaningful "access to justice" if the plaintiff is provided with a court reporter but not a free transcript on appeal, or if he is provided with a reporter and a free transcript but not an attorney to prepare the appeal, or if he is provided with a reporter and a free transcript and an attorney but not expert witnesses to testify at trial should he obtain a reversal on appeal.

(*Id.* at p. 31.)

Desta apparently believes that, unless the state Legislature adopts a full-blown "civil *Gideon*" system,[3] this Court cannot and should not offer any special solicitude whatsoever for indigent litigants when it comes to the court reporting statutes. Absent that, these litigants are destined to lose one way or another, so why bother?

Setting aside the argument's moral monstrosity, it makes no legal or empirical sense. Were the point a legally cogent one, it would erase every one of this Court's long line of incremental improvements in the rights of indigents to access the courts. Why waive filing fees for a plaintiff *in forma pauperis* if he is never going be able to prove the defendant's negligence led to plaintiff's daughter's death? (*Cf. Martin v. Superior Court* (1917) 176 Cal. 289, 296 (*Martin*).) Why waive jury fees if he is destined for a defense verdict? (*Cf. Majors v. Superior Court* (1919) 181 Cal. 270, 274 (*Majors*).) Why waive appellate filing fees if the plaintiff can't afford the cost of transcribing the record or to hire a lawyer to draft her briefs, especially since she will inevitably lose on remand? (*Cf. Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*).) At its core, Desta's argument isn't merely a cavil with providing a free court reporter to indigent litigants—it is an argument against the very notion of incremental progress on the

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[3] *See generally* Hon. Mark Juhas, *On the Anniversary of Gideon, an Argument for Free Civil Representation* (Sept. 2013) Los Angeles Lawyer 44.

road to equal access to justice.[4] Absent the perfect, suggests Desta, there is no reason for a court to exercise in discretion in favor of the mere good, particularly if it costs money.

Along these lines, Desta suggests that the abuse of discretion standard asks "whether the trial court exceeded the bounds of reason." (RAB 36 [quoting *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) According to Desta, since a reported trial would be "illusory" unless Jameson also has a right to free transcription of the reporter's transcript,[5] Desta argues that the trial court "made a rational decision not to provide reporter in civil actions," including in fee waiver cases, particularly in light of the budgetary constraints faced by the courts in this state. (RAB 36–37.)

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4 *Cf.* Rev. Dr. Martin Luther King, Jr., *Where Do We Go from Here?* (Aug. 16, 1967) ["Let us realize that the arc of the moral universe is long, but it bends toward justice."] <http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention/> (as of June 26, 2016).

5 Although Desta contests the point, that an indigent civil litigant has no right to a free transcript necessary to prosecute his appeal is by no means a settled issue of California law. As noted in the opening brief, (POB 14–15) the line of Court of Appeal cases suggesting that no such right exists has its roots in a seventy-five-year-old Court of Appeal case—*Rucker v. Superior Court* (1930) 104 Cal. App. 683—whose rationale has been called into question by this Court. (*See Ferguson, supra,* 4 Cal. 3d at p. 653–54.) In any event, because the right to a free transcript was not presented by the facts of Jameson's appeal—the lack of a reporter left nothing for him to pay to transcribe—and because the Court did not certify it as an issue presented for review, Jameson will not belabor the point.

Of course, the abuse of discretion standard is neither as deferential nor as narrow as Desta makes it out to be. As the Court recently explained, a trial court's discretion "must be exercised within the confines of the applicable legal principles." *Sargon Enterprises, Inc. v. Univ. of S. Cal.* (2012) 55 Cal. 4th 747, 773. "To determine if a court abused its discretion, we must thus consider 'the legal principles and policies that should have guided the court's actions.'" (*Ibid.* [quoting *People v. Carmony* (2004) 33 Cal.4th 367, 377].) "The legal principles that govern the subject of discretionary action vary greatly with context. . . . They are derived from the common law or statutes under which discretion is conferred." (*Ibid.* [quoting (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298 (*Drew*)].) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Ibid.* [also quoting *Drew*].

Under this standard, the trial court's policy exceeds the confines of the long-established principles regarding the obligations of California courts to ensure indigents have access to justice. These principles cannot yield simply because they are fiscally inconvenient for the judicial branch. Indeed, the Legislature itself has found and declared "[t]hat fiscal responsibility should be tempered with concern for litigants' rights to access the justice system." (Gov't Code, § 68630, subd. (b).) And the Court similarly explained in *Earls*, "the broad policy of discouraging frivolous litigation and providing financial support for the judiciary does not justify depriving indigents of access to the courts." (*Earls v. Supe-*

rior Court (1971) 6 Cal. 3d 109, 114 [applying rule in context of right to appeal].) Thus, even if the cost-benefit explanation advanced by Desta is somehow "rational" in a general way, it is nonetheless an abuse of discretion.

In any event, if the reporting of an indigent's civil trial is ensured by a favorable ruling from this Court, it would by no means be "illusory," even without a corresponding right to a free transcript. First off, although the Transcript Reimbursement Fund may be small compared to the need, its existence presupposes that there will be transcribed proceedings for it to fund. (*See* Bus. & Prof. Code, § 8030.6.) And—as the present case illustrates—an indigent litigant can obtain representation on appeal by a non-profit legal services provider or private *pro bono* counsel.[6] Counsel who provide these free services often advance the costs of obtaining the reporter's transcript—costs that are recoverable by a prevailing party on appeal. (*See* Rules of Court, rule 8.278(d)(1)(B).) But a reporter's transcript can *never* be obtained if the trial went unreported. Absent a trial record to justify a reversal, these opportunities will have fleeting value to an indigent appellant.

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[6] Indeed, the courts themselves are currently working with legal services organizations to create appellate *pro bono* projects. Recently, the Second District of the Court of Appeal, in conjunction with Public Counsel, has launched a pilot project to provide representation to indigent litigants. (*See* Appellate Pro Bono Pilot Project, Second District Court of Appeal, *http://www.courts.ca.gov/2503.htm*).

Equally importantly, a litigant unable to pay for a private court reporter to attend every day of a trial[7] may well be able to find the funds needed to transcribe a few pages identifying an error he wishes to appeal. (*See, e.g., Leslie v. Roe* (1974) 41 Cal.App.3d 104, 107 [noting that a partial transcript may be an affordable alternative for indigent litigants].) One of Jameson's prior appeals is illustrative. There, the Court of Appeal reversed in part because the trial court told Jameson that "[a]ny complaint [that Jameson has] about not being at liberty to attend the deposition is something [Jameson] should have considered before committing whatever crime that gave rise to his incarceration." (*See Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1161 (*Jameson III*) [alterations original in opinion].) Although these intemperate comments appeared in a written order, had they been oral, the option of ordering the transcription of only the few pages of transcript containing the comments would have proven a viable option for Jameson to present a record on appeal for this issue.[8]

Moreover, Desta's claim that a right to have a trial reported is meaningless without a corresponding right to a free transcript thus misses a key distinction between the two: Having a trial go

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7 If provided by the court, a court reporter's fees in San Diego are $403 per half day or $806 per full day. <http://www.sdcourt.ca.gov/portal/page?_pageid=55,1057199&_dad=portal&_schema=PORTAL.> Because the court does not regulate fees of privately hired reporters, Jameson and other indigent litigants may face even more prohibitive costs.

8 Elsewhere in the brief, Desta suggests that Jameson could not afford even a partial record. (RAB 55–56.) But nothing in the record establishes that fact.

unreported means that it will be *impossible* for an indigent litigant to find the wherewithal to order and pay for a transcript at some time in the future. The record of an unreported trial is lost *forever*, and well before the litigant could possibly know that a transcript will be necessary to support his appeal.

Indeed, the Court of Appeal recognized this crucial distinction in misdemeanor criminal cases, where the right to a reporter was categorically guaranteed, but the right to a free transcript was not. (*See Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041, 1051, *disapproved on unrelated issue by Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 n.11.) As the *Andrus* court noted, there is a "world of difference" between "when the state must collect a verbatim record" versus "when it must provide a transcript of that record." (*Ibid.*) Reporting is required, in part because of the "the impossibility of predicting what might arise in even the simplest trial[.]" (*Ibid.*) In contrast, in assessing "the need to prepare a transcript posttrial, knowledge will replace speculation[.]" (*Ibid.*) Likewise, an error in permitting transcription has an easy remedy: order the transcript prepared. On the other hand, a failure to require reporting offers little recourse other than to "reverse for lack of an adequate record." (*Ibid.*)

Moreover, having a trial reported has benefits even if it is unclear whether the indigent litigant can later obtain a transcript. (RAB 55.) Even *without* a transcript, an indigent appellant benefits from the presence of a court reporter. Just as in the era before verbatim transcription, the reporter's notes may be used to settle a statement. (*See W. States Const. Co. v. Municipal Court*

of City & County of San Francisco (1951) 38 Cal.2d 146, 150 (*Western States*) [including reporter's notes as a resource to be used when settling a statement]). Indeed, as discussed *infra*, § II, courts have held that a trial court is under no duty to settle a statement absent an unofficial transcript or notes to assist it. (*See, e.g.*, *Averill v. Lincoln* (1944) 24 Cal.2d 761, 765 (*Averill*) [trial court can "require appellants to furnish a transcript of the trial proceedings to assist in the settlement of the statement"]).

B. That the Lack of a Record of Oral Proceedings Does Not Doom Every Indigent's Appeal Does Not Excuse the Denial of the Right of Access in Cases Where It Does.

Desta claims that Jameson "overstates the extent of the denial of 'access to justice' resulting from a Court not providing a reporter to indigent plaintiffs." (RAB 33.) Desta notes that in "many or most appeals, a reporter's transcript is not necessary for effective appellate review." Thus, according to Desta, "the fact that *some* appeals brought by indigent plaintiffs will not be successful because of a lack of a transcript does not justify mandating the provision of reporters to indigent plaintiffs in personal injury actions." (*Ibid.*)

Notably, this argument is unsupported by any citation to authority supporting the proposition that a barrier to the right of indigents to access to the courts is acceptable if it does not leave them without remedy in every case. Indeed, that has no support in the law. California's courts have repeatedly intervened to remove obstacles to the right of access that apply only in limited circumstances. That not every case is jury-triable does not mean that jury fees are an acceptable impediment to access by indi-

gents. (*Cf. Majors, supra,* 181 Cal. at p. 274.) That every plaintiff does not seek a preliminary injunction does not mean that an undertaking requirement is an acceptable obstacle either. (*Cf. Conover v. Hall* (1974) 11 Cal.3d 842, 852.) And that most plaintiffs do not hail from out of state does not mean that a requirement that an indigent foreign plaintiff post security for costs is a permissible barrier to access. (*Cf. Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 431.) It is simply untrue that an impediment to access that fails affect all, or even most, indigent litigants is somehow an acceptable barrier to access to the courts.

C. The Right to Access Requires More than an Empty "Right to Participate"

Finally, Desta argues—yet again without citation to authority—that the right of indigents to access the courts is limited to a "right to participate," not a right to anything else the would be helpful to "prosecute the action effectively." (RAB 34.) This appears to arise from his belief that California's "policy of providing access to those without adequate means is limited to the *waiver of court fees*." (*Id.* at p. 30.) "It does not extend to mandating the provision of services." (RAB 30.) That distinction, however is completely artificial and in several respects demonstrably incorrect. It is, in any event, without support in the decisions of this or any other court.[9]

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[9] Although he doesn't acknowledge as much, the Answering Brief at least tacitly admits that this framework cannot apply to criminal cases (RAB 15 [discussing the requirement to provide free transcripts to criminal defendants established by *Griffin v. Illinois* (1956) 351 U.S. 12]), cases addressing significant issues of

Contrary to Desta's intimation, an indigent's right of access is not a stale formalistic right to participate. Indeed, the Court has rejected barriers that have "the practical effect of restricting an indigent's access to the courts because of his poverty" because they "contravene[ ] 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. (*Isrin*).) As numerous decisions have emphasized that the right of access must be *meaningful*. (*See Payne*, 17 Cal.3d at p. 926; *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792; *Jameson III, supra*, 215 Cal. App. 4th at p. 1176.) Just how meaningful is the right to appeal from a trial when the absence of a reporter makes it *impossible* for an indigent appellant to obtain the record that is a practical necessary for any hope of a reversal?

Moreover, the dichotomy suggested by Desta—between the court's forbearing collection of a fee versus affirmatively outlaying funds from the public fisc to pay for services—is demonstrably false. When, for instance, jury fees are waived for an indigent

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family cohesion (*id.* at p. 21 [discussing the requirement to provide free transcripts to parents challenging terminations of parental rights established by *M.L.B. v. S.L.J.* (1996) 519 U.S. 102]), or in cases involving an incarcerated indigent *defendant* (*id.* at pp. 19–20 [discussing the requirement to appoint counsel in certain civil cases where the defendant is imprisoned established by *Payne v. Superior Court* (1976) 17 Cal.3d 908].) Thus, although he fails to explain why, Desta's claim that the right to access is limited to a formal right to participate is apparently limited to *pro se* indigent civil *plaintiffs*.

litigant (*see, e.g., Isrin, supra,* 63 Cal. 2d at p. 155; Rules of Court, rule 3.56(1)), it is not as if the jurors go unpaid (*see* Code Civ. Proc., § 215, subd. (a) [all jurors paid $15 per day). They are instead paid out of the superior court's general funds. (Code Civ. Proc., § 631.2, subd. (a).)

In any event, Desta's artificial distinctions are inapt here because the Legislature has, by statute, provided for the waiver of court reporter fees for indigent litigants with fee waivers. (Gov't Code, § 68086, subd. (b).) The only reason section 68086's fee waiver failed to resolve the issue for Jameson is because the superior court categorically elected to outsource to private vendors the traditionally court-provided service that is subject to a fee waiver, without any exceptions for parties litigating pursuant to a waiver of fees.

A similar issue has been addressed in the context of masters and referees. Resolving discovery disputes is ordinarily a trial court function to which a fee waiver litigant would have access for free. (*See, e.g.,* Code Civ. Proc., § 2031.320 [motion to compel production of documents]; Rules of Court, rule 3.55(1) ["[c]lerk's fees for filing papers" in superior courts waived].) The Code of Civil Procedure does, however, permit the appointment of a referee to "hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon." (Code Civ. Proc., § 639 subd. (a)(5).) "[T]he court may order the parties to pay the fees of referees . . . in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the

parties." (Code Civ. Proc., § 645.1, subd. (b).) The trial court's discretion to appoint a referee cannot be exercised in a manner that makes it unaffordable for an indigent party to litigate discovery disputes. (*See Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 617.) Because discovery is an "indispensibl[e]" aspect of a lawsuit and indigent litigants "are by definition unable to pay court ordered reference fees," a superior court abuses its discretion if it appoints a discovery referee who must be paid to resolve the disputes. (*Id.* at p. 614.)[10]

A court reporter is no less foundational to an appeal than a discovery motion is to a civil action. Like the plaintiff in *Solorzano,* when he was deprived of access to a service the court would otherwise provide for free, Jameson was unable to afford the alternative services that the court delegated to private sector. Indeed, San Diego Superior Court's policy here is *worse* than trial court's the appointment of a discovery referee in *Solorzano* in a key respect. *Solorzano* was the result of a trial judge's individual decision to appoint a referee. But the San Diego reporter policy categorically and indiscriminately deprives every judge of that court of any discretion at all to have an official reporter present for the civil trial of a litigant for whom the reporter's fee would be waived under Section 68086, subd. (b). Indeed, it expressly pro-

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10 The essential holding of *Solorzano* was later codified into the reference statute. (*See* Stats. 2000, ch. 644 § 2, *codified at* Code Civ. Proc., § 639, subd. (d)(6)(A) [court cannot appoint a referee if any "party has established an economic inability to pay a pro rata share of the referee's fee" unless other party agrees to pay the entire fee].)

vides that such an exception *will not be made.* Compared to *Solorzano*, it would be as if the entire Los Angeles Superior Court outsourced its discovery disputes to JAMS.

* * *

"The right of appeal cannot lie in that discriminatory morass in which it is accessible to the rich and denied to the poor. Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent." (*Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 87–88.) San Diego Superior Court's court reporter policy directly contravenes these principles. It therefore cannot be permitted to stand.

II. The Denial of Jameson's Right to Access Merits the Application of the Avoidance Canon Because Serious Constitutional Questions Are Implicated.

Desta next spends a significant part of his brief arguing against a point that Jameson never made: that the superior court's failure to provide him with a court reporter violated the U.S. or California State Constitutions. Desta's lengthy discussion of this point appears to endeavor to establish that neither this Court, nor the United States Supreme Court have previously held that an indigent civil plaintiff has a constitutional right to a free court reporter. (RAB 37–45.)

But the short discussion of constitutional issues in the opening brief was limited to a different, narrower point: That given the fundamental nature of right to access the courts, this Court's recognition of poverty as a suspect class, and the arbitrary deprivations that flow from policies like that of the superior court here, Jameson's case implicates serious and potentially dif-

ficult equal protection and due process questions. (POB 28–29.) Jameson has not, however, asked the Court to weigh in on those questions at this time. (*Accord* POB 3 [Issues Presented].) Instead, Jameson simply asks the Court to recognize that these fraught issues could be avoided were the common law and statutory issues raised by Jameson resolved favorably to him. (*Accord Ferguson, supra,* 4 Cal.3d at p. 656 n.6 [noting that resolving the case in favor of an indigent's right to access civil appeals on common law grounds avoided the need to resolve constitutional questions].)

III. "Leave It to the Legislature" Is Not an Excuse for Inaction.

Desta next argues that question of whether and when the superior court needs to provide a reporter at an indigent plaintiff's civil trial should be left to the Legislature to decide. (Opp. at 45-48.) This argument, however, falters in two key ways.

First, the Legislature has, in fact, already spoken on this issue, in several ways. It enacted Legislative policy of the State that indigent persons and prisoners have the right to equal access to the courts to prosecute and defend civil litigation. (*See generally* Gov't Code, § 68630, subd. (a); Penal Code, § 2601, subd. (d) And reflecting that policy, it enacted a court reporter fee statute specifically calls for the waiver of reporters' fees for indigent litigants. (Gov't Code, § 68068, subd. (b).) And—as explained in detail in the opening brief—it enacted various provisions in the Government Code and delegated to the Judical Council the authority to promulgate Rules of Court which together afford the superior courts a degree of discretion to permit the use of private-

ly-compensated reporters *pro tempore* in lieu of official reporters. (Gov't Code, § 68068, subd. (d); Rules of Court, rule 2.956(b)–(d).)

While is presented in this case, then, is not a demand to usurp the authority of the political branches. It instead presents a need to harmonize the various laws that have been duty enacted by them—an act that is "emphatically, the province and duty of the judicial department, to say what the law is." (*McClung v. Employment Dev. Dep't* (2004) 34 Cal.4th 467, 469–70 [quoting *Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137].) "*[I]nterpreting* the law is a judicial function." (*Id.* at p. 431 [emphasis in original].)

Second, the issue implicated is of core judicial concern: the right to access directly concerns citizens' ability to have recourse in the courts. Owing that, the Court has on several occasions, refused to wait for the Legislature to act. It has instead used its inherent authority to create *non-textual* exceptions into generally applicable court fee statutes, based on the courts' inherent powers and the availability of such exceptions in the common law of England. (*See Martin, supra,* 176 Cal. at p. 297; *Conover*, *supra*, 11 Cal.3d at p. 851; *Ferguson*, supra, 4 Cal.3d at p. 654; *Majors*, supra, 181 Cal. at p. 274.)

This case, by contrast, does not require so much. Mr. Jameson has demonstrated that trial courts should be required to exercise their legislatively delegated discretion in a manner that, consistent with clearly elucidated statutory policy, respects indigents' rights to access the appellate process. If anyone is disregarding a legislative pronouncement, it is Desta: after all, it is he

who is calling for Mr. Jameson to be shut out from appellate review based on his poverty, in spite of the Legislature's twin pronouncements that "our legal system cannot provide 'equal justice under law' unless all persons have access to the courts without regard to their economic means," and that "fiscal responsibility should be tempered with concern for litigants' rights to access the justice system," (Gov't Code, § 68630(a)–(b).) as well as their enactment of 68086, subdivision (b), which entitles fee waiver litigants to a waiver of court reporter fees.

IV. Jameson Was Not Required to Attempt to Settle a Statement to Preserve His Right to Appeal.

Desta also contends that any deprivation of his right to a court reporter was "harmless" or "waived" because Jameson could have proceeded on appeal by way of a settled statement under Rule of Court, rule 8.137. (RAB 49–55.) According to Desta, even if the trial court abused its discretion by failing to ensure that Jameson's trial was reported, in the absence of any other record, Jameson "was *obligated* to seek to proceed by way of a settled statement." (*Id.* at p. 53 [emphasis original].) And failing that, says Desta, Jameson has no place to complain at this time. (*Ibid.*)

It has been established law, however, for almost seventy years that an "appellant is not necessarily required to prepare a settled statement pursuant to [the Rules of Court]. That remedy, as stated in the rule, is in addition to any remedy given by law." (*Fickett v. Rauch* (1947) 31 Cal.2d 110, 116 (*Fickett*); *see also Feldman v. Katz* (1958) 160 Cal.App.2d 836, 841 ["any failure to move for a settled statement should not be considered a penalizing circumstance"]; Rules of Court, rule 8.130(h)(3) [noting that a

settled statement "supplements any other available remedies"].) Thus in *Fickett*, when a court reporter's death made a transcript impossible to obtain, the Court reversed and remanded for the lack of an adequate trial record, even though the appellant never attempted to settle a statement. *Fickett, supra*, 31 Cal.2d at p. 166.).

The cases cited by Desta do not suggest otherwise.[11] At best, most of them stand for the proposition that a settled statement can, in some circumstances, present an adequate procedure for presenting a record on appeal. The closest case Desta cites is *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295. There, the Court declined to reverse and remand for a recalculation of attorneys' fees when a minute order after an unreported hearing failed to explain the trial court's reasoning. (*Ibid.*) Because it was defendants' burden to provide a record in support of their appeal, they "should have augmented the record with a settled statement of the proceeding." (*Ibid.*) And absent that, their "claim must be resolved against them." (*Ibid.*)

But what is missing in *Maria P.* is the element present in *Fickett* and here: the reason there is no record is because Jameson was deprived of one by someone's actions other than his own. When an appeal is supported by an inadequate record, as in *Maria P.* and countless other cases, the appellant's failure to take

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[11] Indeed, Answering Brief's clearest statement of what Desta contends the rule should be starts with "it does appear" and comes from a 1974 article in *Western State Law Review.* (RAB 53.)

needed steps to create or obtain a record lies at her own feet. If, for instance, her lawyer forgot to request a court reporter attend a hearing, it is unsurprising that she would be required to settle a statement in order to present an appeal that implicates what occurred at that hearing. But if, as here, and in *Fickett*, the very subject of the appeal is the the trial court's failure to live up to its obligations to create and preserve that record, there is no requirement that the appellate court create a second-rate record through a settled statement simply to preserve his right to appeal the trial court's procedural error.

Notably, Rules of Court, rule 8.137(a)(2)(C), which addresses the circumstances under which indigent litigants can proceed by a settled statement, specifically foresees that a reporter's transcript is the preferred record of oral proceedings. It permits an indigent litigant to use a settled statement *only* when he is proceeding under a fee waiver *and* he has applied for, but not received, reimbursement from the Transcript Reimbursement Fund pursuant to Rules of Court, rule 8.130(c). (Rules of Court, rule 8.137(a)(2)(C).) It is axiomatic that an appellant cannot apply for reimbursement for the costs of transcribing a trial that was never reported. Thus, it is only *after* an indigent appellant has tried and failed to obtain preliminary approval for a transcript reimbursement request that he must take necessary steps to proceed with a record that does not include a reporter's transcript, such as an agreed or settled statement. (*See* Rules of Court, rule 8.130(c)(2)(A)–(E).) If the Court of Appeal's decision stands, indigent litigants will never have an opportunity to *apply* for tran-

script reimbursement, because *there will be no reported proceedings to be transcribed.*

By suggesting that Jameson's right to relief depends on his taking efforts to obtain a settled statement, Desta effectively proposes to short-circuit the process that the Judicial Council's rules have created for indigent litigants. Instead, Desta would permit trial courts to categorically deny official reporters to *all* indigent litigants and then channel them into the settled statement process under Rules of Court, rule 8.137(a)(2)(*B*), which permits the creation of an appellate record by settled statement when a proceeding has not been reported or no transcription can be made. That would leave indigent litigants with *only* the option of a settled statement, even were it impracticable or impossible to proceed that way, because the opportunity to create a record by any other means would have been lost. Thus, the upshot of Desta's categorical rule would render superfluous the specific accommodations that Rules 8.137(a)(2)(*C*) and 8.130(c) afford for indigent litigants by making it *impossible* for an indigent appellant to avail himself of those procedures.

Indeed, by guaranteeing that trials go unreported, that practice would also make it all the more difficult to even obtain an accurate settled statement. The Court has specifically recognized that a trial court can rely on the reporter's notes, readbacks, or partial transcripts in settling a statement. (*See Averill v. Lincoln* (1944) 24 Cal.2d 761, 765 (*Averill*) [trial court can "require appellants to furnish a transcript of the trial proceedings to assist in the settlement of the statement"]; *see also* Bernard

Witkin, *Four Years of the Rules on Appeal* (1947) 35 Cal. L.Rev. 477, 486 [noting that early interpretations of the settled statement rule would essentially require a "preliminary preparation of a transcript in almost every appeal on a settled statement"].) Without those resources at hand, courts can and do decline to prepare settled statements. (*See Averill,* 24 Cal.2d at p. 765; *Fickett, supra,* 31 Cal.2d at 116.)

Desta tellingly cites no authority at all to support categorically consigning indigent appellants to the settled statement procedure, much less to an appeal with no oral record at all if that procedure fails to generate a record. To the contrary, both statutes and case law show that California law favors the preservation of trial records though the creation of reporter's transcripts. (*See generally* Code. Civ. Proc., §§ 269, 273; *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 26.) On the other hand, while permitted by court rule,[12] (*see* Rules of Court, rule 8.137) a settled statement is recognized as an inferior form of record generally unsuitable for most cases. IndeedM, this Court has noted that a settled state-

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[12] The settled statement has an historical antecedent in the bill of exceptions, formerly codified in section 652 of the Code of Civil Procedure. (*See* 9 Witkin, California Procedure (2015 online ed.) Appeal, § 657, p. 729.) The current enactment of the Code of Civil Procedure, however, contains no authorization for the settled statement procedure. Given the mandatory language of Code of Civil Procedure section 269(a), that suggests, at minimum, that a civil appellant cannot be required to proceed on appeal with only a settled statement as a record if he does not consent to do so.

ment may ultimately prove an inadequate means to create a record of oral proceedings to permit effective appellate review. (*See In re Steven B.* (1979) 25 Cal.3d 1, 8 [rejecting argument that appellant was required "to show that a settled statement would not suffice" to obtain a new trial due to a lost reporter's transcript]; *Fickett, supra,* 31 Cal.2d at 116 [noting that "in the absence of a transcript, it would be unreasonable to require an appellant to prepare a settled statement from insufficient data"].)

As a leading treatise on California appellate practice explains, a settled statement "is a rarely-used alternative to the reporter's transcript and is permitted only in limited circumstances." (*See* J. Eisenberg, *et al.*, California Practice Guide: Civil Appeals and Writs (The Rutter Group 2015 online ed.) § 4:14.) While a "settled statement theoretically can be used to replace the reporter's transcript entirely, . . . this is *extremely rare*." (*Ibid.* § 4:15 [emphasis added].) "More commonly, a settled statement is used only to supplement or replace part of the reporter's transcript when some or all of the proceedings cannot be transcribed through no fault of the appellant—such as death or disability of the reporter, loss of the reporter's notes, or the reporter's refusal to prepare the transcript (but even this limited use is extremely atypical)." (*Id.*)[13] Because settled statements "pose a substantial danger of *inadvertently presenting an inadequate record*" (*ibid.* § 4:67 (emphasis original)) the authors recommend that "counsel

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[13] *See, e.g., Weinstein v. E. F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 368 [addressing circumstances where reporter's transcript of crucial testimony was lost].

generally should refrain from choosing the[m]" as a means of presenting a record of oral testimony. (*Ibid.* § 4:68.) "Ordinarily, they should be considered only where the appeal presents a simple, straightforward question of law with undisputed facts (or in those rare cases where a settled statement must be used because the reporter is unable to transcribe the trial court proceedings)." (*Id.*)

The treatise's commentary is in line with the limited role of the settled statement in modern civil procedure in California.[14] In civil cases, the procedure was used largely in appeals from municipal courts, as a matter of convenience "to permit the filing of a narrative statement 'in lieu of a reporter's transcript', thus obviating records on appeal being many times longer than there is any necessity for, and which greatly increases the costs to litigants as well as the labors of the appellate court without any corresponding benefit." (*Western States, supra,* 38 Cal.2d at p. 148 (*Western States*) (quotations omitted)). In appeals from unlimited cases, settled statements were often permitted only when the record was relatively simple, with the understanding that if the parties and the trial court proved unable to settle a statement, a

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[14] The narrative settled statement, and its predecessor, the bill of exceptions, were far more common prior to the advent of modern court reporting technology. (*See* Comment, *Appeal and Error: The Narrative Statement and the Reporter's Transcript Compared as Methods of Bringing up Evidence on Appeal* (1942) 30 Cal. L.Rev. 457, 463 ["It has been pointed out that the bill of exceptions was first used before the day of the court reporter when there was no other means of getting the evidence into the record. Today, of course, that justification for a narrative state-

reporter's transcript could ultimately be prepared. (*See Burns v. Brown* (1946) 27 Cal.2d 631, 635; *Averill, supra,* 24 Cal.2d at p. 765; *see also* Rules of Court, rule 8.137(a)(3) [permitting parties to re-designate appellate record if motion for settled statement is denied].) It has been long-established that a trial court has the discretion to decline altogether to provide a settled statement, particularly when there is no transcript for the court to refer in accurately settling the statement. (*See Keller v. Superior Court* (1950) 100 Cal.App.2d 231, 233; *Lande v. S. Cal. Freight Lines* (1947) 78 Cal.App.2d 417, 420.)[15]

Finally, a rule that would effectively categorically consign the record on appeal *only* to settled statements is *particularly* unsuited to indigent, often *pro se*, litigants. The settled statement procedure requires coordination between the appellant, appellee, and the court to propose, amend, and settle the contents of the record for appeal. (Rules of Court, rule 8.137(b), (c).) Particularly

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ment of the evidence is gone."].) By the early 1940's they had begun to fall into disuse. (*Id.* at pp. 466–67.)

[15] Desta cites *Western States* for the proposition that, "[u]nless there is some justifiable excuse, a trial judge may not arbitrarily refuse to settle the statement." (RAB 52 [quoting *Western States, supra,* 38 Cal.2d at pp. 148–49.) But *Western States* was a municipal court appeal, for which a then-in-effect court rule permitted an appellant to proceed by settled statement *as a matter of right.* (*See Western States, supra,* 38 Cal.2d at p. 148 [discussing Rule 7a of the Rules on Appeal from Municipal Courts in Civil Cases].) The appellant could have proceeded by Reporter's Transcript but did not want to because it was too costly. (*Id.* at p. 151.) Moreover, the trial court in *Western States* did, in fact, have access to the reporter's notes.

without the benefit of counsel, the process can become a contentious, time consuming collateral proceeding that will expend far more resources than it saves. (*See e.g., People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973 [holding that a settled statement was insufficient and a transcript was necessary where the parties disagreed and the judge had no memory].) And should that process fail to result in an adequate settled statement, the appellant would be left only with the option of appealing without any record of the trial court's oral proceedings—exactly the same predicament in which Jameson finds himself in the present appeal.[16]

V. Desta's Harmless Error Arguments Are Unavailing.

Finally, Desta advances two arguments that any procedural error committed by the trial court was harmless under Code of Civil Procedure section 475 and Article VI, § 13 of the California

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16 It further merits mention that a settled record approved by the trial court is also unlikely to contain the types of offhand prejudicial remarks that sometimes serve as the basis for reversal in cases such as Jameson's. (*See, e.g., Jameson III, supra,* 215 Cal.App.4th at p. 1176 [reversing, in part, because trial judge's comment on the record that "[a]ny complaint [that Jameson has] about not being at liberty to attend the deposition is something [Jameson] should have considered before committing whatever crime that gave rise to his incarceration" was "entirely inconsistent with t[he] mandate" "that the trial courts are to ensure that [the right to meaningful access to the courts] is protected"].) Although not raised in his petition to the Court, Jameson raised a similar judicial bias issue in the Court of Appeal, which the Court of Appeal rejected because "the record . . . does not indicate that the trial court displayed bias or prejudice against Jameson." (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, 505 (*Jameson IV*).) Without a transcript, however, there is simply no way to be sure.

Constitution. First, repurposing his primary argument, Desta claims that because Jameson couldn't afford a transcription of the reporters' transcript, any failure to have his trial reported was harmless. And second, because the trial court found that Jameson would not be permitted to show causation through the prior deposition testimony of his expert, and because Jameson admitted that he could not afford to pay the expert to testify at trial, Jameson could not have won at his trial.

But as Jameson's opening brief noted, trial court's erroneous denial of a court reporter to an indigent defendant prevents the creation of any reliable record. (POB 30.) That makes it a structural, per se error that cannot be sensibly subject to a harmless error analysis. (*Ibid.*) Without a proper record, any effort to ascertain the prejudice caused by such an error is simply too speculative.

And regardless, neither of Desta's asserted grounds for harmless error has merit. As to the first, Desta is speculating. There is no evidence in the record establishing that Jameson could not afford—either personally, or with support—to pay for even a partial transcript of the relevant part of his trial.

As to the second, the Court of Appeal's decision rejected Jameson's evidentiary arguments that the trial court erroneously precluded him from using various alternative means to establish causation. It did so because they were not "cognizable in the absence of a reporter's transcript." (*Jameson IV*, *supra*, 241 Cal.App.4th at p. 505.) The lack of a reporter's transcript was most certainly not harmless.

* * *

For the reasons stated in Jameson's opening brief and above, the opinion of the Court of Appeal should be reversed, the trial court's judgment vacated, and the matter remanded for a new trial, during which Jameson should be afforded an official reporter to make an adequate record for further appeal without payment of a reporter's appearance fee.

Dated: June 27, 2016

Respectfully submitted,

KIRKLAND & ELLIS LLP

By: ______________________

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CERTIFICATE OF WORD COUNT

I, Michael J. Shipley, hereby certify that in accordance with California Rules of Court, rule 8.520(c)(1), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief, including footnotes, is 8,122 words.

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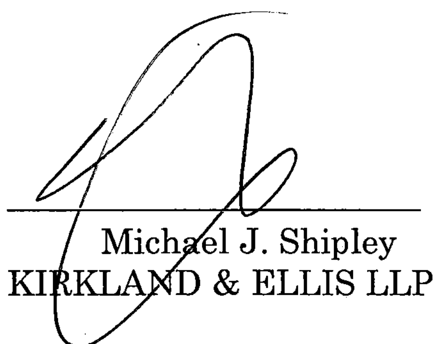

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PROOF OF SERVICE

I, Amy D. Palafox, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Kirkland & Ellis LLP, 333 South Hope St., 29th Floor, Los Angeles, California 90071.

On June 27, 2016, I served the documents listed below on the interested parties in this action as follows:

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[X] **(STATE)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2016, at Los Angeles, California.

Amy D. Palafox