S230899

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARRY S. JAMESON,

Plaintiff and Petitioner,

v.

TADDESE DESTA,

Defendant and Respondent.

California Court of Appeal
Fourth Appellate District, Division One
Case No. D066793
San Diego County Superior Court
Case No. GIS9465
Hon. Joel M. Pressman

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PLAINTIFF AND PETITIONER BARRY S. JAMESON

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the American Bar Association (ABA) requests permission to file the attached *amicus curiae* brief in support of Plaintiff and Petitioner Barry S. Jameson.

INTEREST OF *AMICUS CURIAE*; HOW THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT

The ABA is one of the largest voluntary professional membership organizations and the leading association of legal professionals in the United States. Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.[1]

Since its founding in 1878, the ABA has worked to improve the justice system, with a particular emphasis on issues related to access to justice. The ABA has opposed legislation that would increase barriers to our civil justice system. (Civil Justice System Access <http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/civiljustice.html> [as of July 5, 2016].) And the ABA has developed a number of standards and policies directed towards these issues. These policies and

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[1] Neither this brief nor the decision to file it reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

standards include the ABA Model Code of Judicial Conduct, the ABA Standards Relating to Trial Courts, and the ABA Principles of a State System for the Delivery of Civil Legal Aid, among others. (ABA Model Code of Judicial Conduct (2007) <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf>; ABA Standards Relating to Trial Courts (1992) <http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf>; ABA Principles of a State System for the Delivery of Civil Legal Aid (Aug. 2006) [ABA Principles] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112B.authcheckdam.pdf [as of July 5, 2016].) The ABA standards reflect years of study by leaders in the profession. Although those standards do not purport to define constitutional requirements, they reflect the judgment of a great body of legal professionals about the requirements for the proper administration of justice and fairness in the justice system.

The past few decades have seen the rapid expansion of state Access to Justice Commissions, the formation of which the ABA has encouraged since the 1990s. These commissions bring

the highest levels of the state courts and state bar together with civil legal aid providers and other key players to promote and support the expansion of civil legal assistance. (ABA Principles, *supra*, at p. 7.) The California Commission on Access to Justice, a 26-member body of lawyers, judges, academic, business, and community leaders committed to long-term improvements in access to the civil justice system for Californians living on low and moderate incomes, was established in 1997. (The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California (October 2002) <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=QhMjgCPh4gg%3D&tabid=224&mid=1534> [as of July 5, 2016]; see also Chief Justice Tani G. Cantil-Sakauye, State of the Judiciary Address to a Joint Session of the California Legislature (Mar. 8, 2016) [discussing the Commission and its commitment to improving access to the courts for those of low income and modest means].)

The questions presented in this case squarely implicate many of these access to justice policies and standards. The ABA's proposed brief discusses the ABA's policies and standards, and the guidance they provide in deciding the issues before this Court in this case. These arguments are complementary to, not

duplicative of, the briefing submitted by Jameson and the letter briefs submitted by amici in support of the petition for review.

NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR CONTRIBUTED TO THIS BRIEF

The ABA provides the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amicus curiae* or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the ABA requests that the Court permit the filing of the attached *amicus curiae* brief in support of Plaintiff and Petitioner Barry S. Jameson.

DATED: July 27, 2016

Respectfully submitted,

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AMICUS CURIAE BRIEF

INTRODUCTION

The Petitioner in this case, Barry S. Jameson, is an incarcerated, indigent, self-represented litigant. His case was dismissed after opening statements at trial. Jameson appealed that dismissal. But his appeal was unsuccessful because he did not have any record of the trial. He had no verbatim transcript of the proceedings because of a judicially created San Diego Superior Court-wide policy that official court reporters are no

longer provided in civil cases, and that indigent fee waivers do not apply to the private court reporters that parties would need to hire in lieu of the official reporters. Jameson challenges that court reporter policy, which has the practical effect of precluding indigent litigants from making an adequate record of civil proceedings for appeal.

The court reporter policy at issue, and the trial court's handling of that policy with a self-represented litigant like Jameson, implicate core principles of the American Bar Association (ABA). Among the ABA's foundational principles is a commitment to ensuring that the public has access to the courts. The ABA has promulgated numerous standards and rules that further this purpose, including the ABA Model Code of Judicial Conduct, the ABA Standards Relating to Trial Courts, and the ABA Principles of a State System for the Delivery of Civil Legal Aid, among others. In this brief, we discuss those policies—their background and purpose—and the ways that they inform the issues before the Court. We also briefly discuss the constitutional implications of the San Diego Superior Court's policy.

BACKGROUND

Since 2013, the San Diego Superior Court has had an official court policy that the court does not provide court reporters in civil, family, or probate matters, including civil trials. (See OBOM Ex. A.) The policy makes no exception for indigent litigants, even those who have qualified for a fee waiver and have no other way to pay for a record. (*Id.* at Ex. B, p. 2 ["[I]ndigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver."].) If a litigant wants to make a record of trial court proceedings, he or she must make arrangements for a private court reporter and pay for the reporter to attend and transcribe a trial or hearing. (*Ibid.* ["Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services."].)

Jameson—an indigent prisoner appearing pro se before the San Diego Superior Court—was notified of this policy just ten days before the commencement of his civil jury trial. (RA 231-232.) The trial in his case had been more than a decade in the making. In 2002, Jameson brought claims of medical negligence and breach of fiduciary duty against his doctor, Taddese Desta,

who allegedly mismanaged his course of treatment for Hepatitis and left his vision permanently impaired. (RA 232.) In the years that followed the trial court dismissed Jameson's case three times, and each time the Court of Appeal reversed the trial court's decision.[2]

With this twelve-year history as a backdrop, in 2014 the trial court informed the parties at a hearing ten days before commencement of trial that "the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial." (RA 231-232.) There is no indication in the record that the trial court explained to Jameson how this

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[2] The trial court dismissed Jameson's complaint for lack of diligent service in 2005. (*Jameson v. Desta* (July 2, 2007, D047824), 2007 WL 1885104 at *2 opn. mod. July 26, 2007 [non-pub. Opn.] (*Jameson I*).) The Court of Appeal reversed that dismissal in an unpublished opinion because Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Id.* at p. *6.) In 2008 the trial court again dismissed Jameson's complaint when he failed to appear telephonically at a case management conference. (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 677 (*Jameson II*).) The Court of Appeal reversed because Jameson's non-appearance was the result of prison officials denying him access to the telephone. (*Id.* at p. 683-684.) Finally, in 2011 the trial court entered judgment in favor of Desta following a motion for summary judgment. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1161-1162 (*Jameson III*).) That opinion was also overturned by the Court of Appeal, which held that the trial court improperly ruled that no triable issue of fact existed as to Jameson's claims against Desta. (*Id.* at pp. 1164-1174.)

announcement could impact his case going forward, or apprised Jameson of alternative resources for transcribing the upcoming proceedings. Without the money to pay for a private court reporter as required under the San Diego Superior Court's policy, Jameson proceeded to trial without any means of recording the proceedings. (OBOM at p. 8.)

The trial was a short one. After just 45 minutes of opening arguments, Desta moved for nonsuit and the trial court granted the motion. (RA 257.) Although there is no transcript of the proceedings, a minute order entered by the trial court indicates that the decision to grant a nonsuit was based upon a finding that Jameson "did not establish causation in his opening statement." (*Ibid.*) According to the minute order, "there [was] no basis upon which a jury could find for [Jameson]," because he had not presented any evidence from which a jury could conclude "that Dr. Desta did not meet the standard of care and caus[ed] damage to [Jameson]; nor breached any fiduciary duty." (RA 258.)

Jameson appealed.[3] (AA 1207-09.) But the Court of Appeal declined to address the merits of Jameson's arguments for

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[3] The ABA takes no position on the substantive merits of Jameson's appeal. Rather, the ABA's focus is on the San Diego

reversing the judgment of nonsuit because "none of [them were] cognizable in the absence of a reporter's transcript." (Typed opn. at p. 18.) Citing case law that "an appellant who fails to provide a reporter's transcript on appeal is precluded 'from raising any evidentiary issues on appeal,'" the Court of Appeal held that it could not render an opinion on the merits of a grant of nonsuit, which depends on an analysis of the evidence and arguments presented at trial. (Typed opn. at p. 17.) In the absence of any record of such evidence, the Court of Appeal was precluded from reaching the merits of Jameson's claim. (*Ibid.*)

The Court of Appeal then observed that there is no legal mandate that court reporter services be provided in the first instance. (Typed opn. at pp. 14-15 [explaining that the Government Code, the California Rules of Court, and the San Diego Superior Court policy do not obligate the trial court to provide a court reporter to indigent litigants in civil litigation like Jameson].) The Court of Appeal therefore affirmed the decision of the trial court.

Superior Court's court reporter policy, and the manner in which the policy was implemented in Jameson's case.

This Court granted Jameson's petition for review, which presents the issue of the propriety of a superior court policy that has the practical effect of denying the services of an official court reporter and a verbatim transcript on appeal to a civil litigant who has been granted a fee waiver.

LEGAL DISCUSSION

The ABA has long held as a core value equal access to justice. (ABA Mission and Goals <http://www.americanbar.org/about_the_aba/aba-mission-goals.html> [as of July 5, 2016].) Indeed, the ABA has identified as one of its primary objectives the continued effort to "[a]ssure meaningful access to justice for all persons." (ABA Report to the House of Delegates re the ABA Model Access Act (August 2010) <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf> [as of July 5, 2016].) Accordingly, the ABA has developed a number of policies and guidelines to aid the profession, and the courts, in making that objective a reality.

A. The ABA's policies and standards are designed to ensure that the justice system remains available to all people, including those of low income and modest means.

The proceedings below implicate three ABA policies and standards, each of which reflects the ABA's overarching objective of advancing access to justice for all. (ABA Mission and Goals <http://www.americanbar.org/about_the_aba/aba-mission-goals.html> [as of July 5, 2016].)

1. The ABA Model Code of Judicial Conduct calls on the judiciary to safeguard self-represented litigants' access to justice.

The ABA has long recognized that the judiciary plays a central role in preserving access to justice and the rule of law. (ABA Model Code of Judicial Conduct (2007), Preamble <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf> [as of July 5, 2016].) The ABA's first Canons of Professional Ethics adopted in 1908 included a call for the judiciary to strive for a "free and fair consideration of questions before them," and for the legal profession as a whole to "always exert [its] best efforts" on behalf of indigent prisoners. (ABA Canons of Professional Ethics (1908),

Preamble, Canons 2 & 4 <http://www.abanet.org/cpr/1908-code.pdf> [as of July 5, 2016].)

In 1924, the ABA adopted the first Canons of Judicial Ethics.[4] (ABA Canons of Judicial Ethics (1924), Preamble <http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1924_canons_jud_ethicspdf.authcheckdam.pdf> [as of July 5, 2016].) The first Canons recognized that "[c]ourts exist to promote justice, and thus to serve the public interest," and encouraged judges to "at all times be alert in [their] rulings and in the conduct of the business of the court . . . to make it useful to litigants and to the community." (ABA Canons of Judicial Ethics (1924), *supra*, Canon 2.) The Canons further emphasized that trial judges should make every effort to enable the litigants before them to "secure the full benefit of the right of review accorded to [them] by law." (*Id.* at Canon 22.)

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[4] The Conference of California Judges (now the California Judges Association) modified and then adopted the 1924 Canon for application in California in 1949. (California Code of Judicial Ethics (Aug. 2015), Preface <http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf> [as of July 5, 2016].) Since that time the California Code of Judicial Ethics has resembled the ABA's Model Code of Judicial Conduct, and been updated to match ABA amendments. (*Ibid.*) Where applicable, the current provisions of the California Code of Judicial Ethics will be cited along with corresponding terms in the ABA's Model Code of Judicial Conduct.

Canon 22 exhorted trial judges to "scrupulously grant to the defeated party [the] opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions[5] or otherwise," so as to prevent any wrong that may have been done from becoming "irremediable." (*Id.* at Canon 22.)

In 1972, the ABA reformulated the Canons as the Model Code of Judicial Conduct under the guidance of the Special Committee on Standards of Judicial Conduct, chaired by California Supreme Court Justice Roger J. Traynor. (Robert McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 Utah L. Rev. 391, 391 (1972).) Unlike the Canons of 1924, the reformulated Code was designed to be enforceable by

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[5] The "bill of exceptions," or settled statement, "was first used before the day of the court reporter when there was no other means of getting the evidence into the record." (See Doris Brin Marasse, *Appeal and Error: The Narrative Statement and the Reporter's Transcript Compared as Methods of Bringing Up Evidence on Appeal*, 30 Cal. L. Rev. 457, 463 (1942).) California adopted the court reporter method of preserving a record on appeal in 1907. (*Id.* at p. 460-461 [citing Code Civ. Proc., § 953, subd. (a)].) Although the settled statement is still in use, it is fraught with difficulties, including getting litigants to agree, at the close of contentious litigation, upon the specifics of the events that transpired before the trial court. (*Ibid.*) Establishing a record via a settled statement requires far more legal acumen than that required to obtain a transcribed record, and is even more challenging for self-represented litigants to navigate. (*Ibid.*)

disciplinary action—a step that the Special Committee and the ABA believed would better preserve the integrity and independence of the judiciary. (ABA Model Code of Judicial Conduct (1990), Preface <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf> [as of July 5, 2016] [citing E. Wayne Thode, Reporter's Notes to the Code of Judicial Conduct (1973)].) The tenor of the Code changed to give effect to its new, binding nature, but the animating principles of public service and access to justice remained the same. Accordingly, the 1972 Code required that judges "should accord to every person who is legally interested in a proceeding" the "full right to be heard according to law." (ABA Model Code of Judicial Conduct (1972), Canon 3, Rule A(4) <http://fsmsupremecourt.org/pdf/1972codeofjudicialconduct.pdf> [as of July 5, 2016].)

This language has endured in subsequent versions of the Model Code of Judicial Conduct adopted by the ABA. (See Lisa L. Milord, *The Development of the ABA Judicial Code* (1992) p. 8; ABA Model Code of Judicial Conduct (2007), *supra*, Canon 2, Rule 2.6(A) ["A judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to

law."]; see also California Code of Judicial Ethics (2015), *supra*, Canon 3, Rule (B)(7).) Indeed, current Rule 2.2 of Canon 2 requires judges to uphold and apply the law in a fair and impartial manner—a rule that has existed in every form of the judicial code of conduct since 1924, but clarifies for the first time in the accompanying commentary that judges may "make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." (ABA Model Code of Judicial Conduct (2007), *supra*, Canon 2, Rule 2.2; see also California Code of Judicial Ethics, *supra*, Canon 3, Rule (B)(8), Commentary ["[W]hen a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard."].)

Thus, the Model Code of Judicial Conduct has always embodied the ABA's intent to assist the judiciary in maintaining the highest standards of judicial and personal conduct, particularly with respect to ensuring access to the courts for all, including the self-represented.

2. The ABA Standards Relating to Trial Courts promote full and fair adjudication on the merits, and authorize trial courts to take all "reasonable and necessary" steps "to insure a fair trial" for self-represented litigants.

The ABA Standards Relating to Trial Courts were designed to assist state trial courts in enhancing the quality and efficiency of their administration of justice. (ABA Standards Relating to Trial Courts (1992), Preface <http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf> [as of July 5, 2016].) These non-binding Standards recognize the importance of the trial courts, where most matters are initiated and resolved, and where most members of the community first encounter the justice system. (*Id.* at Introduction ["[T]he trial court is the first and often the only step in protecting the individual from arbitrary use of power."].) As observed in the Introduction to the Standards, "[f]air and efficient administration of justice in the trial court is rarely highly visible or dramatic, but its absence is." (*Ibid.*) The Standards offer procedural and administrative rules and policies to facilitate access to the courts and achieve the fairness and efficiency that form the cornerstone of justice. (*Ibid.*)

Like the Model Code of Judicial Conduct, the Standards Relating to Trial Courts consist of black-letter rules and accompanying commentary.[6] Rule 2.00 promulgates the general principal that trial courts should strive for "full, fair, and prompt consideration of matters on their merits, at reasonable cost." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.00.) Rule 2.41 lists the various administrative functions essential to a trial court's ability to achieve these goals—among them is the administration of court reporting services. (*Id.* at Rule 2.41(c).) The Commentary to Rule 2.41 expands on this point, stating that, "[i]n addition to adjudicatory functions, trial courts have a number of responsibilities, which include . . . making and transcribing the record." (*Id.* at Rule. 2.41, Commentary.)

Rule 2.42 further emphasizes the importance of court reporting services to the effective functioning of the court. (*Id.* at Rule 2.42.) The Rule recommends that court reporting services be internal to the courts and "governed by systemwide [court]

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[6] Unlike the Model Code of Judicial Conduct, the commentary to the Standards Relating to Trial Courts does not necessarily reflect official ABA policy, although the commentary is useful in explaining the black-letter rules. (ABA Standards Relating to Trial Courts (1992), *supra*, Preface.)

policies and regulations" that cover "[a]ll aspects of record making and transcription." (*Ibid.*) The court reporting services envisioned by the Standards would ensure that *all* critical proceedings are adequately transcribed by court-supervised reporters (not private reporters)[7] or a suitable alternative to court reporters,[8] and would strive to "enable hearing, trial, and appellate processes to advance in orderly fashion." (*Ibid.*)

The Standards' guidelines for trial courts dealing with self-represented litigants imply that courts may need to apprise these litigants of the importance of adequate transcription of the record in trial proceedings. Rule 2.23 states that "[w]hen litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial." (ABA Standards Relating to Trial Courts (1992),

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[7] The commentary to Rule 2.42 acknowledges that private court reporting may be feasible so long as "suitable controls" have been established to ensure that "its relatively lucrative rewards do not result in adverse competition with the reporter's duties to the court." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.42 Commentary.)

[8] The commentary to Rule 2.42 recognizes that "[t]echnological development has profoundly changed the ways in which records of trial court proceedings can be accomplished," and encourages the responsible use of "all aspects of record making and transcription." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.42 Commentary.)

supra, Rule 2.23.) The commentary to Rule 2.23 acknowledges that cases involving self-represented litigants "present great difficulties for the court because the court's essential role as an impartial arbiter cannot be performed with the usual confidence that the merits of the case will be fully disclosed through the litigant's presentations." (*Id.* at Rule 2.23, Commentary.) These difficulties "are especially great when one party is represented by counsel and the other is not, for intervention by the court introduces not only ambiguity and potential conflict in the court's role but also consequent ambiguity in the role of counsel for the party who is represented." (*Ibid.*)

The Standards urge trial courts to assume "more than a merely passive role in assuring that the merits are adequately presented." (*Ibid.*; see also John Greacen & Hon. Louise Bayles-Fightmaster, *Ethical Issues for Judges in Handling Cases with Self-Represented Litigants*, Slide 6, Presented at the Statewide Conference on Self-Represented Litigants (Mar. 16, 2006) <http://www.courts.ca.gov/partners/documents/Ethical_Issues_for_Judges_in_Handling_Cases_with.ppt> [as of July 5, 2016] [noting that "[n]eutrality is not synonymous with passivity"]; *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861 ["[T]he judge cannot rely on the

pro per litigants to know each of the procedural steps, to raise objections, to ask all the relevant questions of witnesses, and to otherwise protect their due process rights."].)

It is, after all, "ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.23 Commentary; see also *Handling Cases Involving Self-Represented Litigants*, A Benchguide for Judicial Officers, Judicial Council of California (2007) p. 2-1 <http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf> [as of July 5, 2016] [noting that a judge's "active involvement" in cases with pro se litigants "is not only fully consistent with access to justice, and often required by it, but can enhance the court's neutrality"]; *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1061 ["It has always been the policy of the courts in California to resolve a dispute on the merits of the case rather than allowing a dismissal on [a] technicality."].)

Although the appropriate actions to be taken by a judge in cases involving self-represented litigants "cannot be fully described by specific formula," the ABA Standards recommend that trial courts "in the interest of fair determination of the

merits . . . ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.23 Commentary; *Handling Cases Involving Self-Represented Litigants*, *supra*, at p. 2-2 ["To decide cases fairly, judges need facts, and in self-represented litigant cases, to get facts, judges often have to ask questions, modify procedure, and apply their common sense in the courtroom to create an environment in which all the relevant facts are brought out."].)

In a March 2013 report to the ABA on the proposed expansion of the commentary regarding self-represented litigants in the Model Code of Judicial Conduct, the Conference of Chief Justices and of State Court Administrators recommended that the ABA adopt additional guidance for judges interacting with self-represented litigants. (ABA Model Code of Judicial Conduct Provisions on Self-Represented Litigation (Mar. 2013) <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_jud_conduct_codes.authcheckdam.pdf> [as of July 5, 2016].) The report notes that a number of states have adopted robust guidelines for trial

courts, which include non-exhaustive lists of potential actions for trial courts to take in dealing with self-represented litigants.[9] (*Id.* at 2) Those guidelines, compiled and recommended to the ABA for adoption, include providing self-represented litigants with information about the proceedings and the evidentiary and foundational requirements at issue, asking neutral questions to elicit or clarify information, modifying procedures, refraining from using legal jargon, explaining the basis for a ruling, making referrals to available resources, and explaining to litigants "what will be happening next in the case and what is expected of them." (*Id.* at Appen. III.)

In short, the ABA has long encouraged trial courts to provide court reporters in order to maintain a full and useful record of proceedings for use by the courts and litigants alike, as

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[9] The Judicial Council of California publishes a Benchguide for Judicial Officers called *Handling Cases Involving Self-Represented Litigants*, which provides guidance that is similar in many ways to the guidelines adopted by other states, such as Arizona, Arkansas, Colorado, Connecticut, Hawaii, Iowa, Indiana, Louisiana, Maine, Minnesota, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Washington, Washington, D.C., and Wyoming. (Compare ABA Model Code of Judicial Conduct Provisions on Self-Represented Litigation (Mar. 2013), *supra*, at pp. 5-6; with *Handling Cases Involving Self-Represented Litigants*, *supra*, at p. 3-8 – 3-11.)

well as to take any number of other actions to ensure that self-represented litigants can meaningfully access the courts.

3. The ABA Principles of a State System for the Delivery of Civil Legal Aid address the dire circumstances facing self-represented litigants, and emphasize the importance of securing their access to justice.

The ABA Principles of a State System for the Delivery of Civil Legal Aid, adopted in 2006, identify ten non-binding guidelines for use by Access to Justice Commissions and other relevant entities seeking to improve access to justice within each state. (ABA Principles of a State System for the Delivery of Civil Legal Aid (Aug. 2006) <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112B.authcheckdam.pdf> [as of July 5, 2016] [hereafter, ABA Principles].) The ten principles, accompanied by a short commentary, were "developed to provide guidance to state Access to Justice Commissions and similar entities in assessing their state system, planning to expand and improve it, and ensuring ongoing oversight of its development." (*Id.*, *supra*, at p. 7.) The ABA Principles "are derived from and incorporate the lessons of previous [access to justice] initiatives." (*Ibid.*)

Principle 8 calls upon the states' legal aid entities to engage the judiciary to ensure that court rules and procedures do not impede indigent litigants from accessing the court system. (ABA Principles, *supra*, at p. 4 [affirming that a state's system for the delivery of civil legal aid should "engage[] and involve[] the judiciary and court personnel in reforming their rules, procedures, and services to expand and facilitate access to justice"].) The comments to Principle 8 urge "[t]he judiciary [to] ensure[] that the courts are accessible and responsive to the needs of all residents, including low-income and vulnerable populations and those facing financial, physical and other barriers to access." (*Ibid.*) In implementing the principle, the comments propose that "[t]he judiciary examine[] its rules and procedures to ensure that they do not create barriers to the courts and, where necessary, change[] them to expand and facilitate access." (*Ibid.*) The comments also encourage courts to "provide a range of services" with the ultimate goal of "enabl[ing] all residents to obtain access to the courts in matters before the court." (*Ibid.*)

At the same time that the ABA adopted the Principles of a State System for the Delivery of Civil Legal Aid, the Presidential

Task Force on Access to Civil Justice issued a report that resulted in adoption of ABA Policy 112A, which urged federal, state, and local governments to provide low-income litigants with counsel at public expense when basic human needs were at stake in the dispute. (ABA Policy 112A (Aug. 2006) <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.authcheckdam.pdf.> [as of July 5, 2016].) The findings in the report underscore the necessity of the Principles, particularly in the context of the unrepresented litigant:

> On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry about whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts.

(ABA Policy 112A, *supra*, Report at 7.) The report observes that "[t]he American system of justice is inherently and perhaps inevitably adversarial and complex," and therefore results in the assignment to the litigants of "the primary and costly responsibilities of finding the controlling legal principles and

uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury." (*Id.* at 9.) But self-represented litigants simply are not up to this task: "non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer." (*Id.* at 9-10)

B. The San Diego Superior Court's policy seriously impairs access to the courts, and is contrary to the ABA rules and standards governing the fair and proper administration of justice.

When the judiciary of the San Diego Superior Court implemented the court reporter policy at issue here, there was a widely held belief among many presiding judges and court administrators in the State that such policies were acceptable because civil litigants "do not have a constitutional right to have a court reporter." (See, e.g., Los Angeles Superior Court Policy Regarding Normal Availability of Official Court Reporters and Privately Arranged Court Reporters (May 2012), 1 <http://www.lacourt.org/generalinfo/courtreporter/pdf/CourtReporterPolicy.pdf> [as of July 15, 2016].) The accuracy of that position—at least in the context of indigent litigants like Jameson—is

doubtful, as discussed below. More importantly, the position overlooks non-constitutional issues of equally critical importance that are embodied in the ABA's (and the State of California's) policies, such as access to justice for indigent and self-represented litigants. The San Diego Superior Court policy of not providing official court reporters to indigent litigants in civil, family, or probate matters, including civil trials, falls well short of the ABA's standards and rules. (See OBOM Ex. A.)

As the discussion in Section A, *supra*, demonstrates, access to justice has been an enduring principle of the Model Code of Judicial Conduct for nearly a century. The ABA specifically recognized the importance of securing litigants' right to appeal in the very first Canons of Judicial Ethics, adopted in 1924. (ABA Canons of Judicial Ethics (1924), *supra*, Canon 22.) Those same Canons demonstrate the ABA's recognition of the central role that a complete record of trial court proceedings plays in that process. (*Ibid.*) The most recent provisions of the Model Code similarly call for the judiciary to safeguard litigants' "right to be heard according to law." (ABA Model Code of Judicial Conduct (2007), *supra*, Canon 2, Rule 2.6(A).) These obligations apply to the creation and development of court-wide policies just as much

as they do to decisions made in a courtroom. (See *Id.* at Preamble ["Judges should maintain the dignity of judicial office at all times."]; see also ABA Canons of Judicial Ethics (1924), *supra*, Canon 2 [discussing "the conduct of the business of the court"].)

Because a party without a court reporter cannot create a verbatim record of their proceedings, the policy adopted by the San Diego Superior Court effectively deprives litigants of a right to appeal unless they are willing to pay extra for such access. This deprivation is insurmountable by indigent persons who qualify for fee waivers and cannot afford the services of third-party private court reporters. The same holds true for litigants who—although not indigent—lack sufficient resources to pay for counsel, let alone engage a court reporter. (See Cal. Commission on Access to Justice, *The Path to Equal Justice* (2002) 9-10 <http://www.calbar.ca.gov/LinkClick.aspx?fileticket =QhMjgCPh4gg%3D&tabid=224&mid=1534> [as of July 15, 2016] [describing the needs of lower- and moderate-income families].) California courts have recognized the moral and legal problems associated with access-to-justice issues in the past. (See *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 87-88 ["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."].) And the ABA Standards Relating to Trial Courts call for court reporting services internal to the courts to ensure that "hearing, trial, and appellate processes . . . advance in orderly fashion." (ABA Standards Relating to Trial Courts (1992), *supra*, Rule 2.42, Commentary.) But the San Diego Superior Court's court reporter policy overlooks these issues entirely.

Legal scholars have identified a number of different functions that a robust appellate system serves, including correcting legal and factual errors, encouraging the development and refinement of legal principles, increasing uniformity and standardization in the application of legal rules, and promoting respect for the rule of law. (Chad M. Oldfather, *Error Correction*, 85 Ind. L.J. 49, 49 (2010) ["Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error."]; see also Paul D. Carrington, Daniel J. Meador, & Maurice Rosenberg, *Justice on Appeal* 3 (1976) ["[A]ppellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal

system in which they serve."]; Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 Sw. J. Int'l L. 445, 455 (2012) ["The classic remedy for inconsistent application of the law is appellate review."]; Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 Marq. L. Rev. 825, 827 (2009) ["Despite their comparative scarcity, appealed cases—far more than cases that settle or go to trial—form the basis of much of what many observers know about the legal system."].) By outsourcing reporting of all civil trials to private court reporters, and allowing no exception for the poor, the trial court has rendered it virtually impossible for an indigent civil litigant to create a trial record, and effectively precluded these individuals from taking advantage of the appellate process. Limiting the availability of appellate review to people who can afford it violates the principles that the ABA has long espoused and skews the making of law at the appellate level.

The ABA respects the budgetary challenges facing state courts, and the difficult decisions in determining where and how to save money. But the financial conditions that forced the courts to cut their budgets are the same ones facing the people of California. (See, e.g., *The Path to Equal Justice*, *supra*, at pp. 7-

16.) State courts are facing revenue shortfalls at the same time that many families face losses of their principal source of income. By scaling back essential services like court reporters and placing the economic burden on litigants, state courts merely shift the financial burden to a population that is unable to bear it, and impede those litigants' access to the courts.

The ABA has long-believed that "the organized bar and state Supreme Court and other judicial leaders in each state and territory must take the lead to achieve access to justice in civil matters for low-income persons and others who cannot afford counsel." (ABA Principles, *supra*, at p. 9.) The implementation of these principles is "critical" to "achieving a full range of high quality civil legal aid services" for those of low income and modest means. (*Ibid.*) Yet the San Diego Superior Court's policy deviates from these principles, and sets a dangerous course for the future of access to justice in the State.

C. The way that the Superior Court-wide court reporter policy was implemented in Jameson's case further deviated from the ABA's standards for courts dealing with self-represented litigants.

The record reflects that just ten days before trial, the trial court informed Jameson that "the Court no longer provides a

court reporter for civil trials, and that parties have to provide their own reporters for trial." (RA 231-232.) There is no indication in the record that the trial court explained to Jameson how this announcement could impact his case going forward, that the court apprised Jameson of alternative resources for transcribing the upcoming proceedings, or that the San Diego Superior Court policy recommended that the trial court do either of these things. The San Diego policy could have recommended, and the trial court could have taken, these steps in an effort to "take whatever measures may be reasonable and necessary to insure a fair trial." (ABA Standards Relating to Trial Courts, *supra*, Rule 2.23; see also California Code of Judicial Ethics (2015), *supra*, Canon 3, Rule (B)(8) Commentary [recommending that judges "take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable [a self-represented] litigant to be heard."].)[10]

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[10] Providing such information about the impact of the lack of a court reporter would also foster public confidence in the judiciary. (See, e.g., ABA Canons of Professional Ethics (1908), *supra*, Preamble [recognizing the importance of public confidence in the impartiality of the judiciary, and the corresponding responsibility of all legal professionals to ensure "that the public shall have absolute confidence in the integrity and impartiality" of the administration of justice].) This is particularly so here, where the

Moreover, upon granting Desta's motion for nonsuit, there is no indication that the trial court explained to Jameson "what will be happening next in the case and what is expected of [him]." (Model Code of Judicial Conduct Provisions on Self-Represented Litigation, *supra*, Appen. III; see also *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [requiring the court to "make sure that verbal instructions given in court and written notices are clear and understandable by a layperson"].) The minute order reflecting the trial proceedings indicates that the trial court, in anticipation of another appeal, ordered Desta's counsel to house the exhibits pending the appeal period. (RA 258.) But there is no indication that Jameson was informed of the effect that not having a transcript would have on any attempt to appeal, of the possibility of obtaining a settled statement in lieu of a transcript, or of the resources that might aid him in obtaining this

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Court of Appeal had already offered repeated reminders of the trial court's obligation to provide meaningful access to justice for incarcerated and self-represented litigants like Jameson. (*Jameson II*, *supra*, 179 Cal.App.4th at p. 684 ["On remand, the trial court is directed to ensure that Jameson is provided meaningful access to the courts."]; *Jameson III*, *supra*, 215 Cal.App.4th at p. 1168 [reminding "the trial court of its obligation to ensure indigent prisoner litigants are afforded meaningful access to the courts," and noting that "the record indicates that the trial court failed to carry out this obligation"].)

information on his own.[11] The absence of this evidence stems from the same flaw that prevented Jameson from presenting his appeal—no reporter's transcript.

The ABA has long encouraged trial courts to assist self-represented litigants in navigating the courts. The way that the trial court implemented the San Diego Superior Court court reporter policy in this instance further frustrated these goals.

D. The San Diego Superior Court's policy also raises equal protection and due process concerns.

The right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice. The right of access to the courts is founded in the Due Process Clause and Equal Protection Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. (See *Adsani v. Miller* (2d Cir. 1998) 139 F.3d 67, 77 ["[P]rinciples of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants."].)

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[11] Nor does the San Diego Superior Court court reporter policy require or recommend disclosure of such information.

When important interests are at stake in judicial proceedings, the State and Federal Constitutions require more than a theoretical right of access to the courts; they require meaningful access. The courts bear a substantial part of the burden of ensuring meaningful access, particularly when a litigant lacks the resources to afford legal representation and lacks the knowledge necessary to navigate the court systems. The State of California has established an appellate system for all litigants to utilize, but the San Diego Superior Court policy effectively closes the doors of the Courts of Appeal based solely on their ability to pay for access, and the location where they litigate their claims. This type of policy cannot stand. (*Lindsey v. Normet* (1972) 405 U.S. 56, 77 ["When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."]; see also *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 9 fn. 3 [explaining that a court policy of conducting family law proceedings without a court reporter "can raise grave issues of due process as well as equal protection in light of its disparate impact on litigants with limited financial means"].)

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeal should be reversed, the trial court's judgment vacated, and the matter remanded for a new trial.

Dated: July 27, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 6,426 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

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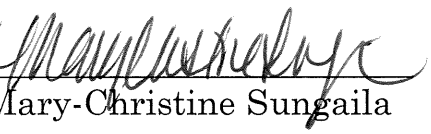
By: 
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PROOF OF SERVICE

(CCP § 1013(a) and 2015.5)

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. I am employed with the law offices of Haynes and Boone, LLP and my business address is 600 Anton Blvd., Suite 700, Costa Mesa, California 92626.

On July 27, 2016, I served the foregoing document entitled **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PLAINTIFF AND PETITIONER BARRY S. JAMESON** on all appearing and/or interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows and in the manner so indicated:

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☒ **[BY MAIL]** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

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

Executed on July 27, 2016, at Costa Mesa, California.

Breean Cordova