No. S275134

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PACIFIC FERTILITY CASES

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, CASE NO. A164472

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS

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APPLICATION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

Pursuant to California Rules of Court, rule 8.520(f), the California Academy of Appellate Lawyers respectfully requests permission to file the attached amicus curiae brief in support of Petitioner Chart Inc.'s argument that Code of Civil Procedure, section 877.6, subdivision (e) does *not* establish that a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement.

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy has participated as amicus curiae in many cases before this Court, including *Guardianship of Saul H.* (2022) 13 Cal.5th 827, *Jameson v. Desta* (2018) 5 Cal.5th 594, *F.P. v. Monier* (2017) 3 Cal.5th 1099, *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, *Conservatorship of McQueen* (2014) 59 Cal.4th 602, and *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097.

The Academy presents the accompanying brief in support of its goal of furthering the effective administration of appellate justice. Because the Academy believes the accompanying brief would assist the Court in its resolution of the appellate

procedural issues this case presents, the Academy respectfully request this Court's permission to file it.

Members of the Academy represent parties on both sides of this case. In accordance with Academy rules, neither those members nor any individuals in those member's firms participated in any discussions among the Academy's membership about whether the Academy should file an amicus brief or the position the Academy should take, voted on the Academy's position, or had any involvement in preparing the Academy's brief.

More broadly, no party, attorney for a party, or judicial member drafted this brief or participated in our decision to file it. Other than the Academy and its members, no person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: February 1, 2023 Respectfully submitted,

Wagstaffe, von Loewenfeldt, Busch & Radwick LLP

By */s/ Michael von Loewenfeldt*
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AMICUS CURIAE BRIEF

The Petitioner raises an issue of appellate jurisdiction: whether a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement under Code of Civil Procedure section 877.6.[1] As discussed further below, the Academy submits that, in a jurisdictional statute, the word "may" should be given its common *permissive* meaning so that parties can rely on the code's plain text in determining what they must do to preserve their rights. Absent statutory language expressly stating that a decision may not be reviewed on appeal, courts should interpret a statute setting a deadline by which a writ "may" be filed as limiting the time in which extraordinary review may be sought, not as impliedly eliminating the right of direct appeal. Section 877.6, subdivision (e) should thus be interpreted as setting the deadlines for a permissive, but not exclusive, opportunity to seek review by writ of mandate. *See* Part I, *post*.

The Academy further submits that, as with any interlocutory decision that is not expressly made unreviewable on appeal, an order approving or denying a good faith settlement is reviewable on appeal from a final judgment under section 906 irrespective of whether the party previously sought writ relief. *See* Part II, *post*.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

I.

WRIT RELIEF SHOULD ONLY BE DEEMED AN EXCLUSIVE REMEDY WHERE THE LEGISLATURE EXPRESSLY PROHIBITS REVIEW ON APPEAL

There are two opportunities for review of an interlocutory trial court order: by right, on appeal from final judgment, and with the reviewing court's permission, on writ of mandate. Some exceptions exist—interlocutory orders that can be immediately appealed or which can only be challenged by writ—but those exceptions are expressly and clearly delineated in the relevant statutes. Litigants are entitled to rely on the plain meaning of procedural statutes, and courts should interpret any ambiguity in such provisions to allow for the right to appeal absent plain legislative intent to the contrary.

The right to appeal is statutory, *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, and section 906 sets a baseline rule allowing post-judgment appellate review of all trial court decisions. "Upon an appeal . . . the reviewing court may review . . . any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (§ 906.) The only exception section 906 provides prohibits review of "any decision or order from which an appeal might have been taken." (*Ibid.*)

A party that wants earlier review of an interlocutory order can seek review by writ of mandate or other extraordinary writ. (See *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; § 1085.) Unlike review on appeal, the decision to grant writ relief is purely discretionary. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351; see *People v. Mena* (2012) 54 Cal.4th 146, 153.)

Of course, "[i]n any case in which the court issues an alternative writ and renders a written decision granting or denying relief, that decision has ordinary res judicata effect." (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 182.) But where writ review is summarily denied, that denial is not a decision on the merits, and thus has no preclusive effect, unless a statute expressly makes writ review the only avenue for review. (*Leone v. Med. Bd.* (2000) 22 Cal.4th 660, 670; *Kowis v. Howard* (1992) 3 Cal.4th 888, 899.)

Whether an order is appealable, and when, are jurisdictional questions. (*Van Beurden Ins. Servs. v. Customized Worldwide Weather Ins. Agency* (1997) 15 Cal.4th 51, 56; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) Limits on the right to appeal should be construed to allow appellate review unless contrary legislative intent is plain. Because "[t]he policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law," this Court has long held that "in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment." (*Koehn v. State Bd. of Equalization* (1958) 50 Cal.2d

432, 435, quoting *People by Webb v. Bank of San Luis Obispo* (1907) 152 Cal. 261, 264.)

Thus, any ambiguity "in rules that limit the right to appeal" should be construed to allow appeal "when such can be accomplished without doing violence to applicable rules." (*Alan v. Am. Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902, citations omitted.) Rules governing appellate jurisdiction "must stand by themselves without embroidery." (*Id.* at p. 903, citation omitted.) "[I]n a matter involving jurisdictional restrictions on the right to appeal, we should not engage in 'guesswork' . . . [n]or should parties operate under uncertainty about when they must file an appeal." (*Van Beurden Ins. Servs. v. Customized Worldwide Weather Ins. Agency*, *supra*, 15 Cal.4th at pp. 62-63, citations omitted.)

Here, the ambiguity is in how to interpet the word "may" in section 877.6, subdivision (e):

> When a determination of the good faith or lack of good faith of a settlement is made, any party aggrieved by the determination *may* petition the proper court to review the determination by writ of mandate. . . .

(§ 877.6, subd. (e), italics added.) This question has split the Courts of Appeal between those that apply the plain meaning of this provision as providing deadlines for a permissive procedure

without eliminating the right to review on appeal,[2] and those that, citing policy and legislative history, construe this provision as eliminating the right to appeal.[3]

The Academy submits that jurisdictional rules should be interpreted as plainly as possible—and based solely on their language if possible—to avoid traps for the unwary. The point of a code of procedure is to instruct all litigants on how to proceed, not just those with the most able counsel.

The ordinary, plain meaning of the word "may" is permissive, indicating an optional choice. (*In re Richard E.* (1978) 21 Cal.3d 349, 354 ["The ordinary import of 'may' is a grant of discretion."], citing *Housing Authority v. Superior Court* (1941) 18 Cal.2d 336, 337; *Walt Rankin & Assocs., Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614 ["the usual rule with California codes is that 'shall' is mandatory and 'may' is permissive unless the context requires otherwise"]; see, e.g., Cal. Rules of Court, rule 1.5(b)(2) ["'May' is permissive"]; Bus. & Prof. Code, § 19;

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[2] *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 636; *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1423.

[3] *Pacific Fertility Cases* (2022) 78 Cal.App.5th 568, 585, review granted Aug. 17, 2022; *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 499; *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1136; *Housing Group v. Superior Court* (1994) 24 Cal.App.4th 549, 552.

Evid. Code, § 11; Fam. Code, § 12; Gov. Code, § 14; Lab. Code, § 15; Prob. Code, § 12 [all: "'shall' is mandatory and 'may' is permissive"].)

Section 877.6, subdivision (e) does not say "may *only*" seek review by writ, or otherwise indicate that the matter cannot be reviewed on appeal. Where the Legislature has provided that writ review is a party's only remedy, it has said so expressly. For example, section 405.39 provides that an order granting or denying expungement of a lis pendens is only reviewable by writ:

> No order or other action of the court under this chapter shall be appealable. Any party aggrieved by an order made on a motion under this chapter may petition the proper reviewing court to review the order by writ of mandate. . . .

(§ 405.39.) Business and Professions Code section 2337 provides, in relevant part, that review of a superior court decision concerning revocation or suspension of a medical license *shall* be reviewed by writ. "Notwithstanding any other provision of law, review of the superior court's decision shall be pursuant to a petition for an extraordinary writ." (Bus. & Prof. Code, § 2337.) Trial court orders under the Public Records Act are expressly reviewable by writ: "a party shall, in order to obtain review of the order, file a petition [for the issuance of an extraordinary writ] within 20 days. . . ." (Gov. Code, § 6259.) Thus, the Legislature clearly knows how to expressly provide that a matter *may not* be reviewed on appeal or that it *shall* be reviewed by writ.

Section 877.6, subdivision (e) provides that, where writ review is sought, the writ must be filed within 20 days, with one possible 20 day extension, and that the court has 30 days to decide whether to hear the writ. (§ 877.6, subd. (e).) The Court of Appeal reasoned that these short time frames suggest a legislative intent that writ review be exclusive. (*Pacific Fertility Cases*, *supra*, 78 Cal.App.5th at p. 578-579.)

Creating a short deadline to file a writ does not imply the writ is an exclusive means of appeal. The short deadline for this statutory writ could, instead, simply be intended to ensure that any writ is brought and addressed quickly and that continuing trial court proceedings are not made unduly uncertain or delayed by the pendency of a writ petition. (Cf. *Volkswagen of Am. v. Superior Court* (2001) 94 Cal.App.4th 695, 701 ["As a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals."].)

Indeed, other statutes provide just such an optional, but expedited, time for writ review. Section 437c, subdivision (m)(1) provides that a writ challenge to an order denying summary judgment or granting or denying summary adjudication must be filed within 20 days (with one 10 day extension)—less time than section 877.6 allows. (§ 437c, subd. (m)(1).) Yet it is clear that seeking a writ under section 437c, subdivision (m) is optional and a party retains the right to appeal the court's order after final judgment. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 504 ["there is no requirement in our summary

judgment statute that parties that wish to challenge orders granting summary adjudication do so by way of a writ petition."].) Similarly, section 418.10, subdivision (c) provides a 10-day period (extendable to 30) in which to take a writ from an order denying a motion to stay or dismiss for inconvenient forum. (§ 418.10, subd. (c).) Those who chose not to seek such a writ may still challenge the order on appeal from a final judgment. (*Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 610-611.) Thus, the Legislature's enactment of short deadlines for writ review does not, alone, imply (much less clearly state) that such a writ is the exclusive means of appellate review.

Respondents argue that there are sound policy reasons why good faith settlement decisions should be reviewed only by writ. For example, they argue that allowing appeals after judgment will introduce an element of uncertainty that will impede settlement of multi-party cases. The Academy agrees that there are sound policy reasons why early review of a good faith settlement decision might be preferable. But the Legislature should weigh those policy reasons, and any contrary arguments. The Legislature knows how to prohibit appellate review when it wants to do so. (See *People by Webb v. Bank of San Luis Obispo*, *supra*, 152 Cal. at p. 265 ["No satisfactory reason can be suggested, if the right of appeal is generally given by the provisions of the Code of Civil Procedure . . . why the legislature, if it contemplated depriving the parties of such right in this particular special proceeding, did not say so."]

The critical policy here should be this Court's longstanding rule of interpreting ambiguous jurisdictional statutes in favor of the right to appeal. Statutory limits on the right to appeal should be unmistakeable from the text of the statute alone so that parties can read the procedural rules and know when and how to preserve their rights. Absent a statute expressly stating that an order may not be reviewed on appeal, or that writ relief is the exclusive remedy, section 906's general right of appellate review should apply. Accordingly, this Court should interpret section 877.6, subdivision (e), and more generally any statute using the word "may" to describe an opportunity to seek a writ, as creating a permissive or optional, not mandatory or exclusive, procedure.

II.

A PRIOR PETITION FOR WRIT OF MANDATE IS NOT REQUIRED TO SEEK REVIEW OF A GOOD-FAITH SETTLEMENT ON APPEAL FROM FINAL JUDGMENT

Petitioner notes that it previously filed a petition for writ of mandate that was summarily denied. (Petitioner's Brief at pp. 20-21.) It argues that *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* and *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.*, held that review must be made by writ of mandate, but each left open whether appellate review is available if a writ is summarily denied. (Petitioner's Brief at pp. 40-41; *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency, supra*, 73 Cal.App.4th at p. 1137, fn.4; *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.*, *supra*, 115 Cal.App.4th at p. 499, fn. 8.) Respondents, for their part, argue

that nothing in section 877.6, subdivision (e) creates an exhaustion requirement. (Respondents' Brief at p. 26.)

Technically, this exhaustion question need not be addressed given that Petitioner *did* seek writ relief and Respondents do not argue for such a rule. However, as *Main Fiber Products* and *O'Hearn* illustrate, there is uncertainty on this issue. (*Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency, supra*, 73 Cal.App.4th at p. 1137, fn.4; *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.*, *supra*, 115 Cal.App.4th at p. 499, fn. 8.) The Academy therefore urges this Court to clarify that whether a writ was previously sought is irrelevant to whether a good faith settlement order is reviewable on appeal (unless, of course, the writ was resolved on the merits). An express ruling on this issue will avoid future confusion and eliminate a potential trap for the unwary.

As discussed above, the rules governing the right of appeal are statutory and courts should interpret such statutes to allow appeal "when such can be accomplished without doing violence to applicable rules." (*Alan v. Am. Honda Motor Co., Inc.*, *supra*, 40 Cal.4th at 902; *People v. Chi Ko Wong*, *supra*, 18 Cal.3d at p. 709.) There is no basis, in either section 877.6 or section 906, to limit the right to appeal to cases in which a writ petition was filed.

Only in dependency proceedings did the Legislature condition the right to appeal on first seeking a discretionary writ. (*People v. Mena*, *supra*, 54 Cal.4th at p. 156.) Welfare and

Institutions Code sections 366.26 and 366.28 state that requirement in unmistakeable terms:

> (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:
>
> (A) A petition for extraordinary writ review was filed in a timely manner.
>
> (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.
>
> (C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.
>
> (2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(Wel. & Inst. Code, § 366.26, subd. (*l*); Wel. & Inst. Code, § 366.28, subd. (b) [identical requirement to appeal placement orders after termination of parental rights].) And, of course, this

exceptional rule reflects the general urgency applied to litigation of the lives of minors in dependency.

"When this [C]ourt has been asked in other contexts to impose a writ requirement as a condition to seeking appellate review, [it] ha[s] declined." (*People v. Mena*, *supra*, 54 Cal.4th at p. 158, citing *People v. Batts* (2003) 30 Cal.4th 660, 678 [double jeopardy], and *People v. Memro* (1985) 38 Cal.3d 658, 676 [discovery].)

While this Court's prior cases on this topic arose in criminal appeals, statutory language allowing consideration of any interlocutory ruling in civil and criminal cases is substantively the same. (Compare Pen. Code, § 1259 and Code Civ. Proc., § 906; see *In re Matthew C.* (1993) 6 Cal.4th 386, 396, fn. 10 ["Penal Code section 1259 sets out a similar rule [to Code of Civil Procedure section 906] governing appeals in criminal cases."].) It is thus unsurprising that, in civil cases, the Courts of Appeal have also declined to create such a requirement—even where a pretrial extraordinary writ is the "proper remedy" or "better practice." (E.g., *Amato v. Downs* (2022) 78 Cal.App.5th 435, 441 [jury right]; *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, 13 [same].)[4]

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[4] We note that the Court has granted review in *Tricoast Builders, Inc. v. Fonnegra*, S273368, to determine whether an appellant that did not challenge the denial of jury trial by pretrial writ must show "actual prejudice" when challenging the order on appeal.

An extraordinary writ is either the exclusive means to challenge an order under section 877.6 or, as argued above, it is not. There is no basis in either the applicable statues or this Court's prior decisions to condition the right to appeal on a prior, unsuccessful writ petition. As this Court held in *People v. Mena*, "[b]ecause the right to appeal is statutory, such a limitation should be considered by the Legislature." (*People v. Mena*, *supra*, 54 Cal.4th at p. 155.) If the Court agrees that there is a right to review of section 877.6 orders on a post-judgment appeal under section 906, it should confirm that right exists whether or not the aggrieved party earlier sought writ review.

CONCLUSION

The Academy urges the Court to clarify the appellate procedural issues discussed above.

Dated: February 1, 2023

Respectfully submitted,

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By */s/ Michael von Loewenfeldt*
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Amicus Curiae Brief of California Academy of Appellate Lawyers is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 3,029 words according to the word count feature of Microsoft Word for Office 365. That count does not include the application for permission. If the application is included, the word count is 3,379 words.

Dated: February 1, 2023

Respectfully submitted,

Wagstaffe, von Loewenfeldt, Busch & Radwick LLP

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PROOF OF SERVICE

I, Garfield Pallister, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Wagstaffe, von Loewenfeldt, Busch & Radwick LLP, 100 Pine Street, Suite 2250, San Francisco, California 94111.

On February 1, 2023 I served the following document(s):

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on the parties listed below as follows:

Clerk of the Superior Court
San Francisco Superior Court
400 McAllister Street
San Francisco, California 94102
Attn: The Hon. Andrew Y.S. Cheng

☒ **BY FIRST CALSS MAIL** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

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

Executed on February 1, 2023, at San Francisco, California.

GARFIELD PALLISTER