

Supreme Court Case No.

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

KENNETH J. SCHMIER,	)	
	)	
Petitioner,	)	Court of Appeal
	)	Case No. A101206
v.	)	
	)	San Francisco County Superior
THE SUPREME COURT OF	)	Court No. CGC-02-4-3800
CALIFORNIA, et al.,	)	
	)	
Respondents.	)	
_____	)	

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**PETITION FOR REVIEW**

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Pursuant to Rule 28(a)(1), California Rules of Court, Petitioner Kenneth J. Schmier, individually and for all persons similarly situated in the State of California, hereby petitions for review of the December 16, 2003, unpublished decision of this case by the Court of Appeal, First District, Division Five; the decision became final on January 15, 2004. A copy of this decision is attached hereto as Appendix 1.

Review is necessary pursuant to Rule 28(b)(1) both to secure uniformity of opinion and to settle important questions of law. This petition presents the following important questions of statewide significance and magnitude:

### **I. ISSUES PRESENTED**

1. Does Rule 977 of the California Rules of Court, which forbids litigants from attributing rules of law, applications of rules of law to facts, and legal reasoning contained in pertinent previous decisions of the appellate courts, which may determine our causes or even relieve any of us of criminal or civil liabilities, violate the constitutional right of free speech or right to petition government for a redress of grievances?
2. Can Rule 977 be found constitutional on demurrer as a matter of law when the underlying courts admit the rule restricts speech, without statement of purpose or justification of the rule, proof of the efficacy of the rule to achieve any stated goals, examination of less restrictive means of achieving the intended benefits of the Rule, and without other factual determinations relevant to any level of First Amendment scrutiny?
3. Given that *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, requires all California courts to abide by the decisions of the appellate courts regardless of whether such cases are designated as “published,” and now that the public is regularly accessing “unpublished” decisions on the internet, is any legitimate state interest served by restricting litigants’ speech by banning citation to unpublished decisions?

## **II. REASONS FOR GRANTING REVIEW**

At issue in this case is the existence of an important public right – the right of litigants and counsel to cite and discuss relevant prior California appellate opinions to influence the outcome of pending disputes.

Petitioner challenges the constitutionality of Rule 977 of the California Rules of Court, which prohibits litigants from bringing to any court’s attention the existence of 94% of the decisions of the Court of Appeal in arguments before any court of the State of California for no reason other than that these decisions have been arbitrarily marked with words “not to be published.” Rule 977, on its face and as it has been applied to Petitioner, has violated his free speech rights guaranteed by the First Amendment to the United States Constitution and Article I, § 3 of the California Constitution.

Rule 977 cannot meet any level of First Amendment scrutiny when it prohibits the mere mention of unpublished opinions in our common law court system for any reason without proof of purpose or evaluation of alternatives. This is particularly true now that all opinions, whether designated “published” or “unpublished,” are widely disseminated on internet search engines and included in the research of all litigants, counsel, and the courts themselves. Even if justification were offered and proven, Rule 977 is unquestionably an overbroad restraint on free expression of citizens where it matters most – in our legal system. The rule prohibits mention of legal authority which could be determinative or thought-provoking, as it did with Petitioner, or as it could with criminal defendants who would be prevented from citing exonerating authorities.

The Judiciary has not permitted Rule 977 to be subject to constitutional scrutiny of any kind, and it cannot be declared a constitutional exercise of legitimate judicial authority on demurrer. The Court of Appeal decision herein is premised exclusively on its incorrect refusal to follow the holding of the United States Supreme Court in *Legal Services Corp. v. Velazquez* (2001) 121 S. Ct. 1043, and ignores all other arguments made to that Court. *Velazquez* calls into question the constitutionality of any law that restricts the arguments that lawyers may pursue before the Judiciary.

The only approach that powerless citizens have before the infinitely powerful Judiciary is to put forth the logic embraced by judges previously and ask for similar treatment. Rule 977 defeats this basic mechanism of justice. For the Judiciary to evade a full inquiry into this issue by the use of power and not logic is an act of tyranny. This case invites the Court to address what the problems of the Judiciary really are and the resources it needs to dispense justice to all litigants consistent with the Constitution and the promise of rational justice.

Review is necessary to clarify this important public right, and to align California with the view espoused by the United State Supreme Court and the position recently recommended by the federal Judiciary.

### **III. STATEMENT OF THE CASE**

On January 24, 2002, Kenneth J. Schmier filed a complaint for declaratory and injunctive relief in San Francisco Superior Court against the Supreme Court of California, the California Courts of Appeal and the California Judicial Council. Schmier alleged that a panel of Division Five of the First District Court of Appeal violated

his constitutional rights of free expression when it refused, on the basis of Rule 977, to permit him to cite and discuss relevant unpublished opinions in an oral argument on behalf of a client.

In his complaint, Schmier sought nominal damages, injunctive relief, and a declaration that Rule 977 of the California Rules of Court violates the First Amendment of the United States Constitution and Article I, § 3 of the California Constitution.

On January 28, 2002, Schmier filed and served an Ex Parte Application for Temporary Injunction, Writ of Mandamus or Prohibition, and for Order to Show Cause for Preliminary Injunction. The ex parte application was denied on January 29, 2002.

Respondents filed a notice of demurrer and demurrer on March 2, 2002, and the demurrer was opposed by Schmier. On April 9, 2002, without appearance by the parties, the trial court adopted its tentative ruling and sustained the demurrer without leave to amend.

The trial court signed the Order Sustaining Demurrer on September 12, 2002, and the order was entered on September 17, 2002. Notice of Entry of Order Sustaining Demurrer was filed October 1, 2002.

The trial court entered the Order Dismissing Case on November 4, 2002. Notice of Entry of Order Dismissing Case was filed on December 20, 2002.

Appellant/Petitioner filed his Notice of Appeal Combined with Notice Designating Clerk's Transcript on December 23, 2002. As set forth in the Notice of Appeal, Schmier appealed the Order Dismissing Case entered on November 4, 2002, and the related Order Sustaining Demurrer entered on September 17, 2002.

Petitioner requested that the panel members of Division Five, First Appellate District, to which the appeal was assigned, recuse themselves because the action directly involved the conduct of that very panel in a prior appeal. The request was denied.

The appeal was briefed by the parties, and the appeal was submitted to the Court of Appeal by the parties without oral argument. The unpublished opinion of the Court of Appeal herein affirming the trial court was filed on December 16, 2003, and it became final on January 15, 2004. No petition for rehearing was filed in the Court of Appeal.

#### **IV. STATEMENT OF FACTS**

Rule 977 of the California Rules of Court provides:

- (a) [Unpublished opinions.] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

Petitioner Kenneth J. Schmier is an attorney at law and member of the California State Bar. Schmier was counsel of record for plaintiff Michael Schmier in an action entitled *Michael Schmier v. Supreme Court of California*, San Francisco Superior Court no. 995232, Court of Appeal, First Appellate District no. AO85177 (hereafter "*Schmier I.*") Kenneth Schmier and Michael Schmier are brothers. *Schmier I* challenged the constitutionality of Rules 976 through 979 of the California Rules of Court.

Appearing as counsel of record before a panel of Division Five, First Appellate District, in *Schmier I*, Schmier sought permission to

cite unpublished appellate opinions with holdings directly relevant to the issues before the panel. Justice Barbara Jones, Presiding, expressly denied the request, relying on Rule 977, and the panel refused to permit Kenneth Schmier to cite or discuss unpublished opinions during his argument on behalf of his client. Rule 977 was thus used by the Judiciary to protect Rule 977.

*Schmier I* thereafter resulted in a published opinion, *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4<sup>th</sup> 703, *rehearing denied*, March 2, 2000, *review denied*, May 24, 2000, *cert. denied*, 531 U.S. 958 (October 30, 2000). The *Schmier I* published opinion affirmed the dismissal of the action there on the ground that Michael Schmier lacked standing to challenge the rules because he could not allege that he was ever personally denied the right to cite unpublished opinions and could thus state no particularized injury. Nonetheless, after finding Schmier lacked standing, the *Schmier I* court stated that Rule 976, which authorizes court to designate some opinions as “published” and some as “unpublished,” did not violate the Due Process or Equal Protection rights of litigants as a matter of law.

On October 1, 2002, the California Courts of Appeal began widely disseminating all decisions – “published” and “unpublished” as defined in Rule 976 – through the internet and popular search engines used by attorneys and the general public. The wide-spread publication of unpublished opinions on the internet has exacerbated practical and constitutional problems created by Rule 977. Neither these issues nor free speech were addressed in the *Schmier I* opinion.

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## V. LEGAL DISCUSSION

Schmier does not challenge the constitutionality of a court's ability to publish cases selectively, nor the power of a court to select from precedents properly presented to it or known by it, those precedents it finds apposite within the context of a particular case. Schmier challenges only the Judiciary's ability to defeat entirely the salutary effects of the flexible concept of *stare decisis* by restricting the content of litigants' speech.

Rule 977 operates unconstitutionally to restrict the free speech rights of litigants by defining an entire line of arguments as impermissible before the courts of California. Specifically, litigants are not entitled to argue, "The California courts have resolved the situation presented in this case in this way, according to reasons stated pursuant to constitutional mandate, and this court should now act in a similar manner." This line of argument is the essence of common law argument, and is an exercise of speech and expression upon which common law courts must depend for the proper exercise of judicial power.

Because a rule defeating this line of argument is antithetic to the foundation of our system of law, *stare decisis*, and the rule of law generally, Rule 977 is an overbroad, unconstitutional restraint on free expression both on its face and as applied to Petitioner.

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**A. THE COURT OF APPEAL DECISION IS INCONSISTENT WITH THE HOLDING OF THE U.S. SUPREME COURT IN *LEGAL SERVICES CORP. v. VELAZQUEZ*.**

*Legal Services Corp. v. Velazquez* (2001) 121 S.Ct. 1043, calls into question the constitutionality of any law that restricts the arguments that lawyers may pursue:

By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. . . . [¶.] The restriction imposed by the statute here threatens severe impairments of the judicial function. Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all references to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation of powers principles is an insufficient basis to sustain or uphold the restriction on speech. It is no answer to say that the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. *The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.*

(*Velazquez, supra*, 121 S.Ct. at pp. 1050-51 (italics added).)

Multiple commentators have recognized that the *Velazquez* holding applies to no-citation rules for the same reasons enumerated by the Supreme Court. (See, e.g., Barnett, Stephen R., “From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules,” *Journal of Appellate Practice and Process* (Spring 2002); Tusk, Maria Brook, “No-Citation Rules As A Prior Restraint on Attorney Speech,” 103 Colum. Law Rev. 1202 (June 2003).) Others have strongly made the argument that no-citation rules violate free speech. (See, e.g., Katsh and Chachkes, “Examining the Constitutionality of No-Citation Rules,” *New York Law Journal* (April 2, 2001).) Rule 977 truncates presentation to the courts in the same way as the law the Supreme Court struck down in *Velazquez*. However, the Court of Appeal here incorrectly distinguished *Velazquez*, and the resulting opinion is inconsistent with the opinion of the Supreme Court.

First, the Court of Appeal finds Rule 977 different from the Act considered in *Velazquez* because Rule 977 is viewpoint neutral. The Court of Appeal is incorrect. Rule 977 eliminates from discussion perhaps the most important viewpoint of all – the Judiciary’s viewpoint as expressed in its own prior opinions.

Moreover, even if Rule 977 is viewpoint neutral, it certainly is not content-neutral because it prohibits attribution of judicial reasoning to its authors. The rule, by its clear language, identifies particular content of speech and prohibits that content. Both content-based and viewpoint-based restrictions are presumptively invalid. (*Hill v. Colorado* (2000) 530 U.S.703, 769 (Kennedy, J., dissenting on other grounds).) The rule unquestionably denies free expression

rights – as the Court of Appeal here admitted – and the required First Amendment scrutiny of whatever level cannot be accomplished on demurrer.

Second, the Court of Appeal finds that Rule 977 does not operate to preclude any attorney from presenting any argument to the court. To the contrary, says the Court of Appeal, “a contention that rests on the reasoning of an unpublished decision may be asserted in a party’s brief or argued in court.” This rationale is circular at best, and simply misses the point. While a litigant may indeed take the analysis set forth in an unpublished opinion and present that analysis as the later litigant’s own argument, the litigant is unquestionably restrained from advancing the most persuasive argument of all. The litigant may not argue, “This reasoning was previously adopted by this very court on indistinguishable facts.” In our system such an assertion is an assertion of law. Our notion of justice then demands that a court provide reasons before departing from that precedent.

Additionally, by purportedly permitting litigants to argue the rationale of an unpublished opinion without revealing the prior court’s authorship and holding, Rule 977 allows some parties to argue cases with which a particular judge or panel is familiar to the disadvantage of parties that may not know the case. Rule 977 thus results in a system in which all litigants, and perhaps even courts, must search all cases, both “published” and “unpublished” alike, to be aware of subtle references, which is more burdensome than simply responding to a stated citation. Undeniably, judges and their law clerks are now reading unpublished opinions. Given the likelihood that all parties, and the court, may know of relevant unpublished opinions, courts may

well become forums where everyone discusses case content in a dance that somehow avoids citation. What rational purpose is served by such a dance? Petitioner and the public are entitled to a truthful answer.

Of equal concern is the conundrum where an appellate court reverses a trial court in an unpublished opinion, and the trial judge subsequently faces the same issue in another case. What is that judge expected to do – knowing as he or she does the holding in the unpublished opinion but being unable to rely upon that decision to supercede the duty to follow his or her prior ruling?

**B. ADJUDICATION OF THE CONSTITUTIONALITY OF RULE 977 CANNOT BE ACCOMPLISHED ON THE FACE OF THE COMPLAINT.**

The Court of Appeal also distinguishes *Velazquez* on the purported grounds that no separation of powers issue exists in the Rule 977 analysis as it did in *Velazquez*. Rule 977 does violate separation of powers because it permits the Judiciary to vacate precedent outside of determining a case or controversy. That is a power reserved for the Legislature. However, the existence of an issue of separation of powers is, at this time, beside the point. The Supreme Court in *Velazquez* did not say that a statute restricting speech may only be invalidated if it constitutes a violation of the separation of powers doctrine. The Court there discussed the proffered rational, or “governmental interest,” that Congress wanted certain provisions removed from the purview of courts, and held that such a rationale was insufficient to justify the restriction of speech.

Here the purported governmental interest advanced by Rule 977 is entirely unknown and unproven. It was not before the Court of Appeal below, and it was not before the trial court. A finding of the constitutionality of Rule 977 on demurrer is not possible because no evidence has been submitted or discovered regarding any justification of Rule 977, possible lesser intrusive means of achieving the same result, or other factual information necessary for any level of scrutiny to be applied. It appears that in judging itself, the Judiciary assumes facts as true for which independent triers of fact might require proof. It is for this reason that the sitting Judiciary should have recused themselves, and prospectively should recuse themselves.

After its discussion of the *Velazquez* opinion, the Court of Appeal side-steps the implications of *Velazquez* by stating that “whatever right to ‘free speech’ an attorney has [in the courtroom] is extremely circumscribed,” and then concludes, “the ‘no-citation’ rule does not encroach on this ‘extremely circumscribed’ right.”

The Court of Appeal thus implicitly admits that Rule 977 *does* invade the area of free expression, a fact that cannot be credibly disputed. The Judiciary must justify this invasion with evidence and logic, and it offers none.

Reasonable restrictions on freedom of speech are necessary to the operation of the courts. However, while freedom of speech may be “circumscribed” in a courtroom, it is not strangled. That was affirmed by the Supreme Court in *Velazquez*. Even if the Court of Appeal’s most basic interpretation of Rule 977 as a viewpoint-neutral statute were correct, the Court of Appeal erred when it found Rule

977 to be a “reasonable restriction,” because the record on appeal did not support a finding of reasonableness.

**C. THE COURT OF APPEAL OPINION HERE IS INCONSISTENT WITH THIS COURT’S PRIOR OPINION IN *AUTO EQUITY SALES* v. *SUPERIOR COURT*.**

In *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, this Court held that an appellate department of a superior court exceeded its judicial “jurisdiction,” as that term is applied in a writ of certiorari, when it refused to follow an opinion of the California Court of Appeal that the appellate department recognized as directly on point.

This determination was clearly in excess of the jurisdiction of the appellate department of the superior court. Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow *decisions* of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. *Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.*

(*Auto Equity Sales, supra*, 57 Cal.2d at pp. 455-56 [italics added].)

*Auto Equity Sales* affirmed the importance of *stare decisis* and the rule that precedent must play in the common law. Although it was written over 40 years ago, *Auto Equity Sales* unquestionably remains the law of California; computer searches indicate that the decision has

been cited in well over 1,000 published cases alone since it was issued.

*Auto Equity Sales* requires inferior courts to abide by the decisions of higher courts as a jurisdictional matter. The *Auto Equity Sales* opinion makes no distinction between published and unpublished opinions.

[A] fair reading of Rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr.321, 369 P.2d 937, but we cannot tell anyone about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law (Civ. Code, § 22.2) with its elementary reliance on the doctrine of *stare decisis*.

(*County of Los Angeles v. Wilshire Ins. Co.* (1978) 103 Cal.App.3d Supp. 1, 3 [Presiding Judge Cole, concurring].)

The publication and wide-spread dissemination of all appellate decisions on the internet and through search engines places the large body of “unpublished” decisions before the public. These cases are “decisions,” and through such prior decisions the body of common law is formed. If litigants are precluded from mentioning the existence of these prior decisions, and courts are forbidden to rely upon them, then the holding of *Auto Equity Sales* is rendered impossible to attain.

This position has been recognized and affirmed by the federal bar. The Advisory Committee on Appellate Rules and the Standing Committee on Rules of Practice and Procedure of the federal Judicial

Conference have approved new proposed federal Rule 32.1, which prohibits no-citation rules in federal courts.

The federal committees have recommended the adoption of Rule 32.1 because they have found "that restrictions on the citation of ‘unpublished’ or ‘non-precedential’ opinions . . . are wrong as a policy matter." (Judge Samuel A. Alito, Jr., Report of Advisory Committee on Appellate Rules (May 23, 2003).) The committee also found no-citation rules “difficult to defend.” (*Ibid.*)

The restriction on litigants’ speech is unjustified, it denies the existence of prior case authorities which are now widely viewed by all litigants and included in their research, and it causes courts as a matter of course to exceed their jurisdictional authority in violation of *Auto Equity Sales*. Review should be granted so this Court can protect our core free speech values, enhance the integrity of the legal system, and resolve the continuing and mounting jurisdictional crisis caused by the conflict between Rule 977 and *Auto Equity Sales*.

## **VI. CONCLUSION**

Case law is replete with examples of situations in which government bureaucracies are forced to justify restrictions on free expression. The California Judiciary has been hypocritically unwilling to submit its own restrictions to the same level of scrutiny it applies every day to other governmental institutions.

We cannot lose sight of the fact that we are dealing with a constitutional protection. Even well-intentioned limitations on such an essential guarantee are to be closely scrutinized. As Justice Bradley observed in *Boyd v. United States* (1886) 116 U.S. 616, 625, 6 S.Ct. 524: “It may be that it is [a limitation] in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way,

namely, by silent approaches and slight deviations from legal modes of procedure .... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

*(People v. Kronke (1999) 70 Cal.App.4<sup>th</sup> 1535, 1573-74.)*

In the Court of Appeal, the Judiciary contended that the constitutional legitimacy of judicial administrative enactments should be presumed without any scrutiny whatsoever. The Court of Appeal obliged them. The opinion of the Court of Appeal is contrary to the law, contrary to common sense, and contrary to the public trust imposed in Respondents, the Judiciary itself.

For the foregoing reasons, Petitioner respectfully requests that the Court grant review, permit full detailed briefing on the questions outlined in this Petition, require the Judiciary to answer all legitimate issues raised, and in due course reverse the order of the trial court and remand the action to the trial court for further litigation on the merits. In so doing, the Judiciary may make its case to the people and preserve its integrity and reputation.

Respectfully submitted,

Date: January 26, 2004

By: \_\_\_\_\_

Kenneth J. Schmier

*Pro Se* Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 14(c)(1)

Petitioner hereby certifies pursuant to Rule 14(c)(1) of the California Rules of Court that this Petition for Review contains 4292 words.

