COPY

08-15785

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA HILD, etc.,

Plaintiff-Appellant,

v.

CALIFORNIA SUPREME COURT, et al.,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of California
No. C07-05107 TE H
The Honorable Thelton E. Henderson, Judge

APPELLEE'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

PAUL T. HAMMERNESS
Supervising Deputy Attorney General

TOM BLAKE
Deputy Attorney General
State Bar No 51885

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Telephone: (415) 703-5506
Fax: (415) 703-5480

Attorneys for Defendant-Appellee
Supreme Court of California

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Statutes

TABLE OF CONTENTS (continued)

08-15785

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA HILD, etc.,

Plaintiff-Appellant,

v.

CALIFORNIA SUPREME COURT, et al.,

Defendant-Appellee.

INTRODUCTION

Appellee in this action is the Supreme Court of California. Appellant is Joshua Hild, a state-court plaintiff who sued a utility company for personal injuries he suffered while playing paintball with a frolicking company employee. In state court, Hild won a personal injury judgment against the utility company on a respondeat superior theory.

The utility appealed and the California Court of Appeal, Second Appellate District, reversed. In doing so, the intermediate appellate court decided that its decision applied settled law and did not meet the publication criteria of

Rule 8.1105, et seq., California Rules of Court.[1/]

Appellant Hild petitioned the Supreme Court of California for review of the appellate decision that overturned his personal injury judgment. While his petition for review was still pending before the state Supreme Court, he sued the California Supreme Court and the Court of Appeal, Second Appellate District, in federal court. (AASup.1-3.) The state appellate courts moved to dismiss.

Before the district court heard the California appellate courts' motion to dismiss, Appellant Hild amended his federal complaint below to delete the Court of Appeal as a defendant and to assert that he was challenging the publication rules. *Id.* His amended complaint dwelt heavily on the state Court of Appeal's allegedly deliberate misapplication of the publication rules to his personal injury case.[2/] (AA 000004-09.) Hild alleged that the state Supreme Court was not likely to review the decision against him because of what he characterized as the Court of Appeal's "deliberate use of a nonpublished opinion" to "insulate that decision" from Supreme Court review. (AA 000005).

---

1. Further references to rules are to the California Rules of Court (Cal.R.Court) except as noted. California Rule 8.500 and Rules 8.1110 et seq. and are collectively the "publication rules."

2. His AOB also dwells on the merits of the personal injury appeal in state court(AOB 6-10, 26-28); Appellant continues to aver that the "inescapable" and "patently obvious" conclusion is that the state Court of Appeal's nonpublication decision was "purposeful" (AOB 34).

In his amended complaint below, Hild recited that he did not seek federal court review of the unpublished Court of Appeal decision per se, but instead asserted that the facts of his underlying state tort case would "establish Plaintiff's standing to bring the underlying constitutional challenge to Rule 8.1115(a)." (AA 000002.) However, absent application of the publication rules to Hild's own case, there is no injury to him and no standing. To find in Hild's favor, the district court would have had to either hold that the state appellate courts erred in deciding the state court appeal, or else that the publication rules promulgated by the California Supreme Court are facially invalid in the abstract.

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

Appellee Supreme Court of California agrees that the district court had jurisdiction to adjudicate Appellant Hild's claims under 28 U.S.C. § 1331, and agrees that venue in the Northern District of California was proper.

The district court was correct in its determination that, under the *Rooker-Feldman* doctrine,[3/] it lacked jurisdiction over Appellant Hild's claim that the California Court of Appeal had "deliberately and wrongfully" issued an

---

3. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486-87 (1983), infra.

unpublished opinion and "intentionally" misapplied the criteria for certifying an opinion for publication under Cal.R.Court 8.1105(c) and that it lacked jurisdiction to review the state court proceedings. (AA 000226.) Federal district courts lack jurisdiction to review state court decisions. *Allah v. Superior Court of the State of California,* 871 F.2d 887, 890-91 (9th Cir. 1989); *Rooker v. Fidelity Trust Co. supra,* 263 U.S. 413, 415; *D.C. Court of Appeals v. Feldman, supra,* 460 U.S. 462,486-87.

B. Jurisdiction of the Court of Appeals.

Appellee Supreme Court of California agrees that this Court has jurisdiction to review the district court's final order dismissing the action and the judgment. 28U.S.C. § 1291.

C. Filing Dates.

The district court entered judgment in favor of the California Supreme Court on February 27, 2008. (AA 000232.) Appellant filed his Notice of Appeal on March 25, 2005. (AA 000228.) The 30 day period did not run until March 28, 2008, and his appeal is therefore timely. Rule 4(a), Federal Rules of Appellate Procedure.

D. Finality Of Order.

The appeal is from a final order that disposes of all claims by all parties.

There has been a final ruling in the district court as to the merits. Rule 28(a)(4)(D), Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Was the district court correct in deciding that Appellant Hild lacked standing to bring a federal action on the theory that Cal.R.Court 8.1115(a) selectively denies litigants with unpublished state appellate decisions the ability to obtain review by the California Supreme Court, where Appellant disavows seeking redress as to his own state court lawsuit and where the time for California Supreme Court review of the decision in his state court lawsuit has passed?

2. Was the district court correct in deciding that the *Rooker-Feldman* doctrine precluded Appellant Hild from bringing a federal action on the theory that the California Court of Appeal deliberately and intentionally issued its decision against him as an unpublished decision to avoid review by the California Supreme Court?

3. Was the district court correct in determining that the California publication rules are constitutional as written and as applied to Appellant?

STATEMENT OF FACTS

Appellant Hild won a personal injury judgment in a California state trial court against a utility company, on the theory that a company employee was within

the scope of her employment when she shot him with a paintball gun.[4/] AOB 1-2.

On appeal, the California Court of Appeal, Second District, reversed Hild's judgment, holding "as a matter of law" that a connection sufficient to impose respondeat superior liability was not made out between the tortfeasor's "practical joke or prank" with a paintball gun and her employment. (AA 000072-73.)

After an examination of the "entire record and applicable law," (AA 000077) the state Court of Appeal applied state law to a record where the facts were "somewhat disputed" as to whether or not the paintball shooting was intentional. (AA 000070.) Intentional or not, the state appellate court found that the evidence "undisputedly shows the employee was participating in a prank or joke with children playing near her work site" and was not within the scope of employment. (AA000067, 70). The state Court of Appeal further decided that the record before it negated the imposition of respondeat superior liability and that the "trial court's denial of [the utility's] motion for judgment n.o.v. was reversible error." (AA 000077.)

Appellant Hild petitioned the California Supreme Court for review of the

---

4. The facts of the underlying personal injury suit are set out in the AOB and are not further recounted here because the correctness of the state court proceedings are of limited relevance here in that review of them was not within the jurisdiction of the district court.

reversal of his judgment, which was denied. AOB 10-11. On October 4, 2007, while his petition for review was pending in the California Supreme Court[5/], he filed the instant action in district court, subsequently amending his complaint to *delete* the Court of Appeal, Second District, and leave only the state Supreme Court as a defendant. AOB 11-12, (AA 000004; AASup 1.)

SUMMARY OF ARGUMENT

The district court was correct in deciding that Appellant lacked standing to bring a federal action on his theory that Cal.R.Court 8.1115(a) unconstitutionally denies litigants with unpublished California Court of Appeal decisions the ability to obtain review by the California Supreme Court.

The district court was correct in determining that Rule 8.1115(a) is constitutional as written and as applied to Appellant.

The district court was correct in deciding that the *Rooker-Feldman* doctrine precluded Appellant Hild's federal action on the theory that the California Court of Appeal deliberately and wrongfully issued its decision against him as an unpublished decision to avoid review by the California Supreme Court, in that the district court lacked subject matter jurisdiction under the *Rooker-Feldman*

---

5. Appellant Hild alleged in his complaint below that he was "preparing" to petition the U.S. Supreme Court for a writ of certiorari (AA 000009). Westlaw, SCT-PETITION, August 22, 2008.

doctrine.

STANDARD OF REVIEW

A. Lack of Subject Matter Jurisdiction, Standing, and Mootness Are Reviewed De Novo.

Subject matter jurisdiction is a question of law to be reviewed de novo. See *Chang v. United States,* 327 F.3d 911, 922 (9th Cir. *2003); A-Z Int'l* v. *Phillips,* 323 F.3d 1141, 1145 (9th Cir. 2003).

Dismissal for lack of subject matter jurisdiction is reviewed de novo. See *Skokomish Indian Tribe v. United States,* 332 F.3d 551, 556 (9th Cir. 2003); *Kildare v. Saenz,* 325 F.3d 1078, 1082 (9th Cir. 2003). Plaintiff bore the burden below of establishing that subject matter jurisdiction existed when challenged under Fed. R. Civ. P. Rule 12(b)(l). See, e.g., *Tosco Corp. v. Communities for a Better Environment,* 236 F.3d 495,499 (9th Cir. 2001).

Mootness and standing are questions of law reviewed de novo. *Porter v. Jones,* 319 F.3d 483, 489 (9th Cir. 2003); *Gest v. Bradbury,* 443 F.3d 1177, 1181, n.1 (9th Cir. 2006).

B. Findings of Fact Relevant to Subject Matter Jurisdiction Are Reviewed for Clear Error.

This Court reviews the district court's findings of fact relevant to its determination of subject matter jurisdiction for clear error. See *Skokomish Indian*

Tribe, supra, 332 F.3d at 556; *Schnabel v. Lui,* 302 F.3d 1023, 1029 (9th Cir. 2002); *United States v. Hughes Aircraft Co.,* 162 F.3d 1027, 1030 (9th Cir. 1998).

C. The Decision Below May Be Affirmed on Any Ground Supported by the Record.

In reviewing decisions of the district court, the court of appeals may affirm on any ground supported by the record. See *Forest Guardians v. U.S. Forest Serv.,* 329F.3d 1089, 1097 (9th Cir. *2003); A-Z Int'l v. Phillips, supra,* 323 F.3d 1141,1145 n.3; *Simo v. Union of Needletrades,* 322 F.3d 602, 610 (9th Cir. 2003); *Solomon v. Interior Regional Housing Authority, 313 F.* 3d 1194, 1196 (9th Cir. 2002); *Matus-Leva v. United States,* 287 F.3d 758, 760 (9th Cir.), *cert. denied,* 123 S. Ct. 54 (2002).

A district court's judgment may be affirmed on any ground supported by the record, even if not relied upon by the district court. See *Atel Fin. Corp. v. Quaker Coal Co.,*321 F.3d 924, 926 (9th Cir. 2003); *Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 750 (9th Cir. 2001). When the decision below is correct, it may be affirmed, even if the district court relied on the wrong grounds or wrong reasoning. See *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.,* 159 F.3d 412, 418 (9th Cir. 1998); *Evans v. Chater,* 110 F.3d 1480, 1481 (9th Cir. 1997).

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT APPELLANT HILD LACKED STANDING AND THAT HIS CLAIM WAS MOOT.

Appellant Hild lacked standing below and his claim was moot. The court below found that the California Supreme Court had "already declined to review Plaintiff's state court case." (AA 000224.) While acknowledging that a district court is required to consider the facts as they existed at the time the complaint was filed, the court below correctly held that there were no grounds for injunctive or declaratory relief because Appellant Hild did not show that he was "realistically threatened" with being wronged in the future by the publication rules. *Id.* Because Hild had neither a case pending in state court nor grounds to assert a likely repetition of a denial of California Supreme Court review, he lacked (and lacks) Article III standing.

Appellant Hild's operative complaint below conceded that the California Supreme Court had already considered and denied his petition for review. (AA 000004.) The complaint averred that, "The gravamen of this action lies solely with the general unconstitutionality of California Rules of Court Rule 8.1115(a) as written...." Hild elaborated in the same paragraph, "Plaintiff brings this action

solely to declare C.R.C. Rule 8.1115(a) unconstitutional as written, but *specifically does not seek review by this court of the underlying unpublished decision itself,* the facts of which are set forth herein for context purposes and to establish Plaintiff's standing . . . ." (emphasis added.) The complaint allegedly sought no "legal or equitable relief of any kind, including damages and/or injunctive relief," other than a declaration that the state courts may not proscribe the citation of certain opinions. (AA 000002.)

Although Hild's only particularized injury is that his money judgment against a utility company was reversed by state appellate court, he ostensibly disavows any interest in having the federal courts reverse that state of affairs. However, if he were not seeking redress of some particular injury to him, such as the reversal of that appellate decision, he lacked Article III standing:

> Under Article III of the Constitution, a plaintiff must demonstrate the existence of a "case or controversy" in order to have standing to assert an action in federal court. (Citations.) To meet this requirement, plaintiffs must show "at an irreducible minimum that they personally have suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."

Maguire v. City of American Canyon, 2007 WL 1875974, p. 5 (N.D.Cal. 2007).

To establish standing, a plaintiff must allege 1) an "injury in fact" that is

concrete, particularized, and actual or imminent, not hypothetical; 2) causation; and 3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *American Civil Liberties Union of Nevada v. Lomax,* 471 F.3d 1010,1015 (9th Cir. 2006); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Contrary to the assertions at AOB 16-17, Hild' s alleged injury (the reversal of his judgment) would not have been "redressed by a favorable decision" because publication of the adverse Court of Appeal opinion would not have restored him to his judgment, nor would publication of the opinion have assured him that the state Supreme Court would grant review, much less have made it "likely, as opposed to merely speculative" that the Supreme Court would reverse the Court of Appeal decision.

Hild's burden in the court below was to show that he was "realistically threatened" by a repetition of the alleged injury. *City of Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983). He contended below that the citation rule "cost him his money judgment" (AA 000200); his claim in essence was that he would have prevailed in state court if the Court of Appeal decision against him had been citable, on the theory that the Supreme Court would have granted review and reversed it. As the district court found, "This is the type of injury that courts have held to be too speculative to serve as the basis for Article III standing." (AA

000220.) In *Loritz v. U.S. Court of Appeals for the Ninth Circuit,* 382 F.3d 990, 992 (9th Cir. 2004), this Court held that the claim that the outcome of a case would have been different if plaintiff had been able to cite to an unpublished case was too speculative to establish standing.

Although the Appellant Hild's petition for state Supreme Court review was pending when he initially filed his federal lawsuit, by the time the district court heard the motion to dismiss, Appellant Hild had amended his complaint to delete the state Court of Appeal as a defendant. (AA 000001-000014). More importantly, the California Supreme Court had denied review of his state court matter. (AA 000009.) Appellant contended that his chances of state Supreme Court review had been curtailed, and he speculated that the California Supreme Court would have been more likely to review the decision against him had it been published. However, he does not allege that throwing out the State's publication rule would have revived his judgment. That loss of the judgment, of course, was his only particularized loss. Put another way, Hild did not, and could not, allege that the California Supreme Court would have reversed the Court of Appeal decision if it had granted review. Appellant's failure to plead that the relief he sought would afford him a particularized and personal remedy of an injury is necessarily fatal to his claim. See *Loritz, supra,* at 992. A plaintiff filing an

action in federal court has the burden of alleging specific facts sufficient to satisfy the standing elements. *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002).

Appellant's effort at AOB34 et seq. to distinguish his situation from *District of Columbia Court of Appeals v. Feldman, supra,* 460 U.S. 462 is unavailing because, unlike the *Feldman* plaintiffs who might reasonably have been expected to petition the D.C. Bar for permission to practice law in the future, Hild had no reasonable prospect of being further affected by Cal.R.Court 8.1115(a). As Appellant asserts here(AOB 16) and below, Article III standing is to be judged at the time the complaint is filed. However, Hild's tort case became final in state court with the denial of Supreme Court review. He did not – and could not – allege a likelihood of being subjected to or directly affected by the California publication rules in the future. Further, as the district court noted, "At oral argument, Plaintiff asserted he would not seek leave to amend to allege he is 'realistically threatened by a repetition of the violation.'" (AA 000224.) Once redressibility ends, the case is moot unless a plaintiff demonstrates that he is "realistically threatened by a repetition of the violation." *Gest v. Bradbury, supra*, 443 F.3d 1177, 1181, *citing Armstrong v. Davis,* 275 F.3d 849,860-61 (9th Cir.2001). There is no Article III standing where, as here, the alleged injury has

already occurred, cannot be repaired, and is not likely to be repeated.

In *Schmier v. Ninth Circuit Court of Appeals, supra,* 279 F.3d 817, this Court addressed the constitutionality of the California Supreme Court's publication rules, Cal.R.Court 8.1000 et seq. The plaintiff in *Schmier* was an attorney who sued the Ninth Circuit for a declaration that Circuit Rule 36-3 was unconstitutional. The rule then provided that neither parties nor courts in the Ninth Circuit may cite an unpublished disposition as precedent. This Court held that the plaintiff in *Schmier* had failed to allege a legally cognizable injury where he did not allege that he personally had suffered sanctions or harm from an inability to rely on an unpublished opinion. This Court further noted that the U.S. Supreme Court has repeatedly admonished against taking jurisdiction over cases involving something less than a "personal," "particularized" and "concrete" injury. *Schmier v. Ninth Circuit Court of Appeals, supra,* 279 F.3d at 822.

Neither Appellant Hild's papers below nor his papers in this Court explain how, absent some application to his own judgment, he is any differently situated than a member of the public who, like the plaintiff in *Schmier,* thinks the publication rules adopted by the California Supreme Court could be improved.

Having amended his complaint below to avoid overtly asking the district court to review his loss in the state appellate court, Appellant avoids application

of the *Rooker-Feldman* doctrine only at the cost of his Article III standing.

II.

THE DISTRICT COURT, ACCEPTING THE PLEADED FACTS AS TRUE FOR PURPOSES OF THE MOTION TO DISMISS, CORRECTLY DETERMINED THAT THE CALIFORNIA PUBLICATION RULES DO NOT CREATE PROHIBITED "SELECTIVE PROSPECTIVITY."

Appellant contended below that the state publication rules are unconstitutional in that they make unpublished cases "selectively prospective" by applying "unassailable, unreviewable, result-orientated decisions and outcomes in isolated cases dramatically departing from well-settled principles of stare decisis, *including Plaintiff's case herein below. . .*" (AA 000009-10; emphasis supplied). Appellant alleges violation of the rule in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991). AOB 1, 10.

Appellant Hild asserts that Cal.R.Court 8.1115(a), which prohibits citation of unpublished cases means that unpublished opinions (such as the one adverse to him) will not create a conflict with published decisions, thereby depriving litigants of the main ground for Supreme Court review - the need to "secure uniformity of decision" - and curtailing those litigants' right to review. (AA 000018-21.) His sole cause of action against the California Supreme Court was for a declaratory judgment that the non-citation rule is unconstitutional.

Appellant Hild asserted several theories: that C.R.C. 8.1115(a) makes unpublished decisions "selectively prospective," that the rule denies litigants the ability to qualify for Supreme Court review, and that the Court of Appeal deliberately used the rule to avoid review in his case.

Appellant Hild's contention that the California publication rules, Cal.R.Court 8.1100 et seq.,[6/] are unconstitutional is in error. Every appellate court, state or federal, that has considered their validity has concluded that California's system for managing the creation and citation of precedent is valid.

A. The Selective Prospectivity Doctrine Does Not Invalidate the State's Publication Rules.

Appellant relies heavily on *James B Beam Distilling Co. v. Georgia, supra,* 501 U.S. 529 (1991), which is inapposite. The *Beam* decision held that a court cannot "apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement," as doing so would violate the "equality principle" that "similarly situated litigants should be treated the same." *Id.* at 540.

Appellant Hild asserts that the publication rules applied a "single-case,

---

6. Formerly Rule 977 et seq., California Rules of Court, have been renumbered as Rule 8.1105 et seq. A January 1, 2007 amendment, adopted June 30, 2006 as part of the reorganization of the California Rules of Court, renumbered the rules and made nonsubstantive changes.

result-oriented Opinion" to his judgment (AA 000008) and facilitated "the rendering of unassailable, unreviewable, result-orientated decisions and outcomes in isolated cases dramatically departing from well-settled principles" (AA00009). However, the California non-citation rule functions in the context of the standards for publication contained in Cal.R.Court 8.1105, which ensure that *new* rules *are* published, *do become* precedent, and are applied according to the principles of *stare decisis*. As the district court found,

> It depends on the standards for publication contained in Rule 8.1105. Those criteria, in turn, ensure that *new* rules *are* published and become precedent, to be applied according to the principles of *stare decisis*. Under California's system for publication and citation of cases, unpublished and uncitable opinions should not announce new rules at all. They therefore do not lead courts to apply a new rule to only the case in which it is pronounced. To the extent that unpublished cases do so, it is because the Court of Appeal misapplied the publication criteria - an argument to be raised on direct appeal, and not in a challenge to the citation rule. They therefore do not lead courts to apply a new rule to only the case in which it is pronounced. To the extent that unpublished cases do so, it is because the Court of Appeal misapplied the publication criteria - an argument to be raised on direct appeal, and not in a challenge to the citation rule.

(AA 000219.)

B. California State Appellate Courts Have Found the State's Publication Rules Constitutional.

In *Schmier v. Supreme Court,* 78 Cal.App.4th 703 (2000), a state court case brought by the same plaintiff who had sued the Ninth Circuit concerning the publication rules, the California Court of Appeal approved the denial of an injunction against operation of the California publication rules, then numbered Rules 976-979. In *Schmier v. Supreme Court*, the state appellate court considered the application of the selective prospectivity rule to the state's publication rules:

> As *Beam* also observed, opinions that overrule precedent are rare. "In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. [Citation.] Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules." [Citation.]
>
> The rules protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. . . . . They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 976(b).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 978.) *In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in Beam that most opinions do not change the law.*

Schmier v. Supreme Court, supra, 78 Cal.App.4th 703, 710-711 (emphasis added).

C. Federal Appellate Courts Have Found the State's Publication Rules Constitutional.

Similarly, the federal courts that have considered the question of selective publication have approved publication rules. Indeed, until recently this Court and other circuit courts had publication rules similar to California's. See Rule 36-1 et seq., Circuit Rules. This Court upheld the Circuit's publication rule in *Schmier v. Ninth Circuit Court of Appeal, supra,* 279 F.3d 817, decided chiefly on standing grounds. In *Hart v. Massanari,* 266 F.3d 1155 (9th Cir. 2001), this Court affirmed the constitutionality of the California publication rules, noting, "Some state court systems apply the binding authority principle differently than do the federal courts. In California, for example, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district." *Hart, supra,* 266 F.3d 1155, 1174, n.30.

III.

THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT IT LACKED JURISDICTION AS TO APPELLANT'S CLAIM THAT THE CALIFORNIA COURT OF APPEAL COMMITTED ERROR – DELIBERATELY OR NOT – IN ISSUING AN UNPUBLISHED DECISION AND THEREBY AVOIDING STATE SUPREME COURT REVIEW.

The court below correctly decided that under the *Rooker-Feldman* doctrine, it lacked subject matter jurisdiction over Hild's claim that the California Court of Appeal had – intentionally or not – misapplied the criteria for certifying an opinion for publication under Cal.R.Court 8.1105(c) and lacked jurisdiction to review the state court proceedings. (AA 000226.)

The decision whether or not to publish a case is a state court judicial decision. California's publication rules provide that the decision whether or not to certify opinions for publication is by a majority of the Court of Appeal rendering the decision (Cal.R.Court 8.1105(a)), and that the publication decision may be reviewed by the California Supreme Court at the request of "any person" (Cal.R.Court 8.1120, 8.1125). Appellant's assertion at AOB 25 that there is "absolutely no remedy nor any avenue of 'appeal' at all from a California Court of Appeal's wrongful refusal to publish a decision" is entirely incorrect.

There is no principled reason why the district courts would have

jurisdiction to review state court decisions as to which of their opinion to publish while lacking jurisdiction to review other state court decisions. See *Allah v. Superior Court of the State of California, supra,* 871 F.2d 887, 890-91; *Rooker v. Fidelity Trust Co., supra,* 263 U.S. 413,415; *D.C. Court of Appeals v. Feldman, supra,* 460 U.S. 462,486-87. Here, Appellant Hild asked the district court to, in effect, overturn the state appellate court's decision not to publish its opinion on the respondeat superior liability of the utility company. Entertaining such a request would violate the basic precept that the district courts are courts of limited original jurisdiction. They are not appellate tribunals empowered to review errors allegedly committed by state courts. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 296 (1970).

A district court has no jurisdiction over issues that are "inextricably intertwined" with allegations underlying a state court judgment. *Feldman, supra,* 460 U.S. at 486-87. An issue is "inextricably intertwined" with a state court's decision "where the district court must hold that the state court was wrong in order to find in favor of the plaintiff." *Doe & Assoc. Law Offices v. Napolitano,* 252 F.3d 1026,1030 (9th Cir. 2001). Here, if the district court had involved itself in this state court matter and ordered the California Court of Appeal to publish its opinion in the underlying tort case, it would be substituting its view for that of the state

appellate court as to whether or not the publication criteria are met, a matter inextricably intertwined with the state court's decision, the necessary result being to declare that the state appellate court was wrong in its decision that its opinion was not ground-breaking or otherwise publishable. The district court was therefore correct in dismissing for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. On the other hand, to the extent that Hild asserted that he merely was seeking a declaration that Cal.R.Court 8.1115(a) is void as violative of "California residents'/litigants' (including Plaintiff's) due process and equal protection rights," (AA 0000014) then he lacks standing to assert the claim because his tort case has been finally adjudicated and is moot. Hild has not alleged a likelihood he will be subjected to or affected by Cal.R.Court 8.1115(a) in the future, and his counsel represented to the district court that "he would not seek leave to allege that he is 'realistically threatened by a repetition of the violation.'" (AA 000224.)

If a determination of the legal issues tendered by the parties could not serve to prevent the alleged injury, there is no longer a case or controversy. *DeFunis v. Odegaard,* 416 U.S. 312, 317 (1974). If a plaintiff is "no longer able to satisfy the redressibility requirement of Article III standing," then his claims are moot. *Scott v. Pasadena Unified School District,* 306 F.3d 646,656-657 (9th

Cir.2003). Redressibility having ended, Hild's case became moot and he lacked Article III standing. See *Gest v. Bradbury, supra, 443* F.3d 1177, 1181.

IV.

UNDER THE *ROOKER-FELDMAN* DOCTRINE, THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE STATE APPELLATE COURT'S DECISION TO REVERSE THE JUDGMENT AS WELL AS ITS DECISION THAT THE OPINION DID NOT MEET THE STATE CRITERIA FOR PUBLICATION.

Appellant Hild contends on appeal that, although he did not plead below that the California Court of Appeal's act was a "purposeful" misapplication of the publication rules, that is "otherwise patently obvious." AOB 34. The district court succinctly and correctly held,

> Here, Plaintiff argues that the Court of Appeal was aware that its decision in *Hild v. Southern California Edison* met seven of eight criteria for publication, FAC | 17, but that the court nevertheless made its decision unpublished to insulate its result-oriented opinion from Supreme Court review.[Citation.] This is an argument that the Court of Appeal acted improperly in Plaintiff's state court case, not a general challenge to a judicial rule or policy. It is barred by *Rooker-Feldman.*

(AA 000227.) And so it is.

Appellant Hild was dissatisfied with the results of the state appellate process which reversed a large judgment in his favor. Averring that he seeks only a declaration that Cal.R.Court 8.1115(a) is unconstitutional (AA 000014, AOB 1),

his position now seems to be that he has been deprived of *his* constitutional rights because unknown *other* litigants, in the future, will not be able to cite the unpublished decision that was adverse to him.

However, reading the operative complaint's allegations of fact rather than its legal conclusions, plaintiff below is asserting that he was injured because the state Supreme Court (wrongly) didn't accept his case for review because the state Court of Appeal (wrongly) decided not to publish its opinion. Although plaintiff below broadly asserted that the state Supreme Court's non-citation rule "axiomatically deprives litigants in civil cases resulting in unpublished Opinions of their right to judicial review under C.R.C. Rule 8.500(b)," his position is more explicit in his subsequent assertion on the same page that "such litigants cannot meet the review criteria under Rule 8.500(b)." (AA 000011.) However, Cal.R.Court 8.500(b) is permissive, not mandatory; the rule provides that the state Supreme Court *may* order review "[w]hen necessary to secure uniformity of decision or to settle an important question of law."

There is no right to a second level of appellate review in California. California law provides for only one appeal as a matter of right, and there is no federal right to appeal state court cases. In the instant case, the Appellant's case had the one level of appeal that is mandated by California statute, although Appellant

did not like the result. There is no constitutional right to a have a second level of appeal to the state Supreme Court, any more than there is a right to have every case heard in the U.S. Supreme Court. In *Porter v. United Services Automobile Ass'n,* 90 Cal.App.4th 837 (2001), the state Court of Appeal observed:

> Subject to certain narrow constitutional limitations, there is no right to appeal. *(Leone v. Medical Board* (2000) 22 Cal.4th 660,665-670, 94 Cal.Rptr.2d 61, 995 P.2d *191; Lindsey v. Normet* (1972) 405 U.S. 56,77,92 S.Ct. 862,31 L.Ed.2d36.) Rather, absent constitutional restrictions, the right to appeal is wholly statutory."

The district court had no jurisdiction to rectify the injury Appellant Hild asserts, because to do so it would have had to either find that the state courts were wrong in deciding Hild's state court case or rule on the constitutionality of the publication rules that he lacked standing to attack in the absence of some realistic threat of future injury to him.

Although Hild disavows asking the federal courts to violate the *Rooker-Feldman* doctrine, six (6) of the 14 pages of his complaint below were devoted to re-alleging the purported errors in the state court decisions (see (AA 000003-8); Appellant's brief in this Court also dwells at length on the alleged misapplication of the state publication standards to the facts of his state tort case (see AOB 2-10).

Federal courts are not appropriate forums for the redetermination of state appellate decisions, including the decision of the state's intermediate appellate

court as to whether its opinions expand the state's decisional law or otherwise meet the criteria for publication. The proper avenue of appeal of such decisions is to the California Supreme Court (Cal.R.Court 8.1120(c), 8.1125(c)) and thereafter to the United States Supreme Court. *Louis v. Supreme Ct. of Nevada* 490 F.Supp. 1174 (D.Nev. 1980); *Rooker v. Fidelity Trust Co., supra,* 263 U.S. 413. Under 28 U.S.C. § 1257, jurisdiction to review state court judgments is with the United States Supreme Court only, not with any other federal court. See *Barry v. Blower,* 864 F.2d 294, 300 (3rd Cir. 1988) [principles of federalism preclude a federal court's direct interference with a state court's conduct of state court litigation]. The federal courts lack jurisdiction to review state court judgments. *Allah v. Superior Court of the State of California, supra,* 871 F.2d 887, 890-91 (9th Cir. 1989). The U.S. Supreme Court recently affirmed that the *Rooker-Feldman* doctrine applies where the federal plaintiff seeks to "overturn an injurious state-court judgment." *Exxon Mobil Corp. v. Saudi Basic Industires Corp.,* 544 U.S. 280, 292 (2005).

Federal district courts are not appellate tribunals empowered to review state court actions for alleged errors. *Atlantic CoastLine Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 296 (1970). A federal court has no jurisdiction over issues that are "inextricably intertwined" with allegations underlying the judgment of a state court. *District of Columbia Court of Appeals v.*

Feldman, supra, 460 U.S. 462, 486-87. If plaintiff has any standing at all on the basis of his factual allegations in the district court, his claims are "inextricably intertwined" because the district court would be required to "scrutinize not only the challenged rule itself, but the [state court's] application of the rule..." *Rabatos v. Colorado Supreme Court, 746* F.2d 1429,1433 (10th Cir.), cert. den, 471 U.S. 1016 (1984). As the Supreme Court held in *Feldman, supra,460U.S.* at486-87, the district courts exercise only original jurisdiction and the U.S. Supreme Court has exclusive jurisdiction to review state decisions. *Id.* at 486. See also 28 U.S.C. §1257.

CONCLUSION

For the reasons set out above, the well-reasoned decision of the district

court should be affirmed.

Dated: August 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California
PAUL HAMMERNESS
Supervising Deputy Attorney General

TOM BLAKE
Deputy Attorney General

Attorneys for Defendant-Appellee Supreme Court of California

08-15785

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA HILD, etc.,

Plaintiff-Appellant,

v.

CALIFORNIA SUPREME COURT, et al.,

Defendant-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: August 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

TOM BLAKE
Deputy Attorney General

Attorneys for Defendant-Appellee Supreme Court of California

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) For Case Number 08-15785

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because:

☒ this brief contains 38,582 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed R. App P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using WordPerfect, version 8 0 in 14 point Times New Roman, or

☐ this brief has been prepared in a monospaced typeface using WordPerfect, version 8.0 with 10 characters per inch Courier New.

Dated: August 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

TOM BLAKE
Deputy Attorney General

Attorneys for Defendant-Appellee Supreme Court of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **HILD, Joshua v. California Supreme Court, et al.**

No: **08-15785**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business

On September 5, 2008, I served the attached **APPELLEE'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Brian D Chase, Esq. (2 copies)
Bisnar Chase
1301 Dove Street, Suite 120
Newport Beach, CA 92660

The Honorable Thelton E. Henderson
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 5, 2008, at San Francisco, California.

Lorraine Smith
Declarant

Lorraine Smith
Signature

20139871 wpd