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Attorney for Plaintiff KENNETH J. SCHMIER.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

vs.

JUSTICES OF THE CALIFORNIA SUPREME  
COURT; MEMBERS OF THE JUDICIAL  
COUNCIL OF CALIFORNIA; SCOTT  
DREXEL, in his capacity as Chief Trial Counsel  
for the State Bar of California; COMMISSIONER  
KENNETH I. SCHWARTZ, in his capacity as  
Traffic Judge, Dept. C54, Superior Court of  
California, County of Orange; ANTHONY  
RACKAUCKAS, District Attorney for the  
County of Orange; and DOES 1 through 50,  
inclusive,

Defendants.

) CASE NO. CV-09-2740-WHA

)  
)  
) PLAINTIFF'S EX PARTE APPLICATION FOR  
) TEMPORARY RESTRAINING ORDER AND  
) ISSUANCE OF ORDER TO SHOW CAUSE RE  
) PRELIMINARY INJUNCTION.

) FILED CONCURRENTLY WITH [PROPOSED]  
) ORDER; MEMORANDUM OF POINTS AND  
) AUTHORITIES AND DECLARATION OF  
) KENNETH J. SCHMIER

) DATE: \_\_\_\_\_  
) TIME: \_\_\_\_\_  
) CTRM: 9

TO DEFENDANTS JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF  
THE JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial  
Counsel for the State Bar of California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity  
as Traffic Judge, Dept. C54, Superior Court of California, County of Orange; ANTHONY

1 RACKAUCKAS, District Attorney for the County of Orange AND THEIR ATTORNEYS OF  
2 RECORD HERETO:

3 PLEASE TAKE NOTICE that Plaintiff KENNETH J. SCHMIER shall and does apply for an Ex  
4 Parte Temporary Restraining Order and Issuance of an Order to Show Cause Why a Preliminary  
5 Injunction Should Not be Granted in the United States District Courthouse, on a date and at a time to  
6 be set by the Court pursuant to the Local Rules of Court, restraining and enjoining the Defendants  
7 JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE JUDICIAL COUNCIL  
8 OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of  
9 California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54,  
10 Superior Court of California, County of Orange; ANTHONY RACKAUCKAS, District Attorney for  
11 the County of Orange, and any of their council co-members, officers, agents, servants, employees, and  
12 attorneys, and all persons in active concert or participation with them, who receive actual notice of this  
13 order by personal service or otherwise, pending the hearing on a preliminary injunction, from  
14 promulgating and/or enforcing California Rules of Court ("C.R.C.") Rule 8.1115(a). Said rule  
15 precludes the citation by Plaintiff, and/or by any other member of the State Bar of California and/or by  
16 any party acting in propria persona, or any court or judicial officer of California, to any unpublished  
17 and/or depublished decisional authority of the appellate courts of the State of California in any specific  
18 judicial proceeding, in which Plaintiff and/or other State Bar Members are acting as counsel of record,  
19 or as self represented parties, or by any self-represented parties. Said Rule further precludes reliance  
20 upon any unpublished and/or depublished decisional authority of the appellate courts or judicial  
21 officers of the State of California.

22 Plaintiff seeks this injunctive relief pursuant to Fed.R.Civ.P. Rule 65 and Local Rule 65-1, on the  
23 grounds that Plaintiff will suffer irreparable injury and harm if Defendants are not so restrained and  
24 enjoined from the infringing conduct sought to be enjoined, on the grounds that:

25 1. Plaintiff is a current member of the State Bar of California, and is currently counsel of record for  
26 a client who is a defendant in a pending criminal traffic case in Superior Court of California, County of  
27 Orange. The Superior Court has set July 22, 2009 for arraignment and court trial of that case.

28 2. Plaintiff is precluded by C.R.C. Rule 8.1115(a) from informing the trial court of the existence of

1 at least three particular decisions of the Appellate Division of the Orange County Superior Court, including  
2 one unpublished decision, one decision previously published by the appellate division of the Orange  
3 County Superior Court, and depublished (without any independent review, notice or explanation) on  
4 February 25, 2009 by the California Supreme Court, and another unpublished decision recommended by  
5 the Appellate Department of the Orange County Superior Court to be published to the California Supreme  
6 Court.

7 3. Citation of these three decisions by Plaintiff would compel and effectuate a complete dismissal of  
8 all criminal charges against Plaintiff's client in said underlying criminal traffic case.

9 4. Plaintiff has attempted to cite unpublished opinions to the courts of California in the past and has  
10 been denied the opportunity to do so.

11 5. Plaintiff has been instructed by the Appellate Court of California that citation to unpublished  
12 decisions of the appellate courts of California is not allowed.

13 6. Plaintiff has been instructed by the Appellate Court of California that citation of unpublished but  
14 relevant authority is not within the ambit of protection created by the 1<sup>st</sup> and 14<sup>th</sup> Amendments of the  
15 United States Constitution.

16 7. Plaintiff will be subjected to monetary sanctions and fines imposed by the criminal trial court  
17 under C.R.C. Rule 2.30, as well as professional discipline inclusive of reproof, suspension and/or  
18 disbarment imposed by the State Bar of California, if he does in fact mention or reference the pivotal  
19 depublished decisions at issue in order to secure a dismissal of criminal charges against Plaintiff's  
20 client.

21 8. Plaintiff will suffer irreparable harm as a result of the content-based prior restraint and  
22 infringement, abridgement and curtailment of his right to freedom of speech guaranteed by the 1<sup>st</sup> and  
23 14<sup>th</sup> Amendments of the United States Constitution effectuated by C.R.C. Rule 8.1115(a).

24 9. Given the pendency of the July 22, 2009 trial date in the criminal trial of his client in the  
25 Orange County Superior Court below, Plaintiff has no plan, or adequate or speedy remedy.

26 10. This application for a temporary restraining order will have been served upon the Defendants  
27 concurrently with the summons and complaint in this matter at least 2 days prior to the filing of this  
28 application with this court.

1 11. Plaintiff submits that good cause exists to file this Application on an expedited basis because  
2 irreparable injury will result to Plaintiff if the requested relief is not granted immediately, as set forth  
3 above and hereinbelow.

4 This ex parte application is based on Plaintiff's Complaint filed in this action, upon the  
5 accompanying memorandum of points and authorities, and upon the supporting Declaration of Plaintiff,  
6 Kenneth J. Schmier.

7 DATED: June 19, 2009

THE AFTERGOOD LAW FIRM

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9  
10 By: 

AARON D. AFTERGOOD,  
Attorneys for Plaintiff.