09-17195

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH J. SCHMIER,

Plaintiff,

v.

JUSTICES OF THE CALIFORNIA SUPREME COURT, ET AL.,

Defendants.

On Appeal from the United States District Court
for the Northern District of California

No. C-09-2740-WHA
The Honorable William Alsup, Judge

ANSWERING BRIEF

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INTRODUCTION

Appellees, the defendants below, are the California Supreme Court, the Judicial Council of California, and a Commissioner of the Superior Court of California, County of Orange. Appellant Kenneth Schmier appeals from the district court's refusal to enjoin these judicial defendants from following Rule 8.1115(a), California Rules of Court, which allows California's appellate courts to control the development of the decisional law of the state.[1]

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

Defendants-Appellees agree that the District Court had jurisdiction to adjudicate Appellant's claims under 28 U.S.C. § 1331, and further agree that venue in the Northern District of California was proper.

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[1] Except as otherwise noted, further references to Rules are to the California Rules of Court.

In 2006, the California citation rules, formerly Rule 976 et seq., were renumbered as Rules 8.1105 et seq. Title 8, Division 5, California Rules of Court. SER001-004. In summary, Rule 8.1115(a), the rule here at issue, provides that an opinion that is not approved for publication may not be cited or relied upon by a court or party in any other action.

B. Jurisdiction of the Court of Appeals.

Defendants-Appellees agree that this Court has jurisdiction to review the district court's final order dismissing the action and the judgment pursuant to 28 U.S.C. § 1291.

C. Filing Dates.

The court below entered judgment on September 1, 2009. ER 000001. Appellants filed their Notice of Appeal on September 30, 2009. ER 000012. As the 30 day period did not run until October 1, 2009, the appeal is 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. Rule 28(a)(4)(D) Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Was the district court correct in denying injunctive relief to bar the enforcement of the Rule 8.1115(a) as to Appellant Schmier in the trial of a state court traffic infraction where Appellant Schmier wanted to cite unpublished authority in violation of that rule?

2. Was the district court correct in determining that Appellant Schmier's suit below was barred by *res judicata*?

3. Was the district court correct in finding that Rule 8.1115 is not an unconstitutional deprivation of Appellant Schmier's First Amendment rights where he is appearing as an attorney in state court on behalf of a client?

STATEMENT OF FACTS

Appellant Kenneth Schmier is an attorney who asked the district court to enjoin the California Supreme Court, the California Judicial Council, and an Orange County bench officer from enforcing Rule 8.1115(a).[2] This was Appellant Schmier's *fourth* attempt to invalidate the California rules concerning the creation and regulation of the state's decisional law.

Most recently, Appellant Schmier alleged below that he has a right to cite cases that California appellate courts have expressly decided are *not* to be precedent in an Orange County traffic trial. The Orange County trial was for running a red light, an infraction that does not carry the possibility of incarceration. Cal. Vehicle Code §21453(a); Complaint, at ER000090.

Notwithstanding the district court's *denial* of relief from the rule, Appellant Schmier nonetheless *did cite* the unpublished opinion in traffic court. The prosecution was not represented by counsel. AOB 18 (DktEntry

[2] Plaintiff captioned his action as against "Justice(s) of the Supreme Court and Members of the Judicial Counsel (sic)," but did not actually name or serve any individuals other than Commissioner Zimmerman.

7, page 25 of 71). There is no indication in the record, or known to this writer, that Appellant Schmier was disciplined or is threatened with discipline for violating the rule.

The core of the Appellant's contention (in the court below, in this Court, and in his three prior actions) is that the California courts may not proscribe the citation of opinions. The district court held that Appellant Schmier, who has litigated against the California Supreme Court and the Judicial Council about the validity of the California publication rules since 1998, was barred by *res judicata*. Appellant's prior litigation on the subject of publication rules includes the following:

A. "Schmier I:" *Schmier v. Supreme Court,* 78 Cal.App.4th 703 (Cal.App. 1 Dist. Feb 28, 2000) (NO. A085177), rehearing denied (Mar 22, 2000), review denied (May 24, 2000); certiorari denied, 531 U.S. 958 (2000).

In 1998, Appellant Schmier brought his first challenge to the state citation rules. He appeared in Superior Court in San Francisco as attorney for his brother, Michael Schmier, who was then a candidate in the Democratic primary for California Attorney General. Mr. Schmier sought to enjoin all California courts from observing the citation rules. The Supreme Court denied his petition. The State Court of Appeal affirmed, denied Schmier's motion for costs and fees, and ordered the decision published.

The California Supreme Court and the United States Supreme Court denied review. The case was reported as *Schmier v. Supreme Court,* 78 Cal.App.4th 703 (2000), *rehearing denied* March 22, 2000, *review denied* May 24, 2000; *cert. denied*, 531 U.S. 958 (2000) (hereafter, "*Schmier I*").

Schmier I made it clear that the publication rules that Appellant Schmier challenges are valid and that no change in them was required:

> The rules were established by persons in possession of a public office with authority to do so, and *they comport with applicable statutory and constitutional requirements.* Since an injunction will not lie to restrain respondents from implementing them, appellant has not stated and cannot state a claim entitling him to relief. [citation.]

(*Schmier I, supra,* 78 Cal.App.4th 703, 712; emphasis added.)

B. "Schmier II:" *Schmier v. Supreme Court,* 96 Cal.App.4th 873 (2002).

In 2001, Appellant Schmier brought a second state-court challenge to the rules under the guise of appealing the denial of attorney's fees for *Schmier I*. This second case, also published as precedent, was *Schmier v. Supreme Court*, 96 Cal.App.4th 873 (2002), hereafter, "*Schmier II.*" Appellant Schmier alleged that *Schmier I* had conferred a significant benefit on the public by restricting the discretion of the state courts as to publishing opinions. The Superior Court denied attorney's fees on the grounds that the

rule had not been eliminated or changed. The state Court of Appeal affirmed. *Id*. at 882-83.

C. "Schmier III:" *Kenneth J. Schmier v. Supreme Court of California, et al., cert. den.* 543 U.S. 818 (2004).

In 2002, Appellant Schmier brought a third citation-rule challenge in state court. Having unsuccessfully litigated the validity of the publication rules as counsel for his brother in *Schmier I* and again under the guise of asking for attorney fees in *Schmier II*, he brought a third Superior Court action in his own name. The decision was published only as to the denial of certiorari by the United States Supreme Court, at *Kenneth J. Schmier v. Supreme Court of California, et al*., 543 U.S. 818 (2004). [3]

D. Challenges to the Circuit Citation Rules.

Appellant has also litigated against the federal publication rules. In *Schmier v. United States Court of Appeals for Ninth Circuit,* 279 F.3d 817 (9th Cir. 2002), this Court rejected on standing grounds Appellant Schmier's challenge to the analogous Ninth Circuit citability rule, then Circuit Rule 36-3.

[3] The Schmier III case was not approved for citation as precedent by the state Court of Appeal. It is cited here for *res judicata* purposes. See, Rule 8.1115(b).

SUMMARY OF ARGUMENT

1. The district court was correct to deny injunctive relief against the enforcement of Rule 8.1115(a), thereby not allowing Attorney Schmier to cite unpublished cases in a state court traffic matter, because Appellant Schmier's federal action was barred by the doctrine of *res judicata*.

2. The district court was correct to deny injunctive relief against the enforcement of Rule 8.1115(a) in state court because the California publication rules are not constitutionally infirm and do not deprive the appellant-attorney of First Amendment rights.

STANDARD OF REVIEW

I. DENIAL OF TEMPORARY INJUNCTION IS SUBJECT TO LIMITED REVIEW.

A district court's decision regarding preliminary injunctive relief is subject to limited review. *See Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004) (review is "limited and deferential"); *Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (same); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). The court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See FTC v. Enforma*

Natural Products, 362 F.3d 1204, 1211-12 (9th Cir. 2004); *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 760 (9th Cir. 2004); *see also Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004) (noting that the Supreme Court, "like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction").

However, as to district court rulings that rest solely on a premise of law and where the facts are either established or undisputed, review is *de novo*. *See Harris, supra*, 366 F.3d at 760.

To obtain a preliminary injunction, one must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v.Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

II. DENIAL OF PERMANENT INJUNCTION IS REVIEWED FOR ABUSE OF DISCRETION.

Denial of a request for permanent injunction is also reviewed on the abuse of discretion standard. *See Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir.), *cert. denied*, 539 U.S. 927 (2003).

III. THE APPLICATION OF *RES JUDICATA* IS REVIEWED DE NOVO.

The trial court's determination that *res judicata* applies is reviewed de novo. *See Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003) (noting mixed questions of law and fact), *cert. denied*, 540 U.S. 985 (2003).

IV. THE DECISION BELOW MAY BE AFFIRMED ON ANY GROUND SUPPORTED BY THE RECORD.

In reviewing district court decisions, the court of appeals may affirm on any ground supported by the record. See *Forest Guardians v. U.S. Forest Serv.,* 329 F.3d 1089, 1097 (9th Cir. 2003); *U.S. v. Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT *RES JUDICATA* BARS APPELLANT SCHMIER FROM RE-LITIGATING THE RULES OF COURT THAT REGULATE THE DEVELOPMENT OF CALIFORNIA'S DECISIONAL LAW.

Appellant Schmier fully litigated the citability issue in actions against the same parties in state court. He was properly precluded by *res judicata* from raising the issue again in federal court. Most recently, the California Court of Appeal determined in *Schmier III* that the no-citation rule (then Rule 977, now renumbered Rule 8.1115) does *not* violate the First

Amendment and rejected Appellant Schmier's application for injunctive relief against enforcement of the rule.

Appellant Schmier had twice previously challenged the rules regarding the publication of opinions in state court, with the same result, in *Schmier I* (2000) and *Schmier II* (2002). Contrary to the assertions at AOB 21-22 (DktEntry 7, pages 28-29 of 71), these decisions *did* reach, and roundly reject, Appellant Schmier's claims on the merits; and the district court so found. ER 000006. The 2000 and 2002 decisions rejected broad challenges to California's rules regarding the publication of opinions. As the district court noted, *Schmier III* addressed and rejected the precise claim plaintiff now makes: a First Amendment challenge to California's no-citation rule. Quoting the United States Supreme Court, the *Schmier III* court explained:

> the high court stated that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed" . . . *As we concluded in Schmier I, the "no citation" rule does not encroach on this "extremely circumscribed" right*.

Schmier III (Schmier v. Supreme Court of California, et al., Case No. A101206, *cert. denied* 543 U.S. 818 (2004) (emphasis added; citation omitted)).

Moreover, *res judicata* bars not only the claims that Appellant Schmier actually litigated in *Schmier I, II* and *III*, but also any claims that "could

have been asserted" in the prior actions. *Clark v. Bear Stearns & Co*., 966 F.2d 1318, 1320 (9th Cir.1992)("[R]es judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same causes of action.")

Contrary to the assertion at AOB 22 *et seq.* (DktEntry 7, page 29 of 71), there are no changes of circumstances relevant to the *California* citation rules that would avoid application of *res judicata*:

- The amendment of the *federal* citation rules (Rule 32.1, Federal Rules of Appellate Procedure) changed no rule or practice in the state courts, and
- The California Judicial Council's amendment of Rule 8.1105(c) that changed the presumption to citability did not abrogate the basic precepts of the California system.

Here, Appellant Schmier, having thrice litigated the validity of the California citation rules against the same parties, the *res judicata* doctrine precludes him from re-visiting the issue in the district court.

II. THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT THE CALIFORNIA PUBLICATION RULES ARE NOT INFIRM.

A. The California Scheme for Managing the Creation and Citation of Precedent is Constitutionally Sound.

Every appellate court, state and federal, that has considered the issue has concluded that the California scheme for managing the creation and citation of precedent is constitutionally sound. California's method of regulating and shaping the decisional law of the state provides that new rules are published, become precedent, and are applied according to the principles of *stare decisis* under the direction of the state's appellate courts. Under the California rules, unpublished and uncitable opinions should not announce new rules. To the extent that unpublished cases do announce new rules, it is because a state appellate court has misapplied the publication criteria in Rule 8.1105. In *Schmier I,* the California Court of Appeal approved denial of an injunction against the publication rules and reviewed the operation of the publication rules:

> 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. . . . . *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, (Schmier I, supra) 78 Cal.App.4th 703, 710-711 (emphasis added).

B. Courts May Regulate and Restrict the Speech of Officers of the Court.

In rejecting Appellant Schmier's First Amendment claims on the merits, the district court correctly noted that he cited no authority for the proposition that the California citation rules are unconstitutional. ER000021. Appellant has not cured that deficiency. AOB, *passim*. On the contrary, the Supreme Court and this Court have held that, as a general matter, the judiciary is afforded latitude in constructing court rules governing speech and conduct. *See, e.g. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (holding that it is "unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed").

First Amendment claims brought by attorneys as officers of the court are closely scrutinized. *Levine v. District Court*, 764 F.2d 590, 595 (9th Cir. 1985). In *Levine,* this Court held:

> The Supreme Court has suggested that it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of nonparticipants. [Citation omitted.] The case for restraints on trial participants is especially strong with respect to attorneys.

Levine, 764 F.2d at 595.

Plaintiff argues that he is just like any other citizen who is subjected to a prior restraint of his First Amendment rights. On that incorrect premise, he asks that the Rule that governs his citation of unpublished or depublished decisions be subjected to "the most exacting scrutiny." AOB 28 (DktEntry 7, page 35 of 71). But Appellant Schmier represents his clients not merely as any other citizen but as a lawyer and an officer of the court, and his speech is to be viewed in that context.

Courts have the authority to regulate and restrict the speech of attorneys practicing before them in order to effectuate their goal and function of achieving justice. First Amendment claims are evaluated differently according to the forum in which they are raised. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797–800 (1985). Courts of law are considered "nonpublic fora" to which a much higher hurdle for establishing a constitutional violation applies. Under this standard, restrictions on free expression in nonpublic fora are constitutional if the distinctions drawn (1) are reasonable in light of the purpose served by the forum and (2) are viewpoint neutral. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966 (9th Cir. 2002). This Court made clear in *Sammartano* that while the reasonability standard was not one of rationality alone, a restriction would not violate the Constitution merely because it was "less reasonable" than its

alternatives. *Id.* at 966–67. Under this standard, the no-citation rule is constitutionally reasonable.

Appellant Schmier alleged in the court below that his client would suffer "irreparable injury" if he were not allowed to cite three unpublished cases. ER0000130-131. This is fallacious in that the determinations of the state Supreme Court and the Appellate Division to exclude these opinions from the decisional law of the state would not have precluded Mr. Schmier from asserting the arguments or the reasoning of those decisions. The rule merely prevents him from attributing to those arguments the weight of decisional law, an approval the state appellate courts have intentionally withheld –presumably for good reason. In other words, a party can use the content of the opinions, but simply cannot attribute to them an authority that the state appellate courts have decided is unwarranted.

Appellant Schmier argued below that his First Amendment claim should be analyzed under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), the standard for *public* fora. ER000105. Appellant Schmier does not mention the *Clark* case in the AOB; he now asserts that *Ashcroft v. ACLU*, 542 U.S. 656 (2004) provides the test to which California's judicial rule must be put. AOB29-30 (DktEntry 7, pages 36-37 of 71). Despite the new citation, the underlying fallacy remains:

courts are not public fora for lawyers' free expression of whatever thoughts they please. Appellant's citation to *Ashcroft v. ACLU, supra,* is not on point because that case turned on an application to protect Internet content providers from prosecution under the Child Online Protection Act. The Supreme Court found that the Internet providers and public interest groups were likely to prevail in asserting that the Act violated the First Amendment by burdening adults' access to protected speech. *Ashcroft v. ACLU* pertained to a forum vastly different from a state court, and the case makes no mention of judicial citation rules.

Citing *Simon & Schuster,Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127–28 (1991), the district court further found that, even under the public forum standard, Appellant Schmier does not show that he would be unlikely to succeed on the merits. ER00008. Appellant Schmier does not demonstrate that the no-citation rule fails the content- neutrality requirement on its face. In *Boos v. Barry*, 485 U.S. 312, 320 (1988), the Supreme Court described "content-neutral speech restrictions as those that are *justified* without reference to the content of the regulated speech." Rule 8.1115(a), which prohibits citation to unpublished decisions, says nothing about the content of such decisions. As in *Boos*, although this Rule pertains to "a

particular category of speech," it appears likely that "its justification had nothing to do with that speech." *Ibid*.

Contrary to the assertion at AOB 30 (DktEntry 7, page 37 of 71), the California citability rules are content-neutral. Appellant Schmier offers no evidence that the California rules were designed to, or do, operate to suppress particular ideas.

> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

A.C.L.U. of Nevada v. City of Las Vegas, 466 F.3d 784, 793 (2006), quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Here, the state rule does not ban the expression of any content, o*nly the attribution of a non-existent appellate imprimatur.* Moreover, the state rule does not limit the content of the speech of attorneys such as Appellant Schmier, who is free to repeat the language as his own; what the state rule prohibits is (falsely) attributing to state decisions the impression that the issuing state appellate court intended the unpublished opinion to have precedential authority. Appellant Schmier should not be heard to assert the free-speech rights of

state appellate judges, nor be heard to impute to their words an authority that they expressly disavowed when issuing the decision.

The federal trial courts are not the appropriate entities to re-weigh the policy decisions of state Supreme Courts and judicial rule-making bodies. Nonetheless, contrary to the Appellant's assertions at AOB 11 (DktEntry 7, page 18 of 71), the court below did consider the policy considerations underlying California's citation rules, astutely observing:

> Many good reasons justify treating even an appellate decision as nonprecedential. The lawyering may have been poor. The record may have been sketchy. No new issue may have been raised. The opinion may be subject to misinterpretation or contain too much dicta or be out of step with precedent. The California Supreme Court, with its bone-crushing caseload, could not possibly hear and decide all such cases and must resort to depublication of lower court decisions from time to time. . . .
>
> Given that at least some appellate outcomes may be eliminated as precedent, it follows that appellate judges must have discretion to select and deselect those that should or should not be binding. True, reasonable minds may differ over which ones should count. But someone must decide — better the judges than the lawyers, who have a manifest bias.

ER 000024. The court below also found that such deviations from absolute uniformity as there may be under the California precedent system are a small price to pay for its overall coherence and deliberate development.

ER000010. Some mistakes or deviations from the ideal are inevitable; every decision-making process has an error rate. As Judge Henderson explained in another citation rule case:

> [u]nder California's system for publication and citation of cases, unpublished and uncitable opinions should not announce new rules at all. . . . 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."

Hild v. California Supreme Court, supra, 2008 WL 544469, at *3 (N.D. Cal. 2008).

As the district court observed with keen insight, "Other citation systems may work elsewhere but California has selected a reasonable one — and nothing in the Constitution bars it from doing so and requiring its lawyers and judges to honor it." ER 000025.

C. The Ninth Circuit Has Long Approved Its Own Citation Rule that is Analogous to the California Rule.

In 2001, while litigating *Schmier I* and *II* in the state courts, Appellant Schmier also initiated a challenge to Circuit Rules 36-3 and 36-4. Those Ninth Circuit rules then provided for this Court to determine whether or not an opinion was to be "published" (citable) in a manner closely analogous to the California rules.

In *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 136 F.Supp.2d 1048 (2001), the district court denied Appellant Schmier's challenge to the Ninth Circuit rules, chiefly on standing grounds. This Court affirmed in *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817 (2001), again chiefly on standing grounds. This Court specifically noted that Schmier's argument that the Ninth Circuit rule violated the "judicial Power" clause of Article III was an invalid assertion. *Id*., at 825.

In an earlier citation case, this Court cited the California depublication rules with approval in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). The *Hart* case concerning the imposition of sanctions on a lawyer for citing an unpublished Ninth Circuit decision. This Court affirmed the constitutionality of the Ninth Circuit's then-parallel Rule 36-3, observing:

> 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. . . . California's management of precedent differs from that of the federal courts in another important respect: The California Supreme Court may "depublish" a court of appeal opinion -- i.e., strip a published decision of its precedential effect. *See* Cal. R. Ct. 976(c)(2); Steven B. Katz, *California's Curious Practice of "Pocket Review*", 3 J.App. Prac. & Process 385 (2001). California's depublication practice shows that it is possible to adopt more aggressive methods of managing precedent than those used by the federal courts.

Hart, supra, 266 F.3d 1155, 1174, fn 30.

In 2006, the Federal Rules of Appellate Procedure were amended to add Rule 32.1, which precludes barring citation to unpublished judicial decisions that were published after January 1, 2007.[4] Importantly, however, the Ninth Circuit maintains its rule that *expressly maintains the prohibition* against citing unpublished Ninth Circuit dispositions issued prior to January 2007. Ninth Circuit Rule 36-3(c). This strongly suggests that the determination regarding whether or not courts may prevent citation to unpublished authority is not grounded in the Constitution.

D. The State's Publication Rules Are Solidly Grounded In California's Constitution and Statutes.

The state's system for controlling the creation of precedent, now Rule 8.1100 et seq., has long been held a constitutional exercise of the California Supreme Court's supervision of the appellate process. Rule 8.1115 and the related rules found in Title 8, Division 5, Cal Rules Court (SER001-4) are

[4] Specifically, FRAP 32.1(a) states: "**Citation Permitted**. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and

(ii) issued on or after January 1, 2007.'"

solidly grounded in California Constitution, article VI, section 14, as well as statutory law. Article VI, section 14, California Constitution, provides that,

> The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal *as the Supreme Court deems appropriate, and those opinions* shall be available for publication by any person.

Cal. Constitution, Art. VI, sec. 14 (Emphasis added).

In addition to the authority of the State Constitution, the publication rules have statutory sanction. In 1967, the California Legislature codified the Supreme Court's authority to provide for the publication of decisions and, impliedly, to select which decisions are to be allowed to stand as decisional law in California Government Code §68902. That statute provides, in its entirety:

> Such opinions of the Supreme Court, of the courts of appeal, and of the appellate departments of the superior courts *as the Supreme Court may deem expedient shall be published in the official reports*. The reports shall be published under the general supervision of the Supreme Court.

Cal. Gov. Code §68902 (Stats.1967, c. 172, p. 1270, §2); emphasis added. SER005-6.

III. APPELLANT SCHMIER'S REQUEST FOR A FEDERAL INJUNCTION WAS IN EFFECT AN IMPROPER APPEAL OF PRIOR STATE COURT DECISIONS AS TO THE PRECEDENTIAL VALUE OF THE NON-CITEABLE CASES.

Appellant Schmier's request for injunctive relief in federal court was in reality an improper attempt to void decisions by the respective California appellate courts that the opinions Schmier wanted to cite were not to be controlling precedent. Appellant Schmier's petition, although most immediately about a traffic ticket in Orange County, was in effect a collateral attack on the state court decisions not to approve those three decisions as part of the decisional law of California. The necessary effect of allowing Appellant Schmier to cite the cases would have been to re-determine, and reverse, those state court determinations of non-precedential value.

One of the cases that Appellant Schmier wanted the district court to empower him to cite was *People v. Fischetti* , 2009 WL 221042, previously published at 170 Cal.App.4th Supp. 1 (2008). ER000136-139. Mr. Schmier proposed to cite it for the proposition that a city's failure to comply with a Vehicle Code section requiring 30 days notice before initiating red-light camera enforcement at a particular intersection is a defense to a red-light ticket at any later time even where the city has given notice of a city-

wide intent to deploy red-light cameras. AOB 17-18 (DktEntry 7, pages 24-25 of 71). The opinion, by a Superior Court Appellate Department, turned on an interpretation of dictionary definitions and legislative history. ER 000068-69. The state Supreme Court declined to let the *Fischetti* opinion become the law of the state and ordered it de-published without expending further judicial resources on traffic-light tickets issued by camera. *People v. Fischetti* , 89 Cal.Rptr.3d 186 (Cal.App.Super. Dec 18, 2008) (No. 30-2008-00080937), *ordered not to be officially published*, Calif. Supreme Ct., Feb, 25, 2009. (at ER000068-69).

While some may assert that the California judiciary should devote further effort to developing the law of this aspect of traffic light enforcement, it is not the role of the district courts to so direct the state courts. In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486-87 (1983), the U.S. Supreme Court held that district courts may exercise only original jurisdiction. The U.S. Supreme Court has exclusive jurisdiction to review state decisions. *Id*. at 486; *see also* 28 U.S.C. § 1257. Federal district courts, as courts of original jurisdiction, may not review the final determinations of a state court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (district courts may not exercise appellate jurisdiction over

state courts); *Doe & Assoc. v. Napolitano*, 252 F.3d 1026, 1029-30 (9th Cir. 2001); *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933, 936 (9th Cir. 1998). Determinations not to give precedential weight to certain decisions should be no more subject to collateral federal challenge than the decision as to which party is to prevail in the underlying state court matter. See, 28 U.S.C. §1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari . . . .").

CONCLUSION

It is clear that the claims below consist entirely of an impermissible effort to invoke a non-existent power of the lower federal courts to reverse decisions as to the precedential value of state-court decisions and to re-litigate the validity of the California publication rules. The well-reasoned decision of the district court should be affirmed.

Dated: March 11, 2010

Respectfully submitted,

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C-09-2740-WHA

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH J. SCHMIER,

Plaintiff-Appellant,

v.

JUSTICES OF THE CALIFORNIA SUPREME COURT, ET AL.,

Defendants-Appellees.

STATEMENT OF RELATED CASES

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

Dated: March 11, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

/S/ TOM BLAKE

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR C-09-2740-WHA

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5,016 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

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[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

March 11, 2010
Dated

/s/ Tom Blake
Tom Blake
Deputy Attorney General