Case No. 09-17195

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

KENNETH J. SCHMIER,
Plaintiff and Appellant,

vs.

JUSTICES OF THE CALIFORNIA SUPREME COURT, et al.,
Defendants and Respondents.

APPELLANT'S OPENING BRIEF

On Appeal from a Judgment following denial of
Plaintiff's application for a preliminary injunction
by the United States District Court
for the Northern District of California
Case No. C 09-02740 WHA
The Honorable William Alsup, District Judge

Aaron D. Aftergood (SBN 239853)
The Aftergood Law Firm
1875 Century Park East, Suite 2230
Los Angeles, California 90067
310.551.5221
aaron@aftergoodesq.com

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TO THE HONORABLE CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Plaintiff and Appellant KENNETH J. SCHMIER, hereby submits, pursuant to F.R.A.P. Rule 28(a), the following Appellant's Brief in support of his appeal from the August 31, 2009 Order of Dismissal and Judgment of the Honorable U.S. District Court for the Northern District of California, the Honorable William Alsup, presiding, dismissing his action against Defendants and Respondents, 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; and COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange.

I. INTRODUCTION

Plaintiff/Appellant[1] filed this action to challenge Rule 8.1115(a)[2] of the California Rules of Court, which forbids citation to unpublished decisions (the

[1] Appellant has been among the challengers to no-citation rules for over a decade. He is credited by the National Law Journal as having brought the issue to the United States Congress, where he testified before the House Subcommittee on Courts, the Internet and Intellectual Property together with the Hon. Samuel A. Alito, Jr., Hon. Alex Kozinski, and Prof. Arthur Hellman of the University of Pittsburgh School of Law. This testimony resulted in the committee hearings that initiated the process leading to new Federal Rule of Appellate Procedure 32.1.

[2] California's appellate opinion publication and citation rules are set forth in Title 8, Division 5 of the California Rules of Court, Rules 8.1100 through 8.1125. These rules are attached hereto in their entirety at "Attachment B."

"no-citation rule"). Appellant, a practicing attorney, sought injunctive relief to bar the enforcement of the no-citation rule because he represents defendants in criminal traffic "red light camera" cases in which he wishes to cite numerous, uncontroverted, carefully written, appellate decisions that establish a complete defense, as a matter of law, and required that the charges against his clients be dismissed. No published authority exists on point. Some of these decisions were recommended for publication, or were in fact published by the authoring courts and subsequently ordered "depublished." At least six consistent, uncontroverted consistent appellate rulings exist on point which could exonerate Appellant's clients yet, under the state no-citation rule, no "law" may be argued for the benefit of the accused. The meaning of California Vehicle Code §21455 has been "tested" six times, and yet Californians have no court-usable or mentionable meaning for the statute.[3] The role of the Appellate Department of the Superior Court, the highest appeal of right in traffic infraction cases, to determine application of statutes to vehicle infraction prosecutions has been abdicated or made nugatory by application of the California no-citation rule and creates *de facto*

[3] Respondents should not be heard to complain about time requirements of their work, for how is it that they seem to have the time to decide the same issue over and over?

unconstitutional selective prospectivity of criminal law decisions.[4] California is left with no institution that must commit the law one way or another as to the proper application of its Vehicle Code. The result is that Appellant has no effective access to law for the defense of his clients.

All of this is inconsistent with the rule of law. "The rule of law, sometimes called 'the supremacy of law,' provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application." *Black's Law Dictionary* 1196 (5th ed. 1979). This maxim is intended to be a safeguard against arbitrary governance. The word "arbitrary" (from the Latin "arbiter") signifies a judgment made at the discretion of the arbiter, rather than according to the rule of law. *Wikipedia.com*, URL: http://en.wikipedia.org/wiki/Rule_of_law. Arbitrary, and the words more immediately connected with it, signify that the decision of the arbiter is made in consequence of his own uncontrolled will, or in consequence of reasons which do not appear." Thomas Curtis, *The London Encyclopaedia* 565 (1829).

The rule of law is not served when judges retain arbitrary discretion to convict or not convict on similar facts without even so much as being allowed to hear what courts of superior or equal appellate jurisdiction have ruled in similar circumstances. Nor served is the appearance of fairness.

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[4] Selective prospectivity is unconstitutional. *Griffin v. Illinois*, 51 U.S. 12, 76 S.Ct. 585, 100 L.Ed 891 (1956).

"Equal Justice Under Law," carved upon our Supreme Court, is unlikely to occur when defendants may not even argue for equal treatment.

The process for citizens to file a test case to obtain determination of the law, a process commonly taught to our children in civics classes as essential to the American judicial process, has been rendered discretionary by the no-citation rule. Any California judicial tribunal may avoid making any meaningful determination of any issue brought to it by the simple expedient of marking an appellate opinion with the words "not to be published."

California's publication and citation rules, set out in California Rules of Court 8.1100, *et seq.* establish, and Respondents implement, a completely arbitrary scheme to pick and choose which appellate decisions, and more importantly, which holdings, may be used for the defense of the accused.

The California judiciary is saying to its lawyers and people, in the words of the highly respected jurist, the late Judge Richard Arnold: "[w]e may have decided this question the opposite way yesterday, but that does not bind us today, and what's more, you cannot even tell us what we did yesterday." *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000).

California court processes are required to accord equal treatment and equal rights. Both equal treatment and the significance of test cases depend upon the ability to mention and cite all relevant appellate decisions. Restricting citation

interferes with processes necessary to produce equal treatment and the effectiveness of the test case mechanism, and therefore must violate the Constitutional requirement of due process of law.

Chief Justice of the United States John Roberts has said with regard to the termination of no-citation rules in the federal judicial system, "a lawyer ought to be able to tell a court what it has done." Tony Mauro, *Judicial Conference Supports Citing Unpublished Opinions*, Legal Times, September 21, 2005.

The no-citation rule chills Appellant's ability to use, mention or argue, on behalf of his clients, California law as determined by California's appellate court system. Absent an injunction from the U.S. District Court, Appellant would be compelled to knowingly violate Court Rule 8.1115 to bring these opinions of California appellate courts, which exonerate his clients, to the attention of the judicial tribunals judging his clients.

As an officer of the court with respect and concern for judicial institutions and the rule of law, Appellant obviously prefers that an improper rule be declared invalid than being pressured to violate that rule. Appellant thus seeks injunctive relief to protect his constitutional first amendment free speech rights without having to incur risks of being sanctioned or accused of unethical conduct for violating the California court rule prohibiting citation.

Where Appellant has mentioned these precedents in violation of the no-citation rule, courts have not listened to such authorities, as they are required to pretend they do not exist, thus rendering Appellant's speech meaningless. Determinations of this issue in the California Courts have been rendered nugatory with findings of no standing and an ultimately unciteable opinion. *See e.g.*, *Schmier v. Supreme Court of California*, 1st Dist. Court of Appeal, A101206, filed December 16, 2003.

So called no-citation rules have been subject to widespread, severe and almost universal criticism since their introduction during the mid 1970s,[5] and many jurisdictions have rescinded them. The United States Supreme Court banned any prospective application of no citation rules in any United States Circuit Court as of January 1, 2007. There has been no report of adverse consequences from eliminating no-citation rules from any judicial institution. Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 Wash. & Lee L. Rev. 1491 (2005).

The Federal Appellate Rules Committee, chaired by now United States Supreme Court Justice Samuel Alito (the "Alito Committee"), commissioned the Federal Judiciary Center to conduct exhaustive study of all issues raised, including by opponents to Rule 32.1. *Citations to Unpublished Opinions in the Federal*

[5] Over one hundred examples are listed at http://www.nonpublication.com/ARTICLES.HTML.

Courts of Appeals: Preliminary Report, Federal Judicial Center, April 14, 2005. Over five hundred letters were received, including that of California Chief Justice Ronald George.

The Alito Committee reports were adopted by overwhelming vote, which included its then member John Roberts, now Chief Justice of the United States. The Alito Committee reports were approved by the Standing Committee on Rules, Practices and Procedures of the Judicial Conference of the United States, then chaired by U.S. District Judge David Levi (E.D. Cal.), where the vote to adopt FRAP 32.1 was unanimous. FRAP 32.1 was then approved by the Judicial Conference of the United States, and subsequently adopted by the United States Supreme Court.

The entire Report is attached to this brief as "Attachment A."

The Committee determined:

> Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither proposed Rule 32.1 nor the Committee Note takes any position — they cannot be justified as a matter of policy. Judge

> Samuel A. Alito, Jr., *Report of Advisory Committee on Appellate Rules to Standing Committee on Rules of Practice and Procedure*, page 4, May 16, 2005.
>
> In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants—who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past—to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.
>
> Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Federal Rule of Appellate Procedure 32.1(a) abolishes those rules and requires courts to permit unpublished opinions to be cited. *Id.* at 6-7.

California continues to enforce its no-citation rule, which forbids any mention of appellate opinions not certified for publication.

This appears to be a case of first impression. The proposition that attorneys are allowed to cite exonerating appellate authority in defense of their clients in the regular manner of citing everything from court decisions to newspaper articles appears to be so fundamental that precious little authority appears to exist on the point.

Appellant is not aware of any other case that involves the actual citation of unpublished authority in defense of a criminal defendant or a need to do so.

To deny a criminal defendant the opportunity to argue in court that another court of superior jurisdiction has already determined that charges like those against the defendant must be dismissed is unconscionable. The awesome prosecutorial engine of the state, coupled with the often collegial relationship of judges of criminal courts with prosecutors and police, the unfortunate importance of the appearance of being "tough on crime" to the reelection of judges, and the lack of knowledge, skill and resources of criminal defendants must be counter-balanced.

The ability to cite exonerating authority from appellate courts is critical to prevent a rush toward conviction. Perhaps nothing is more effective in encouraging any judge to "think that he may be mistaken"[6] than being directed to exonerating appellate opinions. To cause fear of further penalties for citing relevant exonerating opinions is perverse and explains Justice Alito's observation that no-citation rules "undermine public confidence in the judicial system by leading some litigants - who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past -to suspect that unpublished opinions are being used for improper purposes." *Report of Advisory Committee on Appellate Rules to the Standing Committee on Rules of Practice and Procedure*,

[6] Judge Learned Hand suggested that "Think that ye may be mistaken" be emblazoned over the door in clear view of the bench of every courtroom. Learned Hand, *Morals in Public Life* (1951).

May 6, 2005. Respect for law will not be taught to persons convicted of crimes if memory of their punishment is coupled with such manifest unfairness.

The Alito Committee expressly raised the constitutional issues of a prior restraint on free speech, equal protection and due process of law.[7] The Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure concurred.

As a prior restraint the California no-citation rule should not have been validated by the District Court until the California Judiciary met its burden with regard to the scrupulous application of established tests always applicable to prior restraints.

Prior restraints are presumptively invalid, and a very high burden is placed upon the government to establish, with specificity, sufficient justification for the prior restraint, and to prove those justifications cannot be met with alternative methods less intrusive upon free expression and other constitutional values. To that burden must be added two important factors: (1) As stated by the Federal Appellate Rules Committee, "the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or

[7] See also Drew R. Quitschau, *Anastasoff v. United States: Uncertainty in the Eighth Circuit -- Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 Ark. L. Rev. 847 (2002); Marla Tusk, *No-Citation Rules As A Prior Restraint On Attorney Speech*, 103 Colum. L. Rev. 1202 (2003).

should not act consistently with its prior actions;" and (2) that California Evidence Code §451 requires all California courts to take judicial notice of all decisional law of the state.[8] The no-citation rule is obviously inconsistent with Cal. Evid. C. §451. California Constitution Article VI, §6 limits the authority of the California Judicial Council to making rules not inconsistent with statute.[9] When all of these considerations are brought to bear, respondents are unlikely to meet the tests required to validate California Rule of Court, rule 8.1115.

The District Court did not inquire of, nor did Respondents offer, any specific objectives justifying a need for a no-citation rule, nor has any opportunity been given Appellant to show that alternatives less intrusive upon constitutional values would operate just as well.

Because the burden is upon government to justify a prior restraint, Respondents should not have been allowed to validate their own rule with their own conclusory statement of their own needs. Nor should the District Court have court offered its own. Such findings cannot be said to be uncontroverted or above

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[8] "Judicial notice shall be taken of the following: (a) The decisional, constitutional, and public statutory law of this state…" California Evidence Code §451.

[9] California Constitution Article VI, §6(d): "To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute."

dispute because they are directly contrary to the findings of the Federal Appellate Rules Committee.

Given the clear finding made by the Federal Appellate Rules Committee that no-citation rules cannot be justified, a finding made upon research commissioned from the Federal Judicial Center, it is highly unlikely that Respondents will be able to justify this prior restraint.

It was therefore improper for the District Court to deny Appellant the requested preliminary injunction, and dismiss his complaint, particularly so prior to requiring the California Judiciary to justify the no-citation rule. Rather, the prayed-for preliminary injunction should be issued forthwith.

A. WHAT THIS CASE IS NOT ABOUT

Appellant does not seek any remedy that would, of its own terms, bind any judge to follow any particular decision or precedent, however that word is defined. In fact, it does not require any court to define precedent in any particular way. It seeks only to allow an attorney to *cite* and *argue* that which judges have done in the past to resolve similar circumstances according to the well-established common law method.

Put another way, the remedy sought in this appeal tracks that established by Federal Rule 32.1:

> Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is

> constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 [and this appeal] is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court whether or not those dispositions have been published in some way or are precedential in some sense. Judge Anthony J. Scirica, *Report of Advisory Committee on Appellate Rules*, May 22, 2003.

Appellant also understands that this Court may be concerned that striking down Rule 8.1115 might thrust upon the California legal system almost three decades of California Appellate decisions made with the expectation of their authors that those decisions would never surface. Among those decisions are vast numbers of decisions wisely and usefully determining many points of law, but, for whatever reasons, it may be that others could be misleading. This should not be an issue here because nothing about this case suggests this court must go beyond making those decisions citable. Nothing herein is intended to make those cases so called "binding precedent," even if in reality such a thing can exist.

However that may be, Appellant recognizes that this court must sensitively create a remedy that, as does rule Federal Rule 32.1, allow the harm of no-citation rules to be eliminated for the future, without causing undue instability in the California legal system.

Since October 1, 2001, all "unpublished" decisions of the California appellate courts have been published online by the California Supreme Court, and have been indexed and republished by Westlaw and Lexis-Nexis. These decisions are "published" in any meaningful sense of that word. The majority of California Appellate Judges already access these decisions in the course of deciding and writing their opinions. *Report of the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Draft Preliminary Report and Recommendations,* October 2005, at 132. [10]

To address any concerns regarding possible problems with decisions existing only in court files, Appellant voluntarily limits his request for injunction to exclude decisions issued by the Appellate Courts of California prior to October 1, 2001, the date all appellate decisions were to have been available on line. Stephen R. Barnett, Scott Bennett, Maria Lin and Janet Tung, *NEW DAY; California Unpublished Decisions to Be Posted Online,* Daily Journal, September 26, 2001.

[10] Available at http://www.courtinfo.ca.gov/invitationstocomment/documents/report-1005.pdf.

II. JURISDICTIONAL STATEMENT

Appellant asserted that jurisdiction of the District Court over the subject matter of this action was predicated on 28 U.S.C. § 1331, in that the Plaintiff's/Appellant's claims below asserted denial of his constitutional rights to freedom of speech and due process arising under the 1st and 14th Amendments of the U.S. Constitution, and the District Court had jurisdiction to adjudicate the general constitutionality of California Rules of Court ("C.R.C.") Rule 8.1115(a), pursuant to the doctrine enunciated in *Dist. Ct. of Appeals v. Feldman* 460 U.S. 462, 482-483, 103 S.Ct. 1303, 1315-1316, 75 L.Ed.2d 206 (1983). Appellant asserted that venue in the Northern District of California was proper pursuant to 28 U.S.C. § 1391(b), in that Defendants/Respondents in that Defendants JUSTICES OF THE CALIFORNIA SUPREME COURT, MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA, and SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California, all had their principal place of business in the City and County of San Francisco.

Jurisdiction of this Court to review the August 31, 2009 order and judgment dismissing Appellant's entire case on the grounds that it was entirely meritless and also barred by *res judicata* is properly predicated upon 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES

1. May California Rules of Court Rule, rule 8.1115 prohibit the citation of exonerating appellate opinions in the courts of California in violation of the First and Fourteenth Amendments of the Constitution of the United States?

2. Is California Rules of Court Rule, rule 8.1115 unconstitutional as in conflict with California Constitution Article VI, § 6(d)?

IV. STATEMENT OF THE CASE

On June 19, 2009, Appellant filed an action in the District Court in Northern California seeking an injunction to restrain Respondents from "promulgating and/or enforcing" California Rule of Court 8.1115. Appellant argued the California no-citation rule contravenes the Free Speech and Due Process clauses of the Federal Constitution, and is inconsistent with Article 6, Section 6 of the California Constitution because it conflicts with the Constitutional law of California.

Noting that the charges against Appellant's client did not carry any possibility of incarceration, the District Court Judge William Alsup denied Appellant's application for a preliminary injunction as barred by *res judicata* and that, in all respects, Appellant's First Amendment claim was entirely meritless in light of *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (stating that

"in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed").

After considering Appellant's response to an Order to Show Cause, the District Court, *sua sponte*, dismissed the case in its entirety.

A. STATEMENT OF FACTS

This matter was heard on July 16, 2009. Appellant had alleged that he would be representing many defendants in cases involving red light cameras. At the time this matter was heard, Appellant was representing Michael N. Jennings in a pending criminal matter before the Orange County Superior Court.

Mr. Jennings had received a traffic citation pursuant to Section 21453(a) of the California Vehicle Code for allegedly running a red light at an intersection monitored by an Automated Traffic Enforcement System. The charge brought against Jennings was based exclusively on a recording made by that system. At that time, Appellant indicated that Jennings would offer reliable evidence that the City of Santa Ana failed to comply with Section 21455.5(b) of the California Vehicle Code, which required warning notices to be issued for a period of 30 days after installation of automated traffic enforcement systems.

Appellant intended to cite to *People v. Fischetti*, 2009 WL 221042, at *1 (2008), an opinion of the Appellate Division of the Orange County Superior Court, stating that a municipality's failure to comply with California Vehicle Code

Section 21455.5(b) is a complete defense. That opinion, which was originally published, was later depublished by the California Supreme Court. Pursuant to Rule 8.1115(a) of the California Rules of Court, Appellant was and is prohibited from citing such unpublished authority. Appellant wished to cite the depublished *Fischetti* opinion and other unpublished decisions[11] on point in Jennings' defense. He claimed that he could be subjected to sanctions under this rule if he were to cite these orders.

This Court is informed that the underlying Jennings case was heard on July 22, 2009 before Orange County Superior Court Judge Robert R. Fitzgerald. Commissioner Kenneth I. Schwartz recused himself for "conflict." The People of California were represented only by Santa Ana Police Officer Alan Berg. Judge Fitzgerald allowed Appellant to cite to the unpublished/depublished cases resulting in his dismissal of the charge against the defendant.[12]

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[11] *People of the State of California v. Debra Lynn Franco*, Appellate Division Superior Court of California, County of Orange, Case No. 30-2008-93057, filed November 21, 2008; *People of the State of California v. Anna Vrska*, Appellate Division Superior Court of California, County of Orange, Case No. 30-2008-00044334, filed Aug 28, 2008; and *People of the State of California vs. Fischetti*, Appellate Division of the Superior Court of California, County of Orange, Case No. AP-14168, filed Jan 31, 2005. Copies of these decisions can be found in Excerpts of Record filed herewith, ER000067—ER000077.

[12] MR. SCHMIER: Under my duty of the candor to the Court I must tell you that these are all unpublished decisions.

Appellant pled that he anticipated defending others similarly situated to Jennings. Appellant is currently engaged in such representation. That case is *People of the State of California v. Linda Yow Chan*, Citation No. ER32639, Superior Court of California, County of Alameda, Department 103, tried November 23, 2009.

Commissioner Geoffrey N. Carter prohibited Appellant from citing the unpublished decisions Appellant offered, and convicted Appellant's client, requiring her to pay a $438 fine. The case is presently on appeal as *People of the State of California v. Linda Yow Chan*, Superior Court of California, County of Alameda, Appellate Division, Case No. 50246012, but the no-citation rule prevents Appellant from citing to the appellate court hearing the appeal, that at least six California appellate courts have now found that the conviction must be overturned.

The same jeopardy chills Appellant's speech on behalf of his current client that has motivated this action from the start. The underlying dispute between the parties is one "capable of repetition, yet evading review." Therefore this case is not mooted. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546-547 (1976).

THE COURT: I know they are not. The Court need not follow them because it's the Court of first jurisdiction, but they can be persuasive, nonetheless. Trial Transcript, Page 7.

Should this Court decide to remand this case to the District Court, Appellant could amend his complaint to reflect new facts concerning his ongoing and unending case and controversy with/against Respondents.

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews de novo the dismissal of a case based upon *res judicata*. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002).

B. THE REQUIREMENTS FOR *RES JUDICATA* WERE NOT MET BY RESPONDENTS.

The only constitutional issue Appellant raised in this case as the basis for injunctive and declaratory relief was the effect of California Rule of Court 8.1115(a) as a prior restraint of speech necessary for an attorney to properly represent a criminal defendant in a criminal proceeding. Respondents failed to prove, and the District Court could not explain, how this specific prior restraint issue was raised in any of Appellant's previously unsuccessful state court challenges to California's no-citation rule.

Relitigation of an issue is foreclosed by collateral estoppel principles when: (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the

issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). As shown below, none of Appellant's prior cases can possibly serve to preclude this action under the above standard.

The California Court of Appeal's published opinion in *Schmier v. Supreme Court of California*, 78 Cal.App.4th 703 (2000), ("*Schmier I*"), does not document the making of any such prior restraint argument therein. *Schmier I* contains a clear determination of no standing, and does not contain discussion, reasoning or conclusions related to the free speech issue dismissed by it required by California Constitution Article VI § 14, requiring all appellate matters to be in writing with reasons stated.

Clearly, the prior restraint issue was not even raised in *Schmier v. Supreme Court of California*, 96 Cal.App.4th 873 (2002), ("*Schmier II*"), which dealt solely with whether an award of attorneys fees was appropriate following *Schmier I* under California Code of Civil Procedure § 1021.5.

Finally, in *Schmier v. Supreme Court of California*, 1st Dist. Court of Appeal, A101206, filed December 16, 2003, ("*Schmier III*"), an "unpublished" decision in which the California Court did not address the specific, criminal defense related, prior restraint issue raised in this action. Moreover, even if *Schmier III* did actually find standing, a position the Court intentionally left vague,

it sought to bury its written reasoning in an unpublished opinion, thereby declining to decide the issue for all, as a test case would warrant. Appellant is the only person in the world for whom the State of California has determined that the United States Supreme Court's decision in *Legal Services v. Velasquez* does not impeach the no-citation rule. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). [13]

It is well-settled law in the Ninth Circuit that the failure, to establish that the very same claim for relief was in fact brought by Appellant in a prior state proceeding precludes the application of principles of *res judicata* to bar a subsequent action. *See, e.g., Diloreto v. Downey Unif. School Dist.* 196 F.3d 958, 964 (9th Cir. 1999).

C. SIGNIFICANT CHANGED CIRCUMSTANCES ALSO MITIGATE AGAINST APPLICATION OF *RES JUDICATA*.

It is settled Ninth Circuit authority that even where *res judicata* principles genuinely apply to a case, a relevant change of circumstances allows reconsideration of a second good faith action. *See, e.g., Kirkbride v. Cont'l. Cas. Co.* 933 F.2d 729, 732 (9th Cir. 1991); *Peabody v. Maud Van Cortland Hill School*

[13] Quoting from the Supreme Court's opinion: "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. 531 U.S. at 545. A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech." *Id.* at 546.

Trust, 897 F.2d 772, 776 (9th Cir. 1989), *cert den.* 496 U.S. 937, 110 S.Ct. 3216 (1990). Indeed, as the Ninth Circuit so observed in *Schmier v. U.S. Court of Appeal for the Ninth Circuit* 279 F.3d 817 (9th Cir. 2001) [challenging the then existing Ninth Circuit equivalent of existing C.R.C. Rule 8.1115(a), Rule 36-3]:

> "Our ruling, of course, does not preclude another lawsuit by Schmier alleging (subject to the pleading requirements of Fed. R. Civ. P. 11) a situation in which he did immediately face sanctions for citing an unpublished disposition. Nor does it preclude him from attempting to rely on an unpublished disposition in the course of representing a client with a bona fide case or controversy. In either event, the standing doctrine would not divest us of the authority to address Schmier's claims on the merits….
>
> Given the wide range of interest shown in the debate about unpublished opinions, and assuming that parties with personal stakes in live controversies will properly raise the issue with the federal courts, we think it is only a matter of time before the theoretical questions raised by Schmier's complaint are all properly presented and resolved." *Id*., 279 F.3d at 825.

Conditions have substantially changed in the 5 to 10 years since *Schmier I, II,* and *III* were decided.

The most significant "changed condition" involves the September 30, 2005 approval by the Judicial Conference of the United States of Federal Rule of Appellate Procedure 32.1, (which became effective December 1, 2006) barring every Federal Circuit Court of Appeals as of January 1, 2007, from adopting any and all no-citation rules (like Rule 8.1115(a)) which would prohibit or restrict the citation of federal judicial opinions, orders, judgment, or other written dispositions

that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, and the factual findings made by the Federal Judicial Center in conjunction therewith. The U.S. Supreme Court allowed the citation of unpublished opinions in all federal courts on April 12, 2006. In *Schmier I*, the court justified its opinion in part by the no-citation rule of the Ninth Circuit. Therefore the curtailment of the Ninth Circuit's no-citation rule must be a changed circumstance.

The fact that the Federal Courts have now abolished their no-citation rule because there are no genuine public policy reasons now justifying such rules is clearly a major changed fact justifying consideration of the prior restraint issue presented herein, regardless of whether or not it had been previously considered by the California Courts of Appeal.

Yet another "changed condition" concerns the California Judicial Council's amendment of C.R.C. Rule 8.1105(c), effective April 1, 2007, changing the presumption against publication to one favoring publication, and setting forth new criteria for publication.

D. *RES JUDICATA* SHOULD NOT BE APPLIED IN CASES WHERE APPLICATION WOULD BE UNJUST, CASES THAT CONCERN MATTERS OF IMPORTANT PUBLIC INTEREST, OR SITUATIONS THAT MAY ADVERSELY IMPACT NON-PARTIES TO THE ACTION.

Under California law, the doctrine of *res judicata* is subject to an exception where the question is one of law, and application would be unjust. *In Louis Stores*

v. Department of Alcoholic Beverage Control, 57 Cal.2d 749 (1962); s*ee also Ewing v. Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 1585 (1991). Additionally, there is a sound judicial policy against applying *res judicata* in cases which concern matters of important public interest. *Chern v. Bank of America* 15 Cal.3d 866 (1976) (citing *Louis Stores*.)

The Second Restatement of Judgments, §28(5) states the exception as follows: "There is a clear and convincing need for a new determination of the issue … because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action."

In *Arcadia Unified School Dist. v. State Dept. of Education* 2 Cal.4th 251 (1992), the California Supreme Court found that "where the issue is a question of law, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. 2 Cal.4th at 257. The *Arcadia* case, exactly as in the case at bar, involved a prior appellate precedent, on point, that had been depublished, and could not be cited for legal authority. This resulted in continuing uncertainty about the validity of a particular section of the California Education Code, to which school districts had been responding in various different ways. The Supreme Court, in refusing to apply the *res judicata* doctrine, also cited the uncertainty's potentially adverse effects on students, non-parties to the litigation. *Id.* at 258.

Here, Appellant filed his complaint and application for preliminary injunction in direct response to a depublished appellate opinion (*Fischetti*, *supra*), which left government entities all over California under a cloud of uncertainty as to how Cal. Vehicle Code § 21455 ought to be applied. This predicament is the mirror image of *Arcadia*, in which *res judicata* was soundly rejected. Furthermore, Appellant's present and future clients, as well as the thousands of California drivers who continue to suffer inconsistent application of the law, are third parties adversely affected by this improper application of *res judicata*. In sum, assuming *arguendo* that the fundamental requirements for *res judicata* had been met, the Court must reject application of the doctrine as a result of these well established exceptions.

E. THE DISTRICT COURT ERRED IN RELYING UPON *GENTILE V. STATE BAR OF NEVADA* TO INVALIDATE APPELLANT'S CLAIM.

The District Court's reliance upon *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), is misleading. Excerpts of Record, ER00002. *Gentile* reversed a State Supreme Court finding that an attorney holding a pre-trial press conference had violated Nevada Supreme Court Rule 177, which prohibits a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding.

Nothing about *Gentile* relates to the case at bar except only this dictum:

> "The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings. *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683. A lawyer's right to free speech is extremely circumscribed in the courtroom, see, e.g., *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717…" 530 U.S. at 1031.

In *Nebraska Press Ass'n* a state trial judge, in anticipation of a trial for a multiple murder which had attracted widespread news coverage, entered an order which, as modified by the Nebraska Supreme Court, restrained petitioner newspaper, broadcasters, journalists, news media associations, and national newswire services from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers or third parties, except members of the press, and other facts "strongly implicative" of the accused.

Sacher v. United States, 343 U.S. 1 (1952), concerns attorneys held in contempt for conduct described alternatively as **"**lawyers' outrageous conduct - conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never employed by those advocates, for minorities or for the unpopular, whose courage has made lawyerdom proud;" and also described as "[t]o one schooled in Anglo-Saxon traditions of legal decorum, the resistance pressed by these appellants on various occasions to the rulings of the trial judge necessarily appears abominable." 343 U.S. at 3-4.

Gentile, Nebraska Press Ass'n and *Sacher* are distinguished because, as the Federal Appellate Rules Committee found:

> "Rules prohibiting or restricting the citation of unpublished opinions - rules that forbid a party from calling a court's attention to the court's own official actions - are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients." Judge Samuel A. Alito, Jr., *Report of Advisory Committee on Appellate Rules to Standing Committee on Rules of Practice and Procedure*, page 4, May 16, 2005.

In short, citation of relevant exonerating appellate decisions is a duty a "lawyer owes his client" and a perfectly appropriate and ordinary practice of attorneys protecting the rights of clients in the California common law system. In contrast, *Gentile, Nebraska Press Ass'n* and *Sacher* all relate to extreme actions of attorneys and others threatening the fair administration of justice, and cannot be considered relevant here. Still, all of them confirm that free speech and prior restraint analysis and protections apply to what lawyers may say in court.

F. THE NO CITATION RULE IS A PRIOR RESTRAINT ON FREE SPEECH AND AS SUCH APPELLANT IS ENTITLED TO HAVE THE RULE TESTED BY THE SAME TESTS TO WHICH ANY OTHER PRIOR RESTRAINT WOULD BE SUBJECT.

Any statute or ordinance that regulates or infringes upon the exercise of first amendment rights "must survive the most exacting scrutiny." *Buckley v. Valeo*,

424 U.S. 1, 64 (1976). First, the law is presumptively unconstitutional and the state bears the burden of justification. *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1151 (9th Cir. 1973). Second, the law must bear a "substantial relation," to a "weighty" governmental interest. *See Cox v. Louisiana*, 379 U.S. 536 (1964). The law cannot be justified merely by a showing of some legitimate governmental interest. *Buckley, supra*, 424 U.S. at 64. Third, the law must be the least drastic means of protecting the governmental interest involved; its restrictions may be "no greater than necessary or essential to the protection of the governmental interest." *Baldwin v. Redwood City*, 540 F.2d 1360, 1367 (9th Cir. 1976). Fourth, the law must be drawn with "narrow specificity." *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976).

Justice Kennedy, writing for the majority in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), restated the test to which California's no-citation rule must be subjected:

> A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." [Citation omitted.] When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. [Citation omitted.] In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve

> the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives. 542 U.S. at 665-656 (emphasis added).

In light of the Federal Appellate Rules Committee's clear finding that no citation rules cannot be justified, the decision of the District Court was wrong.

G. RESPONDENTS' ASSERTION THAT RULE 8.1115 IS CONTENT NEUTRAL IS FALSE.

Since October 1, 2001, all California appellate decisions are to have been published online. They have been indexed and republished by Westlaw and Lexis. In the context of Rule 8.1115, "not certified for publication or ordered published" therefore has only one meaning; it is a euphemistic stamp applied to decisions that are censored, and may not be cited. Thus the Court must look behind the no-citation rule to the standards for determination of this censorship and all of the circumstances of the making of each decision to censor. Those standards are, despite appearances, at bottom, totally and completely arbitrary. These completely arbitrary standards allowed the California judiciary to not publish, or depublish, the decisions Appellant wishes to cite without any legitimate, obvious or public reasoning whatsoever.

By California Rule of Court 8.1105(c), the standard for citability *appears* to be straight forward:

> "An opinion of a Court of Appeal or a superior court appellate division-whether it affirms or reverses a trial court order or judgment-should be certified for publication in the Official Reports if the opinion:
> (1) Establishes a new rule of law;
> (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
> (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
> (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
> (5) Addresses or creates an apparent conflict in the law;
> (6) Involves a legal issue of continuing public interest;
> (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
> (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
> (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law."

Court rule 8.1105 (d) addresses factors not to be considered:

> "Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion."

Under any view of these rules, the cases Appellant wishes to cite "should be published"[14] and should have been published. But they were not. The reason lies in the arbitrary value assigned to the words "*should* be published" (emphasis added).

Appellant brought to the attention of California's Advisory Committee on Rules for Publication of Court of Appeal Opinions, chaired by Justice Katherine M. Werdegar, that the rule should use more definite language than "should be published." The committee responded:

> "The committee carefully used "should" and not "must," in order to retain some discretion on the part of the justices not to certify an opinion for publication if they conclude that the opinion does not assist in the reasoned and orderly development of the law." *Spring 2006 Revised Recommendations for Amendment to California Rules of Court, Rule 976 Advisory Committee on Rules for Publication of Court of Appeal Opinions, Appendix N: Chart summarizing public comments received in response to 2006 Invitation to Comment*, avail. at http://nonpublication.com/sc_report_appendixes.pdf, page 13, pdf page 223.

Whether or not a scheme could be sufficiently defined and reliable to allow a government to select opinions for citation without resort to their content, it is clear the scheme employed by Respondents does resort to content. For, if one asks, "what are the characteristics of opinions that advance new interpretations of the

[14] Court Rule 8.1110 permits partial publication. A determination to publish and thereby make citable one part of an opinion while forbidding citation of the balance of that same opinion cannot possibly be based upon anything other than content.

statutes of the State of California, or otherwise meet the criteria of Rule 8.1105(c)(4) that do not aid in the orderly development of the law?" the answer includes the content thereof. Indeed, there are numerous law firms in California that specialize in getting depublished, or unpublished, California appellate decisions enunciating content objectionable to their clients.

One danger here is that this vague authority to entirely remove appellate decisions from the body of citable law can be used by the government to suppress content that would protect citizens from improper prosecution. That danger is not hypothetical—it is present here.

H. THAT APPELLANT'S CLIENTS DO NOT RISK INCARCERATION IS IRRELEVANT.

In its order denying Appellant's application for preliminary injunction, the District Court suggests that the charges against Appellant's client not carrying any possibility of incarceration supports its refusal to issue the requested injunction. ER000004, line 28.

To the contrary, that Appellant's clients are defendants in mere traffic violation cases weighs heavily in favor of issuing the injunction. As noted in *People v. Goulet*, 13 Cal.App.4th Supp. 1 (1992), "[t]raffic rules account for most of the contact by average citizens with law enforcement and the courts. Enforcement of laws which are widely perceived as unreasonable and unfair generates disrespect and even contempt toward those who make and enforce those

laws." 13 Cal.App.4th Supp. at 4. Defendants in infraction cases must depend on law for exoneration. The appellate decisions to which Appellant seeks to refer reverse trial court holdings. But Rule 8.1115 forbids those trial courts from relying upon those decisions. If rule 8.1115 is honored, *stare decisis* requires the reversed court to knowingly continue its error in order that it may treat those that come before it consistently. The problem is clear: the no-citation rule is crazy making and cannot be justified.

Few if any criminal defendants, particularly in infraction cases, have the resources or skills to argue persuasively "the reasoning of the case" (even if such could be thought as effective as citation), or attain any appellate relief. Rather, the system depends upon judges in these matters knowing and applying decisions made by their appellate courts. Internet search engines and web sites such as www.highwayrobbery.net make discovery of relevant unpublished decisions relatively easy, allowing lay persons to bring a set of rules to courts' attention by mentioning a case name. Exoneration at the trial court level by citation of a case name must be considered infinitely more efficient for all concerned than allowing convictions at the trial level and referring all who feel unfairly treated to appeal and petition for further review.

Seemingly minor encroachments on the First Amendment, such as prohibiting a traffic citation defendant or his counsel from citing an unpublished

decision are, in fact, not minor at all. As stated by U.S. Supreme Court Justice Clark in *School District of Abington Township v. Schempp*: "[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment with our liberties.'" 374 U.S. 203, 225 (1963) (emphasis added).

VI. CONCLUSION

Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions. *See* Judge Samuel A. Alito, Jr., *Report of Advisory Committee on Appellate Rules to Standing Committee on Rules of Practice and Procedure*, May 16, 2005.

As noted by Judge Holloway of our Tenth Circuit: "all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. [Citation omitted.] No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the

court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness." *In Re: Rules of U.S. Court of Appeals for Tenth Circuit. Adopted Nov. 18, 1986*, 955 F.2nd 38 (10th Cir. 1992).

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule California Court Rule 8.1115(a) must be invalidated. In the interest of efficiency and the need of those who are accused, this court should issue the requested permanent injunction and declaratory relief, or in the alternative, remand the matter to the District Court with instruction to do so.

Respectfully Submitted,

THE AFTERGOOD LAW FIRM

By: s/Aaron D. Aftergood .
AARON D. AFTERGOOD,
Attorneys for Appellant.

CERTIFICATE OF COMPLIANCE

I hereby certify that the length of this brief does not exceed 14,000 words, and in fact based on a word processing macro employed, comprises a specific word total of 8,103 words. FRAP Rule 32(a)(7)(B)(I).

Respectfully Submitted,

THE AFTERGOOD LAW FIRM

By: s/Aaron D. Aftergood .
AARON D. AFTERGOOD,
Attorneys for Appellant.

STATEMENT OF RELATED CASES

I hereby certify that I am aware of no related cases.

Respectfully Submitted,

THE AFTERGOOD LAW FIRM

By: s/Aaron D. Aftergood .
AARON D. AFTERGOOD,
Attorneys for Appellant.

Attachment A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
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SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 6, 2005

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 18, 2005, in Washington, D.C. The Committee gave final approval to two amendments, approved another amendment for publication, and removed two items from its study agenda. The Committee also approved a letter to the chief judges and others regarding the proliferation of local rules on briefing, and the Committee took a first look at problems caused by the Justice for All Act of 2004.

Detailed information about the Committee's activities can be found in the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee is seeking final approval of two items and approval for publication of one item.

A. Items for Final Approval

1. New Rule 32.1

a. Introduction

The Committee proposes to add a new Rule 32.1 that will require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished" or "non-precedential" by a federal court. New Rule 32.1 will also require parties who cite unpublished or non-precedential opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

b. Text of Proposed Amendment and Committee Note

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of unpublished opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion, claim preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these contentions in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither Rule 32.1 nor this Committee Note takes any position — they cannot be justified as a policy matter.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In addition, every court of appeals is now required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g.*, *Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). An exhaustive study conducted by the Federal Judicial Center ("FJC") at the request of the Advisory Committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See* FEDERAL JUDICIAL CENTER, CITATIONS TO

UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 15, 70 (2005) [hereinafter FJC REPORT]. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about the unpublished opinions that both are reading.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished opinions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. To the contrary, a study of the federal appellate courts conducted by the Administrative Office of the United States Courts at the request of the Advisory Committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). The FJC, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See* FJC REPORT at 12-13, 67-68. In addition, when the FJC asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. Id. at 10, 63. It is, of course, true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished

opinions causes the harms predicted by defenders of no-citation rules. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is simply no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that Rule 32.1 would not have an "appreciable impact" on their workloads. Id. at 17, 74. Moreover, the attorneys who expressed positive views about Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See* id. at 17-18, 75.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which makes unpublished opinions widely available at little or no cost.

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has

addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1(a) abolishes those rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the unpublished opinions cited in their briefs or other papers. Unpublished opinions are widely available on free websites (such as those maintained by federal courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

c. Changes Made After Publication and Comment

The changes made by the Advisory Committee after publication are described in my May 14, 2004 report to the Standing Committee. At its April 2005 meeting, the Advisory Committee directed that two additional changes be made.

First, the Committee decided to add "federal" before "judicial opinions" in subdivision (a) and before "judicial opinion" in subdivision (b) to make clear that Rule 32.1 applies only to the unpublished opinions of federal courts. Conforming changes were made to the Committee Note. These changes address the concern of some state court judges — conveyed by Chief Justice Wells at the June 2004 Standing Committee meeting — that Rule 32.1 might have an impact on state law.

Second, the Committee decided to insert into the Committee Note references to the studies conducted by the Federal Judicial Center ("FJC") and the Administrative Office ("AO"). (The studies are described below.) These references make clear that the arguments of Rule 32.1's opponents were taken seriously and studied carefully, but ultimately rejected because they were unsupported by or, in some instances, actually refuted by the best available empirical evidence.

d. Summary of Public Comments

The 500-plus comments that were submitted regarding Rule 32.1 were summarized in my May 14, 2004 report to the Standing Committee. I will not again describe those comments. Rather, I will describe the empirical work that has been done at the request of the Advisory Committee.

You no doubt recall that, at its June 2004 meeting, the Standing Committee returned Rule 32.1 to the Advisory Committee with the request that the proposed rule be given further study. The Standing Committee was clear that its decision did not signal a lack of support for Rule 32.1. Rather, given the strong opposition to the proposed rule expressed by many commentators, and given that some of the arguments of those commentators could be tested empirically, the Standing Committee wanted to ensure that every reasonable step was taken to gather information before Rule 32.1 was considered for final approval.

Over the past year, Dr. Timothy Reagan and several of his colleagues at the FJC have conducted an exhaustive — and, I am sure, exhausting — study of the citation of unpublished opinions. A copy of the FJC's lengthy report has been distributed under separate cover. Before I summarize that report, I again want to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research.

The FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. I will focus on the results of the two surveys, for those are the components of the research that are most relevant to the question of whether Rule 32.1 should be approved.

The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which altogether forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C. Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. The response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote

to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule 32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted

a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1

have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed by the Advisory Committee to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In other words, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

The AO also did research for us — research for which we are also very grateful. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). The AO's report is attached. As you will see, the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of summary dispositions. The AO's study thus failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members — including one of the two opponents of Rule 32.1 — went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 — they prefer a discouraging citation rule to a permissive citation rule — but it is

worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place.

Attachment B

Division 5. Publication of Appellate Opinions

Rule 8.1100. Authority
Rule 8.1105. Publication of appellate opinions
Rule 8.1110. Partial publication
Rule 8.1115. Citation of opinions

Rule 8.1120. Requesting publication of unpublished opinions
Rule 8.1125. Requesting depublication of published opinions

Rule 8.1100. Authority

The rules governing the publication of appellate opinions are adopted by the Supreme Court under section 14 of article VI of the California Constitution and published in the California Rules of Court at the direction of the Judicial Council.

Rule 8.1100 adopted effective January 1, 2007.

Rule 8.1105. Publication of appellate opinions

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (e), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(Subd (b) amended effective July 23, 2008; adopted effective April 1, 2007.)

(c) Standards for certification

An opinion of a Court of Appeal or a superior court appellate division—whether it affirms or reverses a trial court order or judgment—should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

(Subd (c) amended effective April 1, 2007; previously amended effective January 1, 2007.)

(d) Factors not to be considered

Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion.

(Subd (d) adopted effective April 1, 2007.)

(e) Changes in publication status

(1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(Subd (e) relettered effective April 1, 2007; adopted as subd (d).)

(f) Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 8.887.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

(Subd (f) amended effective July 1, 2009; adopted as subd (e); previously amended effective January 1, 2007; previously relettered effective April 1, 2007.)

Rule 8.1105 amended effective July 1, 2009; repealed and adopted as rule 976 effective January 1, 2005; previously amended and renumbered effective January 1, 2007; previously amended effective April 1, 2007, and July 23, 2008.

Rule 8.1110. Partial publication

(a) Order for partial publication

A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under rule 8.1105.

(Subd (a) amended effective January 1, 2007.)

(b) Opinion contents

The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published.

(c) Construction

For purposes of rules 8.1105, 8.1115, and 8.1120, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion.

(Subd (c) amended effective January 1, 2007.)

Rule 8.1110 amended and renumbered effective January 1, 2007; repealed and adopted as rule 976.1 effective January 1, 2005.

Rule 8.1115. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(Subd (b) amended effective January 1, 2007.)

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Rule 8.1115 amended and renumbered effective January 1, 2007; repealed and adopted as rule 977 effective January 1, 2005.

Advisory Committee Comment

A footnote to a previous version of this rule stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. This footnote has been deleted because it was not part of the rule itself and the event it describes rarely occurs in practice.

Rule 8.1120. Requesting publication of unpublished opinions

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within 20 days after the opinion is filed.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Rule 8.1120 renumbered effective January 1, 2007; repealed and adopted as rule 978 effective January 1, 2005.

Advisory Committee Comment

Subdivision (a). This rule previously required generally that a publication request be made "promptly," but in practice the term proved so vague that requests were often made after the Court of Appeal had lost jurisdiction. To assist persons intending to request publication and to give the Court of Appeal adequate time to act, this rule was revised to specify that the request must be made within 20 days after the opinion is filed. The change is substantive.

Subdivision (b). This rule previously did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or could not have granted. In practice, however, it was not uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case or, if there was no such petition, had lost jurisdiction to grant review on its own motion. To assist the Supreme Court in timely processing publication requests, therefore, this rule was revised to require the Court of Appeal to forward the request within 15 days after the decision is final in that court. The change is substantive.

Rule 8.1125. Requesting depublication of published opinions

(a) Request

(1) Any person may request the Supreme Court to order that an opinion certified for publication not be published.

(2) The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages.

(3) The request must concisely state the person's interest and the reason why the opinion should not be published.

(4) The request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal.

(5) The request must be served on the rendering court and all parties.

(b) Response

(1) Within 10 days after the Supreme Court receives a request under (a), the rendering court or any person may submit a response supporting or opposing the request. A response submitted by anyone other than the rendering court must state the person's interest.

(2) A response must not exceed 10 pages and must be served on the rendering court, all parties, and any person who requested depublication.

(c) Action by Supreme Court

(1) The Supreme Court may order the opinion depublished or deny the request. It must send notice of its action to the rendering court, all parties, and any person who requested depublication.

(2) The Supreme Court may order an opinion depublished on its own motion, notifying the rendering court of its action.

(d) Effect of Supreme Court order to depublish

A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Rule 8.1125 renumbered effective January 1, 2007; repealed and adopted as rule 979 effective January 1, 2005.

Advisory Committee Comment

Subdivision (a). This subdivision previously required depublication requests to be made "by letter to the Supreme Court," but in practice many were incorporated in petitions for review. To clarify and emphasize the requirement, the subdivision was revised specifically to state that the request "must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages." The change is not substantive.

Attachment C

THE AFTERGOOD LAW FIRM

January 5, 2010

Tom Blake
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Tracey L. McCormick
State Bar of California Office of General Counsel
180 Howard Street
San Francisco, CA 94105-1639

Re: Schmier v. Justices of the Supreme Court, et al.

Dear Counsel:

This letter is to notify all parties of the extension of time in which to file Appellant's Opening Brief granted by the Court in the above-referenced matter.

The new briefing schedule is now as follows:

Appellant's Opening Brief due:	**January 29, 2010**
Answer Brief due:	**March 1, 2010**
Optional Replay Brief due:	**14 days after service of Answer Brief**

Please do not hesitate to call or email with any questions.

Very truly yours,

Aaron Aftergood

1875 CENTURY PARK EAST, SUITE 2230 | LOS ANGELES, CALIFORNIA 90067
PH 310.551.5221 | FAX 310.496.2840 | AARON@AFTERGOODESQ.COM

9th Circuit Case Number(s) 09-17195

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) January 29, 2010 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /Aaron D. Aftergood/

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)