Case No. 09-17195

CIRCUIT JUDGES MICHAEL HAWKINS, N. R. SMITH & PHILIP PRO

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.

PETITION FOR REHEARING EN BANC OF MEMORANDUM, MOTION AND AMENDED MOTION FOR DISQUALIFICATION

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

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I. INTRODUCTION

Plaintiff-Appellant Kenneth J. Schmier hereby petitions for rehearing *en banc* of this Court's denial of his motion and amended motion to disqualify, and his memorandum filed December 22. The basis[1] for this reconsideration is that this Court is disqualified. The two cases cited by this Court refusing disqualification do not apply to the instant facts - and this disqualification deprives plaintiff-appellant of his constitutional rights including to due process of law.

II. FACTS AND ARGUMENT

A. The Ninth Circuit's Use of the *Sao Paulo* case Is Error Because There Is No Mistake Regarding the Facts

This Court cited *Sao Paulo State of the Federated Republic of Brazil v. Am. Tobacco Co*., 535 U.S. 229, 233 (2002) (per curiam) where it was held that when the alleged facts of a conflict were mistaken or wrong, the judge was not disqualified. Here there is no mistake regarding the facts. In *Sao Paulo*, a district judge's name was on an *amicus* brief on behalf of the plaintiffs...as president of Louisiana Trial Lawyer's Association ("LTLA"). However, the judge stated that he had not participated in the actual writing of the brief and that his term as president had ended when the brief was filed. The judge was not disqualified. *Sao Paulo* turned on the finding that the listing of the judge's name was a mistake - and that despite the appearance of conflict from this erroneous listing, there was really no conflict. The Supreme Court said (see endnote A): [A]

> "Judge Barbier also noted...that he...had no personal knowledge of the disputed facts...had never taken a position with respect to any of the issues

[1] This petition for rehearing *en banc*, incorporates by reference herein the motion and the amended motion for disqualification.

raised in petitioner's suit, and had never been involved in a tobacco related case "one way or another in (his) whole legal career." (See endnote B.) [B]

The instant case, unlike *Sao Paulo*, is not "a close case for recusal." Here, there is neither error in appearance, nor, as stated, mistake. The judge(s) participated and acted publicly in a *quasi*-political campaign effort against removing their bans on citation of unpublished appellate opinions, and continue to forbid citation of those unpublished opinions to the very limit not prohibited by Federal Rule 32.1, issued before 2007. Here, Judge Michael Daly Hawkins and the other judges clearly have personal knowledge of the disputed facts, and have taken a "position with respect to the issues raised"[C] in plaintiff-appellant's case now before them.[D] They have been, and continue to be, involved in related procedures that perpetrate their own rules prohibiting citation of unpublished appellate opinions - the very issue at stake in this case, see *Liljeberg v. Health Services Acquisition Corp*. 486 U.S. 847 (1988). (See endnotes C and D.)

This case should be decided by judges who, after their appointment as judges, have not taken such a campaign-like position, under color of judicial office, on the very issue at stake in the instant case. Taking such a position, especially not in a posture of deciding an earlier case, reveals a bias which violates basic constitutional rights, including to due process of law, *Caperton v. Massey*, 129 S. Ct. 2252 (2009), cf. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (en banc). (See endnote E.)[E]

This position was taken in a coordinated campaign effort – regarding the very issue of this case – by judges, who were plainly cooperating with a named party in this case, defendant-respondent, the California Supreme Court and its Chief Justice (Ronald George) and colleagues. Their statements reflect obvious *ex parte* communications regarding the issue at the heart of this case, indeed the letter of the California Chief

Justice to the federal appellate advisory rules committee directly tracks the format used in such letters by members of the Ninth Circuit. (See footnote 6 *infra*.)

B. The Ninth Circuit's Use of the *Nelson* Case Is Error Because There is No Adverse Judicial Ruling Claimed As Bias

This Court also cited its *United States v. Nelson*, 718 F. 2d 315, 321 (9th Cir. 1983) decision holding that adverse rulings do not constitute the requisite bias for recusal (where a district judge's acceptance of an invalid guilty verdict in a first trial did not necessitate recusal from a second trial). In the instant case, however, it is not an adverse ruling, or any ruling at all which is germane. Rather, the crux is that the judge(s), *after* appointment as judges, and not in a case, but under color of the judicial office, have taken a public advocacy position on the very issue (citation of unpublished opinions) at stake in this litigation. This is very different from a typical claim that a prior adverse case ruling showed a pre-disposition or bias.

C. The Ninth Circuit's Use of Its Local Rule 36.1-5 Forbidding Citation Creates a Conflict

Protection of the validity of the Ninth Circuit's own local rule 36.1-5, which (like the California rule at the heart of the instant case) forbids citation of unpublished opinions, creates a conflict and the appearance of a conflict. The instant case is one of two Ninth Circuit cases in the last two years which challenged the California rule prohibiting citation.[2] The challenge to the California rule is implicitly also a challenge to the analogous Ninth Circuit Local Rule. The Ninth Circuit is a stakeholder. Consistent with the court's predisposition to prohibit citation of unpublished opinions, the Ninth

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[2] See also: *Joshua Hild v. California Supreme Court*, No. 08-15785, Sept. 28, 2009, www.nonpublication.com/Hild9thOrder [other Hild documents at www.nonpublication.com/hilddocs.htm, e.g., Opening Brief # 4)]

Circuit has declined to consider the substantive merits of either case.[3] Rather it disposed of both cases, according to a pattern of summary resolution (*res judicata* and mootness, respectively) This side-stepped consideration of the constitutional issues raised, reducing the statistical chances of securing review by the Supreme Court of the United States. The constitutional issues which the Ninth Circuit chooses to ignore are issues that were raised but not decided by the 2005 federal appellate advisory rules committee when it recommended Federal Rule of Appellate Procedure 32.1, adopted in 2006. Committee chairman, the Hon. Samuel Alito, wrote in pertinent part:

> "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….A prior restraint on what a party may tell a court about the court's own rulings *may also raise First Amendment concerns*." (emphasis added)[4]

The Alito committee expressly underscored the issues' importance, yet this court will not address it. The pattern of predisposition and bias, and the appearance thereof, continues.

Judges who were assigned to these two Ninth Circuit cases, and who publicly opposed reinstatement of the right to cite, Michael Hawkins, Steven Trott and Carlos Bea did not disqualify and recuse themselves from deciding them. Their disqualification was appropriate because, if the Ninth Circuit judges had provided relief in either or both

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[3] Because the Supreme Court generally does not review for error, not affording a policy disposition nor setting forth substantive merits of any kind acts to reduce the statistical chances of securing Supreme Court review.

[4] Memorandum from Judge Samuel A. Alito, Jr. Chair Advisory Committee on Appellate Rules to Judge David F. Levi, Chair Standing Committee on Practice and Procedure (May 6, 2005), (page 4, paragraph 1, lines 1-10), <www.nonpublication.com/alitomemo2.pdf>, attached hereto as "Reconsideration Exhibit" RE-A, *cf.* Tusk, Marla Brooke, No-Citation Rules as a Prior Restraint on Attorney Speech, 103 Colum.L.Rev. 1202 (2003), <www.nonpublication.com/tusk.pdf>

cases, they would have constitutionally invalidated their own Ninth Circuit Local Rule 36.1-5, which forbids citation of unpublished opinions in cases filed *before* 2007.[5]

Further, their disqualification is required (due process, *cf. Caperton v. Massey,* 129 S.Ct. 2252 (2009)) because of their opposition (after their appointment, and not expressed in a case) to citation of unpublished opinions. Judges Hawkins, Trott and Bea, among others, had been part of a furious (and unprecedented) Ninth Circuit letter writing campaign[6] led by Judge Alex Kozinski, in which 35 of 47 current Ninth Circuit Judges

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[5] *Cf*, *Perry v. Schwarzenegger* (9th Circuit Case No. 10-16696 (Dec. 2, 2010)) where Ninth Circuit Judge Stephen Reinhardt refused to recuse himself from the pending challenge to the California (gay marriage) Proposition 8 on allegations regarding his wife's role as an ACLU director; and *Schwarzenegger v. Court of Appeal*, S189114: "Supreme Court Justices Disqualify Themselves in State Building Sale Case; Will Assign Temporary Justices)", California Judicial Council Media advisory Release Number 32, December . 21, 2010: http://www.courtinfo.ca.gov/presscenter/newsreleases/MA32-10.PDF, *cf. Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010) (en banc). Disqualification of judges because they have and are participating in a political campaign against citing unpublished opinions, the very issue in the cases before them; and because they still forbid citation to pre-2007 unpublished opinions present reasons to disqualify stronger than those in *Perry* and *Schwarzenegger, supra.*

[6] See, e.g., letters to Hon. Samuel Alito from: Ninth Circuit Judges: Michael Daly Hawkins (Amended Disqualification Motion Ex. A); Stephen S. Trott, Carlos Tiburcio Bea [attached hereto as Exhibits RE-B & RE-C, respectively], Alex Kozinski (Amended Disqualification Ex. D, also at www.nonpublication.com/kozinskiletter.pdf (January 16, 2004)), and from (respondent herein) California Chief Justice [Ronald George] (Amended Disqualification Motion Ex. E), see also: (http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0803Comments/2003APCommentsChart.aspx [Nos. 03-AP-291, 129, 130, 169, 471, respectively), George letter dated February 13, 2004 (copied ("cc:") to Ninth Circuit Judge Alex Kozinski); see also the unanswered letter to California Chief Justice George (and the California Judicial Council) from California Assemblymember Jared Huffman, dated September 5, 2008, (http://www.nonpublication.com/huffman090508.pdf, attached hereto as Exhbit RE-D. Other Ninth Circuit Judges [35 (judges in 2004) of 47 (judges in 2010)] who wrote to the Hon. Samuel Alito in opposition to citation (followed by (No. 03-AP (omitted after first) and letter number as listed on above us courts website): James R. Browning (No. 03-AP-076), Arthur T. Goodwin (026), J. Clifford Wallace (082), Procter Hug, Jr. (063), Otto R. Skopil (135), Jerome Farris (156), Arthur L. Alacorn (290), Willam C. Canby, Jr. (110),

wrote against the proposed reform being considered by the Alito committee.[7] This is a plain conflict.

D. The Ninth Circuit's Use of *Res Judicata* Is Error As This Court Expressly Invited the Instant Suit, the Issues Are Not Identical, and the Parties Are Different and Not in Privity

The court's memorandum of decision holding that the instant suit is barred by *res judicata* is in error. This is a wrong decision, for a number of reasons.

First, the Ninth Circuit has invited the very suit which it now states is barred by *res judicata.* In 2002, the Ninth Circuit reviewed a federal district court decision, which denied (plaintiff-appellant's brother) Michael Schmier's suit seeking correction of the Ninth Circuit no-citation rules. Although the Ninth Circuit upheld the lower court decision on the grounds that plaintiff lacked standing, the Court promised a resolution of the substantive issue when presented in the course of representation of a client with a *bona fide* case or controversy. The Court stated, in pertinent part:

> 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

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Robert Boocheever (046), Stephen Reinhardt (402), Robert R. Beezer (292), Cynthia Holcom Hall (133), John T. Noonan (052), Diamuid F. O'Scannlain (285), Edward Leavy (289), Ferdinand F, Fernandez (061), Pamela Ann Rymer (253), Thomas G. Nelson (067), Sidney R. Thomas (398), Barry G. Silverman (075), Susan P. Graber (400), M. Margaret McKeown (350), Kim McLane Wardlaw (132), William A. Fletcher (059), Raymond C. Fisher (366), Richard A. Paez (373), Marsha S. Berzon (134), Richard C. Tallman (082), Jay S. Bybee (327), Consuelo M. Callahan (318), Sandra S. Ikuta (085).

[7] 03-AP-169 (January 16, 2004) is also available at: www.nonpublication.com/kozinskiletter.pdf. The Ninth Circuit letter writing campaign was coordinated with defendant-respondent in the instant case, California Supreme Court Chief Justice (Ronald George) (and the California Judicial Council), see fn. 7, *supra, cf., Chief Justice Derails Bill on Changing State's Citation Rules*, Daily Journal, Linda Rapattoni, June 22, 2007, www.nonpublication.com/dymallygeorgemtg.htm.and for general background: www.NonPublication.com (including from home-page: "Press Clippings"; "News"; and "Law Review Articles".

> unpublished disposition. Nor does it preclude him from attempting to rely on an unpublished disposition in the course of representing a client with a bone fide case or controversy….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. *(Michael Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (2002).

The instant case is presented to the Ninth Circuit by Kenneth J. Schmier as attorney representing a client with a *bona fide* case or controversy. His ability to represent his client and protect the client's best interests is severely curtailed by the rules of court prohibiting citation of unpublished opinions. There is not an abstract interest here: either the client will suffer from inadequate representation or the attorney will suffer sanctions for citing unpublished opinions. This issue is properly presented in this case.

Second, the court states that *Michael Schmier v. Supreme Court of Cal*., 93 Cal.Rptr.2d 580 (App.2000) is a case involving the same parties and a claim identical to the instant case, and therefore California *res judicata* law forecloses litigation of this action. However, the parties are not the same. Plaintiff in the cited case is Michael Schmier; plaintiff-appellant in the instant case is Kenneth J. Schmier. The plaintiff in each matter is a separate individual; albeit brothers, Michael Schmier and Kenneth J. Schmier are not the same party nor in privity under the law.

Third, circumstances have changed since the *Michael Schmier* decision rendered in 2000. In 2006, the federal rules were changed with the adoption of Federal Rule of Appellate Procedure 32.1 removing the prohibition against citing unpublished opinions in federal courts. The issue is of significant public interest. Most large state court systems

have followed the federal lead in reforming their practice; respondent California Supreme Court et al resisted the change.

Fourth, the authorities cited by the Court as foundation for applying the California law of *res judicata* to this matter are inapplicable as they involve entirely different factual situations. (*Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896-97 (2002) denied damages in a second suit on the same claim where declaratory judgment and specific relief had already been granted in a first suit; *Henrichs v. Valley View Dev.,* 474 F. 3d 609, 615 (9th Cir.2007) barred appellants from seeking to overturn a state court decision in a federal appellate court.) Plaintiff-appellant does not seek to overturn any decision on a case previously brought in California court; he does seek to overturn state court rules and policy that threaten him with sanctions and impede his efforts to properly represent his client who is involved in a real controversy.

Fifth, the substantive issue at the heart of the instant case is ripe for resolution by the Ninth Circuit. Avoiding resolution by wrongly holding *res judicata* simply reflects the predisposition of members of this Court to uphold the prohibitions on citing unpublished opinions including their own Ninth Circuit Local Rule 36.1-5, reinforces the appearance of bias and conflict, and underscores the need for the judges to be disqualified.

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III. CONCLUSION

On the basis of the foregoing, plaintiff-appellant moves for reconsideration *en banc* of his motion and amended motion to disqualify and the Court's memorandum filed December 22, 2010.

Respectfully Submitted,

THE AFTERGOOD LAW FIRM

By: _____
AARON D. AFTERGOOD,
Attorneys for Appellant.

ENDNOTES:

[A] The Supreme Court in *Sao Paulo, supra,* said:

"Respondents argued that Judge Barbier's association with the Gilboy amicus brief created an "appearance of partiality" requiring disqualification under § 455(a). Brief in Opposition 3. Judge Barbier disagreed. Adopting his reasons for denying recusal in Republic of Panama I, he refused to disqualify himself because his name appeared in error on the motion to file the amicus brief and because he took no part in preparation or approval of the brief. Minute Entry in Civ. Action Nos. 00-0922, 98-3279 (ED La., May 26, 2000), App. to Pet. for Cert. 43a; Tr. of Proceeding on Motion for Recusal in Republic of Panama I, pp. 21, 37-40 (Feb. 3, 1999), App. to Pet. for Cert. 48a-51a (Tr. of Proceeding). Indeed, he was previously unaware of it, which he found unsurprising because the LTLA affixed the president's name to all motions to file amicus briefs, despite the fact that the president had absolutely no role in preparation or approval of the briefs. . . Judge Barbier also noted in Republic of Panama I that he had never practiced law with Mr. St. Martin or any other lawyer listed on the motion, had no personal knowledge of the disputed facts in Gilboy, had never taken a position with respect to any of the issues raised in petitioner's suit, and had never been involved in a tobacco-related case "one way or another in my whole legal career.". . .

"The Court of Appeals for the Fifth Circuit reversed, citing its prior decision reversing Judge Barbier's order denying recusal in Republic of Panama I [535 U.S. 229, 233]. In that case, the Fifth Circuit said:

"The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama. The trial judge's assertions that he did not participate directly in the writing or researching of the amicus brief do not dissipate the doubts that a reasonable person would probably have about the court's impartiality. We acknowledge that this is a close case for recusal." 217 F. 3d, at 347.

"Judge Parker concurred, agreeing that the court was bound by its decision in Republic of Panama I, but arguing that that decision was "erroneous because it requires recusal on the basis of a judge's public statements on the law made prior to becoming a judge ...." Republic of Panama II, supra, at 318. Rehearing en banc was denied over the dissent of six judges, who argued that the decision below amounts to an "issue recusal" rule, requiring disqualification whenever a judge has pre-judicial association with a legal position. 265 F. 3d 299, 306 (2001) (joint dissent of Wiener and Parker, JJ.).

"We need not consider the argument advanced by the dissenting judges, since this case is easily disposed of on other grounds. The Fifth Circuit's decision is inconsistent with Liljeberg v. Health Services Acquisition Corp., 486 U. S. 847 (1988), which stated that § 455(a) requires judicial recusal "if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of his interest or bias in the case. Id., at 861 (internal quotation marks omitted and emphasis added). The Fifth Circuit reached the conclusion that recusal was required because it considered what a reasonable person would believe without knowing (or giving due weight to the fact) that the judge's name was added mistakenly and without his knowledge to a pro forma motion to file an amicus brief in a separate controversy. Although Judge Barbier was indeed a leader of the LTLA at that time (he was a member of the association's executive committee), he took no part in the preparation or approval of the amicus brief; indeed, he was only "vaguely aware" of the case. Tr. of Status Conf. 8, App. to Pet. for Cert. 54a. The decision whether his "impartiality might reasonably be questioned" should not have been made in disregard of these facts; and when they are taken into account we think it self-evident that a reasonable person would not believe he had any interest or bias."

[B] Portions of the Fifth Circuit's language in *Republic of Panama I* [217 F.3d 343 (5th Cir. 2000)] follow:

"Judge Barbier informed the parties that while his name is listed on the motion to file the amicus brief, it was placed on the motion by mistake. Judge Barbier also stated

that his term as president of LTLA had ended by the time the brief was filed, and that he had nothing to do with the researching, writing, signing, or approval of the brief. Judge Barbier explained that in the LTLA the decision to file an amicus brief and the contents of those briefs is exclusively governed by the LTLA Amicus Committee. . .

"Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama. The trial judge's assertions that he did not participate directly in the writing or researching of the amicus brief do not dissipate the doubts that a reasonable person would probably have about the cour"As this court has previously pointed out, the purpose of § 455(a), and the principle of recusal itself is not just to prevent actual partiality, but to "avoid even the appearance of partiality." Jordan, 49 F.3d at 155. The analysis of a § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim. United States v. Bremers, 195 F.3d 221, 225 (5th Cir. 1999) (citing Jordan, 49 F.3d at 157). . .

"Denial of recusal is reviewed for abuse of discretion. Trevino v. Johnson, 168 F.3d 173, 178 (5th Cir. 1999). Appellants argue that Judge Barbier should have recused himself pursuant to 28 U.S.C. § 455(a) ("§455(a)"). Section 455(a) states that a judge should recuse himself "in any proceeding in which his impartiality might reasonably be questioned." "In order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer would question the court's impartiality." Trust Co. v. N.N.P., 104 F.3d 1478, 1491 (5th Cir. 1997) (citing United States v. Jordan, 49 F.3d 152, 155-58 (5th Cir.1995)). The review of a recusal order under § 455(a) is "extremely fact intensive and fact bound," thus a close recitation of the factual basis for the appellants recusal motion is necessary. As this court has previously pointed out, the purpose of § 455(a), and the principle of recusal itself is not just to prevent actual partiality, but to "avoid even the appearance of partiality." Jordan, 49 F.3d at 155. The analysis of a § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim. United States v. Bremers, 195 F.3d 221, 225 (5th Cir. 1999) (citing Jordan, 49 F.3d at 157)." t's impartiality. We acknowledge that this is a close case for recusal. However, we have previously held that if the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal. In Re: Chevron, 121 F.3d 163, 165 (5th Cir. 1997). Accordingly, we hold that a reasonable person might harbor doubts about the trial judge's impartiality, and thus the district court abused its discretion in denying the defendants' motion to recuse.

C In *Republic of Panama*, 250 F.3d 315 (2001) (per curiam) (*Republic of Panama II*), Circuit Judge Robert M. Parker, concurring specially, made arguments opposing

recusal (as follow), but they were neither adopted by the Fifth Circuit, nor by the Supreme Court:

"While I agree with my colleagues that we are bound by precedent, I write separately because I believe that Republic of Panama was wrongly decided. In that decision, a panel of this court held that the district judge abused his discretion by not recusing himself because the judge's name was listed along with Appellee's counsel on a motion for leave to file an amicus brief in an unrelated action asserting allegations similar to Appellee's.

"Such facts do not establish that a reasonable person aware of all the facts would reasonably question the judge's impartiality under 28 U.S.C. § 455(a). See Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir.1982), cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983). The district judge's name was erroneously listed on the motion for leave to file an amicus brief on behalf of the Louisiana Trial Lawyers' Association ("LTLA"), a voluntary bar organization that routinely expresses legal viewpoints to courts through amicus briefs. The district judge did not participate directly in the researching, writing, or approval 317*317 of the brief itself, and his name does not appear on the brief. Moreover, the motion and brief were filed more than ten years ago in an unrelated action in Louisiana Supreme Court before the judge's appointment to the federal judiciary. These facts are simply too tenuous to support any reasonable basis for questioning the judge's impartiality, and even if these facts clearly raise the issue of impartiality, it is error to conclude that the judge abused his sound discretion in denying the motion for recusal.

"Republic of Panama incorrectly relied on Bradshaw v. McCotter, 785 F.2d 1327(5th Cir.), rev'd, 796 F.2d 100 (5th Cir. 1986), as presenting a "somewhat similar"factual situation. In Bradshaw, we held that a judge of the Texas Court of Criminal Appeals should have disqualified himself because at the time of the defendant's conviction the judge's name was listed as a prosecuting attorney on a brief opposing the defendant's appeal, even though the listing was simply a matter of courtesy and protocol. Notwithstanding the irrelevance of whether the judge actually participated in the preparation of the brief, Bradshaw is distinguishable from Republic of Panama and this action because in Bradshaw the judge, before taking the bench, was listed as the prosecuting attorney in the same case on appeal before him. In Republic of Panama and this action, the district judge was merely listed as the president of the LTLA on a motion for leave to file an amicus brief in an unrelated action before a different court more than ten years ago.

"While Republic of Panama notes that there are no decisions precisely on point, relevant decisions confirm that the district judge's denial of Appellants' motion for recusal was not improper. In Laird v. Tatum, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (Rehnquist, J., mem.), then-Associate Justice Rehnquist decided not to disqualify himself on the basis of his public statements on the constitutionality of governmental surveillance, which was contrary to the arguments of the parties seeking his

disqualification. As a Department of Justice lawyer, Justice Rehnquist had testified as an expert witness before the Senate and publicly stated his views on the constitutionality of governmental surveillance of civilian political activity. He testified that the arguments of the parties seeking disqualification, whose appeal was before the court of appeals during the testimony, lacked merit. Framing the issue as whether disqualification is proper if a judge, "who[,] prior to taking that office[,] has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question," id. at 830, 93 S.Ct. 7, Justice Rehnquist analyzed the practices of prior justices, who did not disqualify themselves in cases in which they, prior to taking the bench, previously expressed a viewpoint of the controlling law, and concluded that such public statements could not rationally be the basis for disqualification. Id. at 835-36, 93 S.Ct. 7; see also United States v. Alabama, 828 F.2d 1532, 1542 (11th Cir.1987) (rejecting, in an action challenging segregation in education, disqualification of a district judge on the basis of his background as a civil rights lawyer representing black plaintiffs and stating "[a] judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject."), cert. denied, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988); Shaw v. Martin, 733 F.2d 304, 316 (4th Cir.) ("One who has voted as a legislator in favor of a statute permitting the death penalty in a proper case cannot thereafter be presumed disqualified to hear capital cases as a judge or predisposed to give a death sentence in any particular case."), 318*318 cert. denied, 469 U.S. 873, 105 S.Ct. 230, 83 L.Ed.2d 159 (1984). While Laird was decided prior to the amendment of § 455[1] to include subsection (a),[2] Justice Rehnquist's analysis is important because the motion seeking disqualification based on his prior public statements was not pursuant to any specific provision of § 455 at the time, but on the discretionary portion of the statute, see Tatum, 409 U.S. at 830, 93 S.Ct. 7, which was similar to the "catchall" provision of § 455(a).

"Similarly, in Schurz Communications, Inc. v. FCC, 982 F.2d 1057 (7th Cir.1993) (Posner, J.), Judge Posner denied a motion for disqualification based on an affidavit he submitted as an expert witness on antitrust law prior to becoming a circuit judge. In rejecting the motion, Judge Posner stated "[t]he affidavit repeated views about antitrust policy that I had stated in many different fora over a period of years, and the movants do not and could not argue that a judge should disqualify himself because he has views on a case." Id. at 1062 (citing 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3542 at 568-70 (1st ed.1975)).

"Finally, Cipollone v. Liggett Group, Inc., 802 F.2d 658 (3d Cir.1986), is also important. In Cipollone, the husband of a deceased cigarette smoker brought a products liability action against cigarette manufacturers alleging that his wife's injury and death were cigarette-induced. A panel of the Third Circuit held that some of the plaintiff's claims were federally preempted. The plaintiff then moved to vacate the judgment because a member of the panel should have recused himself due to an appearance of partiality. The plaintiff alleged that such appearance of partiality arose because the judge, while in private practice, represented The American Tobacco Company, which was not a

defendant in the plaintiff's action, in a similar products liability action The court denied the motion because The American Tobacco Company was not a defendant, the issue of preemption was not raised in the prior litigation involving the judge, and even if The American Tobacco Company were a defendant no reasonable person could question the judge's impartiality because his representation ended more than five years before he took the bench. Id. at 658-59.

"In light of these decisions, I am convinced that Republic of Panama is erroneous because it requires recusal on the basis of a judge's public statements on the law made prior to becoming a judge, which I believe is unreasonable under § 455(a). In denouncing such "public statement disqualification," Justice Rehnquist aptly observed that [i]t would not be merely unusual, but extraordinary, if [judges] had not at least given opinions as to [legal] issues in their previous careers. Proof that a [judge's] mind at the time he joined the [c]ourt was a complete tabular as a ... would be evidence of lack of qualification, not lack of bias. 319*319 Laird, 409 U.S. at 835, 93 S.Ct. 7; cf. Liteky v. United States, 510 U.S. 540, 554, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (Scalia, J.) ("[S]ome opinions [of a judge] acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice [for recusal]") (emphasis omitted); Cipollone, 802 F.2d at 660 ("If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could ever be appointed to the bench."). Before taking the bench, we judges solemnly swear or affirm to "faithfully and impartially discharge and perform all the duties," 28 U.S.C. § 653, regardless of our background. To conclude that the district judge abused his discretion in this action would penalize judges for their background and undermine the oath. Thus, I believe we should reconsider Republic of Panama en banc."

D As more fully quoted above, the Supreme Court in *Sao Paulo*, *supra*, recited:

"Rehearing en banc was denied over the dissent of six judges, who argued that the decision below amounts to an "issue recusal" rule, requiring disqualification whenever a judge has pre-judicial association with a legal position. 265 F. 3d 299, 306 (2001) (joint dissent of Wiener and Parker, JJ.).

"We need not consider the argument advanced by the dissenting judges, since this case is easily disposed of on other grounds. . ."

The six dissenting en banc Fifth Circuit Judges emphasized that *Sao Paulo* involved positions taken *before* the judge's appointment, not as here, *after* appointment, and after assuming color of the judicial office. This is very different.

Thus, although the Supreme Court wrote: "we need not consider the argument advanced by the dissenting judges", nevertheless, the Fifth Circuit dissent's argument

(265 F.3d 299, 306, cf. 250 F.3d. 315, 217 F.3d 343, 347, as follows) still would not apply here:

"11 We are firmly convinced that no reasonable person, aware of all the facts, would question any judge's impartiality based on circumstances as attenuated as those presented by this case: (1) The Judge's name was listed, erroneously and without his knowledge, on a motion to file an amicus curiae brief not even the brief itself; (2) the motion and brief were filed on behalf of an association of which the future judge was a past president; (3) the motion was filed in a state court proceeding seven years before the Judge took the bench and eight years before the present lawsuit was filed; (4) the motion related to a legal issue in which the Judge had never been involved as a practicing attorney or otherwise; and (5) it was filed by lawyers for the association with whom the Judge has never been a partner or an associate.

"12 On appeal, the tobacco companies urged a panel of this court to adopt the rule that any judge who had a "pre-judicial association with the position" not with the parties, not with the lawyers, but with a "position" can never fairly decide a case that raises questions pertaining to that "position." In buying into that proposition, the panel clearly called into question the oath we take when we become federal judges. If we should embark on such a perilous course, we will launch a cottage industry in which investigators will comb the contents of speeches made, articles written, and pleadings and briefs filed by a judge prior to his taking of that oath, looking for some trace of evidence suggesting that, prior to his judgeship, the judge held views on legal questions that can be used to disqualify him from hearing cases that implicate such matters. Nothing not the statute, not our jurisprudence, not the public policy underlying the concept of recusal supports the panel's decision to require the Judge's recusal under such attenuated circumstances. . .

"16 Although Bradshaw offers no map out of the present situation, we are not here navigating uncharted waters. In an earlier en banc decision, this court held that a district judge who, before ever becoming a judge, served as president of a racially segregated bar association, was not thereby disqualified from hearing plaintiffs' claims of racial discrimination in the administration of the Alabama State Bar examination. Parrish v. Bd. of Comm'rs of the Ala. State Bar, 524 F.2d 98 (5th Cir. 1975). Even though that future judge had actually taken steps to change the bar's segregation policy, he was faulted by those who sought his recusal for the failure of his effort to obtain membership for African-American lawyers during his term of leadership. Id. at 101. We held in Parrish that the allegation concerning the judge's "past activities in the Montgomery [Alabama] Bar Association [] is essentially an allegation based on the judge's background and states no specific facts that would suggest he would be anything but impartial in the deciding the case before him." Id.

"17 The facts in Parrish more closely parallel those presented in this case than do the facts in the Bradshaw decision relied on by the Republic of Panama I panel. Even if the views expressed in the amicus brief ten years earlier had been firmly held by the

Judge at the time that the brief was written (note that nothing other than his membership in the amicus association and his prior presidency of it can be cited as evidence that in fact he held those views), this would not be grounds for forced recusal under the jurisprudence of this or any other circuit. More to the point, that is not the question presented by the record in this case, which does not indicate that the Judge ever expressed any anti-tobacco sentiments, either publicly or privately, much less that he ever participated in any tobacco litigation whatsoever, whether as a party or as counsel. His only "taint" was his connection to a bar association that advocated, solely as a friend of the court, a similar position on similar litigation in state court almost a decade earlier. Such an attenuated nexus is woefully insufficient to underpin this court's interference with the Judge's decision, which was well within his discretion.

"18 Equally important in sorting out this issue is the position taken by the United States Supreme Court. In Laird v. Tatum, 409 U.S. 824 (1972)(Rehnquist, J., mem.) then-Associate Justice Rehnquist decided not to disqualify himself on the basis of public statements he had made prior to his appointment to the bench. As a Department of Justice lawyer, he had testified as an expert witness before the Senate Judiciary Committee's Subcommittee on Constitutional Rights regarding the statutory and constitutional law dealing with the authority of the executive branch to gather information. Notably, then-attorney Rehnquist's remarks included a reference to the very case involved (Laird), which then was pending in the D.C. Circuit. Id. at 825-27. The respondents contended that the Justice should disqualify himself because he had previously expressed a public view concerning what the law is or ought to be in the matters presented in the Laird litigation. Id. at 824-25. In declining to recuse, Justice Rehnquist stated:

"19 Proof that a Justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. . . .

"20 The oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon (him) . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution. . .

"22 In addition to repudiating clear direction from both our own en banc court and the Supreme Court, the panel opinion disregards the unanimous voices of other U.S. Courts of Appeals that have addressed the issue. For example, in Schurz Communications v.

FCC, 982 F.2d 1057 (7th Cir. 1992), Judge Richard Posner denied a recusal motion that was based on an affidavit he had submitted as an expert witness fifteen years earlier in an antitrust case involving the identical question presented in the case in which his disqualification was being sought. Judge Posner reasoned that if 28 U.S.C. § 455(a) were interpreted to require recusal in such a situation,

"23 I would be eternally disqualified from participating in antitrust or regulatory cases, because when I was a law professor I acted frequently as a consultant and occasionally an as expert witness in regulatory and antitrust matters that presented the same types of issues, often in the same industry, as do cases that come before this court. No decision supports such an interpretation. . . .
* * *

"25 The affidavit repeated views about antitrust policy that I had stated in many different fora over a period of years, and the movants do not and could not argue that a judge should disqualify himself because he has views on a case. . .

"27 Similarly, in a much more closely analogous case, Cipollone v. Liggett, 802 F.2d 658 (3rd Cir. 1986), the district judge had, while in private practice, represented a tobacco company in a case involving a products liability claim like the one currently pending before him as a judge. The Third Circuit affirmed the district court's decision not to recuse himself, stating:

"28 [P]rior knowledge about legal issues is not a ground for recusal of a Judge. . . .If Judges could be disqualified because their knowledge of legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.

"29 Id. at 659-60. See also United States v. Payne, 944 F.2d 1458 (9th Cir. 1991)(rejecting the notion that generalized policy views, expertise on and exposure to a subject necessitates recusal); United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987)(holding that district judge's background representing plaintiffs in civil rights actions does not warrant disqualification in a school desegregation case brought by United States against Alabama); Rosquist v. Soo Line Railroad, 692 F.2d 1107 (7th Cir. 1982)(affirming a denial of recusal and holding that a judge is not required to recuse himself merely because he holds and had expressed certain views on a subject.) . . .

"31 We can perceive no legitimate basis for disturbing the Judge's exercise of discretion in this case and would affirm his denial of the recusal motion. We are satisfied that this issue cuts across ideology, politics, and judicial philosophy, and that it has the potential for undermining the independence of the federal judiciary. No existing jurisprudence supports, much less requires, recusal of a judge who, years before taking the judicial oath, had expressed an opinion on an issue of law, or had represented the same or a related party, or had belonged to and held office in an organization that advocated a particular view of public policy or legal interpretation. Never before has any

court accepted "issue recusal" as a ground for reversing a judge who in his own exercise of discretion, concluded that his recusal was not required. The panel decision that this court has refused to rehear en banc sets an alarming precedent by doing precisely that, and trivializes our oath in the process. For these reasons we are constrained to dissent from the refusal of a majority of the judges of this court to vote to rehear this case en banc."

E In addition to the frequent, regular and routine practice and procedure of assigning circuit judges to participate in deciding cases in circuits other than their own ["Indeed, it is not uncommon 1065*1065 for active circuit judges to sit by designation in other circuits, even without the kind of exigent circumstances that have arisen here. E.g., Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938 (9th Cir.2009) (Tymkovich, J., of the Tenth Circuit, sitting by designation); E.I. DuPont de Nemours & Co. v. United States, 508 F.3d 126 (3d Cir.2007) (Michel, C.J., of the Federal Circuit, sitting by designation", Judge Dennis, *infra*,)], 28 U.S.C. § 291 provides additional alternatives for using outside-the-circuit or surrogate judges as described in Fifth Circuit Judge Davis' dissent language from *Republic of Panama I, supra*, as follows:

"4. Alternatively, 28 U.S.C. § 291 provides an avenue that would avoid depriving appellant of his direct appeal. Section 291 permits the Chief Justice to appoint a judge from another circuit to allow this court to have a quorum to consider the case en banc. 28 U.S.C. § 291 provides that: "(a) the Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request of the chief judge or circuit justice of such circuit." Acting Chief Judge E. Grady Jolly indicated his willingness to request the Chief Justice to designate such a temporary judge if a majority of the eight judges had requested it. We are aware that it would be an unusual request to appoint a judge from another circuit to constitute a quorum of the en banc court but we believe such a request is justified here where the alternative is the appellant must completely lose his right to a direct appeal."

In *Republic of Panama I, supra*, Fifth Circuit Judge Dennis also dissented:

"The majority's decision to dismiss this appeal rests, first of all, on an implausible interpretation of the statute that defines a quorum of an en banc court of appeals, 28 U.S.C. § 46(c)-(d). Second, it contravenes the long-established rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). There are several affirmative grounds that authorize us to fulfill "the absolute duty of judges to hear and decide cases within their jurisdiction." United States v. Will, 449 U.S. 200, 215, 101 S.Ct. 471, 66 L.Ed.2d 392

(1980). These grounds are as follows: (1) we do have a quorum under the correct reading of § 46(c)-(d), which is also supported by Fed. R.App. P. 35(a); (2) the acting chief judge of this court has the authority to seek the designation and assignment of a judge from another circuit under 28 U.S.C. §§ 291 & 296; (3) we can follow the Supreme Court's example in North American Co. v. SEC, 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (1943), and hold the case over until the President and the Senate fill this court's current vacancy and give us nine out of seventeen active judges who can decide the case; and if all else fails, (4) we should comply with the ancient common-law doctrine known as the Rule of Necessity, which overrides the federal statute governing judicial recusals, as the Supreme Court held in Will, 449 U.S. at 217, 101 S.Ct. 471. The Rule of Necessity, and not dismissal, is the appropriate last resort in this situation because it fulfills this court's absolute duty to decide cases within its jurisdiction. The majority's action flouts that duty.

> "Last but not least, the dismissal of this appeal—with the apparent intention to effectively reinstate the district court's order dismissing the case, even though a panel of this court has already held that the district court erred, 585 F.3d 855 (5th Cir.2009)— is contrary to common sense and fairness. Indeed, it is injudiciously mechanistic and arbitrary. For example, if the most recently recused judge had become recused three months earlier, the outcome of this case would have been precisely the opposite: the court could not have granted rehearing en banc (at least not while following the majority's current definition of an en banc quorum), so the panel's decision reversing the district court's dismissal of the case would have remained in effect. Thus, because of the majority's erroneous interpretation of 28 U.S.C. § 46(c)-(d) and its refusal to discharge this court's absolute duty to decide cases within its jurisdiction, the particular timing of one single judge's recusal is being allowed to conclusively determine the outcome of this case.[2]". . .

"3. Inviting a Judge from Another Circuit

"As Judge Davis has also observed, another way to fulfill our duty to decide this appeal would be to follow the procedure set out in 28 U.S.C. § 291: "The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit on request by the chief judge or circuit justice of such court." In accordance with § 291, Judge Jolly, the acting chief judge in this case, can request the designation and assignment of a judge from another circuit to give us a quorum.[20] He does not need the authorization or votes of any other judges in order to make that request, and he ought to do so: it would surely be "in the public interest," since it would enable this court to avoid defaulting on its duty to hear and decide this appeal.[21] Indeed, it is not uncommon 1065*1065 for active circuit judges to sit by designation in other circuits, even without the kind of exigent circumstances that have arisen here. E.g., Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938 (9th Cir.2009) (Tymkovich, J., of the Tenth Circuit, sitting by designation); E.I. DuPont de Nemours &

Co. v. United States, 508 F.3d 126 (3d Cir.2007) (Michel, C.J., of the Federal Circuit, sitting by designation)."

See also: Fifth Circuit Leaves Panel Decision Vacated upon Loss of En Banc Quorum Comer v. Murphy Oil USA, 607 F3d 1949 (5th Cir. 2000) (en banc), 124 Harv.L.Rev 624 (2010)

EXHIBIT RE-A

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

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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.

2. Rule 25(a)(2)(D)

a. Introduction

At the request of the Committee on Court Administration and Case Management ("CACM"), the Appellate Rules Committee has proposed amending Appellate Rule 25(a)(2)(D) to authorize the circuits to use their local rules to mandate that all papers be filed electronically. Virtually identical amendments to Bankruptcy Rule 5005(a)(2) and Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules) — accompanied by virtually identical Committee Notes — were published for comment at the same time as the proposed amendment to Appellate Rule 25(a)(2)(D).

b. Text of Proposed Amendment and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit — or, if reasonable exceptions are allowed, require — papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

EXHIBIT RE-B

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Chambers of
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January 8, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

With all respect to those supporting proposed Rule 32.1, rarely have I seen a proposal "to improve justice" more misguided and as devoid of merit as the proposal to allow the citation of unpublished opinions in the material submitted to us by lawyers in support of their claims. Based on my twenty-three years as a litigator and now fifteen years as a federal judge, this counterproductive proposal will not only not accomplish any positive result, it will measurably set us back in the discharge of our duties expeditiously to settle disputes according to the rule of law.

In the first place, our uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do not make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable. Practitioners simply do not need memorandum dispositions to make their legal points: published opinions will do.

Second, no two cases are so factually and procedurally alike such that equal protection and due process will be denied if we do not add other "similar" unpublished cases to the scale.

Third, a huge percentage of our unpublished dispositions are decided based upon a deferential standard of review. We do not decide whether an appealed act was legally perfect or not, just whether it was (1) an abuse of discretion, (2) clearly erroneous, (3) arbitrary and capricious, (4) supported by substantial evidence viewed in the light most favorable to the winner, etc. Because the latitude given trial courts and administrative agencies and juries is appropriately broad, and because our review in most cases is deferential, such dispositions are essentially worthless as precedent or as persuasive in other cases. Our specific task is not to say whether what was done was perfect and without flaw, but whether it was "off the wall." Contradictory district court decisions on an issue often fall into the no abuse of discretion either way category. This is the way appellate courts work, most often with a deferential standard of review. When the issue is one of law and we do review de novo, we use established principles found in published cases; and if we refine the law or make or acknowledge new law, we do not decide the case in a memorandum disposition: we publish an opinion.

In other words, to us, memorandum dispositions as precedent or persuasive are useless and worthless in the process of deciding new cases. We do not need them, and their citation will only add to the huge caseload we have and bog us down even more in extraneous clutter as we read and consider stuff of no value, and I repeat, no value. I have never seen a memorandum disposition that I needed in order to decide other "like cases." They just don't exist. Moreover, as lawyers engage in what amounts to a snipe hunt as they chase down memorandum dispositions to include in their briefs, it is the client who will suffer, paying for wasted billable hours. This proposal is a classic case of a "cure" in search of a phantom disease.

Thanks for considering my views.

Sincerely,

Stephen S. Trott
Circuit Judge

EXHIBIT RE-C

UNITED STATES COURT OF APPEALS
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January 12, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I write to voice my opposition to the proposed rule change to allow citation of unpublished opinions, FRAP 32.1.

This is not the first time a change of this sort has cast shadows on the effective functioning of courts on which I have served. A few years ago, while I was on the California Superior Court bench, the California legislature considered AB 1165 to change California Rule of Court 977, thereby to allow the citation of State court unpublished decisions. The proposed change brought forth near-unanimous opposition, and the Bill died in Committee.

The basis of the overwhelming opposition to the proposal was that:

(1) the unpublished decisions of the Courts of Appeal in California were crafted with a view to their remaining unpublished because the issues presented were already well decided and further writing on the subject would do nothing but perhaps confuse the already well-established rule, as lawyers would frantically attempt to distinguish the former cases with the latter case.

(2) in view that they would not be published, cited and followed, such unpublished decisions were drafted simply to decide the issues of the particular

case, and not to give guidance for future cases. The writers of the unpublished decisions did not engage in the time consuming work of distinguished other cases or in expressing principles upon which other cases could be decided.

(3) judges had quite enough cases to read and research as it is; a fresh supply of opinions drafted expeditiously, but not intended to stand as precedent, would make matters worse. If anything, matters have already become worse without the addition of unpublished decisions.

All the considerations that applied to the California state controversy apply-in spades!-to federal appellate courts.

There are some who argue that since the proposed rule does not require unpublished cases to be accorded precedential value, there is no more danger in citing to them than there is in citing to Law Reviews or, an increasing favorite, Internet sites. With respect, I disagree with this analysis. A Law Review or an Internet site may deal with a general question and provide some background that may be useful, but seldom, if ever is accepted as a basis for deciding a case.

On the other hand, a written opinion in a case has a much greater impact because it promises to present issues that have already been thought about-if not thought through-and a resolution. By its very nature, it is likely to be taken more seriously, if for nothing else than to be distinguished.

Further, it is naive to think that district judges will totally ignore a memorandum disposition ("mem-disp") signed by three circuit judges, even if those circuit judges spent very little time on the writing of the opinion because it was decided in a screening panel setting.

For all these reasons, I would like to add my name to those who oppose the proposed Rule 32.1. Thanking you for your consideration of my views, I remain,

Very truly yours,

Carlos Bea

Carlos Tiburcio Bea
United States Circuit Judge

EXHIBIT RE-D

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Assembly
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JARED HUFFMAN
ASSEMBLYMEMBER, SIXTH DISTRICT

COMMITTEES
CHAIR, ENVIRONMENTAL
SAFETY AND TOXIC MATERIALS
APPROPRIATIONS
UTILITIES AND COMMERCE
WATER, PARKS AND WILDLIFE

September 5, 2008

Honorable Ronald M. George
Chief Justice of the California Supreme Court and
Chairman of the Judicial Council of California
350 McAllister Street
San Francisco, CA 94102

Re: Citation of Unpublished Court of Appeal Opinions

Dear Chief Justice George:

Thank you for your letter of March 7, and your kind offer to respond with additional information regarding the issue of unpublished opinions, which last year comprised over ninety percent of Court of Appeal opinions. I appreciate in particular your explanation that citation of unpublished appellate opinions "is a complex subject, and one that [you] believe may have fiscal ramifications not only for the courts, but for the practice of law in general." While I have great respect for you and your assessment of this issue, I am unable to reconcile your conclusion with the body of evidence that has led to a different conclusion at the federal level.

Specifically, your views seem to be at odds with studies by both the Administrative Office of the United States Courts (AO) and by the Federal Judicial Center (FJC) done for the federal Advisory Committee on Appellate Rules of the Judicial Council of the United States (Advisory Committee) as part of its consideration of the now adopted Federal Rule of Appellate Procedure 32.1 [see, e.g., *FJC Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 15*, 70 (2005, www.nonpublication.com/fjc.prelim.pdf)]. The federal Advisory Committee, chaired by now United States Supreme Court Justice Samuel Alito, and upon which now Chief Justice of the United States John Roberts was a concurring member, reported that while numerous federal and state courts have abolished or liberalized no-citation rules, there is no evidence of additional costs or other negative consequences to the judiciary, attorneys or litigants. For the Advisory Committee, then Chairman Alito wrote:

> "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 [including (unproven contentions about) additional costs]. 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… - 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."

(www.nonpublication.com/alitomemo2.pdf., pgs. 12-13, cf. pgs. 4 & 6).

I would be most interested in any evidence of negative fiscal ramifications at the federal level since either the 2005 federal reports, or the December 1, 2006 effective date of Rule 32.1, as it is my understanding that the new federal policy is working well.

In the absence of evidence showing negative ramifications from the new federal rule, it seems hard to justify the continuation of a no-citation rule for California. Indeed, continuing the no-citation rule would raise questions that could undermine confidence in the fairness and accuracy of our system of *stare decisis*. I am informed that you have defended the no-citation rule by arguing that it is a "necessary evil to chill the development of the law"; that it is "folly" to force the legal system to reconcile cases that are essentially insignificant; and that "[y]ou'd have a difficult time separating the wheat from the chaff if you published everything," [*Publish is his Platform,* Peter Blumberg, San Francisco Daily Journal, March 9, 1998]. The flipside of these arguments, however, is that the rule creates the appearance, if not the reality, of our Supreme Court having extra-judicial veto power over appellate judging. Further, I am concerned that the Supreme Court's reservation of authority to decide what precedents will be operative in any or all appellate districts through actions taken outside of the determination of any case or controversy could constitute an encroachment upon the powers of the Legislature. If you believe the Supreme Court has such sweeping authority, I would respectfully ask you to explain the source of that authority.

I am also concerned about the effects of the no-citation rule on essential checks and balances in our democracy. Appellate judges are a critical link in the chain of our democracy because they often see new issues first. Court watchers monitor published appellate decisions to protect their interests, and through this process many communities of persons in which all manner of expertise resides scrutinize appellate decisions, join with affected litigants to urge the Supreme Court to correct errors, petition the Legislature for correction of unwise holdings or for further consideration and legislation, or otherwise comment so as to improve the quality of our laws. As long as the citation of unpublished opinions remains forbidden, we have an anomalous situation where these case holdings apply in full force to the parties in those cases, but for the rest of society this body of judicial opinions simply does not "count." Because they do not impact non-parties, what incentives motivate the community of court watchers and public advocates to monitor these uncitable decisions? What errors, injustices, or opportunities for reform are we missing by shielding the vast majority of judicial opinions from the same public

scrutiny that plays such a vital role with regard to the small minority of opinions that are published?

I am grateful for the offer in your March 7, 2008 letter to provide additional information on the subject of unpublished opinions, and I look forward to your responses to the questions I have raised above. I would also appreciate your responses to the following questions relating to the no-citation rule:

1. The federal Advisory Committee on Appellate Rules opined that a no-citation rule could infringe on First Amendment free speech rights, stating: "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… they cannot be justified as a policy matter" (see e.g., the law review article by professor Marla Brooke Tusk: *No-Citation Rules As A Prior Restraint on Attorney Speech*, 103 Columbia Law Review 1202 (2003), www.nonpublication.com/tusk.pdf). Have you considered the free speech implications of California's no-citation rule? What state interests do you believe justify Rule 8.1115(a) as a policy matter, and why are such interests sufficiently compelling to protect the rule from constitutional challenge as a prior restraint on free speech?

2. If the Legislature determines for policy reasons that California should conform to the federal rule regarding citation of non-published opinions, do you contend that the "separation of powers" doctrine would preclude legislative revocation of the no-citation rule? If so, please explain how and why this would differ from routine legislative amendments to many California codes that make law for the courts, including, e.g., Civil Procedure, Evidence, Probate, etc.?

3. The California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee") reported that 58% of California appellate judges regularly rely on unpublished opinions in determining cases before them (www.nonpublication.com/sc_report_12-07-06.pdf). These judges admitted that they routinely rely on uncitable, i.e., unpublished case authorities. The judges do not and cannot mention or cite this authority because the no-citation rule prohibits them from doing so. It would appear, therefore, that judges are routinely contravening the spirit if not the letter of the rule, and that they are relying heavily on what amounts to an un-vetted and incontestable body of law. Do you believe this is a problem, and if so what are you doing to address it?

4. What percentage of Court of Appeals opinions for each of the years from 2000 to 2008 to date, and for each of the months from the beginning of 2006 to date, was ordered unpublished and thus not citable?

5. Litigants often seek equal treatment from judges – frequently by urging that court dispositions of their cases be just like the dispositions given to previous litigants. How can denying a right to cite previous cases be reconciled with our constitutional rights: to equal protection of the law; to petition the government for redress of grievances; to due

process of law and to fair hearing? How can the principles underlying the federal holding that court rules prohibiting publication and citation are unconstitutional in *Anastasoff v. United States*, 223. F.3d 898 (8h Cir. 2000), vacated on other grounds (mooted by settlement), 235 F.3d 1054 (8th Cir. 2000)) not be applied in our state courts?

6. One example of how the no-citation rule could have extreme adverse consequences would be if persons being charged with a crime were not allowed to advise arraignment judges that an appellate court opinion had already decided that the actions alleged would not constitute a criminal offense. Among the myriad unpublished opinions, it is hard to imagine that at least some of them would not be beneficial in defending against criminal charges. Do you agree that inherent in the no-citation rule is a risk of suppressing some opinions that could exonerate criminal defendants and potentially protect them at the arraignment stage against enormously disruptive, stressful, and costly court procedures, including possible incarceration?

7. Your letter states that you want to accumulate data regarding the new publication rules before moving to charge a new follow-up committee that could recommend revocation of the no-citation rule. What more information is needed to determine the scope of the new committee's charge and how long could it take to gather that information? What is the connection, if any, between the effect of the April 1, 2007 revisions of the California state rules for publication and the no-citation rule? On what date do you now expect to convene the new committee? When you convene the committee, will its meetings be open to public attendance and public input, as were the meetings of the federal Advisory Committee on Appellate Rules?

I look forward to reading your response as I work to deepen my understanding of the complexities of this issue and to assess the need for legislative engagement.

Sincerely,

JARED HUFFMAN
Assemblymember, 6th District