No. 10-1344

In The

Supreme Court of the United States

KENNETH J. SCHMIER,

Petitioner,

v.

JUSTICES OF THE CALIFORNIA SUPREME COURT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California "no-citation" rule, California Rule of Court 8.1115(a), selectively prohibiting citation of uncontroverted written California appellate decisions by counsel to any California court, where such decisions establish a complete defense as a matter of law, constitutes a prior restraint of counsel's speech in violation of the First Amendment, or is otherwise unconstitutional.

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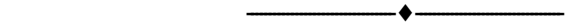
OPINIONS BELOW

The opinion of the Court of Appeals is not reported. (App. 1). The Court of Appeals avoided the merits of Petitioner's claim as *res judicata*. The district court dismissed Petitioner's claim as "entirely meritless" and barred by *res judicata*.[1] (App. 5)



[1] Some explanation is required to address the use of *res judicata* to parry Petitioner's claim by the Ninth Circuit. The Ninth Circuit has been demonstrably hostile to those seeking abolishment of no-citation rules, as has the California judiciary. The *res judicata* reference refers to *Kenneth J. Schmier v. Supreme Court of Cal.*, 2003 WL 22954266 (Cal. App. Dec. 16, 2003) [unpublished], a case that challenged earlier California no-citation Rule 977 and did not involve any circumstance where Petitioner is ethically bound to cite for the defense of his client unpublished decisions establishing a complete defense as a matter of law compelling him to intentionally violate Rule 8.1115(a). Nor did it involve a situation where, as here, Petitioner may allege a refusal of a trial court to allow such a citation, which is now the case.

Troublesome about the assertion of *res judicata* is that the California determination cites earlier decisions that never addressed or determined the First Amendment issue presented to the California judiciary as dispositive. Perhaps most troublesome is that the 2003 decision is superficial, misleadingly relies upon *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), and that the decision was itself unpublished, unciteable, and thus determinative solely for Petitioner in a manner intended to avoid attention of the body politic to its extraordinary holding.

(Continued on following page)

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2010. A petition for rehearing was denied on January 28, 2011. Jurisdiction of this court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Even were the finding of *res judicata* correct, the Ninth Circuit and the district court had the discretion to hear this matter on its merits. Either could have invoked California's important public interest exemption. *See Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal.4th 251, 259 (1992). Poignantly, the federal Appellate Rules Committee report authored by Justice Alito determined that "[t]he citation of unpublished opinions is an important issue," but the Ninth Circuit, consistent with its well-known campaign to derail adoption of Federal Rule of Appellate Procedure 32.1 declined to find "sufficient public interest." The apparent abuse of procedural technicalities seems intended to fend off review.

The Supreme Court applied the incorporation principle to the right of free speech with the case of *Gitlow v. New York*, 268 U.S. 652 (1925). This decision applied First Amendment speech rights to state as well as federal laws.

California Rule of Court, Rule 8.1115. Citation of opinions

(a) Unpublished opinion

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

STATEMENT

Petitioner, Kenneth J. Schmier, is an attorney practicing in California engaged in defending drivers cited with traffic violations determined by automated traffic enforcement systems commonly called "red light cameras." Numerous written, fully explicated, consistent, never overruled decisions of appellate courts of California determine that all of these citations must be dismissed. However, petitioner is prevented by California Rule of Court §8.1115(a), California's so called "no-citation rule," and the decisions below, from citing these decisions to the trial courts of California because the judges that authored them marked the decisions "Not to be Published" or the Supreme Court of California

depublished the decision. At least one of Petitioner's clients has been convicted where the trial commissioner refused to allow citation of these decisions. That conviction in now on appeal. Nevertheless, Petitioner is still prevented from citing to the appellate court hearing that appeal, or even to the Supreme Court of California in a petition for review, decisions of other California courts or even the same appellate court determining the issues presented.

Is it not unthinkable that in courtrooms dedicated to the discussion of law found in the prior decisions of appellate courts, that defense counsel may be prevented from arguing for treatment consistent with those prior decisions by identifying those decisions?

Not only does the no-citation rule chill Petitioner's speech, it chills the speech of all litigants, their counsel and the bench itself. The thoughts of judges expressed in unpublished opinions never rise for further judicial discussion and all learning that could come from that discussion ends.

Now Chief Justice of the Supreme Court, the Hon. Justice John Roberts, then a member of the Advisory Committee on Appellate Rules, endorsed FRAP Rule 32.1 and has stated: "A lawyer ought to be able to tell a court what it has done." *Judicial Conference Group Backs Citing of Unpublished Opinions*, Tony Mauro; Legal Times; April 15, 2004.

U.S. Supreme Court Associate Justice Samuel A. Alito, acting as Chair of the Advisory Committee on Appellate Rules, determined that no-citation rules

are prior restraints that may also raise First Amendment concerns:

> 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. [Emphasis added.]

Judge Samuel A. Alito, Jr., *Report of Advisory Committee on Appellate Rules to Standing Committee on Rules of Practice and Procedure*, page 4, May 16, 2005.

As a prior restraint on free speech, the California no-citation rule should not have been validated by the district court until the California judiciary met its burden with scrupulous application of established tests always applicable to prior restraints.

Prior restraints are presumptively invalid, and a very high burden is placed upon the government to establish, with specificity, sufficient justification for the prior restraint, and to prove those justifications cannot be met with alternative methods less intrusive upon free expression and other constitutional values.

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

Given the clear finding made by the federal Advisory Committee on Appellate Rules that no-citation rules cannot be justified, a finding made upon research of the Federal Judicial Center, it is highly unlikely that Respondents could have justified this prior restraint against the opposition of Petitioner had they been required to do so.

Despite that the burden is upon government to justify a prior restraint, no court has required Respondents to justify the no-citation rule, allowed discovery of the justifications for the rule, or allowed anyone to test such justifications in open court.

It was therefore improper for the district court to deny Petitioner the requested preliminary injunction, and dismiss his complaint prior to requiring the California judiciary to justify the no-citation rule against Petitioner's opposition.

Petitioner suggests that where, as here, there exists probable cause to believe a judiciary's rule violates the peoples' constitutional rights, and high level committees of the federal judiciary have determined that the violation "undermines basic principles underlying the rule of law" and "may also raise First Amendment concerns," there exists a special, even fiduciary, duty to the people to scrupulously justify that rule under well-established constitutional principles to anyone who questions it. That duty is not met by repeatedly evading that inquiry as here.

Despite the efforts of Petitioner over the years that justification has never been made. Rather the California judiciary and the Ninth Circuit have used their power rather than their reason to see that the issues presented never get fairly heard, evidence impartially weighed, and the propriety of no-citation rules determined according to the law of this land. The California Supreme Court, and the Attorney General have attempted to have Petitioner declared a vexatious litigant, and the District Court has indicated that this should be Petitioner's last action on this matter.

REASONS THE PETITION SHOULD BE GRANTED

1. Despite Federal Rule of Appellate Procedure 32.1, citation practices propounded and/or enforced by judiciaries and circuit courts of appeals vary from entirely permissive to entirely restrictive among the federal circuits and from state to state. There is a

clear need for the Supreme Court to make the law consistent, because only this Court has the power to see this issue addressed. *See* Steven R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 471 (2003).

2. It is unthinkable that in a country that values free speech and the right to petition government, a criminal defendant can be prohibited from mentioning or arguing to the trial court numerous, consistent and uncontroverted appellate decisions that require his or her exoneration. The *raison d'etre* of the Supreme Court is to protect Americans from this kind of encroachment of our fundamental rights.

Defense of a traffic violation may seem trivial (the fine is generally approximately $500) but it should be noted that "[t]raffic rules account for most of the contact by average citizens with law enforcement and the courts. Enforcement of laws which are widely perceived as unreasonable and unfair generates disrespect and even contempt toward those who make and enforce those laws." *People v. Goulet*, 13 Cal.App.4th Supp. 1 (1993). As noted by Justice Alito, no-citation rules:

> 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.

Judge Samuel A. Alito, Jr., *Report of Advisory Committee on Appellate Rules to Standing Committee on*

Rules of Practice and Procedure, page 49, May 14, 2004. The internet makes relevant decisions easily available, and warnings not to cite them cause great discomfort. For an example, see the traffic defense self-help website www.highwayrobbery.net. The Supreme Court should act to protect the integrity of our legal system.

3. As was stated by Justice Alito,

> [r]ules 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. 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.

Id. at p. 45. Whether or not no-citation rules are constitutional is a concern that must be addressed.

4. Open citation is the mechanism by which the rule of law is brought to bear upon judges. If the right to appropriately bring to a court's attention relevant prior decisions of that court is to be limited, the effects of such a departure from the "basic principles underlying the rule of law" need to be carefully and publicly examined such that the benefit of the rule of law is not lost in the ever-present race for expediency.

CONCLUSION

The petition for Certiorari should be granted to preserve the public perception of fairness in the courts and the rule of law.

Respectfully submitted,

AARON AFTERGOOD

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH J. SCHMIER,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 09-17195.

D.C. No. 3:09-CV-02740-WHA

MEMORANDUM*

(Filed Dec. 22, 2010)

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted December 10, 2010**
San Francisco, California.

Before: HAWKINS and N.R. SMITH, Circuit Judges, and PRO, District Judge.***

Attorney Kenneth J. Schmier ("Schmier") appeals the dismissal of his federal court action seeking to enjoin enforcement of Rule 8.1115(a) of the California Rules of Court, which prohibits the citation as legal authority of any opinion not certified for publication, with some exceptions not at issue here. We affirm the district court's holding that Schmier's suit is barred by *res judicata*.

Pursuant to Rule 8.1115(a), Schmier was unable to cite several unpublished California decisions that, if precedential, he claims would exonerate certain of his clients facing criminal charges for traffic offenses. Schmier now challenges Rule 8.1115(a) as a content-based prior restraint in violation of the First and Fourteenth Amendments of the U.S. Constitution, as well as Article VI, § 6(d) of the California Constitution.

Schmier's current claim is identical to one involving the same parties previously argued to, and decided on the merits by, the California courts. *See Kenneth J.*

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

Schmier v. Supreme Court of Cal., 2003 WL 22954266 (Cal. App. Dec. 16, 2003), *review denied* (2004), *cert. denied*, 543 U.S. 818 (2004); *cf. Michael Schmier v. Supreme Court of Cal.*, 93 Cal. Rptr. 2d 580 (App. 2000), *reh'g denied* (2000), *review denied* (2000), *cert. denied*, 531 U.S. 958 (2000) (raising the same First Amendment challenge to Cal. R. Ct. 976-979 (now revised and renumbered as Cal. R. Ct. 8.1105-1125) among other constitutional arguments against the same defendants, but on behalf of his brother as named plaintiff). California *res judicata* law therefore forecloses relitigation of this action in a second suit. *See Mycogen Corp. v. Monsanto Co*., 28 Cal. 4th 888, 896-97 (2002); *see also Henrichs v. Valley View Dev*., 474 F.3d 609, 615 (9th Cir. 2007) ("To determine the preclusive effect of a state court judgment, we look to state law."). In adjudicating Schmier's previous claim, the California Court of Appeal distinguished Rule 8.1115(a) from the funding provision at issue in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), which was struck down as unconstitutional viewpoint-based discrimination because it precluded recipient lawyers from making certain arguments in court, and squarely held that Rule 8.1115(a) does not offend an attorney's "extremely circumscribed" First Amendment right to free speech during a judicial proceeding. *See Kenneth J. Schmier*, 2003 WL 22954266, at *2-3 (quoting *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1071 (1991)).

Schmier fails to produce evidence of any material change in circumstances that might warrant setting

res judicata aside, *see Pac. Tel. & Tel. Co. v. City and Cnty. of S.F.*, 17 Cal. Rptr. 687, 701 (App. 1961), nor are we convinced that this case falls within the "extremely narrow" public interest exception to *res judicata* contemplated by California law, *see Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 259 (1992) – an argument which we need not consider, in any event, because Schmier raises it for the first time on appeal, *see Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

v.

JUSTICES OF THE CALIFORNIA SUPREME COURT, *et al.*,

Defendants. /

No. C 09-02740 WHA

ORDER OF DISMISSAL

(Filed Sep. 1, 2009)

Plaintiff filed this action to challenge Rule 8.1115(a) of the California Rules of Court. This rule precludes citation to unpublished decisions. Plaintiff, a practicing attorney, seeks injunctive relief to bar the enforcement of the rule because he is representing a defendant in a criminal traffic case and he wishes to cite unpublished authority.

A July 2009 order denied plaintiff's application for a temporary restraining order. It explained that this action is barred by *res judicata* and that, in all respects, plaintiff's First Amendment claim is entirely meritless. Recognizing that this ruling effectively ended the case, the July 2009 order required plaintiff to respond and show cause why the case should not be dismissed. Plaintiff timely responded and argued against dismissal.

This order, however, is unpersuaded. Plaintiff's claim has been found to be barred by *res judicata* and

has been rejected on the merits. A further dispositive motion would be an empty exercise, and amendment would be futile. For these reasons and the reasons stated in the July 2009 order (Dkt. No. 28), this action is hereby **DISMISSED** with prejudice. Judgment will be entered.

IT IS SO ORDERED.

Dated: August 31, 2009. /s/ Wm Alsup
WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

v.

JUSTICES OF THE CALIFORNIA SUPREME COURT, *et al.*,

Defendants. /

No. C 09-02740 WHA

JUDGMENT

For the reasons stated in the accompanying order dismissing this action, **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendants and against plaintiff. The Clerk **SHALL CLOSE THE FILE**.

IT IS SO ORDERED.

Dated: August 31, 2009.

/s/ Wm Alsup
WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH J. SCHMIER, Plaintiff-Appellant, v. JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California; KENNETH SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange, Defendants-Appellees.	No. 09-17195 D.C. No. 3:09-cv-02740-WHA Northern District of California, San Francisco ORDER (Filed Jan. 28, 2011)

Before: HAWKINS and N.R. SMITH, Circuit Judges, and PRO, District Judge.*

Judge N.R. Smith has voted to deny Appellant's petition for rehearing en banc. Judge Hawkins and Judge Pro have recommended denying the en banc petition.

* The Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.