

Aaron D. Aftergood (SBN: 239853)  
THE AFTERGOOD LAW FIRM  
1875 Century Park East, Suite 2230  
Los Angeles, CA 90067  
Telephone (310) 551-5221  
Facsimile (310) 496-2840

Attorney for Plaintiff KENNETH J. SCHMIER.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

vs.

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

Defendants.

CASE NO. CV-09-2740-WHA

DECLARATION OF KENNETH J.  
SCHMIER IN SUPPORT OF  
PLAINTIFF'S EX PARTE  
APPLICATION FOR TEMPORARY  
RESTRAINING  
ORDER AND ISSUANCE OF ORDER TO  
SHOW CAUSE RE PRELIMINARY  
INJUNCTION.

SUBMITTED CONCURRENTLY WITH  
[PROPOSED] ORDER; EX PARTE  
APPLICATION, AND MEMORANDUM  
OF POINTS AND AUTHORITIES

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

I, Kenneth J. Schmier, declare as follows:

1. I am a member of the State Bar of California, and also counsel of record for Michael N. Jennings (hereinafter "DEFENDANT JENNINGS"), who is a Defendant in a presently pending criminal matter before the Orange County Superior Court, Case No. SA138658PE, arising from said DEFENDANT JENNINGS' alleged violation of Cal.Veh.C. § 21453(a) on March 12, 2009. A true and correct copy of

1 DEFENDANT JENNINGS' traffic citation is attached hereto as "Exhibit A."

2 2. The charges against DEFENDANT JENNINGS therein were brought by the Office of the  
3 Orange County District Attorney predicated solely upon an Automated Traffic Enforcement System  
4 ("ATES") installed by the City of Santa Ana at the intersection of Santa Ana Blvd. and Main Street  
5 ("SUBJECT ATES INTERSECTION"), in the City of Santa Ana, County of Orange, State of California  
6 (hereinafter "UNDERLYING ATES INFRACTION"). DEFENDANT JENNINGS' arraignment and  
7 criminal court trial is presently set for July 22, 2009.

8 3. The City of Santa Ana is reputed to issue approximately 1000 ATES citations each  
9 month. I have been contacted by and expect to also defend numerous other defendants situated  
10 similarly to DEFENDANT JENNINGS.

11 4. I expect to offer reliable evidence in the UNDERLYING ATES ACTION that the City of  
12 Santa Ana failed to comply with the requirement of Cal.Veh.C. §21455.5(b) with respect to the  
13 SUBJECT ATES INTERSECTION because it failed to issue warning notices only for the first 30-day  
14 period following installation of the ATES at the SUBJECT ATES INTERSECTION, and has not done  
15 so for any 30 day period prior to issuing the March 12, 2009 citation to DEFENDANT JENNINGS, as a  
16 complete defense to the charges against DEFENDANT JENNINGS in the UNDERLYING ATES  
17 ACTION.

18 5. On December 18, 2008, the Appellate Division of the Orange County Superior Court  
19 issued its decision in a case styled *People of the State of California v. Fischetti* 2009 WL 221042, 170  
20 Cal.App.4th Supp. 1, hereinafter *Fischetti II*), wherein the Appellate Court held that compliance with  
21 Cal.Veh.C. §21455.5(b)'s warning requirements was mandatory for each ATES intersection as  
22 *separately installed* and that a controlling municipality's failure to so comply was and is a complete  
23 defense to prosecution of an infraction at any such noncompliant intersection where the sole evidence  
24 relied upon for conviction was a non-complaint ATES. The *Fischetti II* decision was subsequently  
25 certified for publication on January 15, 2009. A true and correct copy of the published *Fischetti II*  
26 decision is attached hereto as "Exhibit B."

27 6. To date, no other appellate published authority of the State of California has reached a  
28 contrary conclusion to that reached by the Court in *Fischetti II* with respect to the mandatory application of

1 the Cal.Veh.C. §21455.5(b)'s warning requirements by intersection, and, at the time it was published,  
2 *Fischetti II* was, and continues to be the sole, uncontradicted, dispositive and controlling California  
3 authority on point.

4 7. Two other unpublished and uncitable opinions have previously been issued by the  
5 Appellate Department of the Superior Court, County of Orange reaching the same legal conclusions as  
6 did that Court in *Fischetti II: People of the State of California v. Anna Vrska*, Appellate Division  
7 Superior Court of California County of Orange, Case No. 30-2008-00044334 Filed Aug 28, 2008; and  
8 *People of the State of California vs. Fischetti*, Appellate Division of the Superior Court of California,  
9 County of Orange, Case No. AP-14168 filed Jan 31, 2005. Both *Fischetti* cases involve the same  
10 defendant and the same fact situation but separate citations issued 3 years apart. The 2005 decision is  
11 referred to as *Fischetti I* and the 2008 *Fischetti* decision as *Fischetti II*. A true and correct copy of the  
12 *Vrska* decision is attached hereto as "Exhibit C" and a true and correct copy of the *Fischetti I* decision is  
13 attached hereto as "Exhibit D."

14 8. As did *Fischetti II*, both *Vrska* and *Fischetti I* held that compliance with Cal.Veh.C.  
15 §21455.5(b)'s warning requirements was mandatory for each separate ATES intersection separately  
16 installed and that a controlling municipality's failure to so comply was and is a complete defense to  
17 prosecution of an infraction at any such noncompliant intersection where the sole evidence relied upon  
18 for conviction was a non-complaint ATES. And again similarly to *Fischetti II*, both the *Vrska* and  
19 *Fischetti I* decisions were subject to numerous petitions by non parties seeking to obfuscate their  
20 rulings. In *Fischetti I*, the City of Costa Mesa, with the support of the cities of Long Beach and Santa  
21 Ana petitioned the Supreme Court of California for review of this decision. Review was denied. The  
22 appellate decision was not published. In *Vrska*, the petition of *Vrska* to have the decision published was  
23 denied by the Supreme Court despite a finding by the appellate judge that the decision should be  
24 published.

25 9. The *Fischetti II* decision, having been issued and published by an appellate division of  
26 the Orange County Superior Court, would be mandatory and binding upon the Orange County Superior  
27 Court in the UNDERLYING ATES ACTION, as a matter of law, pursuant to *Auto Equity Sales, Inc. v.*  
28 *Superior Court* (1962) 57 Cal.2d 450, 455. Based upon discovery which has adduced absence of

1 evidence of compliance by the City of Santa Ana with Cal.Veh.C. § 21455.5(b) insofar as the SUBJECT  
2 INTERSECTION as of March 12, 2009 was concerned, my citation of the *Fischetti II* decision, as  
3 counsel of record for, and on behalf of my client, DEFENDANT JENNINGS, in the UNDERLYING  
4 ATES ACTION, would necessitate and result in a complete dismissal of the UNDERLYING ATES  
5 ACTION. The same is true for *Vrska* and *Fischetti I*.

6 10. On February 25, 2009, the California Supreme Court, without comment or explanation,  
7 ordered the *Fischetti II* decision to be depublished pursuant to C.R.C. Rule 8.1125. A true and correct  
8 copy of the depublication order is attached hereto as “Exhibit E.” As a direct result of the Supreme  
9 Court’s February 25, 2009 decision to depublish the *Fischetti II* decision, I have been prevented and  
10 precluded as a matter of law by C.R.C. Rule 8.1115(a) from mentioning to any California court the  
11 *Fischetti II* decision or its content, and attributing its content to an appellate court superior in authority  
12 to the trial court, such that the trial court is compelled by law to acquit my client, DEFENDANT  
13 JENNINGS, in the UNDERLYING ATES ACTION. Plaintiff’s present and ongoing inability to cite  
14 *Fischetti II* has been succinctly set forth in a recent discovery response to DEFENDANT JENNINGS  
15 from the City Attorney for the City of Santa Ana. A true and correct copy of this discovery response is  
16 attached hereto as “Exhibit F.” In short, I am denied the use of the most effective tool of my trade, a  
17 complete defense as a matter of law to the UNDERLYING ATES ACTION.

18 11. As a member of the State Bar of California, and as counsel of record for DEFENDANT  
19 JENNINGS, I have a duty imposed upon me to zealously to represent my client’s interests in defense of  
20 the UNDERLYING ATES ACTION, which must include calling to the Trial Court’s attention that its  
21 own appellate court has repeatedly ruled that charges against my client must be dismissed. This poses a  
22 dilemma for me. C.R.C. Rule 8.1115(a) affirmatively precludes and restrains me from speaking or  
23 uttering the citation or nature of the ruling in *Fischetti II*, *Vrska* or *Fischetti I*, or any part thereof, the  
24 only authority that will exonerate my client.

25 12. Were I to speak or utter the citation of *Fischetti II*, *Vrska* or *Fischetti I*, or attribute the  
26 content of these decisions to the Appellate Department of the Superior Court, County of Orange or any  
27 part thereof, in the zealous defense of DEFENDANT JENNINGS and to secure a dismissal of said  
28 UNDERLYING ATES ACTION, I would be subjected to monetary sanctions and/or contempt

1 proceedings by the underlying Trial Court, as well as professional discipline imposed by the State Bar  
2 of California including, but not limited to, reproof, suspension, and/or disbarment, which discipline  
3 imposed at any level would remain permanently as derogatory information on my record of licensure  
4 with the State Bar, and/or would inflict injury in my professional reputation, and prevent or preclude my  
5 ability to be retained by new clients as a result of such publicly-disclosed bar record information and/or  
6 would result in my being deprived of the right and ability to practice law and thus earn a livelihood in  
7 the State of California.

8 13. I am in heightened peril because I have already attempted to cite unpublished authority in  
9 the courts of California, been denied the opportunity to do so, fully litigated the issue in the courts of  
10 California, and been instructed that I have no right to do so. *Schmier v. Supreme Court of California*  
11 (2000) 78 Cal.App.4th 700 cert. denied, 531 U.S. 958 (*Schmier I*) [as counsel]. *Schmier v. Supreme*  
12 *Court* (2002) 96 Cal.App.4th 873 (*Schmier II*) [as plaintiff], *Schmier v. Supreme Court of California* 1st  
13 Dist Ct of Appeal A101206 12/16/03 [Unpublished]. (*Schmier III*) [as plaintiff]. A true and correct  
14 copy of the *Schmier III* decision is attached hereto as "Exhibit G."

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21,  
2009 at Larkspur, California.

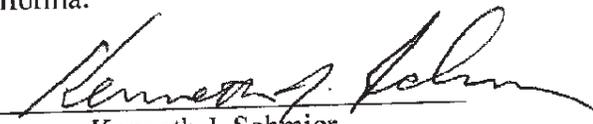
  
Kenneth J. Schmier

EXHIBIT A

# NOTICE OF TRAFFIC VIOLATION

The City of Santa Ana Police Department  
**NOTICE TO APPEAR** Automated Traffic Enforcement **SA138658PE**

DATE OF VIOLATION **March 12, 2009** TIME **7:30**

NAME (FIRST, MIDDLE, LAST)  
**MICHAEL N JENNINGS**

ADDRESS  
**11 VILLAGER**

CITY **IRVINE** STATE **CA** ZIP CODE **92602**

DRIVER LIC. NO. **N5672402** STATE **CA** CLASS **C** COMMERCIAL  YES  NO AGE **49** BIRTH DATE **8/5/59**

SEX **M** HAIR **BROWN** EYES **BLUE** HEIGHT **6'01"** WEIGHT **175.00**

VEH. LIC. NO. **6CKH909** STATE **CA**  COMMERCIAL VEHICLE (Veh. Code, § 15210(b))  
 HAZARDOUS MATERIAL (Veh. Code, § 353)  
 YR. OF VEH. **2008** MAKE **ACURA** BODY STYLE **Utility** COLOR

REGISTERED OWNER OR LESSEE  
**MICHAEL N JENNINGS**

ADDRESS  
**11 VILLAGER**

CITY **IRVINE** STATE **CA** ZIP CODE **92602**

CODE AND SECTION **VC 21453(a)** DESCRIPTION **Failure to Stop at Red Light**

LOCATION OF VIOLATION  
**At Santa Ana Blvd and Main St**

VIOLATION WAS NOT COMMITTED IN MY PRESENCE. THE ABOVE IS DECLARED ON INFORMATION AND BELIEF AND IS BASED ON PHOTOGRAPHIC EVIDENCE.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THE FOREGOING IS TRUE AND CORRECT.

**18-Mar-09** **GARY FRATUS**  **2087**  
 DATE ISSUED DECLARANT SIGNATURE ID NO

YOU MUST RESPOND TO THE COURT ON OR BEFORE:  
**WHEN: 4-May-09**  
**Clerk's Office Hours**  
**Monday - Friday**  
**7:30 AM - 5:00 PM**  
**Night Court:**  
**First and Third Tuesday of**  
**Each Month**  
**4:00 PM - 6:00 PM**

**WHAT TO DO:** FOLLOW THE INSTRUCTIONS ON THE REVERSE.

**WHERE: The Superior Court of California**  
**700 Civic Center Dr. West**  
**Santa Ana, CA 92702**  
**714-449-8100**

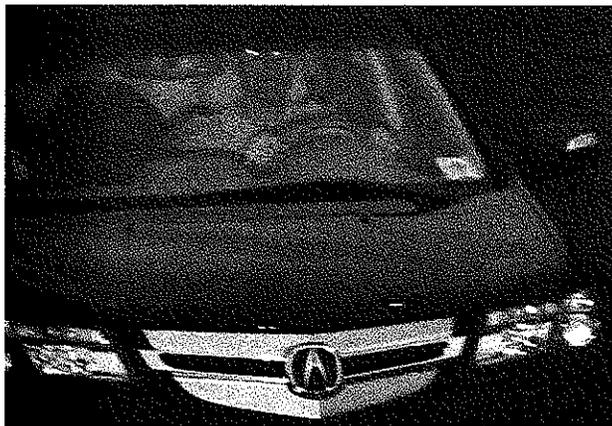
Notice to Appear form approved by the Judicial Council of California SEE REVERSE  
 Rev. 09-20-05 (Veh. Code, § 40518) TR-115

## Certificate of Mailing

I, CHRISTI STAMPLEY of Redflex Traffic Systems Inc., 23751 N. 23rd Avenue, Suite 150, Phoenix, Arizona 85085-1854, do certify that I am over 18 years old and not a party to the above entitled case. On Wednesday, March 18, 2009, I placed this Notice to Appear in an envelope addressed to the registered owner, lessee, or identified driver as shown above, sealed it, and deposited the envelope in a United States Postal Service receptacle located at the United States Postal Service office in Phoenix, Arizona. In the ordinary course of business, the envelope is sealed, affixed with proper postage, and mailed. I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Dated: 18-Mar-09 CHRISTI STAMPLEY (Code of Civil Procedure 1013a[3], 2015.5)



**MICHAEL N JENNINGS**  
**11 VILLAGER**  
**IRVINE, CA 92602**

**1. The Reason You Received This Notice:**

A vehicle registered in your name was photographed failing to stop for an official red traffic control signal, or the registered owner of the vehicle depicted on this citation has submitted an Affidavit naming you as the driver of the vehicle at the time of the offense, or through investigation it was determined that you are the driver of the vehicle. This is a violation of the State of California Vehicle Code Section 21453(a) or (c) pursuant to Section 21455.5.

**2. The Right to View Video**

If you would like to view the photos/video of this offense call the Santa Ana Police Department at (714) 245-8496 for directions and the video viewing schedule. The video can be viewed on the Internet for 60 days from the date of violation at : [www.photonotice.com](http://www.photonotice.com) Enter City Code: SNA. If you experience any problems with the video, call : 1-877-847-2338.

**3. The Options to Resolve This Complaint:**

**WARNING: You Must Select One of the Following Options ON OR BEFORE 04-May-2009. Complete the applicable coupon on the Options Page (page 2) and return the coupon in the enclosed envelope. Make sure the mailing address on the reverse side of the coupon appears in the window of the enclosed envelope. If you do not respond, your citation will NOT be dismissed, you may be convicted of the violation, it may appear on your record at the Department of Motor Vehicles (DMV), it may be referred to a collection agency, and your insurance and credit record may be adversely affected.**

**A. Identify another Driver.** IF YOU WERE **NOT** THE DRIVER, complete the Identify New Driver coupon (Option A on the Options Page) and return in the enclosed envelope by 04-May-2009. You must complete all the information for this citation for your name to be considered for dismissal. If you do not complete the required fields, this citation will remain in your name. All fields are required (i.e. eye color, hair color, date of birth, driver's license number, height, weight, etc.).

**B. Plead Not Guilty and Request a Court Trial or a Trial by Written Declaration.**

If you wish to contest this matter, you must select one of the following options by 04-May-2009.

**For a Court Trial - NOTE:** You must first pay your entire bail amount in order to request a court trial. If you are found not guilty, your bail amount will be refunded by the court. Your options to request a court trial are:

1.) Appear in person at the The Superior Court of California, County of Orange, Central Justice Center, 700 Civic Center Dr. West, Santa Ana, CA 92702. SHOULD YOU CHOOSE TO APPEAR IN PERSON, BRING YOUR COPY OF THE NOTICE TO APPEAR WITH YOU; or,

2.) You may also request a court trial by returning the Option B coupon on Page 2 along with your bail amount in the enclosed envelope. You must check the box to "plead not guilty" on the Option B coupon and complete the Driver's License information. Use of registered or certified mail is required. Upon receipt of your request, you will be notified of your trial date when you should appear in court.

**For a Trial by Written Declaration -** Send a certified or registered letter postmarked not later than five (5) days prior to the appearance date, or come to the court on or before the court response date printed on the front and request a trial by written declaration. **Submit the bail amount.** You will be given forms to allow you to write a statement and other evidence without appearing in court. An officer will also submit a statement. The judicial officer will consider all of the evidence at the same time and decide the case.

**C. Attend Traffic School.** You may be able to avoid the point count and adverse affect on your insurance by attending traffic school if you have not done so within the past 18 months. To determine if you are eligible, call (714) 449-8100. To register for Traffic School, you must first verify eligibility and then pay your full bail amount plus the cost of traffic school. (If you are an Orange County resident, the cost of traffic school is \$57.00. If you are **not** an Orange County resident, the cost of traffic school is \$24.00). You have two options to pay: 1.) Complete the Option C coupon on page 2 and send a check for the bail amount plus the cost of traffic school in the enclosed envelope. Make check payable to "The Clerk of the Court". Include your citation number on your check. Please indicate on the Option C coupon that you would like to attend Traffic School. You will then be sent a package of information on the various school options and enrollment procedures. 2.) Go to [www.occourts.org](http://www.occourts.org) to pay the citation on line and sign up for traffic school.

**D. Pay the Bail.** To pay by mail, submit the bail amount along with the Option D coupon on the Option Page (page 2). If paying by check or money order, please include your citation number on your check and make it payable to "The Clerk of the Court". The person named on the Notice to Appear will be convicted of the violation (pursuant to CVC § 13103). IF YOU WERE **NOT** THE DRIVER, DO **NOT** SELECT THIS OPTION. DO NOT SEND CASH.

**4. For more information regarding this notice, your options, and automated photo traffic enforcement, call the Toll Free Information Line at 1-877-847-2338 between the hours of 9AM - 4 PM (MST).**

**EXHIBIT B**



LEXSEE 170 CAL.APP.4TH SUPP. 1

**THE PEOPLE, Plaintiff and Respondent, v. THOMAS JAMES FISCHETTI, Defendant and Appellant.**

30-2008-00080937

**APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY**

170 Cal. App. 4th Supp. 1; 89 Cal. Rptr. 3d 186; 2008 Cal. App. LEXIS 2535

December 18, 2008, Filed

**NOTICE:**

NOT CITABLE--ORDERED NOT PUBLISHED

**SUBSEQUENT HISTORY:** Review denied and ordered not published by People v. Fishcetti (Thomas James), 2009 Cal. LEXIS 1589 (Cal., Feb. 25, 2009)

**PRIOR HISTORY:** [\*\*\*1]

JUDGMENT ON APPEAL from the SUPERIOR COURT of ORANGE COUNTY CENTRAL JUSTICE CENTER, HON. GLENN MONDO COMMISSIONER.

**SUMMARY:**

## CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant was convicted of running a red signal light (Veh. Code, § 21453, subd. (a)) based upon evidence obtained from an automated traffic enforcement system in Santa Ana. Defendant contended that the city lacked authority to prosecute him because it was operating the system without having first complied with Veh. Code, § 21455.5, subd. (b), in that it had failed to issue warning notices for 30 days before issuing citations. The evidence showed the city had instituted a 30-day warning period when it installed its first automated traffic enforcement systems, but it did not have such a warning period before issuing citations at the location where defendant was cited. The trial court found that the city's actions satisfied the warning notice requirement of Veh. Code, § 21455.5, subd. (b). (Orange County Superior Court, Central Justice Center, No. 30-2008-00080937, Glenn Mondo, Commissioner.)

The Appellate Division, in a one-judge decision pursuant to Code Civ. Proc., § 77, subd. (h), reversed the judgment and directed the trial court to dismiss the com-

plaint. A city may issue citations based upon evidence obtained from an automated traffic enforcement "system" (Veh. Code, § 21455.5, subd. (a)) but only if it first issues warning notices for 30 days (Veh. Code, § 21455.5, subd. (b)). Based upon both the statutory language of § 21455.5, subs. (a) and (b) and its legislative history, the court reasoned that the word "system" refers not to a citywide system, but to each individual automated traffic enforcement unit or in the municipality. Santa Ana had no 30-day warning period before issuing citations based on evidence obtained from the system that photographed defendant. Therefore, its prosecution of defendant exceeded its jurisdiction. (Opinion by Perk, J.)

**HEADNOTES**

## CALIFORNIA OFFICIAL REPORTS HEADNOTES

**(1) Automobiles and Highway Traffic § 2--Automated Enforcement System--Definitions and Distinctions.--** Because Veh. Code, § 21455.5, [\*2] subd. (a) provides that an intersection may be equipped with an automated enforcement system, the term "automated traffic enforcement system" in § 21455.5, subd. (b), cannot refer to a municipality's overall automated enforcement plan, but must instead refer to each individual automated system operated at an intersection within the municipal jurisdiction.

**(2) Automobiles and Highway Traffic § 44--Prosecutions--Automated Enforcement System--Warning Requirements.--**The Legislature in 2003 rejected an amendment to Sen. Bill No. 780 (2003-2004 Reg. Sess.) which would have expressly provided for the warning period of Veh. Code, § 21455.5, subd. (b), to occur during the first 30 days after the first recording

170 Cal. App. 4th Supp. 1, \*; 89 Cal. Rptr. 3d 186, \*\*;  
2008 Cal. App. LEXIS 2535, \*\*\*

unit is installed, and the omission of this language from the amendments enacted in that year is indicative of a legislative intention to avoid linkage of the 30-day warning period with a municipality's initial installation of automated enforcement equipment. Because under § 21455.5, subd. (b) compliance is required prior to issuing citations, a city exceeded its jurisdiction by commencing the prosecution of defendant without having complied with the warning requirements, where the city issued warning notices only for the first photographic enforcement cameras installed within the city.

**JUDGES:** Opinion by Perk, J.

**OPINION BY:** Steven L. Perk

**OPINION**

[\*\*186] **PERK, J.**--Based upon evidence obtained via an automated photographic enforcement system, [\*\*187] appellant was convicted of failing to stop for a red signal, in violation of Vehicle Code section 21453, subdivision (a). The record discloses that the City of Santa Ana (the City) sought to comply with warning requirements of Vehicle Code section 21455.5, subdivision (b) (section 21455.5(b)), by issuing warning notices only for the first photographic enforcement cameras installed within the City.

(1) The trial court's determination that the City complied with section 21455.5(b) is inconsistent with the structure and purpose of the statute as a whole. Because section 21455.5, subdivision (a) provides that "the intersection" may be equipped with an automated enforcement system, the term "automated traffic enforcement system" in section 21455.5(b), cannot refer to a municipality's overall automated enforcement plan, but must

instead refer to each individual automated system operated at an intersection within the municipal jurisdiction.

The dictionary definition [\*\*\*2] of the word "system" (see, e.g., Merriam-Webster's Collegiate Dict. (10th ed. 1993) p. 1197) does not comport with the trial [\*3] court's analysis and conclusion, in the absence of any evidence that the sets of equipment located variously at intersections throughout the City are somehow interactive with, or dependent upon, each other. If such systemic interaction were necessary, operation of automated enforcement equipment at a lone intersection would be impossible. From the perspective of the motorists for whom the statutory requirements were intended to provide protection, it would not make sense for the geographic scope of the 30-day warning period to be determined arbitrarily by the size of the municipality operating the automated enforcement system.

(2) The Legislature in 2003 rejected an amendment to Senate Bill No. 780 (2003-2004 Reg. Sess.) which would have expressly provided for the warning period of section 21455.5(b) to occur "during the first 30 days after the first recording unit is installed," and the omission of this language from the amendments enacted in that year is indicative of a legislative intention to avoid linkage of the 30--day warning period with a municipality's [\*\*\*3] initial installation of automated enforcement equipment. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89 [260 Cal. Rptr. 520, 776 P.2d 222].) Because under section 21455.5(b) compliance is required "[p]rior to issuing citations under this section," the City exceeded its jurisdiction by commencing the prosecution of appellant without having complied with the warning requirements.

The judgment is reversed, with direction that the charge be dismissed.

EXHIBIT C

[[Appellate judge's decision, People v. Anna V., from highwayrobbery.net]]

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

AUG 28 2008

ALAN SLATER, Clerk of the Court

APPELLATE DIVISION  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

*Heather G. Potter*  
BY H. POTTER

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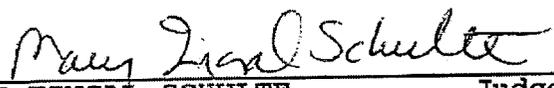
PEOPLE OF THE STATE OF )  
CALIFORNIA, )  
 )  
Plaintiff and )  
Respondent, )  
 )  
vs. )  
 )  
Defendant and )  
Appellant. )

JUDGMENT ON APPEAL  
from the  
SUPERIOR COURT  
of  
ORANGE COUNTY  
CENTRAL JUSTICE CENTER  
  
HON. GLENN MONDO  
COMMISSIONER

The record in this case discloses that the City of Santa Ana  
mistakenly sought to comply with Vehicle Code § 21455.5(b) by  
issuing warning notices only for the first photographic  
enforcement cameras installed in the City. The trial court's  
determination that the City complied with § 21455.5(b) appears to  
be inconsistent with the structure and purpose of the statute as  
a whole. Because § 21455.5(a) provides that "the intersection"  
may be equipped with an automated enforcement system, "automated  
enforcement system" in § 21455.5(b) cannot refer to a  
municipality's overall automated enforcement plan, but must  
instead refer to each individual automated system operated at an  
intersection within the municipal jurisdiction. The "dictionary"  
definition of the word "system" does not comport with the trial  
court's analysis and conclusion, in the absence of any evidence  
that the various sets of equipment located at intersections

1 throughout the City are somehow interactive with, or dependent  
2 upon, each other - if such systemic interaction were necessary,  
3 operation of automated enforcement equipment at a lone  
4 intersection would be impossible. The Legislature in 2003  
5 rejected an amendment to SB 780 which would have expressly  
6 provided for the warning period of § 21455.5(b) to occur "during  
7 the first 30 days after the first recording unit is installed,"  
8 and the omission of this language from the amendments enacted in  
9 that year reflects a legislative intention to avoid linkage of  
10 the 30-day warning period with a municipality's initial  
11 installation of automated enforcement equipment. (See City of  
12 Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 88-89.) Nor  
13 would it make sense, from the perspective of the motorists for  
14 whom the statutory requirements were intended to provide  
15 protection, for the geographic scope of the 30-day warning period  
16 to depend arbitrarily upon the size of the municipal jurisdiction  
17 in question.

18       The judgment is reversed, with direction that the charge be  
19 dismissed.

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23 MARY FINGAL SCHULTE, Judge

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EXHIBIT D

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

JAN 31 2005

APPELLATE DIVISION  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

ALAN SLATER, Clerk of the Court

*K. Paik*  
BY K. PAIK

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PEOPLE OF THE STATE OF )  
CALIFORNIA, )  
 )  
Plaintiff and )  
Respondent, )  
 )  
vs. )  
 )  
THOMAS J. FISCHETTI, )  
 )  
Defendant and )  
Appellant. )

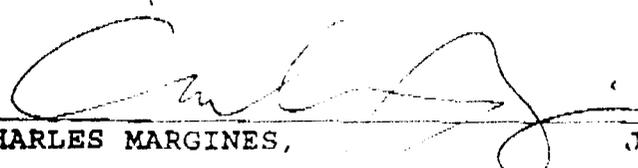
CASE NO. AP-14168  
  
JUDGMENT ON APPEAL  
from the  
SUPERIOR COURT  
of  
ORANGE COUNTY  
HARBOR JUSTICE CENTER  
  
HON. MARK J. SHEEDY  
COMMISSIONER

Vehicle Code § 21455(c) requires that "a" single governmental agency, such as respondent City, undertake "all" the listed activities comprising operation of an automated enforcement system. However, the evidence in this case is undisputed that the signal phasing "and the timing thereof" at the intersection in question was controlled not by respondent City as required by § 21455.5(c)(2)(E), but rather by Caltrans. (Settled statement at 2:4-6.) Respondent's reliance on § 21455.5(d) is misplaced, since that provision only applies where operation of the system has been "contracted out" and "the governmental agency" maintains overall control and supervision - the record does not indicate any contractual agreement between respondent City and Caltrans with regard to the system, and respondent's own evidence shows that overall control of the intersection resided with Caltrans.

In addition, reversal is warranted based upon respondent's

1 failure to implement a 30-day grace period. (Settled statement at  
2 2:3.) Respondent's construction of § 21455.5(b) appears to be  
3 inconsistent with the structure and purpose of § 21455.5 as a  
4 whole. Because § 21455.5(a) provides that "the intersection" may be  
5 equipped with an automated enforcement system, "automated  
6 enforcement system" in § 21455.5(b) cannot refer to a  
7 municipality's overall automated enforcement plan, but must instead  
8 refer to each individual automated system operated at an  
9 intersection within the municipal jurisdiction. Nor would it make  
10 sense, from the perspective of the motorists for whom the statutory  
11 requirements were intended to provide protection, for the  
12 geographic scope of the 30-day grace period to depend arbitrarily  
13 upon the size of each municipal jurisdiction. Tellingly, respondent  
14 itself offers legislative history of a proposed 2003 amendment to  
15 § 21455.5 (SB 780) which would have expressly provided for the  
16 grace period to exist "during the first 30 days after the first  
17 recording unit is installed" - the omission of this language from  
18 the amendments enacted in 2003 must be viewed not as an intention  
19 to adopt the omitted language, as respondent asserts, but rather as  
20 legislative rejection of a link between the grace period and the  
21 installation of the municipality's first automated enforcement  
22 system.

23 Respondent's request for judicial notice is granted as to  
24 Exhibits A, B and D. The judgment is reversed, with direction that  
25 the charge be dismissed.

26  
27  
28  
  
CHARLES MARGINES,

Judge

EXHIBIT E



3 of 7 DOCUMENTS

**THE PEOPLE, Plaintiff and Respondent, v. THOMAS JAMES FISHCETTI, Defendant and Appellant.**

**S170231**

**SUPREME COURT OF CALIFORNIA**

**2009 Cal. LEXIS 1589**

**February 25, 2009, Filed**

**SUBSEQUENT HISTORY:** Amended by People v. Fischetti (Thomas James), 2009 Cal. LEXIS 2544 (Cal., Mar. 10, 2009)

**PRIOR HISTORY:** [\*1]  
People v. Fischetti, 170 Cal. App. 4th Supp. 1 [89 Cal.Rptr.3d 186, 2008 Cal. App. LEXIS 2535] (Cal. Super. Ct., 2008)

**JUDGES:** GEORGE, Chief Justice.

**OPINION**

Depublication ordered. The request for depublication of the opinion of the Appellate Division of the Orange County Superior Court in this matter is granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion filed December 18, 2008, and appearing at 170 Cal.App.4th Supp. 1 [89 Cal.Rptr.3d 186]. (Cal. Rules of Court, rule 8.1125.)

EXHIBIT F

MAYOR  
Miguel A. Pulido  
MAYOR PRO TEM  
Claudia C. Alvarez  
COUNCIL MEMBERS  
P. David Benavides  
Carlos Bustamante  
Michele Martinez  
Vincent F. Sarmiento  
Sal Tinajero



CITY MANAGER  
David N. Ream  
CITY ATTORNEY  
Joseph W. Fletcher  
CLERK OF THE COUNCIL  
Patricia E. Healy

CITY OF SANTA ANA  
OFFICE OF THE CITY ATTORNEY

20 CIVIC CENTER PLAZA M-29 • P.O. BOX 1988  
SANTA ANA, CALIFORNIA 92702  
(714) 647-5201 • Fax (714) 647-6515

April 14, 2009

**SENT VIA U.S. MAIL**

Michael Jennings  
11 Villager  
Irvine, California 92602

Re: *People v. Jennings*  
Orange County Superior Court Case No. SA138658PE

Dear Mr. Jennings:

The Santa Ana City Attorney's Office is in receipt of your request for discovery pertaining to the above-referenced matter. This letter is provided in response to your request and to inform you of the method by which you may obtain the requested discovery pursuant to *Penal Code* Sections 1054, *et seq.*

I am informed that the Santa Ana Police Department has ordered an evidence package in this matter and it should be received shortly. In addition, *Penal Code* Section 1054.1(a) requires the prosecuting attorney to disclose the names and addresses of persons the People may call as witnesses. The District Attorney's office is charged with prosecution of California *Vehicle Code* violations. However, they do not staff traffic infraction trials in Orange County Superior Court. The City Attorney's office represents the Custodian of Records for the Santa Ana Police Department. Thus, when a discovery request on a traffic matter is received, our office attempts to respond with those items required to be produced under the *Penal Code*. Without question, your requests went beyond the discovery obligation of the agency. However, the Santa Ana Police Department responds, and the following disclosure is hereby made:

- Officer Mark Bell, 60 Civic Center Plaza, Santa Ana, California 92702
- Officer Gary Fratus, 60 Civic Center Plaza, Santa Ana, California 92702
- Officer Alan Berg, 60 Civic Center Plaza, Santa Ana, California 92702
- Officer James Berwanger, 60 Civic Center Plaza, Santa Ana, California 92702
- Vinh Nguyen, City of Santa Ana, 20 Civic Center Plaza, Santa Ana, California 92702
- Anthony Parrino, Redflex Traffic Systems, Scottsdale, AZ
- Edward Tiedje, Redflex Traffic Systems, Scottsdale, AZ

Ltr. to Mr. Jennings  
*People v. Jennings*  
April 14, 2009

*Penal Code* Section 1054.1(b)-(f) requires disclosure of any statements of a defendant, all relevant real evidence seized or obtained, the existence of a felony conviction of any material witness (there are none in this instance), and exculpatory evidence, and any relevant written or recorded statements of witnesses the prosecutor intends to call at trial.

All real evidence obtained as part of the Santa Ana Police Department's investigation of the charged offense against you is available for your inspection. Additionally, you may examine items falling within the categories of documents you requested, if those items exist and are not properly classified as work-product or privileged communications. Should you desire a copy of a certain document the Police Department will provide you with a copy at no charge. Voluminous documents may require a short time period for processing or you may choose to arrange for a copy service to be present at your scheduled appointment time.

LEFT MESSAGE 4/21  
9:00 AM

Please contact the Photo Enforcement Unit at (714) 245-8240 and indicate that you would like to schedule an appointment to obtain any physical evidence and examine documents. If you intend to have a copy service accompany you to the document examination, please advise the Clerk of this at the time you make your appointment.

The following additional items you have requested are hereby responded to or specifically objected to on the following grounds:

Request No. 1

Objection. This request misstates the requirements for providing warning notices under California Vehicle Code Section 21455.5(b). In addition, the request cites *People v. Fischetti* (Case # 30-2008-00080937). Please be advised that the California Supreme Court ordered the depublication of the *Fischetti* decision. Accordingly, the *Fischetti* ruling does not have any bearing upon the instant matter, and cannot be cited to for purposes of this case. However, without waiving said objections, the Santa Ana Police Department responds as follows: the information regarding the period of time during which warning notices were issued for the City's red light camera system is available for inspection and copying at the Santa Ana Police Department.

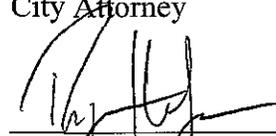
Ltr. to Mr. Jennings  
*People v. Jennings*  
April 14, 2009

If you have any questions or wish to discuss this matter further, please do not hesitate to contact the undersigned.

Very truly yours,

JOSEPH W. FLETCHER  
City Attorney

By:

  
\_\_\_\_\_  
RYAN O. HODGE  
Deputy City Attorney

ROH:

Cc: Officer Gary Fratus, Photo Enforcement

Orange County Superior Court  
Central Justice Center, Department C54  
Attn.: Clerk – Lodge with Case No. SA1030496PE  
700 Civic Center Drive West  
Santa Ana, CA 92701

EXHIBIT G

Filed 12/16/03 Schmier v. The Supreme Court of California CA1/5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**KENNETH J. SCHMIER,**

**Plaintiff and Appellant,**

**v.**

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

**Defendants and Respondents.**

**A101206**

**(San Francisco County  
Super. Ct. No. CGC-02-403800)**

Kenneth J. Schmier appeals the dismissal of his complaint for declaratory and injunctive relief after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks a declaration that California Rules of Court, rule 977, governing the citation of unpublished opinions, is unconstitutional and seeks to enjoin respondents from enforcing rule 977.<sup>1</sup> We affirm.

BACKGROUND

Rules 976 through 979 govern the publication of opinions. Stated simply, rule 976(b) provides that no opinion of the Court of Appeal may be published in the Official Reports unless it establishes a new rule of law, resolves a conflict in the law, presents an issue of continuing legal interest, or reviews the history of a common law rule or statute.

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<sup>1</sup> All rule references are to the California Rules of Court.

Rule 978 establishes the procedure for requesting publication of appellate opinions. Rule 979 establishes a similar procedure for requesting depublication of appellate opinions.

Rule 977 (the “no-citation” rule), at issue in this appeal, provides in relevant part:

“(a) An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

“(b) Such an opinion may be cited or relied on:

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

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

This is appellant’s third appeal on behalf of himself or as counsel for his brother, Michael Schmier (Schmier), challenging rules 976 through 979. In the first appeal, *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703 (*Schmier I*), Schmier contended that these rules violate the federal and state constitutional separation of powers doctrine and the constitutional rights to freedom of speech, to petition the government for redress of grievances, to due process and to equal protection. He also contended that these rules conflict with Civil Code section 22.2 and the doctrine of stare decisis. (*Schmier I*, at pp. 706-707.) This court affirmed the dismissal of Schmier’s action, which sought injunctive relief and a writ of mandate to compel respondents to publish all appellate opinions and to permanently enjoin them from enforcing rules 976 through 977. (*Schmier I*, at pp. 707, 712.) “The rules were established by persons in possession of a public office with authority to do so, and they comport with applicable statutory and constitutional requirements.” (*Id.* at p. 712.) The California Supreme Court denied Schmier’s petition for review.

In the second appeal, *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873, (*Schmier II*), Schmier alleged he was entitled to attorney fees for *Schmier I*, under the

private attorney general doctrine (Code Civ. Proc., § 1021.5), though he had not prevailed, because the case conferred a significant benefit on the public by restricting the discretion of the Courts of Appeal to publish or not publish appellate opinions. The court rejected that contention and affirmed. (*Schmier II*, at pp. 876, 878-880, 882-883.)

While *Schmier II* was pending, appellant filed the instant action, individually and as a private attorney general (Code Civ. Proc., § 1021.5), for declaratory and injunctive relief to permanently enjoin respondents from enforcing rule 977. He also sought nominal damages as a result of being precluded from citing and discussing unpublished opinions at oral argument in *Schmier I*, and the refusal of this court to consider appellant's citation of unpublished opinions in his written briefs in *Schmier II*. Appellant contends that on its face and as applied, rule 977 violates the constitutional rights to freedom of speech and to petition the government for redress of grievances. Respondents demurred on the ground that the rule is valid and therefore appellant's complaint failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The trial court sustained the demurrer without leave to amend on the ground that rule 977 "is not legally or constitutionally infirm," and ordered the case dismissed.

#### DISCUSSION

A demurrer admits the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the judgment of dismissal de novo, and exercise our independent judgment as to whether the complaint states a cause of action. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

In *Schmier I*, this court held that the challenged rules did not violate the First Amendment. Appellant argues that a post-*Schmier I* decision by the United States Supreme Court should lead to a reevaluation of that issue. In *Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533, the court considered a challenge to the Legal Services Corporation (LSC) funding provision. That provision permitted LSC lawyers to represent clients challenging the level of welfare benefits they received, but precluded the lawyers from arguing that any applicable state statute conflicts with a federal statute or

that either the state or federal statute violates the United States Constitution. Over a strong dissent, the high court ruled that the challenged provision was a viewpoint-based discrimination that violated the First Amendment. (*Legal Services Corp.*, at pp. 536-537.) “By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. (*Id.* at p. 545.) “A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.” (*Id.* at p. 546.)

*Legal Services Corp. v. Velasquez* is inapposite. First, the “no-citation” rule does not discriminate between competing viewpoints. No unpublished case may be cited regardless of its position on any particular issue. Second, counsel is not precluded from advancing any argument to a court. In fact, a contention that rests on the reasoning of an unpublished decision may be asserted in a party’s brief or argued in court. The party may not, however, reference the unpublished decision adopting the argument. Third, no separation of powers issue exists; the sole limitation is self-imposed by the judiciary.

In a decision that focused on the First Amendment implications of disciplining a lawyer for comments about a pending case made outside the courtroom, the high court stated that “in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.” (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1071.) As we concluded in *Schmier I*, the “no-citation” rule does not encroach on this “extremely circumscribed” right.

#### DISPOSITION

The judgment is affirmed.

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SIMONS, J.

We concur.

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JONES, P.J.

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STEVENS, J.