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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 KENNETH J. SCHMIER

12 Plaintiff,

13 v.

14 JUSTICES OF THE CALIFORNIA
15 SUPREME COURT, et al.,

16 Defendants.

NO. CV 09-02740 WHA

DEFENDANT ANTHONY
RACKAUCKAS'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

DATE: JULY 17, 2009
TIME: 2:00 P.M.
CTRM.: 9

[Please note: the California State
Attorney General's office will make a
special appearance for Defendant
Anthony Rackauckas at the hearing of
this matter]

22 **MEMORANDUM OF POINTS AUTHORITIES**

23 **IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF**

24 Defendant Anthony Rackauckas, District Attorney of the County of Orange (the
25 "District Attorney"), hereby submits the following points and authorities in opposition to
26 Plaintiff Kenneth J. Schmier's ("Plaintiff") Motion for Preliminary Injunction (the
27 "Motion") and respectfully requests the Court in the above-entitled matter to deny the
28 Motion in its entirety or at least insofar as it pertains to the District Attorney.

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

1 **1. THE INJUNCTION SOUGHT BY PLAINTIFF IS**
 2 **INAPPLICABLE AND UNNECESSARY AS TO THE**
 3 **DISTRICT ATTORNEY**

4 In his Motion, Plaintiff seeks an injunction to restrain and enjoin all of the
 5 Defendants “from promulgating and/or enforcing California Rules of Court (“C.R.C.”)
 6 Rule 8.1115(a),” which Plaintiff asserts precludes his citation of any unpublished or
 7 depublished decision. [Plaintiff’s Application for Preliminary Injunction, p. 2, lines 13-
 8 14.] Plaintiff then goes on to describe the particular context in which he is asking this
 9 Court to enjoin all Defendants from enforcing that Rule of Court – a traffic citation
 10 prosecution of one of his clients, which is scheduled for trial in Orange County Superior
 11 Court on July 22, 2009. [*Id.*, p. 2, lines 16-25; See also Plaintiff’s Complaint, p. 3, lines
 12 20-15, where Plaintiff alleges that this case arises from a citation issued to one of
 13 Plaintiff’s clients by the City of Santa Ana for a traffic violation allegedly detected by
 14 one of the City’s Automated Traffic Enforcement cameras.]

15 Given that context of the injunction Plaintiff seeks – and his specific objective of
 16 being freed from any restrictions on his ability to cite a particular depublished decision at
 17 his client’s trial on July 22, 2009 – the District Attorney is an improperly joined and
 18 inappropriate target of Plaintiff’s Motion for several reasons. The District Attorney
 19 prosecutes felonies and misdemeanors but has no role at all in the enforcement of the
 20 Rule of Court regarding citation of unpublished case law or in the prosecution of traffic
 21 cases. [See Declaration of William J. Feccia filed concurrently herewith (the “Feccia
 22 Decl.”), ¶¶ 5-6.]

23 Even more significantly, the District Attorney will not be in a position to make any
 24 objection to Plaintiff’s citation of or reliance on the depublished decision at the trial of
 25 his client, or for that matter to seek any sanctions or other penalties against Plaintiff for
 26 doing so, because the District Attorney will not be appearing at the trial of Plaintiff’s
 27 client on July 22, 2009. [Feccia Decl., ¶ 10.] The District Attorney does not appear on
 28 ///

1 traffic cases in Orange County, nor is he required to do so. *People v. Carlucci*, 23 Cal.3d
2 249 (1979). [Feccia Decl., ¶ 6.]

3 And the District Attorney is neither responsible for, nor interested in, the
4 depublication of the decision which Plaintiffs wishes to cite without restriction. Contrary
5 to Plaintiff's implication, the District Attorney did not make any appearance in the
6 underlying case which is Plaintiff's primary focus in this action – *People v. Fischetti*
7 (referred to in Plaintiff's moving papers and hereinafter as "*Fischetti II*"), Orange County
8 Superior Court Case No. SA 120279PE, in which a decision issued by the Appellate
9 Division (Appellate Division Case No. 30-2008-00080937) was depublished by the
10 Supreme Court. Nor did the District Attorney ask the Supreme Court to depublish the
11 decision rendered in the *Fischetti II* case. [Feccia Decl., ¶¶ 7-9.]

12 Attached as Exhibit "1" to the accompanying Feccia Declaration are true and
13 correct copies of the following records of the "*Fischetti II*" case: 1) the trial court's
14 docket; 2) the written opinion of the Superior Court Appellate Dept.; and 3) the docket of
15 the California Supreme Court's handling of the case. The District Attorney respectfully
16 requests the Court in this case to take judicial notice of those documents pursuant to
17 Federal Rules of Evidence Rule 201.

18 The Supreme Court's docket reveals that the cities of Santa Ana and West
19 Hollywood requested that the *Fischetti II* decision be depublished, while the Orange
20 County District Attorney made no such request. In fact, Plaintiff's own Complaint
21 alleges that it was the City of Santa Ana which sought depublication of the decision.
22 [Complt., ¶ 25.] It is a curious and perhaps fatal defect in the Plaintiff's case as a whole
23 that he has failed to join the City of Santa Ana. It was the City of Santa Ana who issued
24 the citation in Plaintiff's client's case. And it is the City who stands to be the fiscally
25 interested party as to whether or not the depublished *Fischetti II* decision might, if
26 Plaintiff gets his way, become binding precedent and preclude the City from enforcing
27 traffic citations based on automated camera systems during their early days of operation.
28 Notably, for purposes of the upcoming trial of Plaintiff's client, Plaintiff's own

1 declaration states that it is the Santa Ana City Attorney's Office who has asserted that
 2 Plaintiff may not cite the decision in *Fischetti II*. [Declaration of Kenneth J. Schmier (the
 3 "Schmier Declaration"), ¶ 10, p. 4, lines 13-16.] At the same time, the Schmier
 4 Declaration makes no mention whatsoever of the District Attorney. And the Motion
 5 itself includes only a passing reference to the District Attorney as being among the named
 6 Defendants, but fails completely to show why the injunction should issue as to him.

7 Because the District Attorney had no role in the depublishation of the *Fischetti II*
 8 decision and will have no role in taking any steps against Plaintiff to "enforce" the Rule
 9 of Court regarding citation of depublished decisions either in the upcoming trial of
 10 Plaintiff's client, the injunction sought by Plaintiff is entirely inapplicable and
 11 unnecessary as to the District Attorney. To enjoin the District Attorney in the manner
 12 requested by Plaintiff would be a needless, idle act.

13
 14 **2. COURTS ARE EMPOWERED TO REGULATE AND RESTRICT**
 15 **THE FREE SPEECH OF ATTORNEYS PRACTICING BEFORE**
 16 **THEM TO A GREATER DEGREE THAN WOULD BE**
 17 **ALLOWABLE IN OTHER CONTEXTS**

18 Plaintiff's arguments for injunctive relief start from the premise that he is just like
 19 any other citizen being subjected to a prior restraint of his First Amendment Rights.
 20 [See, e.g., Motion, P&A, p. 2, lines 5-13.] Based on that premise, he asks that the Rule of
 21 Court which governs his citation of unpublished or depublished decisions be subjected to
 22 "strict scrutiny" and that the State be required to demonstrate a "compelling State
 23 interest" before such restrictions can be justified. But Plaintiff's premise is erroneous.
 24 He comes to the Court in this case and in all of the cases where he represents his clients
 25 not merely as another citizen whose rights are being restricted, but as a lawyer and officer
 26 of the court. And his present demand to be allowed to speak in court as he desires –by
 27 citing and relying on unpublished or depublished opinions without restriction – must be
 28 viewed in that context.

1 It is well established that the courts have the authority to regulate and restrict the
 2 speech of attorneys practicing before them in order to effectuate their goal and function
 3 of achieving justice. In *Gentile v. State Bar of Nevada* 501 U.S. 1030, 1074 (1991), the
 4 Supreme Court observed:

5 We think that the quoted statements from our opinions in *In re*
 6 *Sawyer*, 360 U.S. 622 [citation omitted] (1959), and *Sheppard*
 7 *v. Maxwell, supra*, rather plainly indicate that the speech of
 8 lawyers representing clients in pending cases may be regulated
 9 under a less demanding standard than that established for
 10 regulation of the press in *Nebraska Press Assn. v. Stuart*, 427
 U.S. 539 [citation omitted] (1976), and the cases which
 preceded it. Lawyers representing clients in pending cases are
 key participants in the criminal justice system, and the State
 may demand some adherence to the precepts of that system in
 regulating their speech as well as their conduct.

11 Similarly, in *Levine v. District Court*, 764 F. 2d 590, 595 (9th Cir. 1985), the Ninth
 12 Circuit stated:

13 The Supreme Court has suggested that it is appropriate to
 14 impose greater restrictions on the free speech rights of trial
 15 participants than on the rights of nonparticipants. [Citation
 16 omitted.] The case for restraints on trial participants is
 especially strong with respect to attorneys, nonparticipants.
Sheppard v. Maxwell, 384 U.S. 333, 360-63 [citation omitted]
 (1966); see *Nebraska Press Association*, 427 U.S. at 564.

17
 18 **3. PLAINTIFF CANNOT RESTRAIN THE DISTRICT**
 19 **ATTORNEY FROM CARRYING OUT HIS ETHICAL**
 20 **OBLIGATIONS BEFORE THE COURTS**

21 As noted above, it is unclear from the Motion exactly what Plaintiff seeks to
 22 prevent the District Attorney from doing. On page 2 of his Complaint, Plaintiff alleges
 23 that the District Attorney “has the authority to move for sanctions and other discipline...”
 24 At no point does Plaintiff allege that the District Attorney has the authority to impose
 25 such sanctions; nor does he allege that the District Attorney has threatened to do so in the
 26 context of any prior case in which Plaintiff has been involved or threatens to do so in any
 27 pending matter. Apparently, therefore, the Plaintiff seeks to establish some generalized
 28 restriction that would muzzle the District Attorney from objecting in any manner in

1 future cases to Plaintiff's citation of depublished or unpublished decisions. The
 2 hypocritical result that Plaintiff is seeking here would impose a prior restraint on the
 3 District Attorney's ability to make arguments at trial so that Plaintiff is free to speak as he
 4 wishes.

5 Furthermore, Plaintiff's injunction would restrict or even preclude the District
 6 Attorney from carrying out his ethical duty to notify the courts that Plaintiff is relying on
 7 authorities that have been depublished and thus lack precedential authority. Lawyers are,
 8 of course, considered officers of the court and stand in a fiduciary relationship with the
 9 courts. The District Attorney has the same ethical duty of any attorney practicing in this
 10 state to assist the courts in avoiding error and to advise the courts of all material facts.
 11 That a case has been affirmatively depublished by the Supreme Court is clearly a material
 12 fact. In effect then, Plaintiff is attempting not only to enjoin the courts from regulating
 13 his speech but is attempting to restrain another officer of the court from performing his
 14 ethical and legal duty before the courts.

15 In *Williams v. Superior Court*, 46 Cal. App. 4th 329, 330 (1996), the Court stated:

16 "Honesty in dealing with the courts is of paramount
 17 importance, and misleading a judge is, regardless of motives, a
 18 serious offense." [Citations omitted.] "Counsel should not
 19 forget that they are officers of the court, and while it is their
 20 duty to protect and defend the interests of their clients, the
 obligation is equally imperative to aid the court in avoiding
 error and in determining the cause in accordance with justice
 and the established rules of practice." [Citation omitted.]

21 The Court in *Daily v. Superior Court of Monterey County*, 4 Cal. App. 2nd 127, 131-132
 22 (1935) described this duty of disclosure as follows:

23 "Where there exists a relation of trust and confidence, it is the
 24 duty of the one in whom the confidence is reposed to make full
 disclosure of all material facts within his knowledge relating to
 the transaction in question, and any concealment of material
 25 facts is a fraud." In *Matter of Shay*, 160 Cal. 399, at page 406
 [citation omitted], Mr. Justice Shaw speaking for the court said:
 26 "The persons here named are all persons engaged in the service
 of the court, assisting it in the exercise of its jurisdiction, and in
 the performance of its functions. They are actually, or
 27 potentially officers of the court. They stand in confidential
 relations toward the court, and in consequence thereof they owe
 28 to the court the duty of greater fidelity and respect than are due
 from other persons."

1
2 Plaintiff's Motion threatens to impair the District Attorney's ability to carry out his
3 duty to the court to disclose material facts to the court and to make assertions on behalf of
4 the People of the State of California that are warranted by case law regarding what does
5 or not constitute binding or persuasive authority and by Rules of Court on the subject.
6 Such an effort to muzzle the District Attorney for the sake of allowing Plaintiff his
7 unfettered right of free speech should not be allowed.

8
9 **4. CONCLUSION**

10 For the foregoing reasons, and based on the accompanying Declaration of William
11 J. Feccia, the District Attorney respectfully requests the Court to deny Plaintiff's Motion.

12 DATED: July 9, 2009

13 Respectfully submitted,

14 NICHOLAS S. CHRISOS, COUNTY COUNSEL
15 JOHN (JACK) WISNER GOLDEN, CHIEF
16 ASSISTANT COUNTY COUNSEL
17 and JAMES C. HARMAN, SUPERVISING DEPUTY

18 By  _____
19 John (Jack) Wisner Golden, Chief Assistant

20 Attorneys for Defendant Anthony Rackauckas
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OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, California 92701. I am not a party to the within action.

On July 9, 2009, I hereby certify that I caused the foregoing **DEFENDANT ANTHONY RACKAUCKAS'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** to be served upon all counsel of record listed below by electronic filing utilizing CM/ECF.


(BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California, following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

(BY UNITED PARCEL SERVICE (UPS)) I placed such envelope(s) addressed as shown below for collection and delivery by UPS with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by UPS.

(BY FACSIMILE) I caused such document to be telefaxed to the addressee(s) and number(s) shown below, wherein such telefax is transmitted that same day in the ordinary course of business.

(BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below.

(FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed this 9th day of July, 2009 at Santa Ana, CA.


Eileen Blanton

NAME AND ADDRESS TO WHOM SERVICE WAS MADE

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