The Committee for the Rule of Law
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July 20, 2015

Honorable Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Attn: Hon. Justice Kathryn Mickle Werdegar

Re: Opposition to Depublication and No-Citation Rules, e.g., in the context of *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (G048969; S226906), and others.

Dear Honorable Justices:

Governor Jerry Brown, Attorney General Kamala Harris, the State Water Resources Control Board, the Howard Jarvis Taxpayers Association and numerous others are urging either that you depublish, or refrain from depublishing, a recent drought related Fourth District Court of Appeal opinion resolving *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (G048969; S226906). This decision determines the validity of tiered water price structures intended to discourage water use.

These approaches to the Supreme Court breach the separation of powers, bringing the practice of lobbying to judicial decision-making without the many procedural processes employed by the legislative branch before it uses its legislative power.

We are concerned citizens who take no position on the underlying wisdom or rightness of the *Capistrano* case resolution, but who now ask you to abandon permanently your depublication and no-citation rules, policies and practices.

"Depublication" is not defined in any legal or other dictionary known to us but refers to the practice of the California Supreme Court, unique among the states,[1] of erasing published decisions of the California Court of Appeal from the body of precedential decisions of the

[1] More than ninety percent (90%) of California appellate decisions are ordered unpublished by their author judges. The number of the few published decisions is further reduced by Supreme Court depublication orders. No judiciary, neither the federal nor any state – except California, depublishes opinions previously published.

California state courts. California Court Rule 8.1105, which you promulgated, then prohibits us from citing such decisions in California state courts.

We are forbidden – not allowed to rely on, or even to mention – unpublished or depublished opinions in our state courts. This prohibition, a violation of our free speech rights, is troubling for three reasons: 1) citation of prior decisions is certainly appropriate in courts of law; 2) the interference with an essential freedom emanates from this very Supreme Court, whose purpose includes the protection of that right; and most importantly, 3) the practice works to defeat the process by which our democracy clarifies and improves our law. It is this third concern upon which we now focus.

The U.S. Supreme Court in 2006 abandoned the federal judiciary's experiment with no-citation rules. In the nine years since, we are aware of no reports of any adverse consequences.[2]

We preliminarily observe that the options for an appellate court to issue an unpublished decision, or for the Supreme Court to depublish an appellate court decision without replacing that decision with another, discourages concerned citizens from bringing "test cases" to resolve the law. Test cases are well recognized as essential to our system of law. The unpublished or depublished opinions allow courts to avoid meaningful determinations of law to be applied equally to all prospective litigants similarly situated. It thus protects judges from the criticism which otherwise attends every decision presently *or when the issue is raised at some time in the future,* thus encouraging courts to engage in cowardly, bureaucratic group-think. It removes the need for judges to use extreme care. Such results waste the effort of those that bring such a case, those that argue against it, and those who decide it. It is better that judges find protection from criticism by carefully considering many perspectives, and carefully deciding issues.

An order to depublish an appellate decision implies that the three judges of an appellate court are not capable of finally resolving the issue of the subject case. It says that the people are better off without any opinion in the case, rather than the work of the appellate court.

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[2] Our traditional historical right to cite all appeal court opinions was restored in all federal courts in 2006 when Federal Rule of Appellate Procedure (FRAP) 32.1 was adopted by the U.S. Supreme Court. The judiciaries of half the states (not including California) have followed. Authors of FRAP 32.1, the Hon. Samuel Alito, now Justice, and the Hon. John Roberts, now Chief Justice, wrote:

> "A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment [Free Speech] concerns: But whether or not no-citation rules are constitutional…they cannot be justified as a policy matter."

www.nonpublication.com/alitomemo2.pdf, nb. pg. 4, lines. 1-10; pg. 6, l. 39 – pg.7, l. 9; pg. 12, last par. – pg. 13, l. 2; [see, e.g.: "No-Citation Rules as a Prior Restraint on Attorney Speech" by Martha Brooke Tusk, 103 Columbia Law Review 1202 (2003)].

Depublication is an order against enlightenment. It presumes that the seven judges of the Supreme Court have some special ability, not shared by the judges of the appellate panel, to "get it right" with an eraser – without giving the public any detailed explanation of their reasoning.

In truth, only special interests benefit from depublication orders. For the rest, they create uncertainty, confusion and anarchy. Depublication artificially and capriciously obliterates our law, and causes the revision and re-writing of history.

For example, how would depublication of the *Capistrano* case guide water districts? If they rely on the depublication order as *indicia* of the law approving a tiered rate structure, they risk having their budgets devastated should a subsequent decision reach the same result as *Capistrano*. If they ignore the depublication and follow *Capistrano*, they cannot make use of the tool of tiered water rates to discourage water use and protect the public during the current drought and beyond. By depublication, the Supreme Court obfuscates rather than clarifies the law. And, depublication eviscerates the judicial role in the development of law.

Our democracy cannot presume that any panel of judges has sufficient knowledge, wisdom, or experience to resolve correctly every issue coming before it, and it does not do so.

Rather, the duty of the bench at any level is to resolve the issue as best it can. In doing so it is to reconcile its decision with prior decisions - what we call *stare decisis* (the precedent stands). This is often misunderstood to relieve judges of the painful task of creative thought. *Stare decisis* does not, and should not, insist upon absolute forward authority of any precedent. The fallibility of judges, or even panels of judges, is a reason that judicial decisions, unlike statutes, ultimately have no conclusive authority to bind future courts - other than the authority conferred by strength of reasoning.

What is important is that the judiciary resolve the issue with the *present* intent to resolve future similar issues in the same way. Along with this resolution, we require the panel to justify its action in a manner reminiscent of the scientific method: truthfully and carefully recording the facts, conclusions, considerations and reasoning it has used to arrive at its decision. The issue between the parties is resolved so that, hopefully, they can quickly return to productive activities. This process may not result in the best, or even a "right," precedent. It is here that the secret of our democracy lies. The process of developing the law wisely does not require the judiciary to be "right." It only requires that the judiciary provide an initial resolution of the issue presented.

Once a final decision is made by the judiciary, the law correction machinery of the democracy is invoked and engaged - including courts, legislatures and the voices of concerned citizens. This is most critical.

Appellate judges have said that published decisions rarely bring praise but often provoke harsh criticism. That is as it should be, for it is criticism that encourages judges to regard their reasoning from the multiple perspectives that geometry knows to be necessary to find "rightness."

It is dissatisfaction with a decision that ensures that those who appreciate the consequences any particular decision will then bring their expertise and political power to bear and inform judges and politicians - so that the law may be constantly improved. Depublished and unpublished decisions hide bad law and sedate the concern of those who would otherwise be affected by such decisions, as unpublished and depublished opinions warrant little attention because they do not "count." As a result, problems in the law are unaddressed and the healthy development of the law is chilled. [3]

We respectfully request the Supreme Court to abandon permanently its depublication rules, procedures and practice and California Court Rules sections 8.1105 et seq.

Sincerely,

The Committee for the Rule of Law

Michael Schmier, Director

[3] See, e.g., letters from former California assembly-members' to California chief justices, www.nonpublication.com/huffman090508.pdf; www.nonpublication.com/huffman110809.pdf; www.nonpublication.com/dymally.pdf; inter-active (253) "Press Clippings"; (155) "Law Review Articles"; and history of several ameliorative bills in the California legislature, in reverse chronology, accessible at "News" at www.nonpublication.com; cf. California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee"), www.nonpublication.com/sc_report_12-07-06.pdf adopting California Rules of Court 8.1115 (a) etc.]

DECLARATION OF SERVICE VIA UNITED STATES POSTAL SERVICE

I declare:

On July 20, 2015, I served the foregoing document described as:

LETTER RE: OPPOSITION TO DEPUBLICATION & NO-CITATION RULES & POLICIES TO HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT

by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid and deposited in the United States Postal Service at the United States Post Office, 751 East Blithedale Avenue, Mill Valley, California 94941, addressed as follows:

[Opposing Depublication]

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[Position Changed – Unclear - Settlement]

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[No Position]

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 20, 2015, at Mill Valley, California.

J. D. Richards
Declarant

Signature