ORIGINAL

23-993

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

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Peter Kleidman,
Petitioner,

v.

Court of Appeal, Second Appellate District, et al.,
Respondents.

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On Petition for Writ of Certiorari
to the Supreme Court of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California Rule of Court 8.1115(a), the "No-citation Rule," gives a California Court of Appeal the power to prohibit its decision from being cited as an authority in any other California court.

Question 1. Is California's No-citation Rule unconstitutional because it is substantively repugnant to due process?

Question 2. Is California's No-citation Rule unconstitutional because it is substantively repugnant to equal protection?

Question 3. Did the Court of Appeal violate Kleidman's right to due process by deciding a new rule of law adversely to Kleidman, while simultaneously invoking the No-citation Rule so that the new rule is not part of California law generally?

Question 4. Did the Court of Appeal violate Kleidman's right to equal protection by deciding a new rule of law adversely to Kleidman, while simultaneously invoking the No-citation Rule so that the new rule is not part of California law generally?

Question 5. When a California Court of Appeal dismisses an appeal as untimely filed, sometimes the dismissal is decided with the concurrence of two justices whereas other times it is decided by a single justice. Is this classification – appeals dismissed as untimely with the concurrence of two justices vis-à-vis appeals dismissed as untimely by a single justice – violative of equal protection?

PARTIES TO THE PROCEEDING

California Court of Appeal for the Second Appellate District ("DCA2");

Justice Elwood Lui, Administrative Presiding Justice ("APJ") of the California Court of Appeal for the Second Appellate District (ex officio);

California Court of Appeal for the Fourth Appellate District ("DCA4").

STATEMENT OF RELATED PROCEEDINGS

Kleidman v. RFF Family Partnership, LP, No. S225536, S236209 (Cal. Supreme Ct.)

Kleidman v. RFF Family Partnership, LP, No. B260735 (Cal. Ct. App.)

Kleidman v. RFF Family Partnership, LP, No. SC121303 (Cal. Superior Ct.)

Kleidman v. Justice Buchanan, No. 3:23-cv-01251-WQH-JLB (S.D. Cal.)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kleidman petitions this Court for a writ of certiorari to the Supreme Court of California.

OPINIONS BELOW

Kleidman v. Court of Appeal, Second Appellate Dist., No. S281040 (Cal. Supreme Ct., Sep. 27, 2023) (denying both petition for review and request to publish). App.1

Kleidman v. Cal. Court of Appeal, Second Appellate Dist., Nos. D079855, D079855, D079933, 2023 WL 4143274 (Cal. Ct. of App., June 23, 2023). App.2-25.

Kleidman v. Cal. Court of Appeal, Second Appellate Dist , Nos. D079855, D079855, D079933, Order Denying Request to Publish (Cal. Ct. of App. July 14, 2023). App.26.

Kleidman v Division P, No. 19SMCV01039 (L.A. Superior Court, Apr. 24, 2020).

JURSIDICTION

The deadline for this petition was extended until February 24, 2024. No. 23A465. The deadline is therefore February 26, 2024. Sup. Ct. Rule 30. This Court has jurisdiction under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Constitution, 14th Amend., § 1,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

California 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.

(b) Exceptions. An unpublished 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 because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure. On request of the court or a party, a copy of an opinion citable under (b) must be promptly furnished to the court or the requesting party.

(d) When a published opinion may be cited. A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

(e) When review of published opinion has been granted

(1) *While review is pending*. Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

(2) *After decision on review*. After decision on

review by the Supreme Court, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.

(3) *Supreme Court order.* At any time after granting review or after decision on review, the Supreme Court may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2).

California Constitution, Article VI, §3

The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment. An acting presiding justice shall perform all functions of the presiding justice when the presiding justice is absent or unable to act. The presiding justice or, if the presiding justice fails to do so, the Chief Justice shall select an associate justice of that division as acting presiding justice.

STATEMENT OF THE CASE

This saga began in 2013, when petitioner Kleidman sued RFF Family Partnership LP ("RFF") and JPMorgan Chase Bank, NA in California Superior Court, alleging they overcharged him on mortgages. *supra*, ii, No. SC121303. Kleidman suffered an adverse judgment therein in 2014.

In 2014, Kleidman appealed to the California Court of Appeal for the Second Appellate District ("DCA2"), giving rise to appellate case B260735. On February 25, 2015, the Administrative Presiding Justice ("APJ")[1] of DCA2 singlehandedly issued an order dismissing B260735 on the grounds that the notice of appeal was untimely filed ("2/25/15 Dismissal Order").[2]

On June 6, 2019, the proceedings leading to this petition commenced, wherein Kleidman sued DCA2 and its APJ (ex officio) to challenge the validity of the aforementioned 2/25/15 Dismissal Order. Kleidman sued DCA2 and its APJ in California Superior Court seeking to set aside the 2/25/15 Dismissal Order and to reopen the proceedings in the prior appeal, B260735. Kleidman alleged that the dismissal of an appeal as untimely requires the concurrence of two judicial officers under California Constitution Article VI, § 3, whereas the 2/25/15 Dismissal Order was issued by a single justice. *supra*, p. 3. Therefore, according to Kleidman, the 2/25/15 Dismissal Order is void for violating the California Constitution, and the proceedings in B260735 should be reopened so that any purported untimeliness of Kleidman's appeal could be determined with the concurrence of

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[1] See Cal. Rule 10.1004.

[2] California has a 60-day and a 180-day deadline in which to file a notice of appeal, and the 2/25/15 Dismissal Order held that the 60-day deadline was somehow triggered.

two judicial officers (as opposed to the APJ singlehandedly). App.58.

DCA2 and its APJ demurred to the complaint, without arguing against the merits of Kleidman's constitutional challenge to the 2/25/15 Dismissal Order. The demurrer was, in substance, based on jurisdictional and immunity grounds.

In 2020, the Superior Court sustained the demurrer and dismissed the action against DCA and its APJ without reaching the merits. Kleidman appealed, thereby giving rise to case D079855 in the California Court of Appeal for the Fourth Appellate District ("DCA4"). *Kleidman v. Cal. Ct. of Appeal*, No. D079855 (Cal. Ct. of Appeal).[3]

Unlike the Superior Court (which never reach the merits of Kleidman's challenge to the 2/25/15 Dismissal Order), DCA4's opinion in D079855 ("D079855 Opinion") *did* reach the merits. In particular, it argued that the provision in California Constitution Article VI, § 3 (requiring the concurrence of two judges) does not apply when the appeal is dismissed as untimely filed. Remarkably, the D079855 Opinion did not cite established statutory, decisional, or rule-based law specifically addressing this particular issue, *because there is none*. Instead, the D079855 Opinion made a *never-seen-before argument*, purportedly leading to the conclusion that a singular justice can dismiss an appeal as untimely. App.16-19.

Although the D079855 Opinion made a never-seen-before argument purportedly leading to a never-held-before principle of appellate procedure, DCA4

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[3] The appeal was originally assigned to DCA2, but since DCA2 was one of the defendants, it was transferred to DCA4. Also, D079855 was consolidated with two other appeals, D079856 and D079933, which are irrelevant to this petition.

nevertheless invoked Cal. Rule 8.1115(a) – the No-citation Rule – and declared its opinion uncitable as an authority. App.2. Under California's No-citation Rule, an unpublished opinion can never be cited (as an authority) in any California court and is therefore not part of California law. *Farmers Ins. Exch. v. Superior Court*, 218 Cal.App.4th 96, 109 (2013) (unpublished opinions have no precedential value and are not part of the law).

Kleidman protested that the D079855 Opinion must be published on the grounds that it established a new rule of law. App.27-35; Cal. Rule 8.1105(c)(1). Kleidman also argued that under the Equal Protection Clause, Kleidman had the constitutional right to have the D079855 Opinion become part of California law, either by its publication or by a declaration that California's No-citation Rule is unconstitutional. Kleidman further argued that it is unconstitutional for there to be a classification whereby some appeals are dismissed as untimely by a singular justice, whereas others are so dismissed with the concurrence of two justices. App.35-45. Kleidman referenced numerous appeals that had been dismissed as untimely by full three-judge panel with the concurrence of two. App.36-38.

One day later, DCA4 summarily denied Kleidman's motion to publish or declare Rule 8.1115(a) unconstitutional. App.26.

Kleidman then filed a petition for review to the Supreme Court of California where he again raised these issues. App.46-57. The Supreme Court of California summarily denied both Kleidman's petition for review and request that the D079855 Opinion be published. App.1.

REASONS FOR GRANTING THIS PETITION

I. This petition raises an issue of first impression in this Court and is of national importance

No-citation rules are controversial throughout the nation's state and federal courts, to say the least. But are they constitutional?

This petition presents arguments that no-citation rules are unconstitutional, at least in the situation where an appellate decision decides something 'new.'[4] The principal argument is that when an appellate panel declares its decision as uncitable, it has less incentive to 'get it right.' And with less incentive to get it right, the decision is more error-prone. On the other hand, due process guardrails are in place to reduce the risk of error. Therefore, a requirement that appellate decisions be citable is a constitutionally-mandated procedural guardrail (at least when the decision decides something new). An equal protection argument is also advanced herein to the effect that it is unconstitutional to decide a new issue against a party, while at the same time declaring that the decision is not part of decisional law generally. It is further argued that California's classification – whereby the untimeliness of an appeal is sometimes determined by a single justice and other times with the concurrence of two – violates equal protection because this classification is arbitrary.

Once upon a time there were no-citation rules[5] in the federal courts of appeals. When the

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[4] In this petition, "new" in this context means a new issue of pure law or a mixed law-fact issue with new facts.

[5] To reiterate, "no-citation" herein means no citation as a legal authority. The rules permit 'citation' for purposes of determining the preclusive effect of a decision (e.g., claim or issue preclusion and law of the case).

constitutionality of the no-citation rule was challenged in the Seventh Circuit, this Court granted certiorari on the issue, but then left the question for "another day." *Browder v. Director, Dept. of Corrections of Ill.*, 434 US 257, 258, n. 1 (1978). So this issue was once deemed cert-worthy, albeit nearly half a century ago.

Prior to *Browder*, the issue was brought to this Court in an extraordinary writ petition, which was summarily denied. *Do-Right Auto Sales v. US Court of Appeals for the Seventh Circuit*, 429 US 917 (1976).

Some former Justices have suggested that "opinions that are not to be cited as authority in other cases" may contribute to a "threat to the quality of our work" in "the federal judicial system [that] is far more serious than is generally recognized." *Bd. of Ed. of Rogers, Ark. v. McCluskey*, 458 US 966, 972 (1982) (Stevens, J, dissenting, joined by Brennan, Marshall, JJ). A rule prohibiting citation has been likened to "a rule spawning a body of secret law" ... [which] has prompted extensive comment." *County of L.A. v. Kling*, 474 US 936, 938 & n. 1 (1985) (Stevens, J, dissenting, joined "substantially" by Brennan, J), citing scholarly writings.

The issue appeared in some decisions (and dissents) in the Courts of Appeals. The Fourth Circuit in *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091 (4th Cir. 1972) held, "of course, ... any decision is by definition a precedent, and ... we cannot deny litigants and the bar the right to urge upon us what we have previously done." *Id.*, 1094. But it then clarified that "precedent" did not necessarily mean *binding* precedent. *Ibid.* ("[W]e ... refuse to treat [memorandum decisions] as precedent

within the meaning of ... stare decisis").

In the Tenth Circuit, dissenting judges (including the Chief Judge) picked up on the *Jones* opinion in *Re: Rules of US Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986*, 955 F.2d 36 (1992):

> Each ruling, published or unpublished, involves the facts of a particular case and the application of law — to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. [¶¶] [T]he decision must be able to withstand the scrutiny of analysis. ... Our orders and judgments ... should never be shielded from searching examination.

Id., 37-38 (Holloway, CJ, Barrett, Baldock, JJ, concurring and dissenting), citing *Jones*, 1094.

The Eighth Circuit in *Anastasoff v. US*, 223 F.3d 898 (8th Cir. 2000) took the extreme position that it was constitutionally bound to follow all prior decisions, including unpublished decisions. *Id.*, 900-905. Later, *Anastasoff* was vacated en banc, where it was held that "[t]he constitutionality of [our Circuit Rule] which says that unpublished opinions have no precedential effect remains an open question in this Circuit." 225 F.3d. 1054, 1056 (8th Cir. 2000) (en banc). It apparently remains an open question to this day.

In the Fifth Circuit, within one year of *Anastasoff*, dissenting judges in *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) described the "questionable practice of denying precedential status to unpublished opinions" as "an issue that is important to the fair administration of justice...." *Id.*, 260 (Smith, Jones, DeMoss, JJ,

dissenting from denial of reh'g en banc). The dissent then commented on the 'controversial' holding in *Anastasoff*:

> *Anastasoff* has generated substantial controversy, and its historical research and conclusions have been criticized. .... [¶¶] There are powerful arguments both for and against the policy of giving precedential effect to unpublished opinions.

Id., 263.

Three months later, the Ninth Circuit in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) devoted over 20 pages to rebutting *Anastasoff*, and held that no-citation rules are legitimate *Hart*, 1159-1180.

The Federal Circuit chimed in soon thereafter, siding with *Hart* over *Anastasoff*. *Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361, 1366-1368 (Fed. Cir. 2002).

Federal no-citation rules were eliminated under FRAP 32.1, effective December 1, 2006. As a proposed rule, it was a white-hot topic. There were "[o]ver 500 public comments ... submitted by supporters and opponents of [proposed] [FRAP] 32.1." Schlitz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23, 23 (2005). FRAP 32.1 has been considered, "without question, one of the most controversial proposals in the history of federal rulemaking." *Ibid.*, 24.

Citation and no-citation rules in the States, however, is an altogether different kettle of fish. There is a dizzying array of rules. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices*, 45 U. Balt. L. Rev. 561, 595-604 (2016) (providing appendix of the various rules among the states, and

categorizing states according to whether they publish all dispositions, allow unpublished opinions to have binding precedent, allow unpublished opinions to have persuasive value, have "hybrid" rules, or forbid citation to unpublished opinions altogether, i.e., the "no-citation" states); see also Heller, *To Cite or Not to Cite: Is that Still a Question?* 112 Law Libr. J. 407, 415, Appendix B (2020). Notably, of the fourteen no-citation states in *Out of Cite*, four have since allowed citations of unpublished decisions since. Wa. GR 14.1; 210 Pa. Code 65.37; Md. Rule 1-104; Ill. Supreme Ct. R. 23. There have also been changes in favor of citation in two of the 'hybrid' states. Or. R. App. Proc. 10.30; Okl. Supreme Ct. R. 1.200, *In re Amend. to Okl. Supreme Court Rule* 1.200, 2023 OK 21 (2023).

California is one of ten (or so) States with a strict no-citation rule. Cal. Rule 8.1115(a).

II. In connection with decisions which decide something new, California's No-citation Rule violates due process because uncitable decisions are more error-prone

The contention here is that when a California Court of Appeal decides an issue which has not been decided before,[6] then, as a matter of due process, the decision must be citable in California for its persuasive value, because otherwise, the decision is more error-prone.

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[6] Such never-decided-before issues can be either purely legal, or involve mixed questions of law and fact with a new set of facts.

A. When an appellate judicial officer prohibits his/her decision from being cited, he/she has less incentive to 'get it right,' and so the decision is more error-prone, and so due process is violated

Due process protections are in place to reduce the risk of the erroneous deprivation of life, liberty or property. *Carey v. Piphus*, 435 US 247, 262 (1978); *Mathews v. Eldridge*, 424 US 319, 344 (1976). Accordingly, procedures which increase the chance of such error implicate due process concerns.

. As a matter of common sense, judicial officers issuing decisions which they prohibit from being cited have less incentive to get it right than they would otherwise have if their decisions were citable. A judicial officer would naturally feel a greater sense of accountability and responsibility when his/her decision becomes a part of the law, potentially affecting the rights of untold future litigants, as opposed to when her/his decision applies only to the parties in the particular case before her/him. Far more is at stake when the decision is citable, as opposed to when uncitable. Again, as a matter of common sense, the reduced incentive to get it right in an uncitable decision naturally leads to inferior decision-making. With less incentive to get it right, there is a greater risk of error. This sentiment was expressed bluntly in a 2004 letter from Judge Ripple, Circuit Judge of the Seventh Circuit to Justice Alito, then Circuit Judge of the Third Circuit, in connection with then-proposed FRAP 32.1:

> [R]elegating [decisions] to non-citable status is an invitation toward mediocrity in decisionmaking.

Schlitz, 50, citing letter from Ripple, Circuit Judge, to Justice Alito, then Circuit Judge & Chair Adv.

Comm. on Appellate Rules (Feb. 12, 2004) ("Ripple Letter"). The contrapositive is that when judges make decisions with prospective persuasive value, they tend to be more careful in what they decided.

> [A] court, aware its written opinion will be published and could influence decisions in future cases, is more likely to spend more effort insuring the opinion fully and clearly supports the conclusion. Requiring all decisions to be supported by a written opinion and to be published would best advance the error correction goal.

Kelso, *A Report on the Cal. Appellate Sys.*, 45 Hastings L. J. 433, 487-488 (March 1994). The prospective persuasive value of a written decision "serves as a steadying factor which aids reckonability. Its preparation ... provides a due measure of caution by way of contemplation of effects ahead." Llewellyn, *The Common Law Tradition: Deciding Appeals*, 26 (1960)

One of the most alarming statements regarding uncitable decisions appeared in an article by Chief Judge Patricia Wald, former Chief Judge of the DC Court of Appeals:

> [A] double-track system [of published and unpublished decisions] allows for deviousness and abuse. ... I have ... seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.

Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995). If her accusation is accurate, then reprehensible judges preferred to *get it wrong* to save time, so long as the decision had no precedential or persuasive value.

Another alarming account appears in a speech of Professor Monroe Freedman:

> I have had more than enough of judicial opinions that ... falsify the facts ..., ... make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.

Seventh Annual Judicial Conference of the US Court of Appeals for the Fed. Cir., 128 FRD 409, 439 (1989).

Alas, the same theme appears again.

> I asked [my colleagues] to publish, they said "no[.]" ... In my view, my colleagues' refusal to publish concedes their doubts about the propriety of their conclusions – and lends support to the view that result-oriented opinions are routinely swept under the "not for publication" rug.

Ward v. Superior Court, 2001 WL 1194949, *14 (Cal. Ct. App. Oct. 3, 2001) (Vogel, J, dissenting).

These accounts by Wall, Freedman and Vogel support the contention that judicial officers are sometimes less concerned about getting it right when their decisions are uncitable. As mentioned above, a judicial officer would generally naturally tend to feel less responsible and accountable for her/his decision when it is uncitable, which would tend to make the decision more error-prone. This sentiment has been expressed by this Court in *In re Oliver*, 333 US 257(1948):

> [R]eview in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id., 270. The idea here is that the more a judicial officer exposes her/himself to scrutiny by the legal

community, the bar, and the public, the more the judicial officer feels accountable and responsible for her/his actions, thereby resulting in more sound decision-making (i.e., less 'abuse of judicial power'). In this vein, Justice Stevens wrote:

> [A] court of appeals that issues an opinion that may not be ... cited .... engages in decisionmaking without the discipline and accountability that the preparation of opinions requires. ... "If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good."

County of L.A,. supra, 474 US at 940 & n. 6 (Stevens, J, dissenting, joined "substantially" by Brennan, J.) (quoting, Llewellyn, *supra*, 26.

This same sentiment has been expressed by numerous commentators on no-citation rules, who have articulated the importance of judicial officers being held accountable and responsible for the decisions they issue in the furtherance of sound decisionmaking. Perhaps the bluntest statement appeared in the oft-cited Richman & Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996):

> It is not difficult to understand why unpublished opinions are dreadful in quality. The primary cause lies in the absence of accountability and responsibility: their absence breeds sloth and indifference.

Id., 284. Other commentators have chimed in to the same effect:

> No-citation rules undermine account-ability. ... 'Public accountability requires

> that we [judges] not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves.'"

Schlitz, 48, quoting Ripple Letter.

> "[T]he benefits of accountability and uniform national practice carry the day [in favor of FRAP 32.1]." [¶¶] [N]o-citation rules implicate a number of fundamental civic values, including ... the accountability of federal judges....

Id., 52 (quoting e-mail from Easterbrook, Circuit Judge, Seventh Circuit Court of Appeals, to McCabe, Sec'y, Comm. on Rules of Prac. Proc. (Feb. 13, 2004)) & 68.

> Publication ... serves to hold judges accountable for their opinions. Accountability encourages well-reasoned decisions [¶¶] The costs of non-publication [include] reduced ... accountability [and] responsibility....

Richman & Reynolds, 282, 284 (footnotes omitted).

> [F]ervor against no-citation rules can be explained by the fact that such rules are seen as offending important civic values, such as ... judicial accountability.

Schlitz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1429, 1480 (2005)

> Citation to unpublished authority will remind judges of their own words, which would increase judicial accountability. When the entirety of a court's decisions are published, ... [the] effect ... pressures

> appellate courts to be accountable for the precedent established.... Therefore, unpublished authority can operate as a mechanism that reduces judicial accountability. ... When court rules state "unpublished opinions are not precedent," the court is essentially conveying, in some circumstances, it is not bound by what it says. This gives the court an opportunity to sweep issues and troubling decisions under the rug, creating an incentive for judges to use strategic behavior in deciding which cases to publish.... Judicial accountability is necessary on all levels of communication between the court and litigants: ... Unpublished opinions that cannot be cited create an opportunity for a court to issue a decision without having to revisit the reasoning employed in a similar, subsequent case [¶] [U]npublished authority creates an underground body of law. ... By allowing citation to unpublished authority..., judges will be held accountable for their prior statements of law. [¶] ... Allowing litigants the ability to remind courts of their own words would improve judicial accountability for prior decisions.

Damman, *Guess My Weight: What Degree of Disparity is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority or All?* 59 Drake L. Rev. 887, 910-912 (2011) (footnotes, citations omitted).

> Richard Posner, [then] Chief Judge of the Seventh Circuit, has asserted that non-

> precedential opinions are a "sort of a formula for irresponsibility," and has admitted that "[most judges, myself included, are not nearly as careful in dealing with unpublished decisions."

Cantu, *No Good Deed Goes Unpublished: Precedent-Stripping and the Need for a New Prophylactic Rule*, 48 Duquesne L. Rev. 559, 572 (2010).

> Knowledge that the decision stands as possible precedent for future cases ... holds the court accountable.

Bader & Cleveland, *Precedent and Justice,* 49 Duquesne L. Rev. 35, 52 (2011)

> "[S]ay[ing] what we please and tak[ing] no responsibility" is exactly what judges want to do in unpublished opinions. ... [FRAP] 32.1 ... would make judges take responsibility for their unpublished opinions. And that ... is one of the best arguments that can be made for [FRAP] 32.1.

Schlitz, 74 Fordham L. Rev., at 71.

> [J]udges who sign their name to any opinion, published or unpublished, should be responsible for what it says. [¶¶] Perhaps the strongest argument to be made for allowing citation to ... unpublished memorandums is the important public interest in holding judges accountable for their decisions. [¶¶] All judges ... must take responsibility for their decisions and should not be able to hide behind those decisions by delegating them to an 'un-citable' status.

Hetherington, *Keeping Up with Your Sister Court: Unpublished Memorandums, No-Citation Rules, &*

the Superior Court of Pa., 122 Dickinson L. Rev. 741, 757, 758, 761 (2018) (footnotes omitted).

> [P]ublication ... serves [an] important function: preserving judicial accountability. .... The idea that an appellate court can make law that is good in only a single instance and not to be relied upon by later litigants is contrary to the public's sense of how a court ought to proceed...."

Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Proc. 61, 115 (2009).

> [T]he ability for practitioners and courts to remind judges of their own words would ... increase judicial accountability.

Wood, *Out of Cite*, 577.

> "[T]he strongest reasons for [FRAP 32.1] [include] ... responsibility [and] accountability, ... which [are] undergirded and informed by what I view as the unreasonableness of saying to lawyers that you can't cite what we've written."

Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules & the Ethical Duty of Candor*, 1 Seton Hall Cir. Rev. 27, 97 (2005) (quoting testimony of Judge Becker, Transcript of 2004 hearing before Adv. Comm. on App. Rules, Admin. Off. of the US Courts, April 13, 2004, at 246-247).

The list of law journal and law review articles on this issue goes on and on. At bottom, the statement is about human nature, and judicial officers are human. They will be more careful when their decisions are citable. Consequently, it should be found that when a California Court of Appeal decides a new issue, but at the same time declares that its

decision is uncitable, the decision is more error-prone. Accordingly, allowing citations to decisions which decide something new is a constitutionally-mandated procedural guardrail under the Due Process Clause to reduce the risk of error.

Unquestionably, the constitutionality of no-citation rules is of great public importance worthy of this Court's consideration, and so certiorari should be granted here.

B. The *Mathews* factors urge that the No-citation Rule violates due process

When considering Kleidman's due process challenge, one considers the factors in *Mathews v. Eldridge*, 424 US 319 (1976):

> —Kleidman's interest at stake;
>
> —"the risk of an erroneous deprivation of such interest through the procedures used, and the probable value ... of additional ... procedural safeguards;"
>
> —the government's interests at stake if these additional safeguards are provided.

Id., 335.

Here, the underlying action involves Kleidman's claims that certain mortgage lenders overcharged him. App.5. Thus at stake for Kleidman is his constitutionally-protected property interests. *Phillips Petroleum Co. v. Shutts*, 472 US 797, 807-808 (1985) ("chose in action is a constitutionally recognized property interest"), *Richards v. Jefferson Cnty.*, 517 US 793, 804 (1996). There is real money at stake for Kleidman, and he cannot be denied that property interest without due process of law.

It has been urged above that the 'procedures used' — adjudication on appeal by way of uncitable decisions — gives rise to a cognizable increased risk of error (because of the reduced incentive to get it

right). The 'additional procedural safeguard' is the elimination of the No-citation Rule, whereby all appellate decisions can be cited for their persuasive value in subsequent cases. This safeguard will eliminate the aforesaid enhanced risk of error.

The government's interest is that the justices of the California Courts of Appeal, if the No-citation Rule is stricken, could no longer artfully dodge accountability and responsibility for their decisionmaking by burying their decisions in the black hole of uncitable non-law. Without the No-citation Rule, these justices may have to work harder to try to get it right. However, working diligently to get it right is what is required of them by virtue of their oaths to support the Constitution. Art. VI, cl. 3. A judicial officer's constitutional duty is to "'exercise [her/his] best judgment,'" *Cohens v. Virginia*, 19 US 264, 404 (1821), and to decide cases "conscientiously," *Ibid.*, "principled[ly] [and] rational[ly]." *Vieth v. Jubelirer*, 541 US 267, 278 (2004). While California may have an interest in having its justices cut corners to save time, surely it has (or should have) a greater interest in having its judicial officers honor their oaths to the Constitution by deciding cases conscientiously, principledly and rationally, to increase the chances of getting it right. After all, "'[T]he Constitution recognizes higher values than speed and efficiency.'" *Cleveland Bd. of Ed. v. LaFleur*, 414 US 632, 646 (1974). At bottom, the additional safeguard (eliminating the No-citation Rule) would tend to reduce tortious conduct by urging justices to work diligently, instead of cutting corners.

Balancing these factors, California's No-citation Rule should be deemed unconstitutional, especially when a decision decides something new.

III. The No-citation Rule violates the Equal Protection Clause

A. Deciding a new issue, but making the decision uncitable, is an affront to equal protection

The notion that a court can decided something new, but simultaneously decree that it applies only to the parties in the particular case before it, is facially repugnant and an affront to equal protection.

> Law ... must be not a special rule for a particular person or a particular case, but ... "the general law ...," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

Hurtado v. California, 110 US 516, 535-536 (1884), accord *US v. Winstar Corp.*, 518 US 839, 932 (1996) (Scalia, Kennedy Thomas, JJ, concurring).

> "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. ... [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Eisenstadt v. Baird, 405 US 438, 454 (1972); *Hill v. Colorado*, 530 US 703, 731 (2000).

Here, the D079855 Opinion decided a new issue – that a *single* justice can dismiss an appeal as

untimely, notwithstanding the "Concurrence of 2 judges" language in Cal. Const. Art. VI, § 3 – and yet decreed the decision as uncitable, and so not part of California decisional law generally. This result glaringly offends Kleidman's right to equal protection under the laws.

B. Deciding some new issues more carefully than others issues offends equal protection

As argued above, a judicial officer has greater incentive to get it right when his/her decision is citable, as opposed to when uncitable. Why, then, should there be a classification whereby judicial officers have greater incentive to get it right in one class of appeals (citable), and lesser incentive to get it right in another (uncitable)?

When an appellate panel decides a new issue, then surely, as a matter of common sense and fundamental fairness, the panel should not be allowed to dump the newly-decided issue into the muck (i.e., the black hole of uncitable non-law) so that it cares less about getting it right.

One might argue that some new issues are more important than others; and so the less important ones should be dumped into the muck to give courts more time to spend on the more important ones. But such a classification raises the question of whether there is a legitimate state interest in dedicating more judicial resources to important cases at the expense of deciding its unimportant cases more shoddily. In turn, this question boils down to the right of access to the courts under the First Amendment, applicable to the states under the Fourteenth Amendment. *Borough of Duryea, Pa. v. Guarnieri*, 564 US 379, 387 (2011); *Gideon v. Wainwright*, 372 US 335, 341 (1963). There shall be "no law ... abridging ... the right of the people ... to petition the government for a

redress of grievances." 1st Amend. Does not a classification — whereby important cases are treated with more care and unimportant cases with less — abridge the right of access to the courts for those with unimportant cases? The core function of the judiciary branch is to provide a forum for citizens to obtain remedies when they suffer harm, *and it should not matter whether a person's case raises important issues.* Thus the classification into important cases (citable and treated with more care) and unimportant cases (uncitable and treated with less care) does not further a *legitimate* state interest. The state should treat all new issues with utmost care, regardless of whether the new issue is important or unimportant. Therefore all Court of Appeal decisions in California which decide new issues must be citable under the Equal Protection Clause.

IV. California's classification – whereby the untimeliness of some appeals is determined by a single justice and the untimeliness of others is decided with the concurrence of two – violates the Equal Protection Clause

In California, some appeals are dismissed as untimely by a single justice, whereas other appeals are so dismissed with the concurrence of two. For instance, Kleidman's appeal in B260735 was dismissed singlehandedly by the Administrative Presiding Justice (APJ), and the D079855 Opinion approved of this procedure. App.16-19. On the other hand, many appeals are dismissed as untimely by a three-justice panel with the concurrence of two. E.g., *San Diego Innovation Center, LLC v. Skyriver Comms., Inc.*, 2023 WL 5496962, *1-*2 (Cal: Ct. App. Aug. 25, 2023) (Dato, J, joined by Irion, Acting PJ, Buchanan, J); App.36-38 (collecting cases).

This classification – appeals dismissed by a single justice vis-à-vis appeals dismissed with the concurrence of two – is irrational and arbitrary. The "collaborative juridical process ... promotes decisional accuracy." *Salve Regina College v. Russell*, 499 US 225, 232 (1991). Why should timeliness be decided with less decisional accuracy in some instances but with more decisional accuracy in others? *Nowhere* in California law – statutory, rule-based, decisional – are there any articulated, ascertainable, identifiable or cognizable standards which dictate whether the untimeliness of an appeal should be determined by a single justice or with the concurrence of two. As it stands now, the classification is purely arbitrary, subject apparently to the whim, caprice, and unbridled discretion of the Administrative Presiding Justice (at least in DCA2).

Consequently, this Court should grant certiorari to discuss this issue, and either eliminate the classification altogether or perhaps discuss the issue and remand the matter back to the California courts for further consideration.

CONCLUSION

Based on the foregoing, Kleidman requests that the Court grant this petition for certiorari to the Supreme Court of California.

Dated: February 26, 2024

Respectfully,

/s/ Peter Kleidman

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