APPENDIX

APPENDIX – TABLE OF CONTENTS

Appendix A – Order Denying Petition for Review and Request for Publication of Opinion, *Kleidman v. Court of Appeal, Second Appellate Dist.*, S281040 (Cal. Supreme Ct., Sep. 27, 2023).....App.1

Appendix B – Opinion, *Kleidman v. Cal. Court of Appeal, Second Appellate Dist.*, D079855, D079856, D079933 (Cal. Ct. Appeal, June 23, 2023).....App.2

Appendix C – Order Denying Request for Publication, D079855, D079856, D079933 (Cal. Ct. Appeal, July 14, 2023).....App.26

Appendix D – Portions of Appellant's Request that the Opinion Be Published, D079855, D079856, D079933 (Cal. Ct. Appeal, July 13, 2023).....App.27

Appendix E – Portions of Petition for Review to the Supreme Court of California, S281040 (Cal. Supreme Ct., Aug. 3, 2023).....App.46

Appendix F – Portions of Kleidman's Complaint, 19SMCV01039 (L.A. Superior Court, June 6, 2019) App.58

Appendix A
Supreme Court of California

No. S281040

Peter Kleidman,
Plaintiff-Appellant
v.
California Court of Appeal,
Second Appellate District, et al.,
Defendants-Appellees

Filed September 27, 2023

ORDER DENYING PETITION FOR REVIEW AND REQUEST FOR PUBLICATION OF OPINION

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

Appendix B
California Court of Appeal
for the Fourth Appellate District

Nos. D079855, D079856, D079933

Peter Kleidman,
Plaintiff-Appellant
v.
California Court of Appeal,
Second Appellate District, et al.,
Defendants-Appellees

Filed June 23, 2023

Before: Buchanan, Huffman, Castillo,
Justices of the Court of Appeal

OPINION

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication
or ordered published for purposes of rule 8.1115.

CONSOLIDATED APPEALS from orders and a judgment of the Superior Court of Los Angeles County, Elaine W. Mandel, Judge. Affirmed in part, reversed in part, and modified.

Peter Kleidman, in pro. per., for Plaintiff and Appellant.

Lowthorp Richards and Kevin M. McCormick for Defendants and Respondents.

This case arises from a prior action in which

Peter Kleidman filed two appeals in the California Court of Appeal, Second Appellate District Second District). The Administrative Presiding Justice (APJ) of the Second District dismissed the first appeal as untimely, and Kleidman lost the second appeal on the merits. He unsuccessfully sought review by the California Supreme Court (Supreme Court) in both appeals.

Dissatisfied with these results, Kleidman then filed this action against the Supreme Court, the Second District, "Division P" of the Second District, the APJ of the Second District (Hon. Elwood P. Lui), and the Judicial Council of California (Judicial Council) (collectively referred to as the Judicial Branch Defendants), as well as the California Legislature and one of the parties to
the prior lawsuit. As narrowed over time, his primary complaint against the Judicial Branch Defendants is that his first appeal in the prior action should not have been dismissed as untimely by the APJ acting alone because Article VI, section 3 of the California Constitution required the concurrence of two justices.

On April 24, 2020, the trial court sustained a demurrer to Kleidman's complaint and entered a written order of dismissal in favor of all the Judicial Branch Defendants, including the Second District. On August 24, 2020, the trial court sustained a second demurrer brought by the Second District on behalf of its own "Division P" and entered another order of dismissal in favor of the Second District. On March 3, 2021, the trial court entered a judgment on both demurrers in favor of the Judicial Branch Defendants. In this consolidated appeal, Kleidman appeals from both demurrer orders and the judgment. Kleidman argues on appeal that: (1) the

trial court lacked jurisdiction to rule on the Judicial Branch Defendants' first demurrer to his first through sixth causes of action because he voluntarily dismissed those causes of action about a week before the demurrer hearing; (2) the court erred in ruling that his seventh through ninth causes of action were barred as a matter of law; and (3) the court lacked authority to enter the March 3, 2021 judgment for the Judicial Branch Defendants as a result of its issuance of the April 24, 2020 and August 24, 2020 orders, which he claims also constituted judgments within the meaning of Code of Civil Procedure section 581d.[1]

We agree with Kleidman that the trial court lacked jurisdiction to rule on the first demurrer as to the first five causes of action asserted against the Judicial Branch Defendants. As was his right, Kleidman voluntarily dismissed these claims without prejudice before any tentative or final ruling on the demurrer. Accordingly, we reverse these discrete portions of the April 24, 2020 dismissal order, but otherwise affirm the order. In doing so, we conclude as a matter of law that: (1) the APJ acting alone had authority to dismiss Kleidman's first appeal in the prior action as untimely; (2) the Second District and the APJ are entitled to judicial immunity; and (3) Kleidman's complaint failed to state a claim against the Judicial Council.

We also conclude that the April 24, 2020 dismissal order was a "judgment" for purposes of section 581d. Because that order and judgment resulted in a dismissal of the claims against the Second District (including so-called "Division P") and

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

terminated the litigation between the parties on the merits, we further conclude that the trial court was without jurisdiction to issue the August 24, 2020 dismissal order based on the second demurrer of the Second District and the March 3, 2021 judgment that incorporated both orders. We therefore reverse the August 24, 2020 order and the March 3, 2021 judgment. Our disposition completely resolves the litigation and requires no further proceedings on remand.

FACTUAL AND PROCEDURAL BACKGROUND

We derive our facts from those properly pled in Kleidman's complaint. (See *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638 [the "familiar rules" require that we "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law"]; *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 395 [same].) We also may consider matters that have been judicially noticed and exhibits attached to a complaint.[2] (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 210.)

A. *Chase Judgment and Appeal*

In November 2013, Kleidman filed a complaint against JPMorgan Chase Bank, N. A. (Chase) and RFF Family Partnership, L.P. (RFF), among other defendants, claiming they had overcharged him interest, fees, and late charges on numerous loans. (*Kleidman v. RFF Family Partnership L.P., et al.* (Los Angeles County Super. Ct., case No. SC121303 (the Underlying Litigation).) In December 2014, Chase, for itself only, demurred to the complaint.

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[2] Kleidman's request for judicial notice filed in D079855 is granted. His request for judicial notice in D079856 is denied because all of the items listed are now part of the record or briefing before us as a result of our consolidation of the appeals

Kleidman opposed the demurrer, making arguments only with respect to Chase's demurrer. On June 13, 2014, the trial court sustained Chase's demurrer without leave to amend. That same day, the court issued (1) an "Order Sustaining [Chase's] Demurrer to Plaintiff's First Amended Complaint without Leave to Amend"; and (2) a "Judgment of Dismissal of Plaintiff's First Amended Complaint" (the Chase Judgment). On June 18, 2014, Chase served Kleidman with a "Notice of Entry of Judgment or Order."

On December 10, 2014, Kleidman filed a notice of appeal from the Chase Judgment. Later that month, the Second District directed Kleidman to show cause why his appeal from the Chase Judgment should not be dismissed based on his purported late-filed notice of appeal. Kleidman responded to the order to show cause in early January 2015, and Chase filed a reply. Key to the instant litigation, on February 25, 2015, before Kleidman's appeal from the Chase Judgment was assigned to one of the Second District's eight divisions, the APJ of the Second District issued an order dismissing the appeal as untimely. (*Kleidman v. RFF Family Partnership, L.P., et al.*, case No. B260735 (the Chase Appeal).) That order explained that the deadline to file a notice of appeal from the Chase Judgment was August 18, 2014, or 60 days after service on June 18, 2014 of the Notice of Entry of Judgment or Order; Kleidman's December 10 notice of appeal was filed "120 days after the deadline" to appeal the Chase Judgment, and thus was untimely; and as a result, the Court of Appeal lacked jurisdiction to hear the appeal from the Chase Judgment. The case caption on the June 16, 2015 remittitur identified the issuing court as the Second District, Division P. Kleidman filed a motion to

vacate the dismissal and reinstate his appeal. The Second District denied the motion. Kleidman also filed a petition for review in the Supreme Court, which the Supreme Court denied in May 2015. (*Kleidman v. RFF Family Partnership, L.P.*, et al., case No. S225536.) One year later, in May 2016, Kleidman filed a motion to recall the remittitur, followed by a petition for rehearing and another petition for review, all of which were denied.

B. *RFF Judgment and Appeal*

Meanwhile, the Underlying Litigation involving RFF continued. At a hearing in February 2014, the trial court set the matter for trial on April 20, 2015. Kleidman was served with notice of the trial date. On April 13, 2015, RFF filed and served Kleidman with its witness and exhibit lists, which included the time, date, and location of the April 20 trial. Kleidman, however, did not appear for trial and, as a result, judgment was entered for RFF (the RFF Judgment). In early June 2015, RFF filed a motion seeking an award of attorney fees and costs based on a contractual fee provision in a loan agreement between it and Kleidman. Kleidman opposed RFF's motion, contending that it was untimely based on the date of entry of the Chase Judgment. The trial court granted the motion and awarded RFF $41,200 in attorney fees.

Kleidman moved to set aside the RFF Judgment and for a new trial, contending that such relief was necessary because of his mistaken belief that the entire action had been dismissed by the Chase Judgment. The trial court denied Kleidman's request, reasoning that, had he exercised " 'ordinary prudence,' " he would not have been " 'surprise[d]' " by the scheduled trial. Kleidman timely appealed the RFF Judgment and the postjudgment orders. In July

2018, Division Four of the Second District issued an opinion affirming the RFF Judgment, including the fee award. (*Kleidman v. RFF Family Partnership L.P.*, case No. B268541 (the RFF Appeal).) In so doing, the Court of Appeal found that the Chase Judgment was separate and distinct from the RFF Judgment; that the trial court properly exercised its discretion in refusing to vacate the RFF Judgment based on "surprise"; and that RFF, as the prevailing party, was entitled to an award of attorney fees under Civil Code section 1717. The Court of Appeal also briefly addressed the Chase Appeal, rejecting Kleidman's request to vacate the February 25, 2015 dismissal order and reinstate his appeal from the Chase Judgment. Kleidman sought review in the Supreme Court of the Second District's decision affirming the RFF Judgment and post-judgment orders. (*Kleidman v. RFF Family Partnership*, case No. S250726.) The Supreme Court denied review in September 2018.

C. *The Complaint*

Kleidman filed his complaint in this action in June 2019. He alleged eight claims for declaratory relief and one for writ of mandate. With regard to the Judicial Branch Defendants, he named the Supreme Court in the first, second, third, and fourth causes of action for declaratory relief; he named the Judicial Council in the fourth and eighth causes of action for declaratory relief; he named the Second District in the fifth and seventh causes of action for declaratory relief; and he named the Second District's Division P and APJ in the seventh and eighth causes of action for declaratory relief and ninth cause of action for writ of mandate. No Judicial Branch Defendants were named in the sixth cause of action. The complaint alleged that "Division P (a.k.a. Pre-docket

Division) of the Court of Appeal for the Second Appellate District ... is a group within the [Second District] which manages and controls appeals filed from Los Angeles County before they are assigned to one of [the Second District's] eight divisions. Division P consists of a single justice, viz, the Administrative Presiding Just[ice] (ex officio) or a designee, and around three, or so, clerks of [the Second District]." As relevant here, in his prayer for relief, Kleidman requested a judicial declaration that the decisions of the Second District in the Chase and RFF Appeals were void, and that rule 10.1004(c)(2) of the California Rules of Court[3] is void under Article VI, section 3 of the California Constitution and Government Code section 69102 because "any and all judicial power over appeals in [the Second District] is held only by [its] eight divisions." Kleidman also sought a peremptory writ of mandate in connection with the Chase Appeal "commanding Division P and Administrative Presiding Justice Lui (immediately after receipt of the writ) to recall the 6/16/15 Remittitur and assign the appeal to one of [the Second District's] eight divisions."

D. *First Demurrer*

In late September 2019, the Judicial Branch Defendants demurred to all causes of action asserted against them in Kleidman's complaint, contending that (1) they failed to state facts sufficient to state a cause of action; (2) they were barred by claim preclusion; (3) they were barred by absolute judicial immunity; (4) they were barred by the litigation privilege (Civ. Code, § 47, subd. (b)) and governmental immunity (Gov. Code, § 821.6); and (5)

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[3] All further references to rules are to the California Rules of Court.

the court lacked jurisdiction over the claim for writ of mandate.

Kleidman filed his opposition to the demurrer in late November 2019, and the Judicial Branch Defendants replied on December 4, 2019. In his opposition, Kleidman argued that: (1) involuntary dismissals of appeals require the concurrence of two justices; (2) the Second District may exercise judicial power only through its eight divisions and Division P is an "illegal tribunal"; (3) he was denied the right to oral argument in the Chase Appeal; (4) the dismissal order and remittitur in the Chase Appeal were invalid; and (5) the Judicial Branch Defendants' arguments had no merit.

On December 5, 2019, before the demurrer hearing and before the trial court issued any tentative or final ruling on the demurrer, Kleidman dismissed without prejudice: (i) the Supreme Court from the action; (ii) his fourth and sixth causes of action in their entirety, and (iii) his fifth cause of action against the Second District only.[4] As a result, there were no Judicial Branch Defendants remaining in the first six causes of action; all of Kleidman's claims relating to the RFF Appeal were abandoned; and his only remaining claims in the seventh through ninth causes of action related to the APJ's dismissal of the Chase Appeal as untimely. At the demurrer hearing, Kleidman argued that the trial court lacked authority to rule on the demurrer to the first six causes of action based on his voluntary dismissal of those claims against the Judicial Branch

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[4]Kleidman's December 5 request also dismissed the California Legislature from the complaint without prejudice. Five days later, Kleidman separately dismissed RFF from the complaint, also without prejudice. Other than the Judicial Branch Defendants, no other defendants were named in the complaint.

Defendants. Despite Kleidman's voluntary dismissal, the trial court on December 11, 2019 sustained the demurrer of the Judicial Branch Defendants without leave to amend as to all causes of action originally asserted against them, including those asserted against the Supreme Court before the voluntary dismissal. On April 24, 2020, the court signed and entered a dismissal order on the grounds of judicial immunity and lack of authority to reverse the previous orders of the Second District and the Supreme Court.[5] The signed order dismissed the complaint with prejudice as to all the Judicial Branch Defendants, including the Supreme Court and the Second District.

E. *Second Demurrer*

In February 2020, while the first demurrer was still pending, the Second District filed a second demurrer on behalf of Division P. In support, it argued that the complaint failed as a matter of law because Division P was not a separate judicial branch within the Second District and not subject to suit separately from the Second District, and was merely an "internal component or division" of the Second District whose demurrer was sustained without leave to amend in December 2019. The Second District also advanced several other arguments previously made by the Judicial Branch Defendants in their first demurrer. At an unreported hearing, the trial court sustained the Second District's second demurrer without leave to amend on the same grounds as the first demurrer—judicial immunity and lack of authority to reverse the previous orders of a higher court. The court signed

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[5] Kleidman appealed the April 24, 2020 order, which is the subject of D079855.

and filed another order on August 24, 2020 sustaining the second demurrer and again dismissing the Second District from the case with prejudice.[6]

On March 3, 2021, the trial court entered a separate judgment on the two demurrers in favor of the Judicial Branch Defendants.[7] We have consolidated Kleidman's three appeals from the orders of April 24, 2020 and August 24, 2020 and the judgment of March 3, 2021.

DISCUSSION

A. *Standard of Review*

"In reviewing [a judgment or a final] order sustaining a demurrer ... we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162). Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In the instant case, Kleidman has not requested leave to amend his complaint.

B. *The Trial Court Erred in Sustaining the Judicial Branch Defendants' Demurrer to the First Through Fifth Causes of Action*

Kleidman contends that the trial court lacked jurisdiction to sustain the Judicial Branch Defendants' demurrer to the first through sixth causes of action in his Complaint because he voluntarily dismissed those claims on December 5, 2019, six days before the demurrer hearing. We

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[6] Kleidman appealed the August 24, 2020 dismissal order, which is the subject of D079856.

[7] Kleidman appealed the March 3, 2021 judgment, which is the subject of D079933.

conclude that his argument has merit as to the first through fifth causes of action asserted against the Judicial Branch Defendants.[8]

Generally, under section 581, a plaintiff may voluntarily dismiss a complaint, or any cause of action asserted in it, with or without prejudice as to any defendant at any time before the "actual commencement of trial." (§ 581, subds. (b)(1), (c); *Panakosta, Partners, LP v. Hammer Lane Management, LLC* (2011) 199 Cal.App.4th 612, 632 ["Under ... section 581, a plaintiff generally has an unfettered right to dismiss a cause of action before commencement of trial."].) Dismissal "'is available to [a] plaintiff as a matter of right'" and, if in the proper form," 'the dismissal is effective immediately.'" (*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 380.) However, a plaintiff's right to dismiss an action, or a cause of action in a complaint, is not absolute even if the dismissal is before "commencement of trial."[9] Thus, an action may not be voluntarily dismissed "'where the action has proceeded to a determinative adjudication, or to a decision that is tantamount to an adjudication.'" (*Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1209; accord, *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 200 (*Franklin Capital*) ["When the dismissal could be said to have been taken [¶] ... in the light of a public and formal indication by the trial court of the legal merits of the case, or [¶] ... in the light of some

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[8] 8 The Judicial Branch Defendants did not address this argument in their respondents' briefs.

[9] Section 581 defines "commencement of trial" as "the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." (§ 581, subd. (a)(6).)

procedural dereliction by the dismissing plaintiff that made dismissal otherwise inevitable, then the voluntary dismissal is ineffective"].) Here, we conclude that Kleidman's voluntary dismissal of the first through fourth causes of action against the Supreme Court, the fourth cause of action against the Judicial Council, and the fifth cause of action against the Second District, about a week before the demurrer hearing, was effective and not the result of some "formal indication" by the trial court of the merits of the Judicial Branch Defendants' pending demurrer (i.e., a tentative order), or of some procedural problem specific to those claims that made their dismissal "inevitable." (See *Franklin Capital, supra*, 148 Cal.App.4th at p. 200.)

Accordingly, under the plain language of section 581 (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166 (*Sierra Club*)), we conclude that the trial court was without jurisdiction to rule on the demurrer with respect to these dismissed causes of action and its order sustaining them is therefore void. (See *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784 [concluding a "plaintiff's right to a voluntary dismissal pursuant to subdivision 1 [of former section 581] appears to be absolute" and "[u]pon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action"]; *Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 89 ["'[i]t is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of an action ..., the court is without jurisdiction to act further, and any subsequent orders of the court are simply void' "]; *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 425 [an entry of dismissal pursuant to section 581

"terminates the action against the dismissed defendants," allowing the action then to "proceed[] as to other parties"]; *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202 Cal.App.3d 921, 931 ["dismissal of an action by a plaintiff under section 581 ... is available to plaintiff as a matter of right" and "[f]ollowing entry of such dismissal, the trial court is without jurisdiction to act further in the action . . . except for the limited purpose of awarding costs and statutory attorney's fees"]; *Cubalevic v. Superior Court for Los Angeles County* (1966) 240 Cal.App.2d 557, 562 [trial court acted in excess of its jurisdiction when it made an order determining the fair cash value of petitioner's shares because the involuntary dissolution action had been dismissed prior to issuance of that order].)

We thus reverse the April 24, 2020 dismissal order as to the first five causes of action asserted against the Judicial Branch Defendants.[10] To avoid an unnecessary remand for further proceedings, we will exercise our authority to modify the order ourselves to reflect no ruling on these claims, because they were no longer properly before the trial court. (§ 43; Rule 8.264(c)(1).) Our disposition as to these claims does not require any further proceedings on remand, however, because it does not alter the fact that Kleidman voluntarily dismissed them without prejudice before the demurrer ruling.

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[10] We reject Kleidman's argument for reversal as to the sixth cause of action because none of the Judicial Branch Defendants were named in the sixth cause of action. Thus, the Judicial Branch Defendants could not have demurred to this cause of action (and did not purport to do so) and the trial court did not rule on it.

C. *The Trial Court Properly Sustained the Demurrer of the Judicial Branch Defendants to the Seventh Through Ninth Causes of Action*

As a result of Kleidman's December 5, 2019 dismissal, only three causes of action against the Judicial Branch Defendants remained in the complaint: his seventh and ninth causes of action against the Second District and Justice Lui; and his eighth cause of action against the Second District, Justice Lui, and the Judicial Council. Each of these causes of action was premised on Kleidman's theory that the Second District's APJ lacked the authority to decide on his own whether Kleidman's notice of appeal from the Chase Judgment was timely. He argues that article VI, section 3 of the California Constitution and Government Code section 69102 required a three-justice panel of one of the Second District's eight divisions to make that determination.[11] Accordingly, Kleidman contends that the APJ's dismissal of his appeal from the Chase Judgment was null and void, and he should now be allowed to pursue the appeal on the merits.

1. *The Second District's APJ Acting Alone Had the Authority to Determine the Timeliness of Kleidman's Notice of Appeal from the Chase Judgment*

Article VI, section 3 of the California Constitution provides in relevant part: "Concurrence of 2 judges *present at the argument* is necessary for a judgment." (Italics added.) An almost identical provision, section 2 of Article VI, applies to the

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[11] Kleidman pled this theory in his complaint and argued it on the merits in his opposition to the first demurrer and as part of his argument on judicial immunity in his opening and reply briefs on appeal in D079855.

Supreme Court and provides in part: "[c]oncurrence of 4 judges present at the argument is necessary for a judgment." (Italics added.) The Supreme Court has concluded that sections 2 and 3 of Article VI "may be read as requiring the concurrence of at least two Court of Appeal justices or four Supreme Court justices 'present at the argument' *in those circumstances when the court does hear oral argument*, in order to preclude the participation of justices who did not listen to the argument." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1256, italics added (*Lewis*).) The right to oral argument generally applies only to an appeal or original proceeding that "'is considered *on the merits* and decided by a written opinion....'" (*Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871, italics added.)

There is no right to oral argument on the dismissal of an untimely appeal for lack of appellate jurisdiction. The dismissal of an appeal for lack of appellate jurisdiction "not only is not on the merits, it is unreflective of the merits...." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) More specifically, the question whether a notice of appeal has been timely filed has nothing to do with the merits of the appeal. And because there is no right to oral argument on such a dismissal for lack of appellate jurisdiction, the provision of Article VI, section 3 of the California Constitution requiring the concurrence of two justices "present at the argument" does not apply. (See *Lewis*, *supra*, 19 Cal.4th at p. 1256.)

In re R.H. (2009) 170 Cal.App.4th 678 (*R.H.*) provides guidance on this issue. There, a vexatious litigant argued that applying the vexatious litigant statute to an appeal violated Article VI, section 3 of

the California Constitution because it meant that the presiding justice acting alone would decide whether the appeal could be pursued and would pass on the merits of the appeal without an opinion. (*R.H.*, at p. 701.) The *R.H.* court disagreed, finding the premise of the appellant's argument "flawed" because under the applicable law's "own terms, the presiding justice in determining whether to permit the appeal to proceed does not pass on its merits. The presiding justice merely determines if there is an issue to review on appeal." (*Ibid.*)

Here, the APJ in the Underlying Litigation merely assessed whether Kleidman's notice of appeal from the Chase Judgment was timely under the 60-day rule set forth in rule 8.104(a)(1)(B).[12] This jurisdictional ruling was even farther removed from the merits of the appeal than the presiding justice's decision whether to allow the vexatious litigant to pursue his appeal in *R.H.* Accordingly, we conclude that Kleidman's complaint failed to state a claim for a violation of Article VI, section 3 of the California Constitution.

Kleidman's complaint also failed to allege any violation of Government Code section 69102. This statute provides in relevant part: "The Court of Appeal for the Second Appellate District consists of eight divisions having four judges each." (Gov. Code, § 69102.) Kleidman's complaint acknowledges that the Second District does have "eight divisions." As stated in its internal operating practices and procedures, the Second District has eight divisions

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[12]Under rule 8.104(a)(1)(B), an appeal must be filed on or before the earliest of "60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment...."

with four judges each.[13] (See Internal Operating Practices and Procedures, Second Appellate District, Organization of the District ["The Second District covers four counties and consists of eight divisions" and "[e]ach division consists of three Associate Justices and a Presiding Justice"].) Despite its misleading label, Division P is not a separate division; it is merely an administrative designation the Second District uses for motions that are filed and decided before an appeal is assigned to one of its eight divisions. (See *id.* at Motions ["Motions filed before a case is assigned to a division are designated 'Division P' motions and are ruled upon by the Administrative Presiding Justice"].) The Second District's use of such an administrative designation for pre-assignment matters ruled on by the APJ does not violate Government Code section 69102. Because Kleidman's seventh, eighth, and ninth causes of action were each based on the faulty premise that the APJ acting alone lacked the power to dismiss Kleidman's appeal from the Chase Judgment for lack of appellate jurisdiction, we conclude that the trial court correctly sustained the Judicial Branch Defendants' demurrer on these claims without leave to amend.

2. *Judicial Immunity Also Bars the Action Against the Second District and its APJ for Performing their Judicial Functions in the Chase Appeal*

"The concept of judicial immunity is long-standing and absolute, with its roots in English common law.

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[13] Kleidman asked the trial court to take judicial notice of the Second District's internal operating practices and procedures, and also provided a copy that is included in the record on appeal. Under Evidence Code sections 452, subdivision (c) and 459, subdivision (a), we take judicial notice of this document.

It bars civil actions against judges for acts performed in the exercise of their judicial functions and it applies to all judicial determinations, including those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be." (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 851 (*Howard*).) The judicial immunity doctrine derives from "'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in [the officer], shall be free to act upon [the officer's] own convictions, without apprehension of personal consequence to [the officer].'" (*Tagliavia v. County of Los Angeles* (1980) 112 Cal.App.3d 759, 762, quoting *Bradley v. Fisher* (1871) 80 U.S. 335, 347.) It also serves the important public policy of "'protect[ing] the finality of judgments [and] discourag[ing] inappropriate collateral attacks.'" (*Howard*, *supra*, 222 Cal.App.3d at p. 852.)

Here, Kleidman's three remaining causes of action were premised on acts performed by the APJ and the Second District in "the exercise of their judicial functions"—determining the timeliness of Kleidman's notice of appeal from the Chase Judgment. (See *Howard*, *supra*, 222 Cal.App.3d at p. 851.)

Under the judicial immunity doctrine, Kleidman therefore was precluded as a matter of law from collaterally attacking that determination in a separate lawsuit against the Second District and its APJ. (See *ibid.*) Although judicial immunity does not foreclose some actions seeking prospective declaratory relief—such as an action by retired judges against the Chief Justice and the Judicial Council seeking prospective declaratory relief

regarding an allegedly discriminatory program for assignment of temporary judges (*Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 109–110 (*Mahler*)) — judicial immunity does foreclose the relief Kleidman is seeking for retrospective relief against the Second District and the APJ to declare void final judicial actions taken in a prior appeal. For this separate reason, we conclude that the trial court properly sustained their demurrer to the seventh through ninth causes of action without leave to amend.

3. *The Allegations Against the Judicial Council Fail as a Matter of Law*

In his eighth cause of action, Kleidman sought declaratory relief against the Judicial Council for promulgating rule 10.1004(c)(2).[1414] Rule 10.1004(c) lists the "Duties" of an APJ, which include the "responsibility" for "Unassigned Matters" in subsection (2): "The [APJ] has the authority of a presiding justice with respect to any matter that has not been assigned to a particular division." (Rule 10.1004(c)(2).) Kleidman alleged that the APJ relied on rule 10.1004(c)(2) in determining the Chase Appeal, and he sought a declaration that this rule is void under Article VI, section 3 of the California Constitution and Government Code section 69102. We conclude that these allegations against the

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[1414] Article VI, section 6 of the California Constitution establishes the Judicial Council, which " 'is a state entity established by the California Constitution to "improve the administration of justice" and set policies and priorities for the judicial branch of government. The Council is chaired by the Chief Justice of California.'" (*Mahler*, *supra*, 67 Cal.App.5th at pp. 96-97.) The Judicial Council is authorized to "adopt rules for court administration, practice and procedure" as long as they are not "inconsistent with statute." (Cal. Const., art. VI, § 6(d).)

Judicial Council fail to state a claim as a matter of law.

First, we have already concluded that the APJ's determination of the timeliness of Kleidman's notice of appeal in the Chase Judgment did not implicate Article VI, section 3 of the California Constitution or Government Code section 69102. Accordingly, the allegations in the eighth cause of action that the Judicial Council acted outside its authority by empowering the APJ to make this determination fail as a matter of law.

Second, rule 10.1004(c)(2) merely gives an APJ the same authority as a presiding justice over "any matter" in a case that has not yet been assigned to a division. Such "matter[s]" might include, by way of example only, determining whether a vexatious litigant's appeal has merit or is being brought for purposes of harassment or delay (see *R.H.*, *supra*, 170 Cal.App.4th at p. 701); or ruling on applications or motions for calendar preference (rule 8.240), extensions of time to "file records, briefs, or other documents" or "to shorten time" (id., 8.50(a)), and for counsel to appear pro hac vice (id., 9.40(c)(2)); or determining at the outset of an appeal whether an appellant's notice of appeal is timely (id., 8.104), as occurred in the Underlying Litigation. We conclude that rule 10.1004(c)(2) does not violate Article VI, section 3 of the California Constitution or Government Code section 69102. This rule merely sets out one of many duties of an APJ in ensuring "a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources" in the Courts of Appeal.[15]15 (Rule

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[15]Other duties of the APJ include "general direction and supervision of the clerk/executive officer and all court employees" with certain exceptions (rule 10.1004(c)(1));

10.1004(b).) For this separate reason, the demurrer to Kleidman's eighth cause of action against the Judicial Council was properly sustained without leave to amend.

D. *The Trial Court Lacked Jurisdiction to Enter the August 24, 2020 Order and March 3, 2021 Judgment*

Kleidman contends the trial court erred in entering the March 3, 2021 judgment because the trial court's orders of April 24, 2020 and August 24, 2020 constituted "judgments" under section 581d. This statute provides: "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered. [¶] All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." (Italics added.) Preliminarily, we note that the April 24, 2020 dismissal order was written, signed by the trial court, and filed in the action. The April 24 order provided in part: "[T]he Complaint is hereby dismissed, with prejudice, as to the Judicial Branch Defendants. As prevailing parties, the Judicial Branch Defendants shall be awarded costs pursuant to [Code of Civil Procedure sections] 1032 and 1033.5, and [Government Code section] 6103.5 pursuant to a properly filed

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preparation of "reports and assignment of judges or retired judges" (*id.*, (c)(3)); the transfer of cases, when appropriate and in cooperation with the Supreme Court (id., (c)(4)); supervision of the "court's day-to-day operations" (id., (c)(5)); the budget, as allocated by the Judicial Council (id., (c)(6)); and the "operation, maintenance, renovation, expansion, and assignment of all facilities used and occupied by the district" (*id.*, (c)(7)).

Memorandum of Costs." The order itself defined the "Judicial Branch Defendants" to include the Second District. Based on the plain language of section 581d (see *Sierra Club, supra*, 57 Cal.4th at pp. 165–166), we conclude that the April 24 signed and filed dismissal order was a final judgment in favor of all Judicial Branch Defendants—including Division P as part of the Second District.[16] By entering judgment, the trial court exhausted its jurisdiction over the subject matter of the suit and these parties, except for the amount of costs awarded, which jurisdiction the court preserved in the April 24 order. (See *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 [noting a judgment "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined" (internal quotation marks omitted)]; *White v. White* (1900) 130 Cal. 597, 599–600 [noting that after entry of judgment, "the jurisdiction of the court over the subject matter of the suit and the parties was exhausted" and "[a]fter final judgment[,] any further judgment, or order materially varying the judgment, is a mere nullity"]; *Barry v. Superior Court of San Francisco* (1891) 91 Cal. 486, 488 ["The first judgment was final, and the only authority of the court thereafter, in the matter concluded thereby, was the power to enforce the judgment according to its terms"].) Accordingly, the August 24, 2020

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[16] Kleidman's own complaint alleges that Division P is part "of the Court of Appeal for the Second Appellate District." As we have explained, Division P is merely an administrative designation the Second District uses for motions decided by the APJ before a case is assigned to one of its eight divisions. (Internal Operating Practices and Procedures, Second Appellate District, *Motions*.)

dismissal order and March 3, 2021 judgment—covering the same parties and providing the same relief as the April 24, 2020 dismissal order—were null and therefore must be reversed.[17] Once again, however, these reversals necessitate no further proceedings on remand because the prior order of April 24, 2020 fully resolved all issues between Kleidman and the Judicial Branch Defendants, including Division P.

DISPOSITION

The order of April 24, 2020 is reversed only as to the first through fourth causes of action asserted against the Supreme Court, the fourth cause of action asserted against the Judicial Council, and the fifth cause of action asserted against the Second District. The order of April 24, 2020 is modified to reflect no ruling on the demurrer to these claims, and as so modified, the order is affirmed. The order of August 24, 2020 and the judgment of March 3, 2021 are reversed. In the interests of justice, the parties shall bear their own costs on appeal. (Rule 8.278(a)(5).)

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[17] In light of our decision, we deem it unnecessary to address additional issues raised by the parties, including Kleidman's claim that the trial court erred in denying his motion for entry of default against Division P because it allegedly was not a demurring party in the Judicial Branch Defendants' demurrer; and the Judicial Branch Defendants' claims that the seventh through ninth causes of action failed as a matter of law because of claim/issue preclusion and/or the litigation privilege in Civil Code section 47, subdivision (b).

Appendix C
California Court of Appeal
for the Fourth Appellate District

Nos. D07855, D079856, D079933

Peter Kleidman,
Plaintiff-Appellant
v.
California Court of Appeal,
Second Appellate District, et al.,
Defendants-Appellees

Filed July 14, 2023

Before: Buchanan, Huffman, Castillo,
Justices of the Court of Appeal

ORDER DENYING REQUEST FOR PUBLICATION

The request for publication of the opinion filed June 23, 2023 is denied

Appendix D
California Court of Appeal
for the Fourth Appellate District

Nos. D07855, D079856, D079933

Peter Kleidman,
Plaintiff-Appellant
v.
California Court of Appeal,
Second Appellate District, et al.,
Defendants-Appellees

Filed July 13, 2023

Before: Buchanan, Huffman, Castillo,
Justices of the Court of Appeal

Portions of Appellant's Request
that the Opinion Be Published

§I. The Opinion establishes new rules of law

The Opinion establishes new rules of law regarding important questions, as follows:

First Question: When a Court of Appeal is considering an involuntary[18] dismissal of a case,[19] but not on the merits of the case, do the parties have the right to oral argument before the case is actually dismissed?

First New Rule of Law: The answer is, "Generally, no." When a Court of Appeal is

[18] "Involuntary dismissal" means that the dismissal is against the wishes of the appellant or petitioner. Rule 8.264(b)(1)

[19] Herein, "case" means either an original proceeding under Cal. Const. Art. VI, §10, or an appeal under Art. VI, §11.

considering an involuntary dismissal of a case but not on the merits of the case, the parties generally have no right to oral argument before the case is actually dismissed.

Second Question: In the particular situation where a Court of Appeal is considering dismissing an appeal on the grounds that the notice of appeal was untimely filed, do the parties have the right to oral argument before the case is actually dismissed?

Second New Rule of Law: The answer is, "No." When a Court of Appeal is considering dismissing an appeal on the grounds that the notice of appeal was untimely filed, the parties have no right to oral argument before the case is actually dismissed.

Third Question: When an appellate case is postured so that there is no oral argument, does that mean that a single justice can render judgment?

Third New Rule of Law: The answer is, "Yes." When an appellate case is postured so that there is no oral argument, then a single justice can render judgment.

Fourth Question: When a Court of Appeal dismisses a case on the grounds that the notice of appeal was untimely filed, does the dismissal require the concurrence of two justices?

Fourth New Rule of Law: The answer is, "No." When a Court of Appeal dismisses a case on the grounds that the notice of appeal was untimely filed, the dismissal does not require the concurrence of two justices.

Fifth Question: When a party sues to set aside a prior, appellate judgment, does the party seek retrospective or prospective relief?

Fifth New Rule of Law: The answer is, "Retrospective." When a party sues to set aside a prior, appellate judgment, the party seeks

retrospective relief.

§A. The First New Rule of Law is indeed new because no other published opinion has ever considered the First Question

The First New Rule of Law pertains to the situation where a Court of Appeal is considering an involuntary dismissal (i.e., against the wishes of the appellant or petitioner) of one of its cases, but not on the merits thereof. The First Question asks whether the parties are entitled to oral argument before the case is actually dismissed. *There is no published case on point which answers this question.*

The Opinion answers the First Question in the negative as follows:

> "The right to oral argument generally applies only to an appeal or original proceeding that ""is considered *on the merits* and decided by a written opinion....""

(Opn,. at 15, citing *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871, italics added by Opn., but not in *Moles*.) The Opinion's statement *creates new law* because, although the Opinion cites *Moles*, in actuality *Moles* never even considered the First Question and therefore is not authority for the First New Rule of Law.

§1. *Moles* is not authority for the First New Rule of Law

The sole issue considered by *Moles* was:

> "May the composition of a three-judge panel of a Court of Appeal be altered *after* oral argument so that one of the justices taking part in the decision of a case is a justice who has not participated in any part of the prior deliberations?"

(*Moles*, 869.) *Moles* answered in the negative: "there is no authority ... granting the presiding justice of a

Court of Appeal the power to substitute one justice of a panel for another after oral argument." (*Id.*, 874.) Obviously, *Moles* never even considered the First Question and therefore it is not authority for the First New Rule of Law. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 899-900; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 254; *People v. Nguyen* (2000) 22 Cal.4th 872, 879 ["'A decision, of course, is not authority for what it does not consider'"]; *People v. Brigham* (1979) 25 Cal.3d 283, 289 ["Obviously," a case in which oral "argument was held" "is not support for a procedure to bypass oral argument"].) Tellingly, no published opinion has cited Moles for as support for the First New Rule of Law.

§2. Other published opinions which have the same language as *Moles* are also authority for the First New Rule of Law

The sentence in *Moles* upon which the Opinion relies is actually *Moles'* quotation of Witkin, *New California Rules on Appeal* (1944) 17 So.Cal.L.Rev. 232, 243-244 (Witkin). (*Moles*, 871.) The statement in Witkin is:

> 'Generally speaking, the right [to oral argument] exists in any appeal or original proceeding which is considered on the merits and decided by a written opinion...." (Witkin, 243-244.)

Thus *Moles* itself was not here citing established California law, but merely a treatise with, at best, persuasive value. This same statement from Witkin has been cited in California published opinions only by *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1254 and *People v. Brigham* (1979) 25 Cal.3d 283,

285-296, and neither *Lewis* nor *Brigham* are authority for the First New Rule of Law.

The sole question considered by *Lewis* related to oral argument[20] was "whether, in those limited situations where the accelerated *Palma* procedure is appropriate, a court must provide an opportunity for oral argument before issuing a peremptory writ in the first instance." (*Lewis*, 1236.) Thus *Lewis* never considered the First Question and therefore is not authority for the First New Rule of Law.

The sole question considered by *Brigham* related to oral argument[21] was: "Does a Court of Appeal have the power to decide an appeal on its merits without affording ... an opportunity for oral argument on the issues presented?" (*Brigham*, 285.) Thus *Brigham* was faced with an appeal that was decided on the merits, and never had to confront the question of whether there was a right to oral argument when the appeal was not adjudicated on the merits. When *Brigham* held that there was a right to oral argument when the appeal was determined on the merits, *Brigham* did not provide authority for the inverse proposition that there is no right to oral argument when the appeal is not determined on the merits. (*People v. James* (2007) 148 Cal.App.4th 446, 455, fns. 7, 8 [it is logical error to infer the inverse of a statement from the statement itself].) Thus *Brigham*, just like *Moles* and *Lewis*, never considered the First Question. Consequently *Brigham*, just like *Moles* and *Lewis*, is not authority

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[20] *Lewis* also considered whether the Court of Appeal's decision satisfied Art. VI, §14. (*Lewis*, 1237, 1239, 1261-1264)

[21] *Brigham* considered another question not related to oral argument and therefore not pertinent here. (*Brigham*, 285, 290-292 [determining the propriety of certain jury instructions at trial].)

for the First New Rule of Law.

§3. *R.H.* is not authority for the First New Rule of Law

The Opinion maintains that *In re R.H.* (2009) 170 Cal.App.4th 678 "provides guidance on this issue." (Opn., at 16.) However, *R.H.* is dissimilarly postured and materially distinguishable. *R.H* considers a person's rights not during the actual appeal itself, but rather when the presiding justice is considering whether to allow the appeal at all, before any appeal has actually commenced. During the time the presiding justice is making this consideration, *no appeal has commenced.* The prefiling order prevents the person from commencing the appeal until he/she "obtain[s] leave of the presiding justice." (CCP §391.7(a).) Therefore, when the presiding justice is considering the person's prefiling application to appeal, *no appeal has started.* Thus the constitutional, statutory and common-law protections afforded parties to an *actual appeal* do not apply when the presiding justice is deciding the person's prefiling application because at that point *there is no appeal* and so the person is *not a party to an actual appeal.* In contradistinction, the First New Rule of Law applies to an *actual appellate case.*

In sum, *R.H.* never considers a party's procedural rights in an *actual appellate case*, but rather considers those rights only *before any appellate case has commenced.* Thus *R.H.* is not authority for the First New Rule of Law, which concerns a party's rights during an *actual appeal.* Therefore, while *R.H.* may have persuasive value and may "provide guidance," it does not establish the First New Rule of Law.

§B. The Second New Rule of Law is indeed new because no other published case has ever considered the Second Question

The Second New Rule of Law is indeed new for all the same reasons that the First New Rule of Law is new. The First New Rule of Law states the general rule, by virtue of the term, "generally," (Opn., at 15), thereby leaving open the possibility that certain exceptions may be recognized and carved out. The Opinion then takes the *general* First New Rule of Law and applies it to the *specific* circumstances in which a Court of Appeal is considering dismissing an appeal on the grounds that the notice of appeal was untimely filed.[22] Since the *generalized* First New Rule of Law is indeed new, the Opinion's application of the general rule to a *specific* situation to create the Second New Rule of Law is likewise new.

Indeed, the Opinion's creation of the Second New Rule of Law is even more pioneering than its creation of the First New Rule of Law, since the latter is linked (according to the Opinion) to a statement in *Moles*, which also appears in *Brigham*, *Lewis* and Witkin. All four of these references use the critical term, "Generally," leaving open the possibility for exceptions. The Second New Rule of Law dictates that a particular situation is not an exception to the general rule, and so the Second New Rule of Law goes beyond the language in *Moles*, *Brigham*, *Lewis* and Witkin. Not only does the Opinion create the general rule, but it also asserts that a particular situation is not an exception to the general rule, which is an even further advancement.

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[22] It is indisputable that a dismissal on the grounds that the appeal is untimely is a dismissal for lack of jurisdiction, and so is not on the merits. (Opn., at 15-16, citing *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.).

§C. The Third New Rule of Law is indeed new because no other published case has ever considered the Third Question

The Third New Rule of Law pertains to the situation where an appellate case is postured so that there is no oral argument. The Third Question asks whether a single justice can render judgment. *There is no published case on point which answers this question.*

The Opinion answers the Third Question in the affirmative as follows:

> "The Supreme Court has concluded that section[] ... 3 of Article VI 'may be read as requiring the concurrence of at least two Court of Appeal justices ... "present at the argument" *in those circumstances when the court does hear oral argument*, in order to preclude the participation of justices who did not listen to the argument.'".

(Opn,. at 15, citing *Lewis*, 1256, italics added by the Opinion and not appearing in *Lewis*.)

However, *Lewis* is not authority for the Third New Rule of Law. As mentioned above, the sole question considered by *Lewis* relating to oral argument was "whether, in those limited situations where the accelerated *Palma* procedure is appropriate, a court must provide an opportunity for oral argument before issuing a peremptory writ in the first instance." (*Lewis*, 1236, 1239.) Thus *Lewis* never considered the Third Question and therefore it is axiomatic that *Lewis* is not authority for the Third New Rule of Law. (*Ault*, 1268, fn. 10; *Miklosy*, 899-900; *Vasquez*, 254; *Nguyen*, 879.)

Tellingly, no published opinion has ever cited *Lewis* for the Third New Rule of Law. Accordingly, the Opinion's answer to the Third Question does

indeed establish a new rule of law, i.e., the Third New Rule of Law.

§D. The Fourth New Rule of Law is indeed new because no other published case has ever considered the Fourth Question

The Fourth New Rule of Law derives directly from the Second New Rule of Law and the Third New Rule of Law. Since the Second and Third New Rules of Law are indeed new, the Fourth New Rule of Law is, accordingly, new. No published opinion has ever held that when a Court of Appeal dismisses a case on the grounds that the notice of appeal was untimely filed, the dismissal does not require the concurrence of two justices.

§E. The Fifth New Rule of Law is indeed new

The Opinion held that declaring void final judicial actions taken in a prior appeal is retrospective. (Opn., at 19.) Tellingly, the Opinion does not even cite any supporting authority or secondary source, implicitly acknowledging that is creating new law.

§V. Kleidman has the constitutional right to have the Opinion become part of California law under the Equal Protection Clause – either by publishing the Opinion or by declaring Rule 8.1115(a) unconstitutional

Kleidman has the constitutional right to equal protection under the laws. Thus rules to which Kleidman is subjected should be rules to which all appellants are likewise subjected. There is no rational basis for singling out Kleidman. Therefore, this Court cannot in good conscience subject Kleidman to the aforementioned rules, while allowing others to be not so subject.

The Opinion has articulated the following rules:

- When a Court of Appeal is considering dismissing an appeal on the grounds

that the notice of appeal was untimely:

- the appellant has no right to oral argument before the appeal is actually dismissed; and
- the appellant has no right to a dismissal with the concurrence of two justices.

Well, if the Opinion is going to subject Kleidman to these rules, then all appellants must likewise be subjected thereto

However, other appellants whose appeals were subject to dismissals on the grounds that the notices of appeal were untimely have enjoyed rights to oral argument and/or a decision with the concurrence of two justices.

As an example, in *Ellis v. Ellis* (2015) 235 Cal.App.4th 837, the appeal was dismissed as untimely. (*Id.*, 846.) However, the decision had the concurrence of at least two justices (*Ibid.*), and moreover oral argument was held. (*Id.*, 844, fn. 7 [mentioning oral argument].) Why should the appellant in *Ellis* enjoy the rights to oral argument and a decision with the concurrence of two justices, but not Kleidman?

This Division One of the Fourth District has treated other appellants differently from the way it insists Kleidman must be treated. In *Corrales v. Corrales* (April 21, 2020, D075507) [nonpub. opn.], 2020 WL 1919581 (Cal.Ct.App. Apr. 21, 2020), it was found that the "present appeal is untimely and must be dismissed." (*Id.*, 2020 WL 1919581, *5.) Nevertheless, there was oral argument (*Id.*, *6 [mentioning, "At oral argument"]), and the decision was rendered by the concurrence of at least two justices. (*Ibid.*, [Benke, Acting PJ, and Huffman, J, concurring].) Why should the appellant in *Corrales*, whose appeal was dismissed as untimely, have rights

to oral argument and a decision with the concurrence of at least two justices, but Kleidman have no such rights?

In *Brito v. Turner* (*Estate of Turner*) (May 23, 2018, D071313) [nonpub. opn.], 2018 WL 2326328 (Cal.Ct.App. May 23, 2018), the opinion determined that the appeal was untimely filed. (*Id.*, 2018 WL 2326328, *4-*10.) There was no oral argument because both appellant and respondent waived oral argument.[23] Nevertheless, the appellant enjoyed the rights to a decision with the concurrence of two justices. (*Id.*, *11 [Haller, Acting PJ, and Dato, J, concurring].)

In *Delmonico v. Laidlaw Waste Systems, Inc.* (1992) 5 Cal.App.4th 81, the appeal was dismissed as untimely and there was oral argument. (*Id.*, 83-87, & fn. 1 [mentioning oral argument].)

More generally, when a Court of Appeal is considering dismissing an appeal on the grounds that the appeal was untimely, why should some appellants enjoy the rights to oral argument and a decision with the concurrence of two justices, but not all appellants?

The answer is that allowing some appellants to enjoy these rights but not others violates the equal protection clause.

As it turns out, there are many decisions where untimeliness was decided with the concurrence of two justices. (E.g., *Nu-Way Assoc. Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 929; *Crotty v. Trader*

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[23] See online docket attached hereto. (*infra*, pp. 23-26.) The respondent's request for oral argument was conditional on the appellant's, and the appellant waived oral argument. (*infra*, p. 25, dates 12/12/2017, 12/18/2017.) Thus oral argument was completely waived and the matter was decided without oral argument.

(1996) 50 Cal.App.4th 765, 771; *Lavrischeff v. Blumer* (1978) 77 Cal.App.3d 406, 412; *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 999; *In re Alyssa H* (1994) 22 Cal.App.4th 1249, 1254; *Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1111; *Conservatorship of Townsend* (2014) 231 Cal.App.4th 691, 707; *People v. Lyons* (2009) 178 Cal.App.4th 1355, 1364; *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 980; *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1577; *In re Ricky H.* (1992) 10 Cal.App.4th 552, 564; *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd.* (1983) 148 Cal.App.3d 223, 229; *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1178, to name just a few of many.) Why, then, should Kleidman not be able to have the right to a decision with the concurrence of two justices?

There are only two possible remedies.

The first remedy is to publish the Opinion. That way, the rules established by the Opinion become a part of California law, and thereby applicable to all appellants (not just Kleidman).

However, if this Court denies this motion for publication, then Kleidman protests that Rule 8.1115(a) is unconstitutional for violating the equal protection and due process clauses.

A. The Opinion should be published to secure Kleidman's rights to equal protection under the laws

As it stands now, [t]he fact that the Opinion is unpublished means that it is not part of California law. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109; *Satyadi v. W. Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1029, fn. 4; *People v. Garcia* (2002) 97 Cal.App.4th 847, 851 [unpublished opinions "of little worth"].)

Thus the five, aforementioned rules set forth in the Opinion apply only to Kleidman, and no one else. This state of affairs is the epitome of *unequal* protection. Why should Kleidman be subject to rules, whereas others are not? How is that constitutional?

To remedy this unequal treatment, the Opinion should be published, so that it becomes a part of California law.

B. Insofar as the Opinion remains un- published, then the "No-citation Rule" (Rule 8.1115(a)) should be dismantled as unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses

Assume arguendo in this section that the Court denies Kleidman's request to publish the Opinion. Well, in this scenario, Kleidman protests that the Rule 8.1115(a) ("No-citation Rule") is unconstitutional.

§1. The No-citation Rule violates the Equal Protection Clause of the Fourteenth Amendment

This scheme set up by the No-citation Rule violates the Equal Protection Clause because it means that different parties are arbitrarily subjected to different common laws. A case determined by an unpublished opinion is subject to the views of the authors of that particular opinion, which becomes 'law' only for that case, whereas no other case is subject to, or even influenced by, such 'law.' This scheme is the epitome of *unequal* protection under the common law. Each case determined by an unpublished opinion is subject to its own particular 'law,' pertaining to no other case, and so there cannot possibly be equal protection, for there are different 'laws' for different cases. Thus a harsh ruling in one unpublished opinion has no bearing on any other

case, and the adversely-affected party thereby suffers the consequences of unequal protection. If an unpublished opinion in a different case rules in a manner that would be highly favorable to a party in its own case, that party does not enjoy the protection afforded in that other case, because that unpublished opinion has no bearing on the party's own case. Again, different laws being applied to different cases is the epitome of unequal protection. (*Hurta*do *v. California* (1884) 110 US 516, 535 [the law "must be not a special rule for a particular person or a particular case"]; *Maxwell v. Dow* (1900) 176 US 581, 599.) ["no person ... shall be denied the same protection of the laws which is enjoyed by other persons ... in the same place and under like circumstances"].)

§2. The No-citation Rule violates due process because it promotes the imposition of the rule of judicial will, instead of the rule of law

It is unconstitutional for a party to be adversely affected by a decision which is not part of the law. After all, if the decision is not part of the law, how can it justifiably affect a party's rights in a judicial proceeding? And yet subjection parties to unpublished decision is subjecting them to decisions which are not part of the law. We are a nation of *laws* and a party is entitled to due process of *law*. If the opinion is not part of the law, then it is the unconstitutional imposition of the judicial will.

The Constitution sets up a framework where, for each State, there is "one system of jurisprudence, which constitutes the law of the land." (*Claflin v. Houseman* (1876) 93 US 130, 137.) The No-citation Rule violates this principle. Under the No-citation Rule, parties can be pummeled and trampled by

unpublished opinions which are not part of the law of the land, but instead are capricious dictates of the appellate justices.

The words, "due process of law" means "'by the law of the land.'" (*Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 US 272, 276.) A party adversely affected by an unpublished opinion is not afforded due process of law of the land – it is subject to an opinion which is not part of the law of the land, but rather the will of the particular appellate justices deciding that particular appeal. The No-citation Rule is anathema to the principle that we are a nation of laws.

§3. The No-citation Rule violates the Due Process Clause of the Fourteenth Amendment because it disincentivizes justices to arrive at a correct decision

Due process means, inter alia, legal process designed to "'minimize the risk of erroneous decisions.'" (*Heller v. Doe* (1993) 509 US 312, 332; *Greenholtz v. Inmates of Neb. Penal and Correctional Complex* (1979) 442 US 1, 12-13; *Mackey v. Montrym* (1979) 443 US 1, 13 *Carey v. Piphus* (1978) 435 US 247, 259-260 [due process procedural rules are in effect to reduce risks of error]; *Honda Motor Co. v. Oberg* (1994) 512 US 415, 430 ["When the absent procedures would have provided protection against ... inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process"].) However, the No-citation Rule creates a scheme conducive to more error-prone results, and therefore violates due process.

The No-citation Rule violates due process under the factors in *Matthews v. Eldridge* (1976) 424 US 319, 335, for it makes unpublished opinions more error-prone. Parties with a meritorious position on

appeal have a fundamental interest in having their appeals disposed of with utmost care, sound reasoning, due consideration, and proper, well-reasoned, thorough application of the law. This interest is materially jeopardized and abridged by the No-citation Rule, as it creates a framework whereby justices are more inclined to devote their energies into opinions they intend to publish, as opposed to those they intend to keep unpublished.

When appellate justices bury their opinion in the black hole of unpublished opinions, they are unmotivated and disincentivized to reach a correct decision. If their ruling is incorrect, they need not be concerned about . affecting the entire legal community, because their incorrect decision affects only the parties in that particular case. Thus there is little consequence to an incorrect decision when the opinion remains unpublished, whereas there are substantial implications to an incorrect, published opinion.

Appellate justices generally have substantial personal interests in their own legacies and their contributions to the body of law. When a justice affixes her/his name to an unpublished opinion (non-law), there is no resultant impact on her/his legacy, and so she/he has far less incentive to care about the quality of the opinion. However, when a justice affixes his/her name to a published opinion, there is a direct impact on his/her legacy and the justice is therefore deeply motivated to ensure the opinion is sound. Consequently, each justice is highly incentivized to minimize the time he/she spends adjudicating unpublished opinions, so that he/she can spend his/her time on the published opinions which impact his/her legacy.

The No-citation Rule's effect on justices when

writing unpublished opinions, is to disincentivize and de-motivate them to devote as much care to their unpublished opinions (relative to the opinions they publish), hence unpublished opinions are more error-prone. Justices have minimal personal stake in the correctness of the unpublished opinion, for it is extremely unlikely to be seriously scrutinized or overturned. The realm of unpublished opinions creates a framework more conducive and accommodative to a results-oriented, ad hoc approach where justices impose their own wills, as opposed to complying with established legal principles, since they can rule anyway they please with virtual impunity. When writing an unpublished opinion, the justices can adjudicate with comfort that their opinion will go unchecked, since the chances an unpublished opinion will be scrutinized or attacked by any other court (or criticized by the legal community or the public) is de minimis, if not nil. Confident that their unpublished opinions are not part of the law and virtually impervious to scrutiny or attack, the realm of unpublished opinions creates a framework more conducive (relative to the realm of published opinions) to where ""deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."" *Payne v. Tennessee*, 501 US 808, 849 (1991) (Marshall, J., joined by Blackmun, J, dissenting); *N.J. v. TLO*, 469 US 325, 369-370 (1985) (Brennan, J., joined by Marshall, J, dissenting and concurring [criticizing majority because it "engages in an unanalyzed exercise of judicial will"]).

When rendering an opinion with precedential effect, a justice is cognizant that her/his decision will affect all future litigants. This principle naturally imposes a profound sense of responsibility on the

justice to decide correctly to the best of her/his abilities. Thus the precedential effect of a published opinion generally compels justices, when issuing a published opinion, to rule more deliberatively and responsibly than they would when rendering an unpublished opinion. Thus unpublished opinions are more error prone, and so a scheme whereby some opinions have precedential value and others do not is violative of due process and equal protection.

§4. Unpublished opinions are not subject to public judgment

The No-citation Rule unconstitutionally allows appellate justices to dodge scrutiny from the public and the legal community, one of the few checks on their awesome power. "[T]here must always be lodged ... in some person or body, the authority of final decision [with] ... no appeal lying *except to the ultimate tribunal of the public judgment....*" (*Yick Wo* v. *Hopkins* (1886) 118 US 356, 370, emphasis added; *In re Oliver* (1948) 333 US 257, 270 ["forum of public opinion is an effective restraint on possible abuse of judicial power"].) The No-citation Rule allows the appellate justices to dodge the ultimate tribunal of the public judgment. Unpublished opinions go into the black hole of non-law, which is of no concern to the legal community Unpublished opinions are not subject to the ultimate tribunal of the public judgment, but rather are cloaked in eternal darkness.

The public judgment and scrutiny of the legal community are checks on appellate decisionmaking. Unpublished opinions dodge this check.

Appellate justices, who are subject to only to discretionary appellate review, should be constrained by something more than their own, personal compasses. As a matter of fundamental fairness,

appellate justices should not enjoy such profound power unfettered. Rather, to counterbalance such power, the justices should be required to put their reputations and legacies on the line, whereby their decisions are subjected to scrutiny by the legal community and the public judgment. However, the No-citation Rule eliminates such counterbalancing. The No-citation Rule gives appellate justices unchecked power – it allows them to rule however they chose, submerging their opinions in the black hole of non-law, with de minimis fear of scrutiny from any other tribunal or the public eye. Their profound power remains by and large unchecked, which is fundamentally unfair, increases the risk of error, and, accordingly, the No-citation Rule substantively violates due process of law and equal protection.

Appendix E
Supreme Court of California

No. S281040

Peter Kleidman,
Plaintiff-Appellant
v.
Court of Appeal,
Second Appellate District, et al.,
Defendants-Appellees

Filed August 3, 2023

Portions of Petition for Review
to the Supreme Court of California

ISSUES PRESENTED FOR REVIEW...

Issue 4. Does an appellate system violate the Equal Protection and Due Process Clauses, whereby a single justice who believes that an appeal was untimely, has the unbridled discretion to either dismiss the appeal singlehandedly him/herself or to allow the timeliness to be determined with the concurrence of two justices?

Issue 5. In the instant action, DCA4 issued an opinion which held that a single justice could dismiss an appeal as purportedly untimely. However, DCA4 refused to publish its opinion, and therefore this holding constitutes a law which pertains to Kleidman, but yet is not a part of California law generally. Does DCA4's refusal to publish its opinion violate Kleidman's rights to Equal Protection, because the opinion establishes a harsh rule against Kleidman, but not against all California appellants?

Issue 6. California has a classification scheme whereby some opinions are part of California law with persuasive and precedential value (i.e., published opinions), whereas other opinions are not part of California law and have no persuasive or precedential value (i.e., unpublished opinions). Does this classification scheme violate the Equal Protection Clause?

...

Issue 9. Does an appellate system violate Due Process when it allows justices, whenever they please, to bury their opinions in the black hole of non-law (i.e., unpublished opinions), thereby making the opinions more error-prone?

IV. Issue 4 should be reviewed under Rule 8.500(b)(1) because it presents the important federal question of whether procedures employed by the Courts of Appeal comply with the Fourteenth Amendment's Equal Protection Clause and Due Process Clause

When a court of appeal considers whether an appeal may be untimely, sometimes it determines untimeliness with the concurrence of two justices, and other times with only a singular justice. At DCA2 in particular, if the APJ believes the appeal was untimely, he/she has the unbridled discretion to either dismiss it singlehandedly him/herself, or to allow the appeal to proceed to a full panel, whereby timeliness will be determined with the concurrence of two justices.

The foregoing scheme gives rises to an arbitrary classification, whereby some appeals are determined as untimely singlehandedly by the APJ, while others are so determined with the concurrence of two justices. The classification into these two categories

is based on the unbridled discretion, whim, and will of the APJ, since he/she has complete, unchecked control over whether he/she will unilaterally dismiss the appeal or allow it to be determined with the concurrence of two justices.

This Court should consider whether the aforementioned scheme complies with the Fourteenth Amendment's Equal Protection Clause.

There are better chances of a correct decision when there is collegial (as opposed to unilateral) decisionmaking. As this Court stated in *Moles v. Regents of Univ. of Cal.* (1982) 32 Cal.3d 867:

> "'The whole reason for there being more than one judge on an appellate court is that the different perceptions, premises, logic, and values of three or more judges ensure a better judgment. In these differences and in the process of criticism, response, and resolution lies the virtue of the appellate process. The heart of collegiality is unremitting criticism.'"

(*Moles*, 873, citing Coffin, *The Ways of a Judge - Reflections from the Federal Appellate Bench* (Houghton Mifflin Co., 1980) p. 174.) *Moles* further stated that parties on appeal deserve "'insurance against one-judge decisions.'" (*Moles*, 874, citing Pound, *Appellate Procedure in Civil Cases* (1941) p. 393; see also Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 Harv.L.Rev 483, 503 ["'one-judge decisions' ... are the subject of much criticism"]; Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books* (1987) 100 Harv.L.Rev. 887, 904-906; Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* (April, 1994) 46 Stan.L.Rev. 817, 846-847; Edwards,

The Effects of Collegiality on Judicial Decision Making (May, 2003) 151 U.Penn.L.Rev. 1638, 1689 ["In the end, collegiality ... enables us to ... reach better decisions"].)

Thus findings of untimeliness by a single justice are less likely to be correct than those made with the concurrence of two justices. Accordingly, it defies all common sense and rationality that some appeals are determined untimely by a singular justice, whereas others appeals are so determined with a two-justice concurrence. And it defies common sense still further that a single justice can whimsically, arbitrarily decide whether to dismiss the appeal him/herself, or allow the matter to be determined by a two-justice concurrence. Why should some appellants be afforded a procedure more likely to lead to a correct decision, but other appellants deprived of such a procedure? And why should a single justice be allowed to whimsically choose which procedure should be prescribed to a given appellant?[24]

The APJ's power to arbitrarily choose between either deciding timeliness him/herself or assigning it to a panel also implicates Due Process. (*Wolff v. McDonnell* (1974) 418 US 539, 558 ["touchstone of due process is protection ... against arbitrary action of government"].)

Based on the foregoing, this Court should review this important federal, constitutional question. This Court has taken oaths to uphold the Constitution.

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[24] Of the 24 cases mentioned above where the appeal was dismissed, in whole or in part, with the concurrence of two justices, nine of the case numbers begin with "B," indicating they are in DCA2. (*supra*, 15-16.) In these nine cases, why did DCA2's APJ allow untimeliness to be decided with the concurrence of two justices, instead of unilaterally dismissing it himself?

(Art. XX, §3; US Const. Art. VI, cl. 3.) Therefore, if this Court suspects that the aforementioned classification violates the Equal Protection Clause and/or Due Process Clause, it should grant this petition to review this important, federal constitutional issue.

V. Issue 5 should be reviewed under Rule 8.500(b)(1) because it presents the important federal question of whether a particular rule imposed against Kleidman, but inapplicable to other litigants, violates Equal Protection

The 6/23/23 Opinion did something astounding and remarkable. It made the new, never-seen-before holding that a sole justice could singlehandedly dismiss an appeal as purportedly untimely. The 6/23/23 Opinion cites no case law on point (because there is none), but rather cobbled together and concocted its own argument.

Respondents never argued – neither in the trial nor appellate courts – that a sole justice could singlehandedly dismiss an appeal as purportedly untimely. The trial court never held that a sole justice could singlehandedly dismiss an appeal as purportedly untimely. The 6/23/23 Opinion made this ruling in a manner that completely blindsided Kleidman.

What's more, Kleidman requested that the 6/23/23 Opinion be published, so that this never-seen-before holding could become part of California law, and thereby be applicable to all litigants instead of just Kleidman. Naturally, DCA4 refused to publish the 6/23/23 Opinion. Instead, DCA4 determined that its harsh ruling should be applicable to Kleidman, but not to California's general pool of appellants. After all, unpublished opinions are not part of

California law. (Rule 8.1115(a); *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109; *Satyadi v. W. Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1029, fn. 4.)

Why should the 6/23/23 Opinion's harsh ruling (that a sole justice can singlehandedly dismiss an appeal as purportedly untimely) be applicable to Kleidman but not to the general pool of appellants? Such a scheme would violate the Equal Protection Clause, would it not? (*Hurtado v. California* (1884)110 US 516, 535 [the law "must be not a special rule for a particular person or a particular case"]; *Maxwell v. Dow* (1900) 176 US 581, 599.) ["no person ... shall be denied the same protection of the laws which is enjoyed by other persons ... in the same place and under like circumstances"].)

As it stands now, numerous appellants will have the timeliness of their appeals determined with the concurrence of two justices, but not Kleidman. How is that reconcilable with the Equal Protection Clause? Why should some appellants be afforded a procedure more likely to lead to a correct decision, but Kleidman deprived of such a procedure? (*supra*, 23-24.) Based on the foregoing, this Court should review this important federal, constitutional question. This Court has taken oaths to uphold the Constitution (Art. XX, §3; US Const. Art. VI, cl. 3.). Therefore, if this Court suspects that the aforementioned scheme (whereby a harsh rule is imposed against Kleidman but not the general pool of appellants) violates the Equal Protection Clause, it should grant this petition to review this important, federal constitutional issue.

VI. Issue 6 should be reviewed under Rule 8.500(b)(1) because it presents the important federal question of whether California's two-tiered system – whereby some opinions have persuasive and/or precedential value, whereas others do not – violates Equal Protection

As mentioned above, the 6/23/23 Opinion developed a harsh rule applicable to Kleidman, namely, that a sole justice could singlehandedly dismiss an appeal as purportedly untimely. This holding appears nowhere in any other opinion. It was erroneously cobbled together and speciously concocted for the first time in the 6/23/23 Opinion, blindsiding Kleidman.

Because the 6/23/23 Opinion is unpublished, it is not part of California law, and has no precedential or persuasive value. (Rule 8.1115(a); *Farmers*, 109; *Satyadi*, 1029, fn. 4.)

California has a two-tiered system, whereby published opinions are part of California law (with persuasive and/or precedential value), whereas unpublished opinions are not. How can this two-tiered system be compliant with the Equal Protection Clause?

A strong case can be made that published opinions (part of California law) have a greater chance of being correct than unpublished opinions (not part of California law). After all, the appellate panel which produces a published opinion has far greater incentive to reach a correct decision than it otherwise would it if were producing an unpublished opinion. The published opinion affects all similarly-postured cases going forward, whereas the unpublished opinion affects only the one case being decided. Thus the consequences of getting an

unpublished wrong are de minimis, whereas the consequences of getting a published opinion wrong are substantial. With so much more at stake in connection with a published opinion, one reasonably infers that the panel will rule more deliberatively and carefully on its published opinions than it will on its unpublished opinions. Indeed, former California Chief Justice Roger J. Traynor mentioned that a judge is "inevitably preoccupied with the *far-reaching effect* of an immediate solution" and "wrestles with the devil more than once to set forth a sound opinion that will be sufficient *unto more than the day*." (Traynor, *Some Open Questions on the Work of State Appellate Courts* (1957) 24 U.Chi.L.Rev. 211, 218, italics added.) The italicized phrases, 'far-reaching effect,' and 'unto more than the day,' are references to *published* opinions because of their *prospective* persuasive and precedential value as part of California law. By negative implication, these solemn concerns of a justice fall by the wayside when the opinion is to be unpublished and thereby buried in the black hole of non-law. Thus a justice cannot possibly be concerned as much about his/her unpublished opinions as he/she is about his/her published opinions.

Moreover, when justices get an unpublished opinion wrong, the legal community will not hold them accountable. For instance, this Court hardly ever reviews unpublished opinions since it has little incentive to do so. After all, an incorrect unpublished opinion adversely affects only the losing party (or parties) in that particular appeal, no one else. This Court is concerned with California law, of which unpublished opinions are not a part, and so this Court has no incentive to review an unpublished opinion. Based on the foregoing, when an appellate

panel renders an unpublished opinion, it can be comfortably assured that it will not be held accountable by this Court. Indeed, it may be that court of appeal justices intentionally write perfunctory opinions which purposefully avoid meaningful discussions of new situations or important issues for the purpose of circumventing the publication guidelines so as to avoid review by this Court. It is all too easy for court of appeal justices to orchestrate an opinion so as to make it unpublishable, thereby evading review by this Court.

In the same vein, an appellate panel rendering an unpublished opinion can be comfortably assured that it will not be held accountable by the legal community. Other appellate panels are highly unlikely to seriously consider an unpublished opinion, because it is not part of California law. Therefore, the unpublished opinion will never get criticized by another appellate panel or by this Court in any subsequent decisions.

Furthermore, "the forum of public opinion is an effective restraint on possible abuse of judicial power." (*In re Oliver* (1948) 333 US 257, 270), and there is "the ultimate tribunal of the public judgment." (*Yick Wo v. Hopkins* (1886) 118 US 356, 370.) However, an unpublished opinion, although technically public and available to the legal community, is, for all practical purposes, buried in the black hole of non-law. Respecting an unpublished opinion, the 'forum of public opinion' and 'tribunal of the public judgment' are inconsequential, because the public has no incentive to seriously consider it. Thus appellate justices can dodge the forum of public opinion and tribunal of public judgment by burying their opinions in the black hole of non-law.

In sum, a system which allows appellate justices to bury some of their decisions in the black hole of non-law creates a two-tiered system whereby unpublished decisions are more error-prone, and published decisions are less so. This two-tiered system likely violates the Equal Protection Clause.

There is an easy remedy: abolish the two-tiered system, and in particular, abolish the No-citation Rule 8.1115(a), as unconstitutional. There should be no black hole of decisional non-law in which appellate justices can bury their second-, third-, or fourth-rate work. Whether an opinion is published or unpublished should have no bearing on its impact on California law. Justices should not be allowed to produce opinions which they want to bury in the black hole of non-law. By allowing them to do so, the two-tiered system sanctions a mode of appellate decision-making whereby justices are de-motivated and disincentivized to reach a correct result because they intend to bury their results in the black hole of non-law. This system is morally offensive and repugnant to Equal Protection and Due Process.

Opinions buried in the black hole of non-law are more error-prone, and therefore violate Due Process. One of the fundamental purposes of due process is to "minimize the risk of erroneous decisions." (*Greenholtz v. Inmates of Neb. Penal & Correctional Complex* (1979) 442 US 1, 12-13; *Mathews v. Eldridge* (1976) 424 US 319, 335; *Carey v. Piphus* (1978) 435 US 247, 259-260; *Mackey v. Montrym* (1979) 443 US 1, 13.) Thus the two-tiered system creates an arbitrary, irrational classification whereby some opinions are more error-prone than others.

In the instant action, for instance, it is entirely possible that the DCA4 panel issuing the 6/23/23

Opinion did not carefully scrutinize each step in their arguments, because they were looking for a convenient way to dispose of the case. They did not have the courage to publish the 6/23/23 Opinion, likely because they sought to shield it from scrutiny from this Court's review, from the legal community at large, from the forum of public opinion and from the tribunal of public judgment, by burying it in the black hole of non-law. Kleidman has been deprived of not only Equal Protection, but also Due Process, because the 6/23/23 Opinion, by virtue of it being buried in the black hole of non-law is more error-prone. And yet Due Process is the process which is meant to minimize the risk of error.

Justices of the Court of Appeal should not enjoy the profound, unfettered, unbridled power to bury their decisions in the black hole of non-law. Rather, they should be required to put their reputations and legacies on the line, whereby their decisions are subjected to scrutiny by the legal community and the public judgment. However, the No-citation Rule 8.1115(a) gives these justices unchecked power – it allows them to rule however they chose, submerging their opinions in the black hole of non-law, with de minimis fear of scrutiny from any other tribunal or the public eye. Their profound power remains by and large unchecked, which is fundamentally unfair, increases the risk of error, and, accordingly, the No-citation Rule substantively violates Due Process and Equal Protection.

Based on the foregoing, Issue 6 should be reviewed under Rule 8.500(b)(1)

...

IX. Issue 9 should be reviewed under Rule 8.500(b)(1) because it presents an important question on whether the No-citation Rule 8.1115(a) violates Due Process

Issue 9 is essentially an extension of Issue 6. (*supra*, 26-30.) The No-citation Rule 8.1115(a) creates a two-tiered system which, arguably, violates the Equal Protection Clause. But it also likely violates the Due Process Clause because it sanctions the issuance of opinions which are more error-prone. Allowing justices to bury their opinions in the black hole of non-law whenever they so please creates an appellate system which results in shoddier opinions which are generally less reliable and more error-prone. Moreover, the justices can *arbitrarily* choose to render their opinions as unpublishable by intentionally omitting meaningful discussions. Such arbitrary power further implicates Due Process concerns. (*Wolff*, 558 ["touchstone of due process is protection ... against arbitrary action of government"].) This system substantively violates Due Process and should be dismantled. Consequently, this Court should review this important federal constitutional question.

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Appendix F
Los Angeles Superior Court

No. 19SMCV01039

Peter Kleidman,
Plaintiff-Appellant
v.
Division P, et al.,
Defendants-Appellees

Filed June 6, 2019

Portions of Kleidman's Complaint

[T]he 2/25/15 Order violates Article VI, §3, which requires the court of appeal to conduct itself as a three-justice court and that any judgment must have the concurrence of two justices. ... An involuntary dismissal of an appeal is a judgment in the sense of Article VI, §3. The 2/25/15 Order did not have the concurrence of two justices, hence is void.