Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

All comments are verbatim unless indicated by an asterisk (*) or brackets ([]). List by alpha..

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1.	Appellate Defenders, Inc. Elaine A. Alexander, Executive Director; and Staff Attorneys Loleena Ansari, Howard Cohen, Cheryl Geyerman, Helen Irza San Diego, CA	A	Appellate Defenders, Inc., submits these comments on the proposed amendments to California Rules of Court, rules 8.1105 and 8.1115, which would change the rules on publication and citation of cases that have been granted review. ADI is the appointed counsel administrator for the Fourth Appellate District. It selects counsel for indigents on appeal in the district and oversees the representation provided. All counsel in its program have a stake in what constitutes citable and binding precedent. **Proposal that opinions remain citable after grant of review** ADI supports the proposal that cases would retain their publication status after a grant of review. There is considerable value to having an opinion freely citable for its persuasive value and reasoning. It is a way of facilitating the best and most informed decision-making possible while lower courts and litigants and the public wait the year or two or more for the Supreme Court to resolve the underlying issue. Well thought out intermediate court decisions will help the Supreme Court reach a sound conclusion, as well. Of course, ADI agrees a case's review-granted status must be noted prominently. On these points we seem to have the agreement of the other 49 states and the federal courts, according to the Invitation to Comment. **Binding effect of review-granted decisions** The second part of the proposal offers two alternatives. Alternative A would provide the review-granted opinion would retain the same precedential or binding force it had before the grant of review. Alternative B would allow the review-granted opinion to be cited freely, but the rule would give it no binding effect. It could be cited for persuasive value only. *Public policy* ADI supports Alternative B as a matter of public policy. As noted above, the *reasoning* of a review-granted case would be greatly helpful in the marketplace of ideas. To make its holding binding on trial courts as "the law," however, when it is inevitably destined not to be the last word on the subject, seems to have little utility. Why bind trial courts to follow a rule that may or may not end up being the law, rather than allowing them to decide what is the best position? Binding trial courts may build in error that would never have occurred had the courts been free to weigh the merits of the various positions. Normally the system reposes confidence in the good judgment of trial courts until higher courts have settled the law; it seems most sensible that the law should not override that judgment and force a result in advance of a decision as to what is in fact the right result. *Law as to what constitutes binding precedent* Alternative A also raises tricky legal issues that could muddy rather than clarify the whole situation. The assumption behind Alternative A is, apparently, that under current law a published Court of Appeal

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			decision is in fact binding on trial courts, within the meaning of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, up until the time review is granted. If that were not the assumption, there would be no practical difference between A and B; in both situations, the review-granted decision would be citable but have no further effect.[1] [1The provision is phrased as "the same binding or precedential effect that it had prior to the grant of review." If this is deliberately ambiguous because the court believes the law is unsettled, ADI would suggest a comment to the rule to that effect, because the proposed rule and the Invitation to Comment give no hint of such a doubt and indeed tend to leave the impression the court assumes opinions are binding when filed. The other commentators ADI has encountered have unanimously so construed the proposal.] But ADI has doubts about this assumption. Although hardly definitive, the weight of authority appears to suggest that a published appellate court decision (including one of the Supreme Court), although citable, is not binding under *Auto Equity* until it is *final*.[2] A review-granted opinion is clearly not, and almost surely never will be, final. [2 For purposes of this comment, "finality" refers to the conclusion of California appellate reviewability. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 34 [Court of Appeal opinion in writ case has "no effect" until final as to *both* Court of Appeal and Supreme Court].) It does not include federal or collateral review.] The law on this subject is surprisingly sparse and indirect and a bit contradictory. The closest case ADI has found is *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541. The Court of Appeal issued a published opinion holding a particular initiative defining a special circumstance never became effective because it was not duly approved by the electorate. The defendant committed the offense several weeks after that decision and was prosecuted under the initiative with a special circumstance allegation. A few days after the offense the Supreme Court granted review in the published case that found the initiative ineffective and ultimately upheld the law. The defendant claimed that under the law at the time of his act – meaning the Court of Appeal opinion invalidating the law – he committed no special circumstance and the application of later-announced law was an unforeseeable enlargement of criminal liability, a violation of due process akin to an ex post facto law. The Court of Appeal disagreed (pp. 1548, 1549): The case was not final when the crimes were committed . . . or when review was granted . . . , and thus our opinion never was the law. . . . [O]ur opinion in [the other case] was never final, and never had any precedential value . . . . Accordingly, it could not have been relied on by these defendants or

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			anyone else. To the extent *Clark* talks about *citing* a non-final opinion, it has been superseded by subsequently-enacted rule 8.1115(d): "A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." That rule explicitly makes a new opinion citable and also says parties "may rely" on it – i.e., point to it as good-faith justification for taking a certain position or action. But the rule does not address the question of the opinion's binding stare decisis effect one way or the other. ADI has encountered no authority or commentary suggesting rule 8.1115(d) was intended to, or did, confer a binding stare decisis effect where it did not exist before. To the contrary, in an unpublished 2013 case,[3] *People v. Samuels* (2013, G045624) 2013 WL 2605430, the court rejected the defendant's argument, based on rule 8.1115(d), that the state was obligated to release him as soon as a favorable appellate opinion was published. The court noted: "A published appellate decision can be cited immediately, but it is subject to being modified or vacated by the issuing court either on its own motion or by granting a petition for rehearing within the 30-day period after the decision is filed…Nor is a decision final for all purposes until at least 60 days after it is issued because 'the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court.'" It upheld the state's decision to wait until the favorable opinion was final. (See also *People v. Reynolds* (2006, E036242) 42 Cal.Rptr.3d 761, unpublished [no error when trial court failed to follow non final published Court of Appeal decision, which was later granted review and decided against defendant by retroactive Supreme Court decision].) [[3]Rule 8.1115(a) prohibits citation of unpublished authorities by a "court" or "party" in "any other action." As ADI construes it, this rule does not extend to participation in public discussions of proposed policy, wholly outside the context of litigation.] The case closest to going the other way ADI has found is *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093. The Court of Appeal issued a published opinion disapproving of a trial judge's handling of peremptory challenges in a certain situation. Before that opinion became final, the same issue came up in the same judge's courtroom. She opined the opinion was not binding on her because not final and repeated the same behavior already condemned. The Court of Appeal issued a peremptory writ: [The judge's] refusal to follow [the published precedent] on the ground it was not final, was brave but foolish. *It was also legally wrong*. [Quoting rule 977(d), the predecessor to rule 8.1115(d).] Except in extraordinary circumstances, a trial judge should follow an opinion of the Court of Appeal

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			that speaks to conditions or practices in the judge's courtroom, even though the opinion is not final, until the opinion is depublished or review is granted. (141 Cal.App.4th at p. 1098, emphasis added.) Although the court offered the opinion the trial judge's action was "legally wrong," the ultimate holding was that the trial judge abused her discretion. And the *Jonathon M.* court immediately followed the "legally wrong" statement with a qualifying explanation of the highly fact-specific rule it intended to apply ("a trial judge should follow an opinion of the Court of Appeal that speaks to conditions or practices in the judge's courtroom"), which was "laser-targeted" at this judge. (*Ibid.*) Most of the remaining precedents ADI has found are merely suggestive and lacking in any discussion of the problem at issue here. Nevertheless they tend to support the theory that court decisions must be final to be binding. Examples include (with all emphasis added): In *In re Edgerly* (1982) 131 Cal.App.3d 88, 91, the Supreme Court denied a petition without prejudice to raising claim in Court of Appeal upon the *finality* of a Supreme Court precedent; the Court of Appeal cited California Rules of Court, rule [currently 8.532(b)] on finality of Supreme Court decisions and opined, "The deference required of inferior state courts to decisions of the state Supreme Court [under *Auto Equity*] is necessarily governed by that rule." (*Id.* at p. 91, fn. 1.) *Barber v. Superior Court* (1991) 234 Cal.App.3d 1076, 1082, said: "[O]ur [previously published] decision never became *final* and is without any precedential value or binding force." *People v. Love* (1980) 111 Cal.App.Supp.3d 1, 13, noted all "published and *final* opinions" of the appellate division are binding on municipal courts of the jurisdiction. The Supreme Court often defers action on a case pending the finality of a controlling precedent. (E.g., *People v. Hernandez*, S227457 ["briefing deferred pending *finality* of decision in People v. Prunty, S210234"].) Unpublished cases (see fn. 3) say the same thing. For example, again with all emphasis added, *People v. Whittington* (2005, C045516) 2005 WL 2008662, footnote 3, unpublished, said in applying a new Supreme Court decision: "Although this decision is not yet *final*, it reflects the high court's position;" likewise, as to the same Supreme Court decision, *People v. Lawson* (2005, C047237) 2005 WL 1663525, *2, unpublished, noted: "*If and when it becomes final*, we must follow the holding…, which is binding on us." If an appellate decision not yet final has no binding precedential effect, a rule like Alternative A–that a review-granted case retains the same precedential status as before the grant of review–does very little. That is essentially the result required by Alternative B, which states the rule much more directly and clearly and does not require litigants and lower courts to guess what the prior precedential effect was or do

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			the obscure research cited in this comment. If Alternative A is construed to *confer* binding force on an opinion that did not have it before, it would be a very odd rule indeed. It would give review granted opinions a *higher* status than non-final opinions still standing. Such an anomalous provision would be hard to defend as either policy or law. **Conflict with existing published case** On a separate topic: Both Alternatives A and B raise the question what is sufficient to counteract an existing contrary precedent within the meaning of this *Auto Equity* provision: [T]he rule under discussion [that an appellate decision is binding on trial courts throughout the state] has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 456.) Even if it is insufficient to bind trial courts in its own right, does a non-final published opinion create a conflict, removing the precedential binding effect of a contrary opinion? Would both of the alternative proposals for review-granted cases answer the question the same way? ADI raises these questions but can offer no answer. **Summary** In summary, ADI supports the proposal that review-granted opinions be citable. As to precedential effect, Alternative B represents sound policy and leaves far fewer legal questions to be sorted through than Alternative A, although neither approach answers everything completely. We therefore support Alternative B.
2.	Appellate Practice Section of the San Diego County Bar Association Victoria E. Fuller, Chair	A	The Appellate Practice Section of the San Diego County Bar Association greatly appreciates the opportunity to comment on the California Supreme Court's proposed changes to California Rule of Court, rules 8.1105 and 8.115. As discussed below, the Section supports the proposal to amend rule 8.1105 to eliminate the automatic depublication of opinions when the Supreme Court grants review. In addition, the Section supports adoption of Alternative A, which would amend rule 8.1115, to keep published Court of Appeal decisions citable with the same binding or precedential effect that existed prior to the grant of review.

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			The Section Supports Amendment of Rule 8.1105 to Allow Published Court of Appeal Opinions to Remain Published and Citable Pending Supreme Court Review The Section supports the proposed change to rule 8.1105 to remove the effect of automatic depublication. This change is long overdue. As the Invitation to Comment states, between 1979 and 1988 the Supreme Court received requests from judicial advisory committees, courts, the California State Bar, the Attorney General of the State of California, the California Judges Association, and various local bar associations including the San Diego County Bar Association, seeking modification of what is now rule 8.1105, which mandates depublication of a published Court of Appeal opinion whenever the Supreme Court grants review. In 1979, Chief Justice Bird's Advisory Committee for an Effective Publication Rule recommended a change to end the automatic depublication of opinions on grant of Supreme Court review, stating in part: > The committee believes that maximum information and exposure is the road to maximum good; every other Anglo-American jurisdiction with a multitiered appellate structure exposes to permanent public view the reports of the entire progress of an appeal, rather than pretending that a major portion of that process never occurred. Under any circumstances, the committee believes there would be benefit for both the public and the judiciary in increasing awareness of the interaction between our courts of appeal and Supreme Court. (Report of the Chief Justice's Advisory Committee for an Effective Publication Rule, June 1, 1979, p. 28) But the proposal to drop the depublication rule was not accepted with the other amendments urged by the Committee, which were adopted in 1982. The legal landscape changed in 1984, when California voters approved Proposition 32. The proposition amended article VI, section 12 of the California Constitution to authorize the Supreme Court to review all or part of a decision of a Court of Appeal. Again Chief Justice Bird's Judicial Advisory Committee appointed in 1985 to implement Proposition 32 recommended amendment of rule 976 (now rule 8.1105). The committee rightly stated the practice of depublication followed logically from the former legal doctrine that a "grant of hearing" by the Supreme Court nullified the Court of Appeal decision. But it acknowledged the legal doctrine upon which the depublication rule hung was changed by Proposition 32. There no longer seemed to be any pressing reason for maintaining such a rule contrary to virtually every

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			other jurisdiction in the United States. Despite this acknowledgement, the depublication rule remained in effect. In 1986, Administrative Presiding Justice Racanelli of the Court of Appeal, First Appellate District, wrote to Chief Justice Bird to announce the unanimous adoption of a resolution by all of the justices of that court, requesting the amendment of rule 976 to replace the depublication rule with a rule that allowed an opinion certified for publication by the Court of Appeal to remain published if the Supreme Court granted review. Although the Presiding Justices of both the Third and Fifth Appellate Districts joined in this request, the Supreme Court again chose not to amend the rule. The issue was raised again in 1988, when the State Bar of California, the California Attorney General, the California Judges Association, the Bar Association of San Francisco, and the San Diego County Bar Association jointly requested that Chief Justice Lucas ask the Judicial Council to consider changing the depublication rule. The proponents suggested a rule that would have allowed a published Court of Appeal opinion to remain published following the grant of Supreme Court review, but without stare decisis effect except where the Supreme Court expressly ordered. Again, the proposed change was considered, but no pressing need for action was found, even though the need for such a restrictive rule had been abrogated. In light of the above, the current rule set forth in 8.1105 appears to be a legal anachronism from the prior "hearing grant" procedure that was abrogated by Proposition 32 more than 30 years ago. It is entirely proper to bring the practice in California into step with the practice of virtually every other jurisdiction that operates with an intermediate court of review. Doing so also makes California consistent with the modern trend that permits citation to any available source. **The Appellate Practice Section Supports Amendment of Rule 8.1115 to Allow Published Court of Appeal Opinions to Remain Citable and to Have Binding or Precedential Effect Unless Otherwise Ordered by the Supreme Court** While the Section quickly came to an agreement regarding the continued publication of Court of Appeal opinions following the grant of Supreme Court review, the question of what precedential value to accord such opinions garnered more discussion among Section members. Some members voiced concern that where a newly published Court of Appeal opinion changed existing law, the inability to cite that authority with precedential effect upon a grant of Supreme Court Review deprives parties of substantial justice during the review period. Other members raised the concern that where a split of authority is created by a newly published Court of Appeal decision, the current law requires trial courts to ignore the new, and

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			perhaps better-reasoned, opinion and follow the published opinion not under review. *Auto Equity Sales, Inc. v. Supreme Court* (1962) 57 Cal.2d 450, 455-456. This is so even where the Supreme Court grants review for reasons having nothing to do with the issue upon which the split of authority exists. Further, Section members noted that although both alternatives A and B provide the Supreme Court with authority to make exceptions to the rule regarding precedential effect, past history suggests the authority would seldom be exercised in practice. Despite some members' concerns, a large majority of the Section's members concluded that Alternative A is the better option for the following reasons: First, as noted in the Invitation to Comment, Alternative A is consistent with the rule set out in *Auto Equity Sales, supra,* 57 Cal.2d 450, 455. It recognizes that published Court of Appeal opinions, including those under Supreme Court review, apply to all state superior courts. Second, Alternative A is consistent with the approach of other states, with respect to published opinions while review is pending in a higher court. But to address some of the concerns raised above, it also gives the Supreme Court the flexibility to deviate from the standard practice by "otherwise ordering" that an opinion have a limited, or no binding effect pending review. Third, similar to Justice Racanelli's comment in his 1986 letter to Chief Justice Bird, the fact that a Court of Appeal opinion may be cited while the case is pending in the Supreme Court is no reason to prevent a published case from having full precedential effect. Under the proposed change to rule 8.1105, a notation of review must appear on the published opinion. Further, the grant of review would inhibit reliance upon the Court of Appeal opinion by competent counsel as well as the lower courts as a practical matter, just as it now occurs in the federal system and virtually all other multitiered jurisdictions. Thus, adopting Alternative A would make California no different from all other jurisdiction that see no problem with according precedential value to published opinions under review. Fourth, Alternative A is easier to apply than Alternative B, which treats published opinions in cases pending review as merely persuasive. Alternative B would effectively make some published California opinions the equivalent of opinions from outside of the jurisdiction. This would be an entirely new category of published California case authority that practitioners and superior courts may find difficult to manage. Similarly, Alternative B also fails to address *Auto Equity Sales, supra,* because it treats published opinions on review as merely persuasive authority. Thus, in the case of a split of authority, trial courts are

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			prohibited from choosing, and are bound to follow the opinion not under review, even where that opinion may be less sound. Fifth, Alternative A is consistent with the settled doctrine that there is no inference that the Court of Appeal erred from the mere fact that review is granted. Alternative B, however, necessarily implies that the Court of Appeal opinion is incorrect, and does not merit full availability to superior courts and the legal profession as precedent. The general rule, consistent with Alternative A, is that until and unless it is overruled, the Court of Appeal opinion should be deemed presumptively correct. Whatever may be the outcome upon review, the published Court of Appeal decision should be accorded precedential weight consistent with the general rule.
3.	Appellate Section of the Bar Association of San Francisco David J. de Jesus, Vice-Chair	A	The Appellate Section of the Bar Association of San Francisco, by and through its undersigned Executive Committee members, respectfully submits the following comment in support of the proposed amendment to Rule of Court 8.1105 regarding the depublication of Court of Appeal opinions upon the Supreme Court's grant of review.[1] [1 We do not comment on the proposed amendments to Rule of Court 8.1115 regarding the citation of Court of Appeal opinions that are under Supreme Court review.] In 1988, the Bar Association of San Francisco, along with the State Bar of California, the Attorney General of the State of California, the California Judges Association, and the San Diego County Bar Association, submitted a joint request to refer to the Judicial Council a similar proposed rule change. Our Section's members played an important role in drafting and submitting the request, which set forth several compelling reasons for changing the rule. Those reasons still hold true almost 30 years later, and intervening developments in the practice of law, including internet-based legal research, make the proposed rule change even more sensible today. As an initial matter, California's practice of automatic depublication is out of step with every other state and federal jurisdiction. Although this outlier status is not itself problematic, it does raise the question of whether California jurisprudence is uniquely served by a rule of automatic depublication that no other jurisdiction has adopted. We do not believe this rule provides any distinctive benefits for California law; instead, the current California rule increases the opaqueness of the law and thus impedes its development. Publication of Court of Appeal opinions is uncommon. According to the recent Judicial Council's Court Statistics Reports, only 9% of majority opinions were published statewide (17% in civil cases and 4% in

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			criminal cases) during fiscal year 2012-2013. These percentages were roughly the same in the two previous years. Court of Appeal opinions remain predominately unpublished because the criteria for publication are stringent. An opinion is published only where it (1) establishes a new legal rule, (2) modifies or criticizes an existing rule, (3) resolves or creates an apparent conflict in the law, (4) involves a legal issue on continuing public interest, or (5) makes a significant contribution to the legal literature by reviewing the historical or legislative development of a legal rule or statute. See Cal. R. Ct. 8.1105(c). The Courts of Appeal take these requirements seriously, so the opinions selected for publication generally are drafted and researched with great care and reflect the Court of Appeal's belief that the opinion involves a new or significant legal issue. Automatic depublication deprives the legal community and the public of the fruits of this considerable effort and diminishes the Court of Appeal's important educational function. Moreover, before the Supreme Court has issued its opinion, automatic depublication implies that the Court of Appeal decided the matter incorrectly because the opinion no longer is available to the legal community for citation. But in granting a petition for review, the Supreme Court does not review the merits of the opinion; it evaluates only whether the Supreme Court should step in to secure uniformity in decisions or to settle important legal questions. See Cal. R. Ct. 8.500(b). Indeed, during this interim stage, an earlier Court of Appeal opinion that conflicts with the decision on review will often be left as controlling authority—only to be overruled when the Supreme Court renders its decision. Automatic depublication upon the grant of review is inconsistent with the reasons causing the Supreme Court to grant review. In many instances, Supreme Court opinions can be better understood when read in tandem with the underlying Court of Appeal decision that the Supreme Court reverses or affirms. In the case of an affirmance, the Court of Appeal opinion is an important component of the decision-making record because it fills in any gaps that the Supreme Court may not have focused on in reaching its decision. Even where the Supreme Court reverses, the legal community will benefit from a more complete understanding of the rationale or reasoning that the Supreme Court has rejected. Even if a published opinion is not controlling authority on a specific point of law, it can still provide practical and educational value to the legal community and to the public at large. Moreover, reversal does not undercut the reason(s) the Court of Appeal opinion was published in the first place. In the past, a principal reason given for maintaining the rule of automatic depublication was that it would be too "confusing" if opinions remained on the books while the matter was under review or even after a

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			decision on the merits. We are confident that this concern will not pose a significant problem. As in the federal system, there are many state Court of Appeal opinions which the Supreme Court later disapproved or which were superseded by statute in whole or in part. Practitioners already must be vigilant to ensure that the cases they cite are, in fact, citeable and are obligated to provide courts with any subsequent history that will impact the precedential or persuasive value of a case. Maintaining publication for opinions under review will not require practitioners to adjust their approach to legal research or briefing or otherwise cause confusion. This is particularly true given the near-immediate availability of information and the predominance of electronic research services like Westlaw and LexisNexis. In the late 1980s when these amendments were last considered, and for years before that, practitioners relied principally on printed official reports and citation services like Shepard's to conduct legal research. Legal research in those days required substantially more effort to assess subsequent authority. Those who opposed the amendments at that time might have believed that automatic depublication upon review was a way to make things easier for practitioners by drawing a bright-line rule that publication always equates with citeability. Today, however, the vast majority of practitioners use electronic research services where, with one click of a button, an opinion's entire subsequent history is revealed—including whether it is under review, has been reversed or superseded, or has been cited favorably or negatively by courts around the country. These electronic tools make it relatively easy to evaluate the precedential or persuasive value of any Court of Appeal opinion, regardless of whether it is (or has been) under review. Any concerns over possible confusion have no application today. In short, we believe that the proposed amendment to Rule of Court 8.1105 is long overdue. Not only does the amendment align California with the federal system, but it fixes a rule that is at odds with the important function Courts of Appeal serve in our state court system. The amendment promotes the development of our laws in ways that will greatly benefit the legal community and the public. We respectfully encourage the Supreme Court to adopt it.
4.	Best Best & Krieger LLP Sarah Owsowitz, Attorney Walnut Creek, CA	N	The law firm of Best Best & Krieger LLP would like to offer the following comments on proposed amendments to California Rules of Court, rules 8.1105 and 8.115. Under the current California Rule of Court, rules 8.1105(e)(1), 8.1115(a), a published appellate court decision is automatically depublished when the Supreme Court grants review of the case, meaning that the appellate opinion can no longer be cited in other cases. However, under Rule 8.1105(e)(2), the Supreme Court may order the opinion republished, in whole or in part, at any time after granting review.

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			This offers the Supreme Court the option of maintaining an opinion, or part of it, published and binding during the period the case is under review and even after decision. We believe that the proposed rule change, which would reverse the default of depublication after grant of review, unless the court ordered otherwise, would substantially increase the burden on the Court, produce unnecessary confusion for the bench and bar, and offer little, if any, benefit. Under the current regime, the effect of default depublication upon grant of review, eliminating the binding effect of the published opinion, is clear and certain. However, if a published decision remains binding, or even of "persuasive value only," after grant of review, the bench and bar would be subject to a decision which is, at the very least, of suspect authority and application. This could, at a minimum, make trial court determinations more difficult. And, if such appellate decisions under review are binding, these decisions could well be the basis for trial decisions that would be immediately vulnerable, if not totally undermined, once the Supreme Court has ruled. For a firm like ours, that advises public agency, as well as private clients, dealing with binding or even "persuasive" appellate opinions, which are under review by the California Supreme Court, will significantly complicate the advice we render, especially to our public agency clients. Should the Court decide to alter the depublication rule, we would urge it to adopt Alternative B, which provides that, unless otherwise ordered by the court, an opinion has no binding or precedential effect while it is under review. This approach would, while review is pending, place the entire appellate opinion in the same category as a decision rendered in another jurisdiction; it might have persuasive value, but would not have binding or precedential effect. As discussed above, we believe that to adopt Alternative A and leave a decision as binding authority while review is pending would produce an extremely problematic outcome. Finally, we believe that proposed new rule 8.1105(e)(2), which would provide that: 1) after decision on review by the Supreme Court, a published appellate opinion has precedential effect only to the extent it is not inconsistent with the decision of the Supreme Court or is disapproved by that Court, and 2) that the absence of discussion in a Supreme Court decision about an issue addressed in the appellate decision does not constitute an expression of the Court's opinion, serves to illustrate why the present default depublication rule should not be altered. This proposed post-decision milieu rule would further contribute to confusion and uncertainty in the state of the law, complicating the work of the bench and bar.

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5.	Hon. Kyle S. Brodie Superior Court of San Bernadino County	N	Currently, when the California Supreme Court grants review of a published opinion, the precedential value of that opinion is eliminated. That is a good policy, and it should be maintained. Depublishing the opinion is an appropriate means of alerting the legal community that the issue is currently under review, and avoids suggesting the court of appeal's opinion should have any persuasive value. It is true that, while issues remain unsettled pending the Supreme Court's decision, trial courts are left to flounder a bit. But even though a case is depublished pending review, it does not disappear entirely. Online databases include opinions that are never published in the first instance, and even after an opinion is granted review, it can still be viewed online. (For example, the court granted review in *People v. Canizales* (2014) 229 Cal.App.4th 820, but I just accessed that opinion through Lexis.) The mere fact that an opinion is available online or otherwise does not necessarily mean it should carry any persuasive value, even if some trial courts will inevitably review and consider its reasoning. The requested modification appears to be driven by a desire to provide guidance to lower courts without needing to wait for the California Supreme Court's ultimate resolution of a given issue. But the grant of review reflects (at least) that the question raised in the opinion needs to be settled on a statewide basis. Any persuasive value of the opinion is dubious once review has been granted. It is a laudable goal, in the abstract, to give trial courts guidance. But I think that leaving published opinions "on the books" is as likely to cause confusion as clarity. When the California Supreme Court grants review, it is making a statement that it intends to write its own map of California law. It is best to eliminate the decision that, in the absence of a specific order, will inevitably by supplanted. It's not a perfect analogy, but consider if a map were published, then recalled. Would you consult it to find the way? Or would you instead be guided by other well-tested maps and your knowledge of the landscape generally, and then make your own inferences about where you should go to your specific destination? I personally favor the latter approach, and believe the current rule should remain in place. Finally, it bears noting that Rule 8.1105, subdivision (e)(2) already allows the California Supreme Court to order that an opinion be published, in whole or in part, after it grants review. Although that seems to be a rare occurrence, perhaps the court could make a more frequent use of that subdivision if it believes guidance is required pending its own decision.
6.	California Academy of Appellate Lawyers Kathryn E. Karcher, President	A	As president of the California Academy of Appellate Lawyers, I am writing on behalf of its membership to provide comments on the above-described proposal. The Academy consists of more than 100 California appellate lawyers with substantial experience in briefing and arguing appeals in the California court

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			system. The Academy has a vital interest in ensuring that the rules governing appellate practice promote the efficient and fair administration of justice at the appellate level. The Academy strongly supports the proposed rule change, which provides that Court of Appeal opinions remain published after a grant of review by the Supreme Court. The benefits of that change are important: maintaining a record of important cases that end up before the Supreme Court, providing enhanced notice to practitioners researching published decisions of issues currently pending before the Court, and preserving the work of the Court of Appeal. Because Court of Appeal opinions often address issues as to which review is *not* granted, adopting the proposal has the virtue of maintaining the availability of the Court of Appeal's analysis on those issues. Precedential guidance on such issues is a welcome benefit to litigants and to the lower courts. Regarding Alternatives A and B, governing the precedential value of Court of Appeal decisions when review is pending, the Academy qualifiedly favors Alternative A for the reasons discussed below. We emphasize, however, that the Academy supports adoption of the proposal regardless of which alternative the Judicial Council approves. Between the two proposed precedential alternatives, the Academy supports Alternative A for several reasons. Alternative A is the model followed by the federal courts insofar as the precedential value of an opinion is not altered by a grant of certiorari, and that model works well in the federal system. Although under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 (*Auto Equity Sales*) the scope of such precedential value is different in the two systems, Alternative A will achieve a more appropriate result than Alternative B when the Supreme Court grants review to secure uniformity of conflicting Court of Appeal decisions. In that event, under the stare decisis doctrine as applied under existing California law, no conflicting Court of Appeal opinions will bind the superior courts until the Supreme Court issues its opinion. By contrast, in that same situation Alternative B would merely perpetuate the status quo, in which superior courts are bound by the earlier line of decisions when review of a conflicting decision is granted and the new decision is automatically depublished. The Academy believes that allowing the lower courts to choose between the conflicting lines of authority while review is pending is preferable to what could be a random outcome under Alternative B if an earlier decision (or line of decisions) decided an issue one way and the opinion on review is in conflict. Under Alternative B, the earlier decision would remain binding on the superior courts unless the Supreme Court altered the default rule and declared the opinion on review to be binding precedent even while review remained pending.

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			Alternative A also avoids some challenging complexities that Alternative B could create. Under Alternative B, a Court of Appeal opinion would operate as binding precedent until review is granted (Cal. Rules of Ct., rule 8.1115(d)), but upon a grant of review, would become merely persuasive, not binding, authority. But upon completion of review, the Court of Appeal opinion would again become binding precedent to the extent not disapproved by or inconsistent with the Supreme Court's opinion. This "on again, off again" quality could be challenging for courts and practitioners to implement, and could also lead to arbitrary results in different cases when a Court of Appeal decision is binding precedent one day, then not the next day, and then at some future point regains binding precedential status. The changing precedential status of a Court of Appeal opinion could also result in multiple motions for reconsideration in pending cases in the superior courts, increasing the burden on those courts. While Alternative A appears to be the preferable approach in situations where review is granted to resolve conflicts among the intermediate courts, Alternative B might be preferable when there is a single Court of Appeal opinion on an important issue of law and the Court grants review to decide that issue. This is especially so under the reasonable assumption that lower court decisions on important issues of first impression are reversed more often than not when review is granted. Treating such decisions as binding precedent would result in an erroneous outcome in the majority of such cases while review is pending. In such cases, the Supreme Court retains discretion to depublish a Court of Appeal decision if its holding is likely to work serious injustice when applied to a particular issue under review. Indeed, the Supreme Court's discretion to selectively depublish decisions is an important part of the answer to any critique of *either* Alternative A or Alternative B. We anticipate, however, that such discretion would be used infrequently to avoid unintended consequences. Lower courts and practitioners will carefully watch any orders that are contrary to the "default" rule and read much into them—perhaps something more or different than what the Supreme Court intends. In addition, parties to cases under review that are subject to selective depublication could perceive that as a strong advance signal from the Supreme Court as to the likely outcome, and be more likely to settle and thereby deprive the Court of an opportunity to decide the issue with adversary briefing by fully engaged parties. As an alternative to selective depublication if Alternative A is adopted, the Supreme Court may instead wish to refine its decision in *Auto Equity Sales* as applied to intermediate appellate decisions from which review has been granted on issues of first impression. Just as such decisions are not binding on other intermediate appellate courts (see *Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1193 ["there is no horizontal stare decisis" in the Courts of Appeal]), the Supreme Court could alter the general stare decisis rule to provide that when review has been granted on an issue of first impression, the superior courts

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			would not be bound by the Court of Appeal decision, but would instead remain free to use their best judgment to anticipate how the Supreme Court will decide the issue under review.
7.	California Department of Justice Edward C. DuMont Solicitor General San Francisco, CA	NI	The Supreme Court has invited comment on possible changes to Rules 8.1105 and 8.1115 of the California Rules of Court, concerning the continued publication and precedential status of court of appeal opinions, originally designated for publication, in cases in which the Court grants a petition for review. The Attorney General regularly represents the People, the State, and various state officers and agencies in litigation in both state and federal courts. We appreciate the opportunity to participate in this discussion. The materials posted in connection with the Court's invitation to comment provide a detailed history of the current "automatic depublication" rule and of prior proposals for change. As an initial matter, we note that attorneys at the Department of Justice have not expressed any particular dissatisfaction with the current rule, or reported that the rule has presented special challenges for client agencies or officials. There is, moreover, some concern among Department attorneys about the possible practical consequences of any change to a longstanding and familiar rule. As a general matter, changes to procedures and rules impose transitional costs while attorneys and courts become accustomed to them. There is usually some uncertainty as to how new rules will operate in practice, and it can take time and a commitment of resources on the part of counsel, parties, and the courts to identify and resolve unanticipated interpretive questions. At the same time, we recognize that there may well be sound reasons for updating the rule in question here. Most saliently, technological developments have substantially changed the practical significance of "depublication." Now that judicial opinions are routinely available to attorneys, courts, and the public in electronic form, the practical effect of formal "depublication" is primarily to prohibit almost any reference, in state proceedings in California, to judicial opinions that are otherwise readily available on the public record (and, indeed, are sometimes cited to other state and federal courts). That prohibition, too, has its costs. The current rule deprives the legal community of the ability to refer overtly, in other state proceedings, to potentially valuable discussions of relevant issues by court of appeal justices who have considered those issues from the standpoint of neutral arbiters but in the practical context of a particular case. That deprivation can lead to its own inefficiencies. It may also entail an undue impoverishment of the ongoing public discussion among parties, advocates, and judges on which our common-law system relies for the sound development and application of the law. If a change is to be made, in our view the key to proper evolution of the current rule is to focus on breaking the traditional link between "publication" and the different question of precedential effect during

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			the period when review is pending. For reasons discussed below, the Department strongly opposes any change to the current default rule that a published appellate decision ceases to have any binding precedential effect as to issues that the Court has decided to review. Thus, we oppose the potential change identified as "Alternative A." On the other hand, so long as the default rule remains that the grant of review on an issue deprives the underlying appellate opinion of any immediate binding or precedential effect as to that issue, we can see value to a change that would permit citation to and discussion of such an opinion in other state proceedings, for whatever persuasive value it may have, while the Court is considering the issue. Accordingly, as set out in the discussion below, we would not oppose the potential change identified as "Alternative B." We also identify some additional points that the Court may wish to address or clarify in any new rule. 1. *Alternative B Strikes an Appropriate Balance by Distinguishing Between Publication and Precedential Effect* Under the current system, any published court of appeal decision constitutes binding precedent for superior courts statewide. *(Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 *("Auto Equity").)* "Binding" in this context means that a superior court, as a court of lower authority, must accept and follow published court of appeal decisions. *(Ibid.)* Where published appellate opinions are in conflict, superior courts "can and must make a choice" between them. *(Id.* at p. 456.) In contrast, published court of appeal decisions are not binding at the state appellate level. *(Jn re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.) Rather, they are generally considered only persuasive authority. (See, e.g., *California Clean Energy Committee v. City of San Jose* (2013) 220 Cal.App.4th 1325, 1345, fn. 8 [appellate court "not bound by precedents created by other appellate courts, [but] may find the reasoning set forth in [those] decisions, including dicta, persuasive as to the facts . on appeal"]; *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485 [appellate courts "ordinarily follow the decisions of other districts" unless there is "good reason to disagree"]; *Danley v. Superior Court* (1923) 64 Cal.App. 594, 599 [previous appellate decision has "persuasive" effect if current appellate court "agree[s] both in the reasoning advanced and the conclusion reached"].) The current system properly recognizes that when the Supreme Court grants review of a published court of appeal decision, that decision should no longer be binding on any court, at least as to the issues subject to review. Currently, that change is clearly signaled by automatic depublication of the court of appeal decision. With minor exceptions, a depublished decision may not be cited or referred to in other state proceedings for any purpose. (See, e.g., *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873, 881-882; *Airline Pilots Association Intern. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 724, fn. 7.) Both Alternative A and Alternative B propose to move away from automatic depublication, but they differ

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			greatly in their treatment of the precedential value of published court of appeal decisions after a grant of review. Alternative A would provide that, unless otherwise ordered by the Supreme Court, the court of appeal decision not only would remain published but also would continue to have the same binding or precedential effect that it had before review was granted. Alternative B, in contrast, breaks the link between publication and precedential effect. Under Alternative B, while a court of appeal opinion that was originally certified for publication would remain published, and thus could be cited and discussed in other proceedings, absent some further order the opinion would be recognized only as potentially persuasive authority, not as binding precedent. Because there can be different views about exactly what "persuasive" authority means, we think it would be helpful for the Court to clarify that, in this context, it would mean that its influence should depend on the extent to which the court examining it finds it to be relevant and well reasoned. (See, e.g., *Danley v. Superior Court, supra,* 64 Cal.App. at p. 599; *People v. Landis* (1996) 51Cal.App.4th1247, 1255.) With that clarification, we believe Alternative B is far superior to Alternative A. Allowing court of appeal decisions to be cited for whatever persuasive value they may have would seem to address most of the concerns that have motivated calls for changes to the automatic depublication rule. It respects the efforts and considered opinions of appellate justices. It promotes the development of the law by recognizing that the appellate opinion may have offered important contributions, such as historical or doctrinal discussions of potential use to other courts, future litigants, and legal scholars. And it ensures that, where the Supreme Court has granted review to consider only some of the issues addressed by the court of appeal's decision (or may end up addressing only some of those issues in its own discussion), the remainder of the court of appeal's efforts are not needlessly cast aside. Alternative B achieves those goals as well as Alternative A, and offers at least one significant practical advantage. By decoupling (in this limited circumstance) an opinion's publication status from its status as binding authority, Alternative B would reduce what is otherwise likely to be considerable pressure on litigants or interested non-parties to request that the Supreme Court order what would now be discretionary depublication pending review. For instance, when the Attorney General successfully seeks Supreme Court review, it is often because a court of appeal decision harms a statewide program, impedes the proper enforcement of state law, or could adversely affect a large number of pending cases. If, under Alternative A, the Court's grant of review presumptively left such a decision binding pending the Supreme Court's review, then the Attorney General and other public officers or agencies would likely often feel the need to request depublication or seek some form of stay or similar order to protect the public interest. Ruling on such applications would, in turn, require the Supreme Court to devote additional resources to further proceedings at the initial stages of such cases, before full briefing and argument. Alternative B is

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			likely to lessen the need for such additional proceedings, to the benefit of the Court and litigants alike. Alternative B also avoids certain ill effects that would result from making court of appeal decisions binding on superior courts while the Supreme Court resolves the legal uncertainties raised or recognized by the grant of review. Given the frequency of reversal by the Supreme Court, a court of appeal decision under review is not best thought of as presumptively correct.[1] While it may well make sense to allow superior courts to consider the reasoning and persuasiveness of such a decision, it does not make sense for the default rule to be that they must apply it as binding precedent. The number of superior court cases affected could be substantial, given the time that may be required for briefing, argument, and final decision in the Supreme Court. And the consequences may be serious, or even irreversible. In criminal cases, for example, where Double Jeopardy protections bar retrial following an acquittal, a court of appeal decision might require trial courts in other cases to exclude highly probative evidence or to instruct the jury using a heightened mens rea requirement. (See, e.g., *People* v. *Cogswell* (2010) 48 Cal.4th 467, 471 [reversing court of appeal decision that required exclusion of out-of-state victim's preliminary hearing testimony]; *People* v. *Valdez* (2002) 27 Cal.4th 778, 781 [reversing court of appeal decision that required subjective awareness of risk, rather than criminal negligence, for felony child endangerment]). If such trial rulings were followed by potentially erroneous acquittals, the People would have no remedy even if the Supreme Court later corrected the court of appeal's error. [1 The Court's reversal rate has been estimated at 40 to 55 percent. (Jon B. Eisenberg, Ellis J. Horvitz and Justice Howard B. Wiener (Ret.), California Practice Guide: Civil Appeals and Writs (Sept. 2015), ch. 13, § 13:119.1.)] In civil cases, interim errors likewise will not always be capable of subsequent correction. For instance, a court of appeal decision might require superior courts to reject a claim of privilege and order information disclosed—an act that, once done, cannot be fully undone. (See, e.g., *Roberts* v. *City of Palmdale* (1993) 5 Cal.4th 363, 367 [reversing court of appeal decision that required disclosure of attorney-client letters under the Brown Act]; *Coito* v. *Superior Court* (2012) 54 Cal.4th 480, 486 [reversing court of appeal decision requiring disclosure of witness interview recordings made by investigators employed by counsel and disclosure of witness identities; remanding to determine whether attorney work product privilege should apply].) Even where mistakes can be remedied by a later reversal, interim errors could impose substantial costs on litigants and judges alike—costs of appeal, retrial, and prolongation of proceedings. The occurrence of such adverse results will be reduced if superior courts have the ability to consider and evaluate for themselves the benefits and harms that would flow from following the reasoning of a court of appeal decision that the Supreme Court has decided to review.

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			Alternative B differs from the rule in the federal courts, where a published circuit court decision continues to be binding precedent within the circuit even after the U.S. Supreme Court grants certiorari. (See *Medina-Remigio* v. *Solis* (5th Cir. 2001) 252 F.3d 436.) This difference is also present, however, in the existing state system.[2] And California law differs from federal law in a variety of other related ways. A California court of appeal decision is binding on superior courts throughout the State, whereas a published federal circuit court opinion binds courts only within that circuit. (Compare *Auto Equity, supra,* with, e.g., *Apache Bend Apartments, Ltd. v. United States* (5th Cir. 1993) 987 F.2d 1174, 1177.) Comparatively speaking, then, the effect of a single California court of appeal decision is broader than the effect of a single federal court of appeals decision. On the other hand, as discussed above, the California appellate decision, unlike a federal circuit decision, does *not* bind other appellate panels, even within a single appellate district. Furthermore, under California law, "mandatory" injunctions requiring a change in the status quo must be stayed on request pending appeal, whereas federal judgments are stayed on appeal only when ordered by the court in its discretion. (Compare *Ohaver v. French* (1928) 206 Cal. 118, 121, with *Newball v. Offshore Logistics Internat.* (5th Cir. 1986) 803 F.2d 821, 827.) Similarly, California trial court judgments have no res judicata effect while an appeal is pending, whereas federal district court judgments do. (Compare *Franklin & Franklin v. 7-Eleven Owners* (2000) 85 Cal.App.4th 1168, 1174, with *United States* v. *5 Unlabeled Boxes* (3d Cir. 2009) 572 F.3d 169, 175.) In short, we do not view any divergence from the federal model as a serious objection to Alternative B. [2 In the Ninth Circuit, a panel opinion is deprived of any effect, and may not be cited, if the court grants en banc rehearing. This reflects the view that the grant of rehearing means that there is no longer any effective decision of the court. (See Circuit Adv. Comm. Note (3) to Ninth Circuit Local Rules 35-1 through 35-3; *Socop-Gonzalez v. I.N.S.* (9th Cir. 2001) 272 F.3d 1176, 1186, fn.8 (en banc).)] 2. *Alternative B Will Not Create Confusion About Precedential Effect* Some have expressed concern that Alternative B could cause confusion by introducing a new category of persuasive authority into California law. We see little basis for this objection, because the concept of persuasive authority is not a new one under California law. California litigants and courts often look to other states' judicial interpretations of their own laws as potentially persuasive in the development of California law. (E.g., *Bacich* v. *Board of Control* (1943) 23 Cal.2d 343, 352.) They acknowledge federal circuit and district court decisions as nonbinding but potentially persuasive both on matters of federal law (e.g., *People* v. *Bradley* (1969) 1 Cal.3d 80, 86) and on the interpretation of California statutes that are modeled on federal law (e.g., *Upland Police Officers Assn.* v. *City of Upland* (2003) **111** Cal.App.4th 1294). Indeed, as noted above, the panels of the courts of appeal generally treat published decisions of

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			other panels as persuasive authority. (See *In re Marriage of Shaban, supra,* 88 Cal.App.4th at p. 409.) Moreover, a substantial number of lawyers who practice in California state courts also practice in federal court, where they presumably are accustomed to citing district court opinions and out-of-circuit appellate opinions as persuasive authority. California already provides a rule for how persuasive authority works: A court considering such authority decides whether or not to follow it based on an evaluation of the thoroughness and persuasiveness of the opinion's analysis. (E.g., *People v. Teresinski* (1982) 30 Cal.3d 822, 827 ["Although recognizing the authority of this court to construe the California Constitution to provide protection beyond that afforded by parallel provisions of the federal document, we nevertheless find the reasoning of [a United States Supreme Court decision] persuasive and consistent with past California decisions; we therefore adopt [it] as defining the rights of the parties under the California Constitution."].) That is similar to what presumably happens under the existing regime when a superior court chooses to follow one of two or more conflicting published court of appeal decisions based on its analysis of which decision is best reasoned and most consonant with other binding principles of law. (See *Auto Equity, supra,* 57 Cal.2d at p. 456.) In short, Alternative B would not require lawyers or judges to grapple with any fundamentally new concept or skill. It would simply involve extending well established principles and tools to a new context. 3. *Alternative B's Effect in Cases of Conflicting Decisions* One aspect of Alternative B should be further clarified. The Supreme Court frequently grants review to "secure uniformity of decision." (Rule 8.500, subd. (b)(l).) In such a circumstance, Alternative B as currently written leaves unclear whether superior courts could choose to follow the reasoning of a court of appeal opinion in a case the Court has accepted for review (which would be considered only persuasive authority under the proposal), or whether they would instead be required to follow the conflicting decision in a different case which the Court is not simultaneously reviewing (perhaps because the time for granting review in that case expired before a later decision created the conflict). The confusion arises from the draft's statement that the court of appeal opinion from a case where review has been granted "has no binding or precedential effect"—something that the Invitation to Comment regards as placing the opinion "in the same category as a decision rendered in another jurisdiction." (Invitation to Comment, p. 4.) Because a superior court has no authority to follow a case from another jurisdiction over a contrary California court of appeal decision (see *Auto Equity, sipra,* 57 Cal.2d at p. 455), Alternative B appears to mandate that the opinion not subject to review be followed and that the opinion under review be disregarded, although it could now be cited to the lower court. Where two or more cases reaching different conclusions on a point of law are all relatively recent, it might often make sense to allow superior courts to choose which decision to follow while the Supreme Court

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			considers the issue. In such circumstances, the fact that the Court granted review in one case and not another cannot confidently be read as an endorsement of the reasoning in the non-reviewed decision. Indeed, it may be mere happenstance that one case reached the Court and the other did not, or that one was a better vehicle for the Court's review. There may thus be substantial value in allowing trial courts to select the reasoning that they believe should prevail and will best do justice between the parties and serve the public interest pending the Court's decision. On the other hand, where existing court of appeal precedent on an issue is longstanding and the Court grants review based on a conflict created by a new case that may be characterized as an outlier, allowing superior courts the discretion to follow the new decision and ignore established law may be disruptive and ill advised. For these reasons, we recommend that further thought be given to what default rule makes the most sense for those matters where review is granted to secure uniformity of decision. If the answer is not clear (as we think may be the case, based on our limited consideration of the issue during this comment period), the Court might wish to consider adopting a transitional practice for some period: in its orders granting review based on conflicts in authority, the Court could specify whether the reasoning in the decisions being reviewed may be followed while the case remains pending, notwithstanding contrary published precedent. After a period of time the clarity and usefulness of that practice could be evaluated, or an appropriate default approach might become apparent. Alternatively, the Court might consider promulgating the new rule as proposed but noting this potential issue and specifying an appropriate way for litigants or other interested parties to bring a situation of this sort to the Court's attention, with a proposal for an appropriate order, on an ad hoc basis. 4. *Process for Requesting Depublication Between Grant of Review and Decision* Under the proposed change to Rule 8.1 105, subdivision (e)(l), "automatic depublication" would be abolished. The proposed advisory committee comment clarifies, however, that the Supreme Court's power to order a particular opinion depublished would remain intact. Neither the proposed rule nor the advisory comment specifies the procedure by which parties would request depublication in conjunction with a grant of review, or the criteria the Court would use to evaluate such a request. We think these matters warrant some consideration. If the Court adopts Alternative B, there may be little need for any adjustment to current practice in this regard. In that situation, a party filing a petition for review would do so with the understanding that a grant of review would not automatically result in depublication. If under the current system the party would have sought depublication as an alternative to a grant of review (and at roughly the same time), it would have the same motivation to do so under the new rule, because of the usual possibility that review will be

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			denied. Any additional argument for why the Court should order depublication even if it does grant review would presumably be available to the party at that same time, and could be included in the same request letter that would have been filed under current practice. In contrast, adoption of Alternative A (which we oppose) would entail new complications. In many cases, there may be sound arguments for plenary review, but no particularly persuasive argument for depublication if review is denied. (For example, this could be true in a case of first impression interpreting the meaning or application of a statute or the implementation of a public program.) Under the current system, a party challenging such a decision would file only a petition for review. Under Alternative A, however, the same party would apparently be required to file, at roughly the same time, a parallel letter setting out any argument for why the Court should order the appellate opinion depublished if review is granted. It is not clear that this would be an efficient use of party or judicial resources. Thus, if the Court were inclined to adopt Alternative A, then it should also consider specifying that a request for post-grant depublication could be filed within some reasonable period after the grant of review. Alternatively, the Court could consider creating an exception, for this purpose, to its current rule forbidding parties from including a request for depublication as part of a petition for review. In addition, it would be helpful for the Court to provide some guidance to parties concerning what grounds it would consider appropriate for seeking depublication in this new situation—or whether the Court would prefer that parties seek some other form of relief, such as a stay or a new type of order addressing the precedential status, rather than the publication status, of a decision as to which review has been granted. As noted above, such guidance would be especially important for the Attorney General and public officers or agencies faced with potential disruptions to enforcement activities or public programs during the time necessary to secure a final decision from the Court. As also noted, however, we believe that these potential additional questions and complications are best avoided by not adopting Alternative A.
8.	California Judges Association Lexi Howard, Legislative Director Sacramento, CA	NI	Thank you for the opportunity to submit comments regarding this matter. On behalf of the California Judges Association (CJA), we offer the following comments. The proposal would effect a major change in California appellate practice. It would alter the current provisions under which published court of appeal opinions become unpublished when the California Supreme Court grants review. Among other things, the proposal would provide that the grant of review would not affect the publication of a court of appeal opinion, except to the extent the Supreme Court orders otherwise, and would require that the published opinion be accompanied by a notation indicating that review has been granted.

Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

All comments are verbatim unless indicated by an asterisk (*) or brackets ([]). List by alpha..

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			The proposal presents two alternative changes for comment. Each would substantially change the present rule. Under the first alternative, the opinion would retain full binding, stare decisis authority. The second alternative would provide that the opinion would have "persuasive" but not binding authority. As distributed, the summary presents a brief history of previous proposals and reports, but does not present a merits review of possible changes. As noted in the summary, this topic has been the subject of four earlier reports and recommendations which called for changes to the governing rules that would permit publication and citation: in 1979, 1985, 1986, and 1988. On each occasion the Supreme Court reviewed the recommendations and declined to change the rule. CJA expressed its support for this type of proposal at least once before, in 1988. Nevertheless, the present proposal is somewhat different, and warrants further consideration of the alternatives presented, as well as other alternatives that may be proposed. There are other alternatives and questions not discussed. For example, should the rule direct that only issues not specified in the order granting review be citable? Are there problems with what follows after the Supreme Court has decided on the case (or cases) under review? If so, how should they be resolved? This category includes "grant-and-hold" cases, where the court decides the issue under review without restoring the court of appeal direction for publication. More fundamentally, what are the advantages and problems created by any change. And what legal and practical problems will be presented by these or other alternatives? It has been 18 years since the last time this subject was reviewed by the Court. Much has changed in terms of the accessibility of published and non-published opinions of the appellate courts, as well as the volume of that material. Some of the issues and problems have been discussed, substantially or briefly, in previous reports, some not. But a careful review by a committee appointed for the purpose, which would have the advantage of previous reports and information and insights gained over the last 18 years, can only aid meaningful consideration of any policy change to the rule. That is the course taken when major changes in court practices or procedure are proposed, and we believe it is the course that should be taken with respect to this one. For these reasons, CJA recommends a committee be appointed under the auspices of the Supreme Court to conduct a thorough review of the proposal and alternative changes, and prepare a report summarizing the advantages and problems of alternative modifications, and making recommendations for consideration by the Supreme Court. We note that the authority to change a rule governing publication of opinions is vested

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			in the Supreme Court, and there may be a question whether it is appropriate for a Judicial Council committee, such as the Rules and Projects Committee or the Appellate Advisory Committee, to undertake or authorize the review; some previous reviews have been conducted by committees appointed by the Chief Justice. Such a study and report would be a valuable resource to the Supreme Court when changes are considered, and we believe the advantages of such a review would more than offset the relatively brief time the review will entail.
9.	AB Carr	A	I support the CA Supreme Court's proposed amendment SP15-05.
10.	Jack Cohen, Attorney Beverly Hills, CA	N	The following comments pertain to the proposed amendments to the California Rules of Court relating to the publication and citation of Court of Appeal opinions when the California Supreme Court grants review. I am an attorney and one of the drafters of Proposition 218, an initiative constitutional amendment known as the "Right to Vote on Taxes Act" that added articles XIII C and XIII D to the California Constitution and was approved by California voters in November 1996. To date, the California Supreme Court has granted review in numerous Proposition 218 cases and it is anticipated the California Supreme Court will grant review in future Proposition 218 cases that would be impacted by the proposed rule amendments. I oppose the proposed rule amendments. As former Chief Justice Malcolm Lucas stated in his letter dated November 8, 1988, when this issue was last considered and rejected, "there is no pressing reason at this time to change the publication status of Court of Appeal cases in which review has been granted." (Letter Chief Justice Malcolm M. Lucas dated Nov. 8, 1988.) Reasons in apparent support of the proposed rule amendments provide no pressing reason for their adoption. For example, the Invitation to Comment document noted that "some Court of Appeal justices have expressed a renewed interest in changing the rule calling for automatic depublication of published Court of Appeal opinions when the Supreme Court grants review." (Invitation to Comment, p. 3.) While this might provide a basis for considering the proposed rule amendments, it does not provide a sound basis for adopting the rule amendments. Similarly, the Invitation to Comment document notes that "California appears to be unique in its treatment of appellate opinions when review by the state's highest court has been granted." (Invitation to Comment,

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			p. 2.) Even if true, this "bandwagon" argument does not provide a solid policy basis for adopting the proposed rule amendments. California must decide what is best for California based on circumstances and conditions that exist in California and not based on what other jurisdictions are doing. In light of the foregoing, it is the conditions and circumstances under which the California Supreme grants review in cases that led me to oppose the proposed rule amendments. Several years ago, I performed an informal analysis of the reversal rates in civil cases by the California Supreme Court. The analysis covered volumes 50 Cal.4th through 53 Cal.4th, inclusive (4 volumes). Of the roughly 50 civil cases included in the analysis, the California Supreme Court reversed the judgment of the Court of Appeal in about 80% of the cases. Even in cases where the judgment of the Court of Appeal was affirmed, in many instances the reasoning by the California Supreme Court was significantly different than that by the Court of Appeal. With regard to Proposition 218 cases, the California Supreme Court has to date decided six (6) cases on the merits following a grant of review (covering a period from 2001 to 2010). This includes one Proposition 218 case that was ultimately decided on statutory procedural grounds. Of the six (6) cases decided, the California Supreme Court reversed in five (5) cases and affirmed in one case. The one case where the judgment was affirmed, the reasoning by the California Supreme Court was significantly different. The conclusion I reached was that when the California Supreme Court granted review in at least a civil case the likelihood is high that the decision of the Court of Appeal will either be reversed or affirmed on a substantially different basis. In the context of the proposed rule amendments, what this means is that the vast majority of the impacted Court of Appeal decisions will not be good law once the California Supreme Court ultimately decides the case, a process that can often take several years. Under such circumstances, it is highly questionable that such Court of Appeal decisions should be allowed to remain on the case books and citable pending a decision by the California Supreme Court. Furthermore, if such Court of Appeal decisions remained on the case books and continued to be citable with the same binding or precedential effect prior to the grant of review (Alternative A), it is expected that such decisions will be cited in other published Court of Appeal decisions pending a decision by the California Supreme Court (which could take several years). If that were to happen, and if the California Supreme Court were to subsequently reverse or affirm on a substantially different basis (which is highly likely), then those other Court of Appeal decisions will have been based on one or more decisions that are no longer good law. This would effectively result in the unnecessary propagation of bad case law to other

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			published Court of Appeal decisions, which is not a good result. For the reasons set forth herein, the proposed rule amendments should be rejected as they have been in the past. Thank you for your consideration of my comments.
11.	Committee for the Rule of Law Kenneth Schmier, Chairman Emeryville, CA	A[1]	In response to your request, some comments are offered here regarding your proposed amendment to the California Rules of Court concerning publication of appellate opinions (rule 8.1105(e)(1)) and the citation of opinions (rule 8.1115) - to provide that a published opinion of a Court of Appeal will no longer be automatically depublished after the Supreme Court grants review of the case. 1. The "no-citation" rules, forbidding us to mention in our state courts all unpublished opinions (over ninety percent), should be included as a part of this study now - and/or in another study in your next six-month cycle – and be revoked. Unfortunately, however, the "charge" or "mandate" outlining the scope of your study does not refer to no-citation rules. Regardless, the no-citation rules should be studied first because it is not unlikely that you will follow the successful example of almost ten years in the federal judiciary - and abandon them. This would obviate the need for study of depublication rules - and save the taxpayers the unnecessary cost of an additional study. The public should be timely and effectively notified of the study of no-citation rules, including by ads in general circulation newspapers, in order to permit you to gather its input. Posting to your website all public comments immediately upon receipt, like many federal agencies do, and providing 60 or more days for response, also immediately posted, would help foster meaningful dialogue. This would fulfill the commitments by former Chief Justice Ronald M. George to then Senator Sheila Kuehl in 2004, and to then Assemblymember Jared Huffman in 2008: "… to accumulate data regarding the new publication rules before *moving* to *charge* a *new follow-up committee* that could *recommend revocation* of the *no-citation rules*…" (emphasis added, www.nonpublication.com/huffman090508.pdf, p.4, par.2, no.7). The study should address all the questions and concerns about non-publication and no-citation rules transmitted to the Supreme Court by Assemblymember Huffman's letters dated September 5, 2008 and his August 9, 2011 www.nonpublicaton.com/huffman110809.pdf) and by the May 8, 2007 letter from then Assemblymember Mervyn Dymally (www.nonpublication.com/dymally.pdf).

[1] This is the position stated in the comment submitted. However, the content of the comment focuses on alternatives to the proposal (ending the practice of having unpublished decisions that are not citable), suggesting that the position should not be considered one of support for the proposal, but rather as agree if modified or not indicated.

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			2. Our position is that rule 8.1115 (the "no-citation rule") should be eliminated in its entirety. Rule 8.1105(e)(1) and the balance of Rule 8 have no meaning other than to effect censor of the vast majority of decisions of our appellate courts in the courts themselves - a serious deviation from basic concepts of freedom of speech, active transparency, accountability and the mechanism by which the rule of law is imposed on our state and its judiciary. There is no purpose for the no-citation rule. The California Supreme Court, through its lawyer, the Attorney General of California, wrote: "First, the determinations of the state Supreme Court and the Appellate Division to exclude these opinions from the decisional law of the state do not preclude the Plaintiff from asserting the arguments on the reasoning of those decisions. The California Rules of Court merely prohibit him from attributing to those arguments the weight of published decisional law, a weight the authors of those published opinions decided – for whatever reasons – that these opinions should not have. In other words, Plaintiff can use *the content of the opinions*, he simply cannot attribute to them an authority that the state appellate courts have decided is unwarranted" (*emphasis added*).[1] [1 Edmund G. Brown, Jr., Attorney General of California, attorney for the California Supreme Court, the Judicial Council of California *et al*,, Opposition to Application for Motion for Injunctive Relief, *Schmier v. Justices of the California Supreme Court, et al.*, U.S. Dist. Ct. No. Dist, Cal., Case 3:09-cv-02740, Document 22, pg. 10, lines 5-11, (filed 7-10-09).] The words *"the content of the opinions*" includes the caption, the recitation of facts, the legal analysis, the conclusions, and the signatures of the deciding judges as per Evidence Code, Section 451 (a). That is consistent with: the California Constitution's restriction upon court rulemaking authority that permits only court rules which do not contradict state statutes; the California Constitution's requirement that appellate opinions be written with reasons stated; the *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal 2d 450 (1962) requirement that lower courts are jurisdictionally bound to follow the *decisions* (not limited to the *published* opinions) of the Courts of Appeal; and the fact that: "[F]ifty eight percent [58%] of the justices stated that they have *relied* on *unpublished* opinions when drafting opinions," a judicial ethics and rule-forbidden practice - which affords litigants no chance to refute these clandestine references.[2] [2 California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Committee") 2006 Report adopting California Rules of Court 8.1100 *et seq.*, pg. 41, Graph 21, emphasis added, www.nonpublication.com/sc_report_12-07-06.pdf.]

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			The no-citation rule defeats the mechanisms by which the democracy is informed, and by which the people have opportunity to correct the law, discussed *infra*. It destroys the legal system's intrinsic warranty, namely: that cases are not decided arbitrarily, but rather, according to law applicable to all. It fosters judges' efforts to avoid criticism, a fundamental part of the legal system, and thus turns many into timorous recreants, discussed *infra*. Moreover, there are other, albeit generally ignored consequences of the no-citation rule including the unseemly contortions an otherwise respectable judicial system uses to maintain this rule: 1) the standards for publication allow substantially unfettered discretion (*e.g.* the use of the word "should" (not "must") in Rule 8.1105); 2) the meaning of the word "precedent", i.e. that which was done in the past, is re-written to select, parse-out and revise history prospectively; 3) the re-definition of "published" to be only those opinions chosen by their author-judges to be physically included and bound into the published volumes, and excluding all others - even though they are all available online and indexed by legal services; 4) the fact that the no-citation rule and *Auto Equity Sales, supra,* combine to give published cases a prospectivity not unlike statutes, while allowing deviations of all kinds to be made under the cover of darkness provided by unpublished decisions; 5) the idea that a litigant may inform a court of logical argument made by an appellate court, but cannot say it was done by an appellate court; and 6) the fact that the rule prevents criminal defendants and other litigants from citing cases that would exonerate and help them. The no-citation rule is unnecessary. The federal judiciary has eliminated it. In the nine years since its 2006 adoption, Federal Rule of Appellate Procedure ("FRAP") 32.1 has been working successfully. As far as we are aware, there has been no criticism. We do not argue that any judge must, at any time, blindly follow prior decisions of the California judiciary at any level. This may suggest that *Auto Equity Sales, supra,* was wrongly decided. It interferes with the use of individual logic by individual judges. The sole requirement for the use of judicial power is that its rationale be articulated and intended to resolve future similar conflicts in the same way. In all events, judges need to be free *no*t to follow precedent – but must correctly articulate the facts, the prior existing law and the logic and reasons supporting their decision not to follow precedent – in opinions which are citable. This is the healthy process called the "development of the law." Its key is citability. The unworthy alternative in achieving the desired result forces judges intentionally to misstate, truncate, obfuscate and/or omit matters in their recitation of facts, law and logic, and use the dark censorship of no-citation rules to cover-up. This destroys reliability, disrespects and dishonors the humanity of the litigants

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			and transmits unpredictable shock and devastation. Generally the doctrine of *stare decicis* will suggest following prior decisions of a similar issue. But *stare decisis* has limits. It must be understood in light of the fundamental difference in the law-making power of the judiciary on the one hand, from that of the legislature on the other. Subject to constitutional limitations, the legislature may make rules of permanent prospectivity because it has substantial practices and procedures, unavailable to the judiciary, to inform its use of that power. Judicial law-making is generally done by panels of three judges who cannot be expected to be sufficiently knowledgeable about the vast variety of issues that may arise in the future and to contemplate all the intended or unintended consequences of the rules they make. Appellate opinions may be imperfect for many reasons - that is why they are called 'opinions' of the law. These opinions face a host of problems, including error and mistake as to law or fact. They are often the product of less than three active judges, and sometimes, unfortunately, are even produced by one assistant staff attorney, or a young law clerk. A recent example occurred when Governor Jerry Brown, Attorney General Kamala Harris, the State Water Resources Control Board, the Howard Jarvis Taxpayers Association and numerous others urged either that the Supreme Court depublish, or refrain from depublishing, a recent drought related Fourth District Court of Appeal opinion resolving *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (S226906; G048969). This decision determined the validity of tiered water price structures intended to discourage water use. These approaches to the Supreme Court breached the separation of powers doctrine, bringing the practice of lobbying to judicial decision-making, without the many procedural processes employed by the legislative branch before it uses its legislative power. We are concerned citizens who took no position on the underlying wisdom or rightness of the *Capistrano* case resolution, but who attempted to ask the Supreme Court to abandon permanently its depublication and no-citation rules, policies and practices. Seeking depublication, often thought by attorneys to increase the slight, approximately one percent, chance of obtaining Supreme Court review, has become a part of the "gamesmanship" - and has become voluminous. The Supreme Court Clerk has advised receiving an average of ten requests for depublication per day, *cf. [requests unrelated to review], e.g. Nevada County (Sheriff) et al. v. S.C. (Siegfried*), S227745, S227265 (8-19-15), [3DCA C074504].

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			As indicated above, "depublication" is not defined in any legal or other dictionary known to us, but refers to the practice of the California Supreme Court, unique among the states,[3] of erasing published decisions of the California Court of Appeal from the body of precedential decisions of the California state courts. California Court Rule 8.1105, which you promulgated, then prohibits us from citing such decisions in California state courts. [3 More than ninety percent (90%) of California appellate decisions are ordered unpublished by their author judges. The number of the few published decisions is further reduced by Supreme Court depublication orders. No judiciary, neither the federal nor any state – except California, depublishes opinions previously published.] We are forbidden – not allowed to rely on, or even to mention – unpublished or depublished opinions in our state courts. This prohibition, a violation of our free speech rights, is troubling for at least three reasons: 1) citation of prior decisions is certainly appropriate in courts of law; 2) the interference with an essential freedom emanates from this very Supreme Court, whose purpose includes the protection of that right; and most importantly, 3) the practice works to defeat the process by which our democracy clarifies and improves our law. It is this third concern upon which we now focus. As stated above, the U.S. Supreme Court in 2006 abandoned the federal judiciary's experiment with no-citation rules. In the nine years since, as indicated above, we are aware of no reports of any adverse consequences.[4] [4 Our traditional historical right to cite all appeal court opinions was restored in all federal courts in 2006 when Federal Rule of Appellate Procedure (FRAP) 32.1 was adopted by the United States Supreme Court. The judiciaries of over half the states (not including California) have followed. Authors of FRAP 32.1, including the **Hon. Samuel Alito**, now **United States Supreme Court Justice**, and the **Hon. John Roberts**, now **Chief Justice of the United States**, wrote: **"A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment [Free Speech] concerns: But whether or not no-citation rules are constitutional…they cannot be justified as a policy matter."** www.nonpublication.com/alitomemo2.pdf, nb. pg. 4, lines. 1-10; pg. 6, l. 39 – pg.7, l. 9; pg. 12, last par. – pg. 13, l. 2; [see, e.g.: **"*No-Citation Rules as a Prior Restraint on Attorney Speech*"** by Martha Brooke Tusk, 103 Columbia Law Review 1202 (2003)]. **Chief Justice Roberts**, then a member of the federal

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			advisory committee on rules, said: **"A lawyer ought to be able to tell a court what it has done."** Legal Times, Tony Mauro, 4-15-04, par. 10, http:// www.non-publication.com/USJudConf..htm or *op cit.* "Press Clippings" #89] We preliminarily observe that the options for appellate courts to issue unpublished decisions, or for the Supreme Court to depublish appellate court decisions without replacing them with other decisions, discourages concerned citizens from bringing test cases to resolve the law because the unpublished decisions do not stand "citable" and do not count as law - and thus do not merit the effort needed to criticize them. Test cases are well recognized as essential to our system of law. The unpublished or depublished opinions allow courts to avoid meaningful determinations of law to be applied equally to all prospective litigants similarly situated (hence called: "selective prospectivity"). This thus protects judges from the criticism which otherwise attends every decision presently *or when the issue is raised at some time in the future,* thus encouraging courts to engage in functionary group-think. It removes the need for judges to use extreme care. Such results waste the effort of those that bring such a case, those that argue against it, and those who decide it. Judges would find far better protection from criticism by carefully considering many perspectives, and carefully deciding issues. An order to depublish an appellate decision implies that the three judges of an appellate court are not capable of finally resolving the issue of the subject case. It says that the people are better off without any opinion in the case, rather than the work of the appellate court. Depublication is an order against enlightenment. It presumes that the seven judges of the California Supreme Court have some special ability, not shared by the judges of the appellate panel, to "get it right" with an eraser – without giving the public any detailed explanation of their reasoning. In truth, only special interests benefit from depublication orders. For the rest, they create uncertainty, confusion and anarchy. Depublication artificially and capriciously obliterates our law, and causes the revision and re-writing of history. For example, how would depublication of the *Capistrano* case, *supra*, guide water districts? If they rely on the depublication order as *indicia* of the law approving a tiered rate structure, they risk having their budgets devastated should a subsequent decision reach the same result as *Capistrano*. If they ignore the depublication and follow *Capistrano*, they cannot make use of the tool of tiered water rates to discourage water use and protect the public during the extant drought and beyond. By depublication, the Supreme Court obfuscates, rather than clarifies the law. And, depublication eviscerates the judicial role in the

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			development of law. Our democracy cannot presume that any panel of judges has sufficient knowledge, wisdom, or experience to resolve correctly every issue coming before it, and it does not do so. Rather, the duty of the bench at any level is to resolve the issue as best it can. In doing so it is to reconcile its decision with prior decisions - what we call *stare decisis* (the precedent stands). This is often misunderstood to relieve judges of the painful task of creative thought. *Stare decisis* does not, and should not, insist upon absolute forward authority of any precedent. The fallibility of judges, or even panels of judges, is a reason that judicial decisions, unlike statutes, ultimately have no conclusive authority to bind future courts - other than the authority conferred by strength of reasoning. What is important is that the judiciary resolve the issue with the *present* intent to resolve future similar issues in the same way. Along with this resolution, we require the panel to justify its action in a manner reminiscent of the scientific method: truthfully and carefully recording the facts, conclusions, considerations and reasoning it has used to arrive at its decision. The issue between the parties is resolved so that, hopefully, they can quickly return to productive activities. This process may not result in the best, or even a "right," precedent. It is here that the secret of our democracy lies. The process of developing the law wisely does not require the judiciary to be "right." It only requires that the judiciary provide an initial resolution of the issue presented. Once a final decision is made by the judiciary, the law correction machinery of the democracy is invoked and engaged - including courts, legislatures and the voices of concerned citizens. This is most critical. Articles are written arguing the reason(s) that no court should follow a particular decision in the future. This spreads light. If the decision is unpublished and not citable, darkness prevails because, as stated above, beyond the case parties, the decision does not count - so there is no interest, nor market in writing or reading about it. Appellate judges have said that published decisions rarely bring praise but often provoke harsh criticism. That is as it should be, for it is criticism that encourages judges to regard their reasoning from the multiple perspectives that geometry knows to be necessary to find *rightness*. It is dissatisfaction with a decision that ensures that those who appreciate the consequences of any particular decision will then bring their expertise and political power to bear and inform judges and

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			politicians - so that the law may be constantly improved. Depublished and unpublished decisions hide bad law, and sedate the concern of those who would otherwise be affected by such decisions. There is no pressure on judges to follow the law, and hence, judicial arbitrariness and no law obtain, but "not counting", this warrants little attention. The problems are unaddressed and the healthy development of the law is greatly skewed, and seriously chilled.[5] [5 See Federal Judicial Center ("FJC") *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report* April 14, 2005 by Tim Reagan et al., www.nonpublication.com/fjcprelim.pdf, pgs. 1-135; also (232) "*Press Clippings*" and (156) "*Law Review Articles*" [all inter-active and accessible from home-page at www.nonpublication.com]; photocopies and a history of three ameliorative bills and related documents in the California legislature in reverse chronology (Kuehl SB 1655, 2005, www.nonpublication.com/sb1655.htm; Dymally AB1165, 2003, www.nonpublication.com/1165 introduced.htm, and Papan AB2404, 2000, www.nonpublication.com/2404introduced.htm), all also accessible beginning from "News and Events" at home-page at www.nonpublication.com] As Sacramento Bee columnist Dan Walters recently wrote: "The situation cries out for rational resolution to create more uniformity and less legal gamesmanship." (www.nonpublication.com/walters.pdf or *ibid* "Press Clippings" #3, 7-27-15). We respectfully request the Supreme Court to revoke and abandon permanently its depublication and no-citation rules, procedures and practice, and California Court Rules sections 8.1105 *et seq*.
12.	Court of Appeal Fifth Appellate District Hon. Brad R. Hill Presiding Justice	A	We appreciate the opportunity to comment on the proposed amendment to the rules on publication that would eliminate the automatic depublication of appellate opinions when the Supreme Court grants review. I write on behalf of all of the justices of the Fifth Appellate District in unanimous support of the amendment. We also unanimously support "Alternative A" which would allow a published opinion to continue to have precedential effect while review is pending. We believe that Alternative A will insure predictability, continuity and uniformity. It will also greatly benefit the trial courts by maintaining the status of all court of appeal decisions until the issue in question is decided by the Supreme Court. Thank you for allowing us to present our views on this critical issue.

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13.	Court of Appeal First Appellate District Hon. William R. McGuiness Administrative Presiding Justice	A	The proposed amendment to the rules on publication that would eliminate the automatic depublication of appellate opinions when the Supreme Court grants review has generated considerable discussion among the Justices of the First Appellate District. While I did not lead those discussions, Presiding Justice Kline and Justice Pollak did so on my behalf. They created an objective process to obtain input from all of our Justices. They have voted unanimously to support the proposed amendment. By definition a published appellate opinion resolves an issue of law that is important or needs clarification. Because careful review by the Supreme Court necessarily takes time, automatic depublication deprives the bench and bar of guidance on an important issue while that review is occurring. The Justices of the First Appellate District believe the better practice is to leave the decision on depublication pending review to the Supreme Court's discretion on a case-by-case basis. The Justices of the First Appellate District also unanimously support "Alternative A" under which a published opinion would continue to have precedential effect while review is pending. In our view, Alternative A, would better insure continuity, predictability, and uniformity and would thereby ease the burden on judges of the lower courts while review is pending. Alternative A also would avoid the anomalous scenario where a published opinion might have precedential effect before review is granted, lose it pending review, and then regain precedential status after the Supreme Court renders its decision. Thank you for allowing us to present our views on these important proposed amendments.
14.	Court of Appeal Fourth Appellate District Hon. Judith McConnell Presiding Justice	A	In response to the California Supreme Court's invitation to comment on the proposed amendments to the rules on publication to eliminate the automatic depublication of appellate opinions when the Supreme Court grants review, I write on behalf of the justices of the Fourth Appellate District in unanimous support of the amendments. Because appellate opinions are published to resolve important issues of law, we believe that the courts, the bar and the public would benefit from having the high court's decision on whether to depublish an opinion pending review made on a case-by-case basis and that this would facilitate further consideration, analysis and refinement of a published appellate opinion's resolution of the issue by the courts during the time that review is pending. We also support proposed "Alternative A" of the proposed changes, which will allow a published opinion to continue to have precedential effect pending review, to promote continuity, predictability, and uniformity of the law to ease the burden on, and reduce confusion in, the lower courts. Alternative A

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			would also avoid the anomalous scenario that arises from a published opinion having precedential effect before review is granted, losing it pending review, and then regaining that status after the Supreme Court renders its decision. We appreciate this opportunity to present our views on these important proposed amendments.
15.	Court of Appeal Sixth Appellate District Hon. Conrad L. Rushing Administrative Presiding Justice	A	I write to comment on the current proposal of the Supreme Court and to convey this Court's unanimous support for elimination of automatic depublication. We see merit in both Alternative A and Alternative B. We plan a further meeting and hope to amplify our response in the near future.
16.	Court of Appeal Third Appellate District Hon. Vance W. Raye Presiding Justice	A	Following careful consideration, my colleagues on the Third District Court of Appeal, with the abstention of one judge, have authorized me to express our support for the proposed rule to end the automatic depublication of court of appeal opinions upon a grant of review by the Supreme Court. As our court unanimously expressed in 1986 when a similar revision of rule 976 was proposed, we believe the California rules of court should conform with the rules of every other state and the federal courts by permitting a published opinion to continue to have some effect while review is pending. At first blush, alternative A seems to provide maximum flexibility by providing the opinion to be reviewed would continue to have the same binding or precedential effect unless the Supreme Court orders otherwise as to all or part of it. However, the flexibility comes at the cost of increasing the complexity of the Supreme Court's review and injecting an element of confusion into the process. Having decided an issue merits review, the Supreme Court would then be required to reach an interim decision on the merits of the ultimate issue by deciding whether to permit some or all of the opinion to remain in effect during the review process. The parties and lower courts could reasonably be expected to attach significance to the court's decision to invalidate all or part of the opinion though no reasons or analysis accompany the decision. Alternative B, on the other hand, preserves the benefits of the existing depublication rule by removing an opinion as controlling authority where the court's grant of review reflects doubt as the viability of the opinion, while permitting it to be cited and considered as persuasive authority and thus to influence development of the law on the issue for which review was granted as well as on other points of law addressed in the opinion that are unaffected by the grant of review. It offers the benefits of depublication without imposing additional decision making obligations on the Supreme Court. The Supreme Court need only decide whether an issue merits review without also deciding whether the appellate court's opinion on

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			the issue should be stricken from the published volume and denied any effect. Thank you for providing an opportunity to comment on this important issue.
17.	Melanie Dorian, Attorney Glendale, CA	AM	There is only one scenario, where it would be appropriate for a portion of a published opinion to remain published following a grant of review. If an appeal involves issues A and B, and review is sought/granted as to issue A only, then, the portion of the opinion that deals with issue B (not subject to review) should remain published. As an example, People v. Smith (2012) 203 Cal.App.4th 1051, addressed two unrelated arguments. Argument B was resolved in favor of the defense, and argument A was not. Review was sought and granted as to argument A only. (People v. Smith (2013) 57 Cal.4th 232.) However, the entire appellate court opinion was automatically depublished, even though argument B presented a first impression issue and the portion of the opinion addressing argument B could/should have theoretically remained published.
18.	Gerald H. Genard Blackhawk, CA	AM	Electronic publication and storage has eliminated much of the rationale for depublishing opinions. The more opinions available for research and citation, the better the chances of the bench and bar making the right arguments and reaching the right results on legal issues. Particularly now that the Supreme Court can accept specific issues and not others for appeal, issues not accepted but decided by the lower court should still be binding on lower courts and citing of those opinions for that purpose can be subject to the requirement of adding "Reversed on other grounds" or "Affirmed on other grounds" followed by the citation to the Supreme Court decision.
19.	Hon. Joseph R. Grodin Distinguished Emeritus Professor, University of California, Hastings College of the Law; former Associate Justice, Supreme Court of California; former Presiding Justice, Court of Appeal, First Appellate District Berkeley, CA	A	As a former Justice of both the California Court of Appeal and the California Supreme Court, as an occasional appellate advocate, and as an academic consumer of judicial output, I have had opportunity to observe from various perspectives the current rules that call for automatic depublication and preclusion of citation of Court of Appeal opinions upon grant of review, and I write in support of the proposed amendments, including "Alternative A" under the proposed new subdivision (e) to rule 8.1115. The historic and current practice of relegating Court of Appeal opinions to a jurisprudential black hole because the Supreme Court has granted review has several adverse consequences. The practice is discouraging to the Court of Appeal justices and staff who have labored to produce what they consider to be an opinion of quality. It is mystifying to the litigants who may find vindication in portions of the Court of Appeal opinion even if other portions are eventually disapproved. More broadly, it deprives the legal world, including both advocates and scholars, of the Court of Appeal's reasoning that is potentially useful

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			both to understanding the context of the Supreme Court's opinion in the particular case and to the development of precedent that may be of jurisprudential value on issues that might be left untouched by the Supreme Court. And, by eliminating citation and precedential value during the process of review, existing practice creates a kind of judicial limbo, in which lower courts are deprived of otherwise applicable guidance for an unpredictable period of time. Moreover, existing practice (which are virtually unique in American law) produces these adverse consequences without offsetting gain. While it may have been justified as a means of avoiding confusion when the only form in which judicial opinions appeared was the printed page, technology has rendered that justification obsolete. The proposed requirement that the lower court opinion be accompanied by a notation advising that review by the Supreme Court has been granted is adequate to put the legal community on notice as to the opinion's tentative nature. And, the proposal in Alternative A to allow binding effect to the lower court opinion under *Auto Equity Sales*, 57 Cal. 2d 450, 455, unless otherwise ordered by the Supreme Court, would on balance be preferable to the current uncertainty. While the subject is beyond the scope of the rule amendments currently under consideration, I would urge the Court at some point to reconsider the current practice of ordering depublication of Court of Appeal opinions in which no review is granted. Early in my career on the Supreme Court, at a time when depublication practice was shrouded in mystery and not publicly discussed, I wrote an article, published at 72 Cal. L. Rev. 514 (1984), confessing that the practice did in fact exist, and attempting to explain the reasons for its existence, while reserving my own judgment as to whether these reasons justified the rule. Over time I have come to believe that on balance arguments in support of the practice are in most situations outweighed by other considerations, and that the goal of avoiding doctrinal mischief might well be achieved by other and better means. It is time, I think, for the Court to inquire whether that is so.
20.	Beth Holzman, Research Attorney Superior Court of Sacramento County Sacramento, CA	N	This will make it a nightmare in the future, regarding the continuing validity of cases granted review that are granted and held and later retransferred to the courts of appeal after the lead case is decided, or worse, simply dismissed review. If left to stand published, the reader will have to figure out what the lead case had been, and will have to compare it to the lead opinion to figure what part of it remains valid and what part is no longer valid. By continuing the present rule, the case is automatically depublished, relieving researchers of the future of this burden, as the cases will not be printed in the official reports bound volumes and there will be no question about it. It is better to let the CalSupCt decide in an individual case that it should remain published pending review, rather than have all of them do so. It will simply be a nightmare for legal researchers of the future, if this is adopted.

Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

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	Commentator	Position	Comment
21.	Michael J. Kennedy, Attorney Law Office of Michael J. Kennedy Indio, CA	A	My concerns on the topic of the publication of opinions are much broader than the issues the Court is seeking to discuss here, so I shall reluctantly confine my comments to the issue being debated, although I think the Court needs eventually to consider the wider issue of publication of opinions. The way things are now [and will largely continue to be regardless of the resolution of the question being posed here], a brilliantly discussed and researched matter of law cannot even be alluded to in litigation if it is presented in an unpublished or depublished opinion, but if the same judge whose opinion must be ignored if unpublished or depublished writes up the same arguments and presentations, verbatim, in an op-ed piece or letter to the editor, it can be cited, discussed, considered, relied on by other courts [the only limitation being that it would not be precedental stare decises]. For a profession pretending to be learned but too often proving to be quite otherwise, that is an intellectually challenged policy. But we digress. The question here poses a question with two alternative answers; I select alternative B. Alternative B proposes that if there is a grant of review, the reviewed opinion may be cited by other and lower state courts for its persuasive value [like an appeals opinion from another jurisdiction, foreign state or intermediate federal], but it is not authoritatively precedental. The Supreme Court can still, however, order the opinion being reviewed depublished; it is just that depublication would not automatically follow a review grant, as is the case now. The Supreme Court could also, however, order that the opinion being reviewed continues to have whatever precedental value it had prior to the grant of review pending that review. Along the lines of my prefatory comments, it makes no sense to completely eliminate the didactic value of well-considered and litigated matters just because the Supreme Court has chosen to also take a peek. We should always be expanding our understanding of the manifold possibilities of appellate advocacy and resolution, because legal wisdom is the product of many gray areas of juristic thought. So, proposed Rule 8.1115(e)(1) should be added/amended to provide that, upon a grant of review of a published appellate opinion, the Supreme Court could order that the reviewed opinion continue to have precedental value, or it could expressly order that it is depublished, but absent either of those, the reviewed opinion would have persuasive but not precedental value.
22.	Law Office of Priscilla Slocum Priscilla Slocum Nipomo, CA	N	Having practiced appellate law for years, I think the proposed changes will allow parties to cite cases that are being re-considered by the California Supreme Court and, if the court reverses, numerous other appellate decisions may still be the subject of renewed petitions for review. The change ultimately will not be efficient and will result in unnecessary expediture of judicial resources and attorneys fees.

Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

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	Commentator	Position	Comment
23.	League of California Cities Patrick Whitnell, General Counsel Sacramento, CA	N	The League of California Cities appreciates the opportunity to present our comments on Proposal SP15-05. The League has significant questions and concerns regarding the proposal. After reviewing the Invitation to Comment, the proposed rule changes, and the historical information provided, we are unclear as to the need for proposed changes. Further the proposed changes will have significant practical effects that need to be further explored. Lastly, the League believes that the current Rules of Court provide enough flexibility to the Supreme Court to allow Court of Appeal opinions to be republished, in whole or in part, in appropriate circumstances. The League of California Cities is a membership association of 474 cities in California. The League, through its Legal Advocacy Program, participates frequently as amicus curiae in the Courts of Appeal and the Supreme Court. Further, the League files lawsuits in its own name and currently has two cases pending in the Courts of Appeal. In evaluating the proposed changes to the Rules of Court, the League consulted with its Legal Advocacy Committee, which consists of 24 city attorneys from all parts of the State. These comments reflect the Committee's recommendation that the League provide its perspective to the Supreme Court as set forth below. **1. The League is unclear as to the need for the proposed rule changes.** The Invitation to Comment does not present any discussion on the asserted need for the proposed changes to the Rule of Court. The Invitation, on page 2, notes that California is unique compared to other state and federal court systems in its treatment of intermediate court opinions after review has been granted. But this, standing alone, does not justify a change to the longstanding practice in the Rules of Court for treatment of Court of Appeal opinions where the Supreme Court has granted review. Certainly there may be value in conforming the California Rules of Court to the practice of other state and federal court systems in appropriate circumstances. But it is not clear why conforming the current rules in this area would provide any significant benefit. In reviewing the historical materials provided along with the Invitation to Comment, it is similarly difficult to discern a relevant need for the proposed rule change. Dating from 1980 to 1985, the primary concern expressed in these materials was that depublication of Court of Appeal opinions upon grant of review would deprive the public of the benefit of those opinions. While this may have been a valid concern in the early 1980s, this concern has been adequately addressed by modern legal research technology. Unpublished and depublished opinions are readily available from various electronic searchable databases such as Westlaw and LexisNexis as well as the court's website. Thus, these opinions are easily accessible to the public through sources that weren't available in the early 1980s.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment
			2. The practical effects of the proposed rule changes need to be explored further. Neither the Invitation to Comment nor the historical materials discuss the practical effects of the proposed rule changes. The League is concerned that either alternative set forth in the proposed rule changes may have unintended consequences detrimental to judicial economy. For example, the League is concerned that litigants may be forced to appeal a trial court ruling where the trial court applied a binding appellate court decision for which review has been granted. Litigants may feel compelled to appeal the trial court ruling in order to keep the case alive pending final Supreme Court adjudication. The same concern is also presented by Alternative 2. If a trial court ruling were based on a persuasive Court of Appeal decision, the disappointed litigant may similarly feel compelled to appeal the decision pending final Supreme Court adjudication. Thus, under the proposed rule changes, litigants may feel compelled to appeal trial court decisions that they may have otherwise settled or accepted as final. Further, the rule change set forth in Proposed Rule 8.1105(e)(2)(A) also seems to encourage further litigation. It is readily foreseeable that litigants will disagree to what extent a Supreme Court's ruling is inconsistent with a binding, precedential Court of Appeal decision. Similar disagreements can also be expected with respect to whether, and to what extent, a Supreme Court ruling has disapproved a binding, precedential Court of Appeal decision. The League sees little, if any, benefit from the increased litigation that will arise in the course of resolving these disputes. For cities, keeping Court of Appeal decisions as binding and precedential after a grant of review presents particular concerns. For example, tax levies by cities and other public taxing agencies are frequently challenged. While the particular city receiving an adverse ruling in the Court of Appeal is certainly fiscally impacted, the consequences may be felt more broadly. Cities and other public agencies that levy taxes similar to those that a Court of Appeal has declared unlawful may face litigation and attendant fiscal uncertainty if the Court of Appeal decision remains binding and precedential. Under the current Rules of Court, a Supreme Court grant of review maintains the status quo pending the Court's final adjudication. This provides a significant benefit for cities and other taxing agencies by providing fiscal certainty and avoiding unnecessary court costs in the interim. The League notes that the Supreme Court currently has three such cases pending on its docket. **3. Current Rule of Court 8.1105(e)(2) provides the Supreme Court with the discretion to order a Court of Appeal ruling to be published after a grant of review.** Rule 8.1105(e)(2) provides that "The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review." Recently in *Hilton v. Superior Court* (Case No. S217616), the Supreme Court ordered the Court of Appeal decision republished, seven weeks after the Court had

	Commentator	Position	Comment
			dismissed reviewed. Similarly, the Supreme Court recently ordered *Rodriguez v. RWA Trucking Company, Inc.* (Case No. S214150) to be republished. Given that the current Rules of Court allow the Supreme Court to grant republication, in whole or in part, after a grant of review, the League is unclear as to what benefit would be obtained from removing this decision from the Court's sound discretion. The League of California Cities has significant concerns that the proposed rule changes do not provide any significant benefits, particularly in light of the discretion provided to the Supreme Court under the current Rules of Court, and the potential practical effects as discussed in our comments. The League of California Cities requests that the Supreme Court either reject the changes as proposed or direct that further analysis be undertaken.
24.	Connie Littrell Lead Appellate Attorney Court of Appeal, Fifth Appellate District Fresno, CA	A	I would like to see Alternative A adopted. It would be very helpful in some instances (for example, the issue whether Proposition 47's definition of "unreasonable risk of danger to public safety" applies to resentencings under Proposition 36) to be able to cite a case as authority to dispose of the issue rather than having to reinvent the wheel for every new appeal that raises the same issue.
25.	Nelson Lu Deputy Public Defender San Joaquin County Public Defender Stockton, CA	A	Specifically, I agree with Alternative A. As the rules currently stand, the lack of Court of Appeal guidance while an issue is pending before the Supreme Court tends to cause trial court judges to act in a random manner, which is not conducive to the interests of justice. Having Alternative A (rather than Alternative B - which I would also support as better than having no change at all) would give better guidance to the trial courts.
26.	John McCurley Attorney, Dependency Legal Group of San Diego, CA	A	I think this change makes sense as the granting of review does not mean the Court of Appeal decision is incorrect. It merely means that the Supreme Court will review the issue. The depublication rule seems particularly incongruent with the normal judicial process when the Supreme Court ultimately declines to decide the issue (i.e., a decision is not published by the Supreme Court).
27.	Hon. Richard M. Mosk Associate Justice Court of Appeal, Second Appellate District, Division Five Los Angeles, CA	A	With regard to the question of publication of Court of Appeal opinions, I favor option B. I also think that the case should not [be] depublished after a Supreme Court opinion because it may contain issues on which the Supreme Court did not reach. Finally, I would like to see an end to selective depublication. If the issue is subject to depublication, the Supreme Court should grant review. A losing party remains a loser even thought the Supreme Court apparently disagrees with the Court of Appeal opinion.
28.	Hon. Stuart R. Pollak	A	I would respectfully offer the following comments re the proposed changes to Rules 8.1105 and 8.1115:

Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

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	Associate Justice Court of Appeal, First Appellate District, Division Three San Francisco, CA		1. In general I wholeheartedly support the changes. Not only do the changes preserve the views of the appellate court on any issue as to which the Supreme Court disagrees, for consideration by legislators, scholars and possibly future members of the Supreme Court, but the changes will also preserve rulings on issues included in published appellate opinions that are not considered in the Supreme Court opinion. 2. The proposed new Rule 8.1105, subdivision (e)(1)(B) refers only to the grant of review of a decision by the Court of Appeal, whereas subdivision (b) refers to the publication of opinions by a Court of Appeal or superior court appellate division. I do not know how frequently, if ever, the Supreme Court grants review of an appellate division decision, but query whether subdivision (e)(1)(B) should also refer to the review of such a decision. 3. As to proposed Rule 8.115, subdivision (e)(1), I believe that Alternative A is preferable. This alternative is more consistent with the provisions in subdivision (e)(2), especially as the rule affects issues that the Supreme Court decision does not discuss. Alternative B would mean that the Court of Appeal decision on such an issue would be citable and have precedential effect before review is granted, then lose that status after review is granted, but then regain that status after the Supreme Court decision is issued. This could only lead to confusion. 4. Although not within the scope of these proposals, I would urge that renewed consideration be given to modifying Rule 8.1115, subdivision (a), to permit the citation of unpublished opinions for their persuasive value but without binding or precedential effect. Current research technology has rendered the non-citation rule an anachronism which I believe merits reconsideration at this time. I hope these comments will be of some assistance.
29.	Chris Redburn Attorney, Law Offices of Chris R. Redburn San Francisco, CA	N	I do not believe that cases that have been accepted for review should continue to be cited as binding precedent. I do not believe it will serve the need for consistency in the law if there are two binding precedents on an issue which are in direct conflict. However, I would favor a change in the rules which would allow litigants to cite cases accepted for review, not as precedent, but as evidence of a split in authority and of the substantive holdings courts have made on the issue. Any decisions so cited should be clearly identified as non-precedential. Although it is technically improper, the Supreme Court and other Courts of Appeal have cited unpublished or depublished cases for this purpose, so the rule change I propose would simply reflect the practice of our appellate courts.

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30.	Hon. Laurence D. Rubin Associate Justice Court of Appeal, Second Appellate District, Division Eight Los Angeles, CA	A	I agree with the proposed changes and suggest Alternative A is the better approach.
31.	Stefanie Sada Judicial Research Attorney Court of Appeal, First Appellate District San Francisco, CA	A	I agree that published opinions by the courts of appeal should remain citable while review is pending. As a judicial research attorney, I know that as a practical matter the courts of appeal look to opinions on which review has been granted for the analyses they contain, even if the opinions are not cited directly. Additionally, review is sometimes limited to a single issue in a case that discusses many issues; it doesn't make much sense to preclude the courts from citing a case for points not encompassed in the grant of review. As to whether published decisions should be binding on lower courts under Auto Equity or simply treated as persuasive authority, I think the latter approach would be more consistent with what a grant of review entails. When review is granted to settle an important question of law, the ultimate outcome is usually subject to debate, which militates against making the decision binding. In cases where review has been granted to resolve a conflict in the courts of appeal, the superior courts would follow the court of appeal decision they found most persuasive, so it wouldn't really matter whether the decisions were deemed "binding" or not.
32.	Mark Schaeffer Sherman Oaks, CA	N	Rule should remain as it has been. When review granted, Ct of App opinion is automatically depublished and not citable.
33.	John M. Scheppach, Attorney	A	I am providing the following comments in my individual capacity. I speak only for myself and not as a representative for or on behalf of anyone else. The opinions expressed herein are my own. <u>The Underlying Question</u> The underlying question is whether the California Supreme Court ("Court") should change its existing publication practice such that published Court of Appeal decisions are no longer depublished automatically upon the Court's grant of review. For several reasons, I believe the answer to this question is "yes," the Court should change its existing publication practice.

	Commentator	Position	Comment
			First, the contemplated change makes the best use of taxpayer dollars. The state's judiciary is funded by our taxpayers, and Courts of Appeal undoubtedly spend significant judicial resources (*i.e.*, taxpayer dollars) on researching, writing, editing, and finalizing published opinions. From law clerks, to judicial assistants, to the Justices who pen the opinions, creating a published appellate opinion is a considerable financial undertaking (and rightfully so). The current practice of automatically depublishing a Court of Appeal decision upon grant of review can have the negative effect of depriving the public of their taxpayer investment in published Court of Appeal decisions. Because depublished opinions are generally non-citable, they often have little value to the general public (instead, depublished opinions primarily benefit only the parties to the case). Published appellate opinions, by contrast, become part of California law and help contribute to the development of legal principles that may ultimately redound to the benefit of the taxpaying public. Second, and relatedly, the contemplated change makes the best use of judicial effort. In my view, Court of Appeal Justices, their law clerks, and their judicial assistants should not automatically lose the fruit of their labor simply because a decision has been made (for one reason or another) to grant review of their published opinion. This is especially true when, upon review, the Court agrees with the Court of Appeal's analysis, or when the Court disagrees with a only tiny fraction of the Court of Appeal's decision. In the same vein, the Court itself should not, upon grant of review, automatically deprive itself of the potential value of a published Court of Appeal decision. In a future case, the Court may want to openly cite, discuss, or solicit briefing on a certain portion of the Court of Appeal's decision. Third and finally, it is logical to change to the current practice so that it better aligns with the neutrality of the review-granting process. In theory, the Court's decision whether to grant or deny review is supposed to be viewed as a position-neutral, institutional decision that does not signal either approval or disapproval of the Court of Appeal's decision. (See *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 689, fn. 8.) In other words, the decision whether to grant or deny review is not supposed to be viewed as an endorsement or rejection of the Court of Appeal's decision; rather, it is an agnostic procedural act. It logically follows that a grant of review should not automatically change the publication status of an appellate opinion. An automatic depublication seemingly departs from the neutrality that inheres in the review-granting process. An automatic depublication can carry negative connotations because it's an outward signal to all litigants (and the public) that the opinion is effectively "off the books." <u>Alternative A or Alternative B</u> If the current practice is changed, the next question is whether Alternative A or Alternative B should be

	Commentator	Position	Comment
			adopted. My vote is for Alternative B for two main reasons. First, Alternative B is a less drastic departure from tradition. There is no question that Alternative A is a wholesale departure from the past practice – a complete 180. Conversely, Alternative B is a more gradual, measured breaking with the past. To ensure a smooth transition away from the past practice and an orderly implementation of the new regime, Alternative B provides a middle-ground approach that (in my view) will be easier to effectively institute. After it is implemented, and over time, Alternative B can be evaluated and assessed to determine whether it is successful, whether changes/modifications need to be made, or whether the time is ripe to implement the more aggressive Alternative A. Second, Alternative B requires less work from the Court. Admittedly, both alternatives will likely add more work and deliberation to the review-granting process. But the workload increase will be more significant under Alternative A. Under Alternative A, a Court of Appeal's decision will remain published and binding on the Superior Courts unless the Court orders otherwise. Thus, Alternative A puts rather immediate pressure on the Court to determine (and reach a majority consensus on) whether a Court of Appeal's decision should be depublished, or whether some other qualifier should be added to the grant of review. This same institutional pressure will not exist under Alternative B because the grant of review will, by itself, render the opinion non-binding on the Superior Courts.
34.	Gary Simms Owner Law Office of Gary Simms Davis, CA	A	By definition, a case in which the Supreme Court has granted review either raises an important question of law or creates a conflict in the law. If the decision creates a conflict of law, the decision should remain published so that the grant of review does not skew the law while the case is pending in the Supreme Court. To illustrate: Assume a prior Court of Appeal decision construes a statute to mean X. Then, a new opinion construes the same statute to mean not X, i.e., the opposite of the prior opinion. Under the current rule, if the Supreme Court grants review of the new decision, the prior opinion controls, and trial courts will be bound by it for the two to three years that the new case is pending in the Supreme Court. That creates an unfair playing field. Parties who are benefited by the older opinion can continue to cite it. But parties who are benefited by the new opinion cannot cite it, even though it may set forth the view ultimately adopted by the Supreme Court. This means cases decided in the interim by trial courts will necessarily be wrongly decided because, under Auto Equity, those courts will have to apply the prior, and ultimately incorrect, appellate opinion. Moreover, the Supreme Court should also consider leaving parts of a Court of Appeal opinion published while review is pending or even after decision by the Supreme Court. It is not uncommon for a Court of Appeal to decide two or more issues in an opinion. (This, of course, differs from Supreme Court cases, in

	Commentator	Position	Comment
			which review is often limited to one issue.) Under the current rule, if the Supreme Court grants review on any issue, the entire Court of Appeal opinion becomes unpublished. Thus, even if the Court of Appeal opinion provides useful and entirely correct guidance on an issue in which the Supreme Court has no interest, the bench and bar are deprived of that guidance. Allowing parts of an Court of Appeal opinion to remain published pending review, or even after the Supreme Court decision, would be a salutary change.
35.	The State Bar of California Committee on Appellate Courts John Derrick, Chair	A	The State Bar of California's Committee on Appellate Courts appreciates the opportunity to comment on the two related proposals to amend rules 8.1105 and 8.1115 of the California Rules of Court. As discussed below, the Committee supports the proposal to amend rule 8.1105 to provide that published Court of Appeal opinions remain published following the Supreme Court's grant of review. As for the two alternative proposals to amend rule 8.1115, the Committee supports Alternative A, which would keep the Court of Appeal opinion fully citable as binding and precedential authority. 1. <u>Proposed Amendment to Rule 8.1105 re: Publication Status of Court of Appeal Opinions Following Grant of Review</u> The Committee supports this proposal for three main reasons. First, the current rule is a relic of a judicial system that has long since changed. As the Invitation to Comment explains, before a constitutional amendment in 1985, whenever the Supreme Court exercised discretion to grant "hearing" in a case, review proceeded de novo from the trial court's judgment as if there were no intermediate Court of Appeal decision. (Invitation to Comment, pp. 2–3.) Accordingly, the Supreme Court reviewed the entire decision rather than a specific issue, and it did so without regard for what the Court of Appeal had done. After the 1985 constitutional amendment, the Supreme Court no longer reviews cases de novo from the trial court, it addresses particular issues rather than the entire case, and it defers to the Court of Appeal's statement of the issues and facts. (See Cal. Rules of Court, rule 8.500(c)(2).) Because the Supreme Court no longer supplants the Court of Appeal's decision entirely (particularly where there are multiple issues in a case but the Supreme Court reviews only some of those issues), the default rule of full and automatic depublication upon grant of review makes less sense. As the Invitation to Comment points out, various groups have sought to change that rule since the 1985 amendment. (Invitation to Comment, pp. 2–3.) Second, the modern trend is to permit citation to any available source, and allowing these Court of Appeal opinions to remain published would put California courts in line with that trend. The rule restricting publication and citation of Court of Appeal opinions made more sense before online research was the norm. Before then, there was a risk that a decision presented to a superior court judge, for example, might

	Commentator	Position	Comment
			have been superseded by a higher court or might have been a minority view in a sea of contrary opinion. Because the status of a published case was not readily verifiable (as it is now), it made sense to limit the number of sources from which attorneys were permitted to draw. This has changed. As the Invitation to Comment points out, California is the *only* jurisdiction to depublish intermediate appellate court opinions following a grant of review. Notably, in the federal system, even *unpublished* opinions after January 1, 2007 are citable. (See Fed. Rules App. Proc., rule 32.1.) Simply put, the modern trend recognizes that there is no danger today—as there once may have been—in citing a case for which review is pending as long as that fact is disclosed to the reader. This amendment would recognize that reality. Third, and finally, the current rule creates a few anomalies that the amendment would remedy. For example, under the current rule, after the Supreme Court grants review, a Court of Appeal decision cannot be cited for *any* purpose—including for issues that the Supreme Court will not consider on review. The Court of Appeal's opinion simply has to be treated as if it does not exist. As a practical matter, this means that a once-published decision of three justices of the Court of Appeal is given less weight in our courts than, for example, a practice guide or an order from a federal judge in another state. Another anomaly is that a grant of certiorari by the United States Supreme Court does not have the same depublication effect on either California Court of Appeal or California Supreme Court opinions. Although a Court of Appeal opinion that is granted review in the California Supreme Court is automatically depublished, a Court of Appeal opinion that is granted certiorari in the United States Supreme Court is not. (See, e.g., *Imburgia v. DIRECTV, Inc.* (2014) 225 Cal.App.4th 338, revd. *sub nom. DIRECTV, Inc. v. Imburgia* (2015) 135 S.Ct. 1547.) Similarly, when the United States Supreme Court grants certiorari in a California Supreme Court case, the latter also remains published and citable. (See, e.g., *People v. Brendlin* (2006) 38 Cal.4th 1107, revd. *sub nom. Brendlin v. California* (2007) 127 S.Ct. 1145.) There is no reason why the California Supreme Court's grant of review of a Court of Appeal opinion should be treated differently. For these reasons, the Committee supports the proposal to allow Court of Appeal opinions to remain published following the Supreme Court's grant of review. 2. <u>Proposed Amendment to Rule 8.1115 re: Citation of Court of Appeal Opinions Following Grant of Review</u> Between the two alternatives offered in the proposal to amend rule 8.1115, the Committee prefers Alternative A, which provides that, unless otherwise ordered by the court, while review is pending, the Court of Appeal opinion would continue to have the same binding or precedential effect that it had prior to the grant of review. We believe Alternative A is preferable for several reasons.

	Commentator	Position	Comment
			First, as the Invitation to Comment notes, Alternative A reflects the practice in all other states. This is a noteworthy consideration, especially because part of the impetus behind these proposals is to bring California in line with other jurisdictions. Moreover, these other jurisdictions have maintained this practice without any apparent problems or complaints from the bench or bar. Second, Alternative A is cleaner and easier to apply. Treating opinions in cases pending review as technically just persuasive, as Alternative B provides, would create a brand-new category for the treatment of Court of Appeal opinions that jurists and practitioners would have to navigate. And this categorization would not remain static during the life of a given case. Under the current rule, before the Supreme Court decides whether to grant review in a case, the Court of Appeal opinion is fully citable if it is published. (See Cal. Rules Court, rule 8.1115(d) ["A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published"].) Under Alternative B, the opinion would become persuasive upon grant of review. But then after the Supreme Court issues its decision, the Court of Appeal opinion would again be fully citable as binding or precedential. (See Invitation to Comment, p. 7.) Having the legal landscape fluctuate in this rollercoaster-like fashion threatens the smooth and consistent administration of justice, especially in the superior courts, which rely most directly on Court of Appeal decisions. Alternative A, on the other hand, would provide litigants and judges in the superior courts with more uniformity, clarity, and predictability. Third, allowing citation of Court of Appeal opinions but giving them a diminished status would create some practical problems. For example, where the Supreme Court has granted review in one case to resolve a "split" in the Courts of Appeal, and where one or more conflicting Court of Appeal opinions have already become final (and therefore are not subject to grant-and-hold status), those latter cases would remain binding law. While the new rule would permit citation of the case pending review, Alternative B (which would make that case merely persuasive) would require a superior court to disregard it entirely and follow the older binding case(s). In that scenario, there is little benefit to being able to cite the case under review. On the contrary, if all cases were citable as binding authority (as Alternative A allows), the superior court would be permitted to follow the case that it found to be most persuasive pending resolution of the issue in the Supreme Court. Treating a Court of Appeal opinion as persuasive in the interim also creates special problems in multi-issue cases where only one issue is subject to Supreme Court review. For example, if the Court of Appeal decides Issues X and Y, and the Supreme Court grants review to consider only Issue X, under Alternative B, the Court of Appeal's holding on Issue Y is entitled only to persuasive weight in the interim. Yet after the Supreme Court renders its decision on Issue X, the Court of Appeal's holding on Issue Y will almost

	Commentator	Position	Comment
			certainly be resurrected as binding, precedential authority under these proposals. Meanwhile, however, superior courts would be free to disregard the holding on Issue Y (or, in the case of a split, *required* to disregard it) even though that holding was almost certainly going to be controlling law all along, given the Supreme Court's decision not to review it. Fourth, treating Court of Appeal opinions as binding and precedential pending resolution of an issue in the Supreme Court would more effectively keep the issue "in play" in the appellate courts, and may ultimately contribute valuable additional views, through the marketplace of ideas, while the Supreme Court is considering the same issues. Fifth, and finally, full citability of Court of Appeal opinions in cases where the Supreme Court has granted review best effectuates the spirit of the rule change. Part of the reason behind the rule change appears to be an acknowledgement that a grant of review is not a commentary on the merits of the Court of Appeal opinion. (See Cal. Prac. Guide Civ. App. & Writs Ch. 13-B ["A grant of review does not necessarily mean . . . that the supreme court will reverse the court of appeal's judgment. The supreme court's reversal rate tends to run around 40 to 55 percent."].) Depublication—and, similarly, officially treating an opinion as merely persuasive—sends the opposite message. **Disclaimer** **This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.**
36.	Todd Thompson Lead Appellate Attorney Court of Appeal, First Appellate District San Francisco, CA	A	It is obvious that depublication deprives practitioners and trial courts of usuable authority during the pendency of a decision before the Supreme Court, and it should be eliminated for that reason alone. While the depublished cases are available for consideration by both court and practitioners through on-line services, the decisions cannot be overtly discussed. What's more, because they cannot be cited, practitioners must rely on busy trial judges to locate the decisions on their own for use as sub silencio authority. There's an air of unbecoming duplicity about it. There is an additional, perhaps less obvious, problem with depublication. It permanently deprives bench and bar of legal authority on issues considered in depublished opinions that, for one reason or another, are not resolved by the Supreme Court in deciding the depub'ed cases. Here's an example. The Supreme Court recently decided Sanchez v. Valencia Holding Company, a challenge to the substantive

	Commentator	Position	Comment
			unconscionability of certain aspects of an arbitration clause in a pre-printed auto sales contract used throughout CA. There were perhaps three aspects of the contract challenged as unconscionable in Sanchez, and all were rejected. Several Court of Appeal cases challenging the identical clause had been depublished by the Supreme Court in the three years of Sanchez's pendency. In those cases, however, an additional four or five aspects of the same arbitration clause were challenged, in addition to the aspects of the clause addressed in Sanchez. For example, see Vasquez v. Greene Motors (subject to a grant and hold). Because the Supreme Court's decision in Sanchez did not address those aspects of the arbitration clause, the issue of their unconscionability must now be re-litigated in the trial and appellate courts--without the overt benefit of all the depublished cases. It is a waste of judicial resources and creates unnecessary uncertainty about the state of the law.
37.	Roy G. Weatherup, Partner Lewis Brisbois Bisgaard & Smith LLP Los Angeles, CA	N	This letter is written in response to the Supreme Court's invitation to comment (number SP15-05), concerning proposed amendments to rules 8.1105 and 8.1115 of the California *Rules of Court.* For the reasons stated in this letter, I believe that the proposed amendments are undesirable, because they would make it more difficult for the Supreme Court to ensure uniformity of decision, as well as increasing its workload. Although I have also handled civil litigation, including 16 trials, my practice has been focused on appellate work in California courts since my admission to the Bar in 1972. I have handled 25 cases in which the Supreme Court has granted review, 14 representing a litigant and 11 as amicus curiae. Approximately 200 of my cases have resulted in published decisions. I believe that the proposed Alternative A would be a disaster, increasing the workload of the Supreme Court and seriously compromising uniformity of decision among published opinions. Under Alternative A, many trial court judgments, and some published Court of Appeal decisions, would be based on opinions where a Court of Appeal decision was published but where review was subsequently granted. Since these judgments and decisions would rest on shaky authority, there would be an unwarranted increase in appeals from judgments, and a similar increase in petitions for review. Alternative B is somewhat less harmful than Alternative A, but would cause some of the same problems. Perhaps trial court judges and Court of Appeal Justices would hesitate to rely on decisions that had no binding precedential value. However, some courts might find them persuasive, causing the same problems as Alternative A.

	Commentator	Position	Comment
			Both Alternative A and Alternative B would impair the authority and definitive character of Supreme Court opinions. At the present time, an appeal from a trial court judgment can generate only one published appellate opinion with binding effect on future cases. The situation would change if either proposed alternative is adopted. It appears that the large majority of cases in which review is granted, and in which the Supreme Court hands down a decision, are cases in which the Court of Appeal decision was published. Therefore, in most future cases, after the Supreme Court has spoken, there would still be a published Court of Appeal decision on the books with some degree of binding authority. It is well known that, in every case on appeal, there may be differences of opinion as to what the relevant facts are and what legal issues are potentially dispositive. Where there is only one final published opinion in a case, that opinion governs the question of what facts are relevant to the final appellate decision and what legal issues have been decided. Such an opinion is self contained. However, when there are two separate opinions from different courts, both must be analyzed and interpreted together. Whenever there is a published decision of a Court of Appeal, followed by a Supreme Court decision, it would be necessary in the future to not only cite but analyze both decisions. In many cases, there may be considerable dispute about the extent, if any, to which the lower court's appellate decision is operative and binding. It is much better to have one self- contained dispositive decision explaining the relevant facts and the legal effect of these facts. Another problem would arise when review is dismissed by the Supreme Court after settlement or for other reasons. There would then be published opinions that would be binding statewide, even though the Supreme Court had once granted review, thus raising doubts about them. From the invitation to comment, I note that the present proposed amendments were submitted by "some Court of Appeal Justices." I should also note that, at a meeting of the Appellate Courts Section of the Los Angeles County Bar Association on September 16, 2015, Administrative Presiding Justice Roger Boren expressed his opposition to the proposed amendments. He referred to the general principle that, "If it ain't broke, don't fix it," and mentioned practical problems with the proposed amendments, particularly Alternative A. I understand that other states may have systems similar to those proposed. However, no other state has nearly as many intermediate appellate court published decisions. California is unique, and the problem of maintaining uniformity of decision is far more difficult here than in less populous jurisdictions.

Public Comments on Supreme Court Proposal to Amend Cal. Rules of Court, rules 8.1105 and 8.1115

All comments are verbatim unless indicated by an asterisk (*) or brackets ([]). List by alpha..

	Commentator	Position	Comment
			For all the reasons stated above, I urge the Supreme Court to reject the proposed amendments to rules 8.1105 and 8.1115.
38.	Matthew Zevin, Attorney Stanley Law Group San Diego, CA	AM	I agree with the proposed changes, but only with the adoption of "Alternative B" to Rule 8.1115(e)(1). I think it is important to maintain publication of the decision of an intermediate appellate court as persuasive authority, but it should not have binding or precedential effect while it is pending review by the Supreme Court. This is particularly true given the history of diverse and inconsistent rulings by our various Courts of Appeal. If the Supreme Court is going to resolve an issue decided by one or more intermediate appellate courts, we should wait for that conclusive guidance before giving binding deference to an intermediate opinion that may only be "the law of the land" for a short interim. Alternative B, therefore, provides the appropriate balance of maintaining the persuasive value of an appellate court's opinion, without the resulting chaos of frequently changing laws.