No. _____

In The
Supreme Court of the United States

NOB HILL GENERAL STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Contracting parties use a "notwithstanding any language to the contrary" clause in their contracts to preclude the applicability of competing contractual language. It is universally established principle of American jurisprudence that such clauses trump all other contractual language regardless of how arguable or compelling the competing contractual claim. Through the expedient mechanism of issuing an unpublished decision, the Ninth Circuit, *in manifest contravention of this Court's precedent*, found that a "notwithstanding" clause in a collective bargaining agreement was "tethered" to other contractual language such that competing contractual claims were applicable and could be administered by the union.

1. Whether *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993), precludes the Ninth Circuit from finding that a contractual "notwithstanding" clause – which provides that a collective bargaining agreement (CBA) shall have no applicability "whatsoever" to a new store – is "tethered" to other CBA terms such that those contractual provisions are arguably enforceable.

2. Whether the Ninth Circuit's Local Rule, that results in designating more than 90% of its decisions as having "no precedential" value, is violative of Article III and/or the Due Process Clause and/or the Equal Protection Clause.

3. Whether the Ninth Circuit applies its Local Rule, specifying which decisions shall be published, in an

QUESTIONS PRESENTED FOR REVIEW –
Continued

arbitrary and capricious manner such that its application violates the Due Process and/or Equal Protection Clauses.

4. Whether the Ninth Circuit violated its Local Rule requiring the publication of decisions meeting the Circuit's delineated criteria when it rejected Nob Hill's publication request.

PARTIES TO THIS PROCEEDING

In addition to the parties named in the caption, the United Food and Commercial Workers Union, Local 5, a labor organization, was the charging party in the NLRB proceeding and an Intervenor in the Ninth Circuit case.

CORPORATE DISCLOSURE STATEMENT

Nob Hill General Stores, Inc. (whose correct corporate name is Nob Hill General Store, Inc.) is a wholly owned corporate subsidiary of Raley's, a privately held California corporation. No publicly owned corporation owns any portion of Raley's stock.

RELATED PROCEEDINGS

Nob Hill General Stores, Inc. and United Food and Commercial Workers Union, Local 5, Case 20-CA-209431. National Labor Relations Board ("NLRB") Decision, dated August 29, 2019.

Nob Hill General Stores, Inc. and United Food and Commercial Workers Union, Local 5, Case 20-CA-209431. Decision of NLRB Administrative Law Judge Amita Baman Tracy, dated January 31, 2019.

NLRB v. Nob Hill General Stores, Inc., No. 19-72523, U.S. Court of Appeals for the Ninth Circuit, NLRB Cross-Petition for Enforcement, Judgment Entered December 24, 2020.

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OPINIONS BELOW

The December 24, 2020 Memorandum Decision of the Ninth Circuit Court of Appeals affirming the NLRB Decision is reproduced in the Appendix at App. 1-6 and unofficially reported at 2020 WL 7663455.

The February 4, 2021 Order of the Ninth Circuit Court of Appeals denying the Petition for Rehearing En Banc (and the included request for publication) is reproduced in the Appendix at App. 49-50.

The February 23, 2021 Order of the Ninth Circuit Court of Appeals denying Nob Hill's request to publish the Memorandum Decision is reproduced in the Appendix at App. 7.

The August 29, 2019 NLRB Decision affirming, in part, the decision of the Administrative Law Judge ("ALJ") is officially reported at 368 NLRB No. 63 (2019) and reproduced in the Appendix at App. 8-11. The ALJ's Decision is appended to the NLRB Decision and is included in the Appendix at App. 12-48.

JURISDICTION

The Ninth Circuit entered its judgment on December 24, 2020, and denied Nob Hill's Petition for Rehearing on February 4, 2021. (App. 49.) Pursuant to this Court's Order of March 19, 2020, this Petition is filed within 150 days of the date the Petition for Rehearing

was denied, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND LOCAL CIRCUIT RULES INVOLVED

A. THE UNITED STATES CONSTITUTION, IN RELEVANT PART:

(1) Section 1 of Article III:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

(2) The Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

(3) The Fourteenth Amendment:

" . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any person deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

B. NATIONAL LABOR RELATIONS ACT, IN RELEVANT PART:

Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (29 U.S.C. § 158(a)(1) and (a)(5)):

"It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees. . . ."

C. NINTH CIRCUIT LOCAL RULES, IN RELEVANT PART:

(1) Local Circuit Rule 36-1:

"Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. . . . All opinions are published; no memoranda are published; . . . "

(2) Local Circuit Rule 36-2:

A written, reasoned disposition shall be designated as an OPINION if it:

(a) Establishes, alters, modifies or clarifies a rule of federal law, or

* * *

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case . . .

* * *

(3) Local Circuit Rule 36-3(a):

Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(4) Local Rule 36-4:

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. . . . If such a request is granted, the unpublished disposition will be redesignated an opinion.

STATEMENT OF THE CASE

A. Factual Background

Nob Hill operates retail food stores in Northern California. (App. 14.) The United Food & Commercial Workers Union, Local 5 (hereinafter "Union"), or one of its sister locals, represents some, all, or none of the employees working in these stores. *Id.* The employees represented by the Union are subject to one, all inclusive collective bargaining agreement (hereinafter "CBA"). (App. 15-16.)

Nob Hill decided to open a new store in Santa Clara, California and initially scheduled the opening for October 2017. (App. 19.) The opening was delayed, and the store ultimately opened on January 10, 2018. *Id.*

Prior to the opening, by letter dated September 25, 2017, the Union requested that Nob Hill provide it with information *concerning the Santa Clara store*. (App. 21-22.) Among other things, the Union requested:

- Copies of any employee handbook applicable to the Santa Clara employees
- A statement of the range of wage rates to be paid the Santa Clara employees
- Copies of any benefit plans applicable to the Santa Clara employees
- A list of any current employees who have indicated a willingness to work in the new store

- A list of bargaining unit employees who have been asked to work in the new store

Citing various CBA provisions, the Union stated that the information was necessary in order to allow it to administer its CBA – even though the Union did not, *and has never*, represented the employees working in the Santa Clara Store. (App. 21, 23.) Nob Hill responded by noting that, although the Union had asserted that it needed the requested information "to administer the contract," its demand ignored the *express language* of the CBA stating that the CBA had no applicability to the new Santa Clara store *whatsoever* until it had been open to the public for 15 days. *Id.* Specially, Section 1.13 of the CBA provided, in relevant part:

> "*Notwithstanding any language to the contrary contained in this Agreement* between the parties, it is agreed this Agreement shall have no application *whatsoever* to any new food market or discount center until fifteen (15) days following the opening to the public of any new establishment." (App. 17.) (emphasis added.)

Nob Hill advised the Union that, in light of this "notwithstanding" clause, the CBA could have no *present* applicability to the Santa Clara store, and on that basis, Nob Hill declined to provide the requested information (adding, however, *that when the store had been open for 15 days, Nob Hill would "consider any [information] requests made at that time*"). (App. 23.)

The Union replied that Nob Hill's interpretation of the "notwithstanding" clause was erroneous because it meant that the CBA imposed no staffing requirement on the new store which was not a "reasonable" interpretation in light of the contractual language that required Nob Hill to staff the new store with a cadre of existing employees. (App. 24.) While Nob Hill acknowledged this contractual obligation, Nob Hill noted that – in light of the "notwithstanding" clause – it was *only after the store had been open to the public for 15 days* that the Union was free to enforce this contractual obligation. (App. 23, 36.) In other words, the Union's information request was premature because when made, there was no extant contractual provision to administer.[1]

After a fruitless exchange of correspondence, the Union filed an unfair labor practice charge with the NLRB alleging that Nob Hill was violating Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by refusing to provide the requested information. (App. 12, 23-26.)

B. Procedural Background

On March 6, 2018, the NLRB's General Counsel issued a Complaint against Nob Hill asserting that Nob Hill was required to provide the Union with the requested information. (App. 12.) The parties waived

[1] It is undisputed that an employer is not required to respond to a premature information request. *E.g.*, *Tri-State Generation*, 332 NLRB 910, 912 (2000) and *General Electric Co. v. NLRB*, 916 F.2d 1163, 1171 (7th Cir. 1990).

trial, and the matter was submitted to an ALJ for decision on a stipulated factual record. *Id.*

1. The ALJ Decision.

On January 31, 2019, ALJ Amita Baman Tracy issued her Decision concluding that the Union had satisfied its obligation of demonstrating that the information sought was relevant "to administer the CBA regarding the staffing of the Santa Clara Store. . . ." (App. 34-35.) While the ALJ acknowledged the existence of the "notwithstanding" clause, she erroneously concluded, based on her misreading of two prior NLRB cases, that the NLRB had *already determined* that this "notwithstanding" proviso was a so-called "after acquired stores" clause and that, therefore, the proviso did "not affect the Union's information requests." (App. 36.) Nob Hill filed timely exceptions, and on August 29, 2019, the NLRB issued its Decision. (App. 8-11.)

2. The NLRB Decision.

The NLRB agreed, *in part*, with the Administrative Law Judge. Specifically, the NLRB concluded that "the information sought by the [Union] regarding the opening of the new Santa Clara store is relevant to the administration of its collective bargaining agreement with [Nob Hill], and that [Nob Hill's] failure to provide certain information . . . violated. . . . the Act." (App. 9.) While the NLRB disavowed some of the ALJ's conclusions, it made no comment regarding the meaning or effect of the contractual "notwithstanding" clause, and

thus, implicitly adopted the ALJ's erroneous analysis. *Id.*

3. The Ninth Circuit Decision.

On September 24, 2019, Nob Hill filed a Petition for Review with the Ninth Circuit Court of Appeals. After oral argument, the panel (consisting of Chief Judge Thomas and Circuit Judges Schroeder and Berzon) issued an unsigned, "unpublished" Memorandum Decision. (App. 1-6.) In that Decision the Court did *not* adopt the NLRB's erroneous interpretation of the "notwithstanding" clause but instead concluded that the "notwithstanding" clause was unavailing because the clause has no independent meaning but rather is "tethered" to other language in the CBA. (App. 3.) Although the Ninth Circuit noted that this Court, in *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993), held that a "notwithstanding" clause *overrides* conflicting contractual provisions, the panel held that the "notwithstanding" clause in Nob Hill's CBA did not preclude the Union from administering contractual provisions that arguably applied to current employees. (App. 3-4.)

On December 31, 2020, Nob Hill filed a Request for Rehearing En Banc and, additionally requested that the Memorandum Decision be published as an Opinion of the Court. On February 4, 2021, the Court, without comment, denied Nob Hill's requests. (App. 49-50.)

On February 18, 2021, pursuant to Local Circuit Rule 36-4, Nob Hill formally requested that the Memorandum decision be designated an Opinion of the

Court and published as precedent. (App. 51-52.) On February 23, 2021, the Court denied that request. (App. 7.)

REASONS FOR GRANTING THE WRIT

Plain and simple, the Ninth Circuit's Decision conflicts with (1) this Court's precedent, (2) its own precedent; and (3) precedent issued by *every court that has ever interpreted a contractual "notwithstanding" clause*. It is a universally established principle of American jurisprudence that a "notwithstanding" clause *trumps all other contractual provisions*. No matter how clever the lawyerly argument, Federal and State courts have uniformly held that *no* contractual provision can survive a "notwithstanding" clause. There is not a single reported exception to this rule.

The Ninth Circuit fabricates its extraordinary holding through the tactical device of issuing an unpublished decision that, under its Local Rules, lacks precedential value. Moreover, when Nob Hill requested publication, under a Local Rule that makes publication of such a decision *mandatory*, the Ninth Circuit denied the request.

The practical effect of the Ninth Circuit's action is to render a decision at odds with *controlling* precedent, yet effectively insulated from review or use by future litigants. The Ninth Circuit flaunts its defiance of this Court's precedent and its own Rules with the apparent confidence that this Court will not employ its valuable

resources to review an unpublished decision arising from a mundane NLRB "refusal to provide information" case.

If this were the only example of the flouting of precedent, the Ninth Circuit's actions might be overlooked as an exception to the rule. But as ever growing evidence demonstrates, such circuit conduct is the rule, not the exception.

This unsanctioned practice of designating the vast, vast majority of circuit court decisions as "lacking precedential value" raises serious Constitutional questions that need to be addressed. All the more so where the decision to "publish" is controlled by the Circuit Judges themselves, notwithstanding their obvious conflict of interest. Surely, at a minimum, those who have a vested interest in "burying" particular judicial opinions should not control this critical determination.

While past certiorari petitions have raised this issue, this Court has so far declined to address this circuit practice.[2] This petition again presents the Court with the opportunity to address these Constitutional

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[2] *E.g. VBS Distribution, Inc. v. Nutrivita Laboratories, Inc.*, ___ U.S. ___, 141 S. Ct. 454 (2020) (cert. den.) More than 30 certiorari petitions have raised the issue, but this Court denied all but one petition, and in that one instance, the Court ultimately decided the case without reference to the publication issue. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 Marq. L. Rev. 685, 688-689 (2009).

issues, *as well as the issues presented by the Circuit's arbitrary refusal to follow its own publication rules*.

A. THIS COURT SHOULD GRANT REVIEW TO ENSURE THAT A "NOTWITHSTANDING" CLAUSE IN A COLLECTIVE BARGAINING AGREEMENT IS GIVEN ITS ACCEPTED COMMON LAW MEANING IN CONFORMITY WITH THIS COURT'S PRECEDENTS.

In *Cisneros v. Alpine Ridge Group*, *supra*, this Court was directly confronted with the meaning and effect of a contractual "notwithstanding" clause. This Court, *in a unanimous opinion*, unequivocally concluded that a contractual "notwithstanding" clause trumped *all* other contractual provisions, *even those that arguably could apply*, stating:

> "As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section *override conflicting provisions of any other section*. *See Shomberg v. United States*, 348 U.S. 540, 547-548 (1955). Likewise, the Courts of Appeals generally have 'interpreted similar "notwithstanding" language to supersede all other laws, stating that "a clearer statement is difficult to imagine.'" [courts of appeals' citations omitted] Thus, we think it clear beyond peradventure that § 1.9(d) [the notwithstanding language] provides that contract rents 'shall not" be adjusted . . . *even if*

> *other provisions of the contracts might seem to require such a result*."

508 U.S. at 18-19 (emphasis added.)

Seventeen years after *Cisneros*, the Ninth Circuit reached the identical conclusion.

> "The parties use of the word 'notwithstanding' plainly indicates that even if a transaction *arguably falls* within the scope of the Records Sold provision, F.B.T. is to receive a 50% royalty if Aftermath licenses an Eminem master to a third party for 'any' use."

F.B.T. Productions, LLC v. Aftermath Records, 621 F.3d 958, 964 (9th Cir. 2010) (emphasis added).[3]

It is beyond dispute that federal common law interprets a "notwithstanding" clause as preempting the applicability of all other contractual provisions. It is equally well established that the terms of a collective bargaining agreement *must be interpreted* under *ordinary principles of federal common law*. *CNH Industrial N.V. v. Reese*, 583 U.S. ___, 138 S. Ct. 761 (2018) (*per curiam*).

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[3] The State and Federal cases holding that a "notwithstanding" clause trumps all other contractual provisions, whether or not other contractual provisions *arguably apply*, are voluminous. *E.g.*, *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 502 (2005). In *Cisneros*, this Court referenced eight such appellate decisions. 508 U.S. at 18. Additionally, this Court has reached the identical result when interpreting a statutory "notwithstanding" clause. *NLRB v. SW General*, 580 U.S. ___, 137 S. Ct. 929, 939 (2017).

The issue before the Ninth Circuit was plain: does the "notwithstanding" clause in the parties' CBA preclude the applicability of any *arguably* applicable contractual provision to the new store until, as provided by the express contractual language, the store had been opened to the public for 15 days. In contravention of *controlling* precedent, the Ninth Circuit held that other contractual provisions had to be considered in "conjunction" with the "notwithstanding" clause. The Court held:

> "As Nob Hill stresses, 'a "notwithstanding" clause signals the drafter's intention that provisions of the "notwithstanding" section override conflicting provisions of any other section.' [citing *Cisneros*] But a 'notwithstanding' clause is necessarily *tethered to other language that determines its scope*; the clause has no independent meaning."
>
> (App. 3) (emphasis added.)

Such a "tethering" is precisely what this Court prohibited in Cisneros. A "notwithstanding" clause does have an independent meaning. A "notwithstanding" clause serves to preclude the application of *any other* contractual provision. *Cisneros*, 508 U.S. at 18. The Ninth Circuit's conclusion is nothing more than a claim that other language in the CBA "arguably" applies and, therefore, survives.

Indeed, Nob Hill's "notwithstanding" clause sought to make it crystal clear that no other contractual provision survived stating: "it is agreed this Agreement

shall have no application *whatsoever*. . . ." The Ninth Circuit's conclusion is flatly defiant of this contractual language as well as this Court's holding in *Cisneros*.

The Ninth Circuit justified this circumvention by concluding that the Union was seeking to administer contractual provisions that applied to currently represented union employees. (App. 4.) That facile observation disguises the critical point that the contractual claims were all related to the current employees rights *vis-à-vis the new store*; i.e., the right to transfer to the new store. *This precise factual point was conceded by the Union when it made its information request*. In its own words, the Union sought the information because it believed extant contractual provisions applied to the new store.[4] In carving out an exception to the meaning of a "notwithstanding" proviso, the Ninth Circuit disregards this critical factual concession.

Indeed, the *very* contractual provisions (Sections 1.1 and 4.9) that the Ninth Circuit cited as being "unrelated" to the new store and therefore not subject to the trumping effect of the "notwithstanding" proviso (App. 4) were *specifically claimed by the Union to be applicable to the new store*:

> "Finally, this is a reminder that there are various provisions of the collective bargaining

[4] The Union's information request stated: "According to published reports, Nob Hill will be opening a store in Santa Clara in October of this year. Nob Hill has not sought to negotiate over this opening and the impact on the bargaining unit. It has ignored the provisions of the contract *which apply to the store*." (Excerpt of Record, p. 106.) (emphasis added.)

> agreement which apply to the opening of this store. *See*, in part, Sections 1.14, 2.4, 2.5, 4.3.4, 4.9, 4.10, 5.9 and various other provisions." (Excerpt of Record, p. 107.)

Not only is the Ninth Circuit's factual predicate false, but its conclusion is nothing more than an evasion of the contracting parties' "notwithstanding" proviso and this Court's precedents. This Circuit defiance of precedent is only possible through the mechanism of its issuance of an "unpublished" decision lacking precedential value. By burying its blatant disregard of precedent in this judicial graveyard, the Ninth Circuit avoids having to issue a principled decision in compliance with the dictates of this Court's precedents and the requirements of *stare decisis*.

B. THIS COURT SHOULD GRANT THIS PETITION TO CLARIFY THE CONSTITUTIONAL LIMITS ON THE AUTHORITY OF ARTICLE III COURTS TO DETERMINE THE PRECEDENTIAL VALUE OF THEIR DECISIONS.

A case concerning a union's demand for information hardly presents the most compelling case for the use of this Court's resources, especially when it lacks precedential value. Here, however, the judicial process itself, as well as this Court's authority, is at issue.

As of September 2020, 87% of all federal appellate decisions were unpublished (the Ninth Circuit's percentage exceeds 93%). *Admin. Office of the U.S. Courts,*

U.S. Court of Appeals Judicial Business, Table B-12 (2020). The consequence of designating a decision as "unpublished" is to deprive it of precedential value. *E.g.*, Ninth Circuit Local Rule 36.3(a).

While under Rule 32.1 of the Federal Rules of Appellate Procedure ("FRAP") an unpublished case can be cited, the circuit courts are free to ignore the cited decision because, by Local Rule, the unpublished decision lacks precedential value. As a result, FRAP 32.1, while a step in the right direction, accomplished little.[5] The existence of a vast body of citable, but non-precedential cases, undermines the integrity of the federal appellate process and subjects litigants to a two-tier system of justice.

This Court has never directly addressed this Circuit practice, no less approved it. However, Justice Stevens, in dissenting from a summary disposition in *County of Los Angeles v. Kling*, 474 U.S. 936, 939 (1985), noted that selective publication was "plainly wrong." Similarly, in dissenting from a denial of certiorari, Justice Thomas, joined by Justice Scalia, noted that the Fourth Circuit's failure to publish a 39-page opinion, accompanied by a dissent, was "disturbing" (and yet

[5] FRAP 32.1 was a compromise between those who sought to preclude designating any decision as unpublished and those who wished to continue the practice of designating unpublished decisions as non-citable. *See generally* Schiltz, *Much Ado About Little: Explaining the Sturm and Drang over the Citation of Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1429 (2005). As a result, as soon as FRAP 32.1 rendered all decisions citable, the circuit courts quickly reacted by designating their unpublished, but now citable decisions, as lacking precedential value.

another reason to grant review) given that it appeared that the Fourth Circuit had made that decision in order "to avoid creating a binding law for the Circuit." *Plumley v. Austin*, 135 U.S. 828, 831 (2015).

Circuit Judges have also questioned the practice. *E.g.*, *Williams v. DART*, 256 F.3d 260 (5th Cir. 2001) (J. Smith, joined by Circuit Judges Jones and DeMoss, dissenting from denial of rehearing en banc) ("The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions."); and *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) (severely restricting the related practice of vacatur while noting that "judicial precedents are presumptively correct and valuable to the legal community as a whole.")

The creation of nonprecedential law – whether by litigants through vacatur or by judges through selective publication – ignores the public and Constitutional interests in the creation of a coherent and consistent body of law. *See generally* Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication, And Vacatur*, 30 Harv. C.R.-C.L. Rev. 109 (1995). As observed by Justice Douglas: "[T]here will be no equal justice under the law if a negligence rule is applied in the morning but not in the afternoon. . . . *Stare decisis* serves to take the capricious element out of the law and to give stability to society." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

If this non-publication designation was truly restricted to cases whose outcome was easily determined by settled precedent and therefore merited little to no discussion – a position advocated by the proponents of the practice – the practice might pass Constitutional scrutiny. The truth is far, far different.

First, cases that the circuits deem "second tier" receive little, if any attention, from Article III judges and are routinely decided by staff attorneys and designated as "unpublished." Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435 (2004); and Reynolds & Richman, *Injustice on Appeal: The United States Courts of Appeals in Crisis* (2013). Nothing in the Constitution permits Article III judges the right to delegate their judicial duties. *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (the practice of allowing a non-Article III judge to sit on the court of appeals by designation is not authorized); and *see generally* Posner, *Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments* (2017).

Second, it has now become apparent that even when Article III judges are involved the unpublished designation is being used, as it was in this case, to avoid the application of precedent, or alternatively, to avoid creating new precedent – a fact conceded by some candid circuit judges. "To the contrary, however, there are opinions that, although unpublished, do establish a new rule of law or apply existing law to distinct facts. . . . Empirical evidence suggests that such cases

. . . *are more common* than one might think." *Williams v. DART*, *supra*, 256 F.3d at 262 (J. Smith, joined by Circuit Judges Jones and DeMoss, dissenting from denial of rehearing en banc) (emphasis added).

Indeed, Justice Stevens noted that he was more inclined to grant certiorari with respect to unpublished opinions because "judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Cole & Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 Litig. 8, 67 (2006). This Court, as a whole, reached a similar conclusion with respect to one recent Ninth Circuit *unpublished* decision, "[The] decision is as inexplicable as it is unexplained. It is reversed." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam). The empirical evidence bears out these observations.

For example, with respect to the resolution of one question, the Ninth Circuit acknowledged that it had issued 20 separate unpublished decisions "instructing district courts to take a total of three different approaches" creating "no small amount of confusion." *U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000); and *see also* Ricks, *The Perils Of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study Of The Substantive Due Process State-Created Danger Doctrine In One Circuit*, 81 Wash. L. Rev. 217 (2006) (demonstrating that in one six year period the Third Circuit had "created inconsistent non-precedential opinions of the identical legal theory").

Even worse, the Fifth Circuit issued diametrically opposed unpublished decisions in a case *involving the same litigant* – Dallas Area Rapid Transit – holding in one case that the transit authority was a political subdivision, immune from suit under the 11th Amendment, and in the other, that it was not. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, *supra*, 92 Marq. L. Rev. at 688-689 (1992). It is difficult to conceive how such conflicting rulings issued by the *same* circuit court involving the *same* litigant meets Constitutional due process and equal protection standards. Yet this inexplicable result occurs because the circuit court is free to ignore its own decisions even when it involves the same litigant.

Circuit judges also use the unpublished designation to avoid the controversial case or difficult precedent.[6] As noted by Circuit Judge Wald: "We do occasionally sweep troublesome issues under the rug, though most will not stay put for long." Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995). Indeed, the " . . . evidence suggests that many cases that are plainly law-making are being designated unpublished.

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[6] For example, in 1988, the Fourth Circuit announced in an unpublished *per curiam* decision that prison authorities may have violated a prisoner's "equal protection" rights by denying him a prison job because of his homosexuality. *Johnson v. Kable*, 862 F. 2d 314 (1988) (unpublished disposition). As the first case to ever imply that homosexuality might constitute a "suspect classification", it was nothing less than ground-breaking and should have been published under the Circuit's Rules.

These include novel interpretations of the law, reversals of what the district court believed to be the law, split decisions, decisions at variance with other panels of the same appellate courts, and decisions that evidence circuit splits, to name a few." Cleveland, *Overturning The Last Stone: The Final Step In Returning Precedential Status To All Opinions* 10 J. App. Prac. & Process 61 (Spring 2009). This Court has previously taken note of this circuit practice stating: "We deem it remarkable and unusual that, although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* decision." *U.S. v. Edge Broadcasting Co*., 509 U.S. 418, 425 n. 3 (1993).

The empirical evidence is overwhelming that this circuit practice results (1) in a routine failure to follow precedent; (2) in inconsistent results within a circuit; and (3) in the pronouncement of new rules of law which cannot be relied upon by future litigants, thus depriving them of the benefit of *stare decisis*. No litigant can ever be confident that their appeal will be decided according to precedent. Equally alarming, lawyers cannot confidently advise their clients of the probable outcome of litigation because, 90% of the time, any appellate decision will be unpublished and essentially lawless.

One need look no further than the case at bar. Based on uniform precedent, a first year law student would have counseled Nob Hill that the use of a "notwithstanding" contractual clause would preclude the

Union from successfully asserting that the parties' CBA applied to a new store. Accordingly, Nob Hill expended time and resources to bargain the inclusion of this contractual provision only to have it rendered null and void by an unpublished circuit decision.

This practice causes uncertainty and inequality and defeats the very purpose of *stare decisis*. *Morange v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (to furnish a clear guide for the conduct of individuals; to enable them to plan their affairs; to eliminate the need to relitigate every issue; and to maintain public confidence in the judiciary); and *see also Nat'l Classification Comm. v. United States*, 765 F.2d 164, 174 (D.C. Cir. 1985) (Wald, J., separate statement) (noting that had an earlier decision been published, "the present appeal might well have been entirely avoided").

This circuit practice is suspect on any of three Constitutional grounds: (1) Article III; (2) due process; and (3) equal protection of the laws.

(1) Article III of the Constitution establishes the judicial branch and it was presumably intended by the Framers, as was then the practice under English law, that cases be decided according to precedent. "*Stare decisis* is a cornerstone of our legal system. . . ." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989). The centrality of adherence to precedent is illustrated by Justice Story's well-known comment: "A more alarming doctrine could not be promulgated by any American court than that it was at liberty to disregard all former rules and decisions, and to decide for

itself, without reference to the settled course of antecedent principles." Joseph Story, *Commentaries on the Constitution of the United States*, Section 377 (Hilliard, Gray & Co. 1833).

When 80% to 90% of all circuit court decisions lack precedential value, Justice Story's fear is today's reality. A serious Constitutional question arises as to whether the federal courts can pick and choose which of their decisions constitute precedent or can avoid precedent by designating a decision as unpublished. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), vacated on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000). Chief Judge Holloway persuasively summarized this concern when he dissented from the Tenth Circuit's adoption of a rule prohibiting the citation of unpublished decisions:

> "The most important reasons for permitting citation of published precedents are just as cogent to me in the case of unpublished rulings. Each ruling, published or unpublished, involves the facts of a particular case and the application of law to the case. *Therefore all rulings of this court are precedents, like it or not*, and we cannot consign any of them to oblivion by merely banning their citation. *See Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) (" . . . any decision is by definition a precedent. . . ."). No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should

> be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule."
>
> *Re: Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986*, 955 F.2d 36, 37 (1992) (Mem.) Chief Judge Holloway dissenting, in part, joined by Circuit Judges Barrett and Badcock) (emphasis added).

(2) The inability to rely upon prior cases as precedent – a well-established principle and right under the common law – also violates the Due Process Clause. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) ("Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. . . . When absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.")

(3) The fact that unpublished decisions allow for the unequal treatment of similarly situated parties raises profound Constitutional questions under the Equal Protection Clause. Indeed, as previously discussed, sometimes the same litigant has received different treatment.

Congress has never authorized the practice, and this Court has never reviewed it. These Constitutional issues and concerns are long overdue for consideration by this Court. The proliferation of this practice among the courts of appeals cannot legitimize it. *Cf. Nguyen v. United States*, *supra*, 539 U.S. at 83.

Certainly the goal is *not* to require the circuit courts to do the impossible and to issue full-blown written decisions in *every* case. No commentator or court has ever suggested such an outcome. Not all cases require such attention. Alternatives exist that might well pass Constitutional muster and allow the circuit courts to handle their workload efficiently. *See*, *e.g.*, Cleveland, *Overturning The Last Stone: The Final Step In Returning Precedential Status To All Opinions*, *supra*, 10 J. App. Prac. & Process at 143. ("This overstates the importance of a lengthy, dissertational opinion . . . and in many cases a short description of the decision, the authority relied upon, and the operative facts that bring this case within the ambit of the prior authority will be entirely sufficient.") In fact, as discussed next, the Constitutional solution might be as simple as removing the publication decision from the circuit judges' control.

C. THIS COURT SHOULD GRANT THIS PETITION TO DECIDE WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO ALLOW CIRCUIT JUDGES TO DETERMINE THE PRECEDENTIAL VALUE OF THEIR DECISIONS AND/OR WHETHER THEIR PUBLICATION DETERMINATIONS ARE ARBITRARY AND CAPRICIOUS.

The problems evidenced by selective publication should have been ameliorated by local circuit rules that *mandate* the publication of certain "qualifying" decisions. Once a litigant brought to the circuit's attention the precedential value of its decision, presumably the circuit court would reverse course and order publication. Reality is far different. The Ninth Circuit, without explanation or justification, *blatantly flouts* its own local rule and provides litigants with no avenue of appeal or redress. Its actions are arbitrary and unconstitutional.

Through the use of the word "shall" the Ninth Circuit's local rule makes publication *mandatory* where the decision meets specified criteria, to wit, "A written, reasoned disposition shall be designated as an OPINION if it: (a) Establishes, alters, modifies or clarifies a rule of federal law, or . . . (d) involves a legal or factual issue of unique interest or substantial public importance, or (e) is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case. . . ."

Nob Hill wrote to the court requesting publication on the grounds that the decision it issued *required* publication under any one of three criteria spelled out in the local rule. (App. 51-52.) Nob Hill wrote:

> "First, the Memorandum meets the criteria under Circuit Rule 36.2 (a) in that it 'establishes, alters, modifies or clarifies a rule of federal law' because it, for the first time, provides for an exception or modification or clarification to the uniformly accepted meaning of a contractual 'notwithstanding' clause.
>
> Second, the Memorandum meets the criteria under Circuit Rule 36.2 (d) in that it involves a 'legal or factual issue of unique interest or substantial public importance' in that contractual 'notwithstanding' clauses are ubiquitous and the Memorandum decision provides future litigants of such clauses a potential argument that does not presently exist in established precedent.
>
> Third, the Memorandum meets the criteria under Circuit Rule 36.2 (e) in that the Memorandum disposes of an underlying NLRB decision that is published and clarifies the Board's ruling."

Without comment, the publication request was denied, and no avenue of redress was afforded Nob Hill. (App. 7.) The local rule specifying what decisions *shall be published* means little if a decision *that obviously*

meets the criteria for mandatory publication is arbitrarily designated as nonprecedential.[7]

The Ninth Circuit, without any stated justification, ignores its own mandatory standard for publication – a fact that, on another occasion, Justices of this Court have observed. *Los Angeles County v. Rettele*, 550 U.S. 609, 616 (2007) (Stevens & Ginsburg, JJ., concurring in summary reversal) ("The fact that the judges on the [9th Circuit] Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion."); and *see also Plumley v. Austin*, *supra*, 135 U.S. at 831 (Justice Thomas, joined by Justice Scalia, dissenting from a denial of certiorari, noting that the Fourth Circuit's failure to publish a 39-page opinion, accompanied by a dissent, was "disturbing" and a reason to grant review).

Scholarly research bears out the fact that the circuit courts are *not* following their own rules for when a decision merits publication. As far back as 1990, Professor Songer determined that the official rules regarding unpublished opinions did *not* explain the courts' publication practices. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 Judicature 307, 313 (1990) ("The data presented above clearly demonstrate

[7] The Ninth Circuit held oral argument in this case – something it does less than 20% of the time. *Admin. Office of the U.S. Courts, U.S. Court of Appeals Judicial Business*, Table B-10 (2020). At least initially the judges believed that Nob Hill's arguments were worthy of their time.

that the official criteria for publication do not provide an adequate description of the differences in practice between decisions which are published and those which are not. A significant number of the unpublished decisions of the courts of appeals appear to involve cases which are non-routine, sometimes politically significant, and which are nonconsensual appeals which present the judges on the panel hearing the appeal with an opportunity to exercise substantial discretion in their decision-making."); and *see also* Merritt and Brudney, *Stalking Secret Law: What Predicts Publication In The United States Courts Of Appeals*, 54 Vand. L. Rev. 71, 120 (2001).

The Ninth Circuit is not constitutionally free to arbitrarily disregard its own rules. "A duly-authorized *rule of court* has the force of law, and *is binding upon the court* as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case." *Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U.S. 603, 608 (1899) (emphasis added); and *see also Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010).

The Ninth Circuit's failure to follow the dictates of its own publication rule (or to provide any explanation for its deviation) is violative of due process and equal protection. Moreover, as previously demonstrated, this failure is a normal custom of the circuit, and therefore, even if Constitutional problems were not present, this Court should review the practice under its "inherent supervisory authority." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). Circuit courts are required to follow their

stated rules or modify them. Ignoring those rules, when judicially convenient, is not a constitutionally permitted option.

The difficulty, of course, lies in the fact that the judges who issue the decision make the publication determination. If, for whatever reason, the court has already determined to issue an unpublished decision, it is highly unlikely a letter – referencing the circuit's local rule mandating publication – will persuade the court to alter course. As Justice Stevens noted: "A rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product." Remarks at the Illinois State Bar Association's Centennial Dinner (January 22, 1977).

Professor Beyler, in a study of 3,000 unpublished Illinois state court decisions, demonstrated the truth of Justice Stevens' observation. He first asked the attorneys involved in the litigation whether the unpublished decisions should have been published, and 41% responded in the affirmative. He then surveyed members of the state bar, with expertise in the specific subject area, to review the 41% to determine their precedential value. The result: 15% of that sample were deemed sufficiently important that they should been published and given precedential status. Beyler, *Selective Publications Rules: An Empirical Study*, 21 Loy. U. Chi. L. J. 1, 28-29 (1989).

Circuit judges have a direct and obvious conflict of interest in making the publication determination, as demonstrated by their repeated failure to abide by their own rules. If the publication decision could be effectively challenged or were removed from the circuit judges' control, many of these Constitutional issues might evaporate. Decisions that should be precedential would be designated as precedential, and *stare decisis* would again be determinative. But, as the situation presently stands, the proverbial fox is guarding the hen house raising Constitutional issues that require review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, or alternatively, direct the Ninth Circuit to comply with its Local Rules and designate its Decision as an Opinion of the Court.

Respectfully submitted,

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