No. 20-_____

In the Supreme Court of the United States

VBS DISTRIBUTION, INC., a California corporation, also known as VBS HOME SHOPPING, and VBS TELEVISION, INC., a California corporation,

Petitioners,

v.

NUTRIVITA LABORATORIES, INC., a California corporation, et al.,

Respondents.

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

The Lanham Act authorizes a civil cause of action for false advertising "by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. §1125(a).

In the decision below, the Ninth Circuit panel majority held that a plaintiff in a false-advertising claim must provide evidence of "actual injury" in order to proceed to trial. That holding creates a circuit split on the question and stands at odds with binding Ninth Circuit precedent on a question for which uniform application is essential.

The panel majority issued its decision in a non-precedential memorandum disposition. It did so in the face of: (1) a dissenting opinion on a question of law; (2) a third-party request for publication; and (3) a vote to grant rehearing by the dissenting judge. As a result, the order below sets out a legal rule that conflicts with all authority on point but does so purportedly without disturbing precedent in a one-off decision applicable to only the parties below. In short, it represents a form of appellate decision-making that bears none of its hallmarks.

The questions presented are:

1. Whether a plaintiff in a false-advertising case must demonstrate "actual injury" to state a claim under the Lanham Act.

QUESTIONS PRESENTED—Continued

2. Whether the Ninth Circuit's decision to apply an aberrant and erroneous legal standard to this case through a non-precedential memorandum disposition is consistent with Article III and the Due Process Clause.

PARTIES TO THE PROCEEDING

VBS Distribution, Inc., a California corporation, also known as VBS Home Shopping, and VBS Television, Inc., a California corporation, are Petitioners here and were Plaintiffs-Appellants below.

Nutrivita Laboratories, Inc., Nutrivita, Inc., U.S. Doctors' Clinical, Inc., Robinson Pharma, Inc., Tuong Nguyen, and Jenny Do a/k/a Ngoc Nu are Respondents here and were Defendants-Appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioners VBS Distribution, Inc. and VBS Television, Inc., certify that they have no parent corporation and that no publicly held corporation owns 10% or more of either company's stock.

RELATED CASES

VBS Distribution, Inc., et al. v. Nutrivita Laboratories, Inc., et al., No. 18-56317 (9th Cir.) (memorandum disposition issued and judgment entered April 30, 2020; petition for rehearing and rehearing *en banc* denied June 12, 2020; mandate issued July 1, 2020).

VBS Distribution, Inc., *et al. v. Nutrivita Laboratories, Inc., et al.*, No. 17-55198 (9th Cir.) (memorandum disposition issued and judgment entered September 15, 2017).

RELATED CASES—Continued

VBS Distribution, Inc., *et al. v. Nutrivita Laboratories, Inc., et al.*, No. 16-cv-01553-CJC(DFM) (C.D. Cal.) (order denying motion for preliminary injunction issued January 19, 2017; order granting summary judgment issued September 10, 2018).

There are no additional proceedings in any court that are directly related to this case.

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Respondents falsely advertised that their product was one-hundred percent herbal and directed that message to a niche market that valued such a designation. Petitioners market a dietary supplement that directly competes with Respondents' product. They sued to enjoin Respondents' deception, but their suit was rejected by the Ninth Circuit on summary judgment because, according to the panel majority below, Petitioners were required, but failed, to show "actual injury."

That is not the standard to proceed on a Lanham Act claim in any circuit and runs contrary to the law's aim of freeing the marketplace of deceptive practices. If allowed to stand, the Ninth Circuit panel majority's decision in this case will conflict with every circuit to have addressed the issue. This Court should grant certiorari to resolve that split and correct the panel majority's mistaken requirement that a plaintiff in a false-advertising claim show "actual injury" under the Lanham Act.

The panel majority's decision is especially wrong as a matter of Ninth Circuit law. Yet the panel—over the dissent of one of its members and a non-party request to publish—chose a non-precedential memorandum disposition to render judgment against Petitioners. That procedural maneuver effectively relegated this case to second-class status. Non-precedential memorandum decisions like the one below create a substratum of "persuasive" law that deprives both the parties to the suit and those that may want to rely

on its outcome of the full force and effect of binding precedent. The Ninth Circuit's procedures allowing for intra- and inter-circuit splits to be buried in so-called "non-precedential" dispositions give rise to a class of cases insulated from both the application of binding precedent as well as review: in short, accountability. The two-tiered system of appellate review created by non-precedential dispositions—especially in cases that garner dissent on a question of law—cannot be justified under Article III or the Due Process Clause. The Court should grant review to correct this infirmity in the decision below—an infirmity woven deeply into the fabric of the federal courts of appeals.

OPINIONS BELOW

The opinion of the court of appeals affirming summary judgment on Petitioners' false-advertising claim is an unreported memorandum disposition and is reproduced at App. 1–13. The district court's order granting Respondents' motion for summary judgment is unreported and is reproduced at App. 14–51.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2020. A petition for rehearing and rehearing *en banc* was denied on June 12, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Under Section 1 of Article III, "[t]he 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."

The relevant provisions of the Lanham Act, 15 U.S.C. §1125, and the relevant provisions of the Ninth Circuit Rules are reproduced at App. 58–62.

STATEMENT OF THE CASE

A. Factual Background

Petitioner VBS Distribution, Inc. manufactures and sells an herbal dietary supplement called "JN-7 Best." *See* App. 11. Respondents Nutrivita Laboratories, Inc., Nutrivita, Inc., US Doctors' Clinical, Inc., Robinson Pharma, Inc., Tuong Nguyen, and Jenny Do (collectively, "Nutrivita") manufacture and sell a rival supplement known as "Arthro-7." *See id.* 2, 11–12. Both products strive to relieve muscle and joint pain and are marketed to a niche audience: generally, Vietnamese individuals who value vegetarianism. *See id.* 11–12.

B. Procedural Background

VBS Distribution, Inc. and VBS Television, Inc. (collectively, "VBS") filed suit in the district court against Nutrivita, asserting multiple claims. The only cause of action relevant to this petition is a claim for false advertising under the Lanham Act. Specifically, VBS sought to recover damages and to enjoin Nutrivita from, *inter alia*, falsely advertising Arthro-7 as "100% Herbal." *See* App. 11. The trial court denied a preliminary injunction, VBS appealed, and the Ninth Circuit reversed. *VBS Distribution v. Nutrivita Labs., Inc.*, 697 F. App'x 543 (9th Cir. 2017).

On remand, the district court granted summary judgment against VBS on all claims. On VBS's false-advertising claim, the district court found there was a disputed issue of fact as to whether Nutrivita's "100% Herbal" advertisement was false. It nonetheless granted summary judgment "because there [was] no evidence that Plaintiffs were in any way harmed by this limited advertisement." *See* App. 27–28.

On appeal, the Ninth Circuit panel majority affirmed on the Lanham Act false-advertising claim in a non-precedential memorandum disposition. The panel majority acknowledged the declaration of VBS's CEO stating that Nutrivita's false claims about Arthro-7 diverted sales from VBS because they "cause consumers to believe their product is superior to ours, and that causes consumers to purchase their product over ours." *Id.* 3–4. But it dismissed this evidence as insufficient to allow a jury to find that VBS suffered "actual injury"

as a result of Nutrivita's false advertising. *See id.* 4–5. On this basis, the panel majority affirmed summary judgment in Nutrivita's favor.

In a footnote, the panel majority brushed aside the fact that VBS prayed for damages *and* injunctive relief. The majority stated that "VBS failed to challenge the district court's denial of injunctive relief in its opening [appellate] brief, and so waived this issue on appeal." *Id.* 5 n.2. This was a puzzling application of the waiver doctrine because there was no separate ruling on injunctive relief for VBS to challenge; indeed, the district court's order did not even mention injunctive relief (other than a passing reference to the Ninth Circuit's previous reversal of the order denying VBS's motion for a preliminary injunction).

Judge Bybee dissented. He noted that "[a] plaintiff's burden at the summary-judgment stage to demonstrate injury caused by a false advertisement is quite lenient." *Id.* 10. "All the Lanham Act requires," he explained, "is evidence tending to show that the false advertisement 'likely' caused injury." *Id.* (quoting 15 U.S.C. §1125(a)(1)(A)). This standard is expansive for a reason: It "'allows the district court in its discretion to fashion relief, including monetary relief, based on the totality of the circumstances.'" *Id.* (quoting *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997)).

"In his declaration," Judge Bybee reasoned, "VBS's CEO described VBS's target consumers as Vietnamese individuals who 'value vegetarianism,' so the

advertisement that Arthro-7 is entirely herbal could reasonably affect those consumers' purchasing decisions. Because the false statement appeared on multiple Arthro-7 advertisements, including a well-circulated Vietnamese newspaper, it is reasonably likely that the false statement induced some consumers to purchase Arthro-7 rather than JN-7 Best." *Id.* 11. "Because VBS has presented some evidence of injury," he concluded, Nutrivita's "summary-judgment motion should have been denied." *Id.* 13.

VBS petitioned for rehearing and rehearing *en banc*, both of which were denied by the panel majority, but with Judge Bybee voting to grant rehearing. *See id.* 52–53. A non-party—with no affiliation or connection to Petitioners—requested publication of the memorandum disposition, which was also denied. *See id.* 54–57.

REASONS FOR GRANTING THE PETITION

The questions presented in this petition are of critical importance. Granting review on the first question will ensure the proper and consistent enforcement of false-advertising claims across all circuits. Answering the second question is vitally important to guarantee the constitutionality of non-precedential dispositions in cases like this one.

The Ninth Circuit's decision created a circuit split on whether a plaintiff alleging false advertising must present evidence of actual injury in order to proceed

under the Lanham Act. Every circuit to have considered the question has come to the same conclusion: To pursue injunctive relief to end false advertising, a plaintiff need not present evidence of actual injury. The Ninth Circuit split with this consensus in an opinion that contravenes the Lanham Act's express statutory mandate and thwarts the law's ability to curb false-advertising practices. And the threshold damages showing is especially important when it comes to uniform enforcement of false-advertising claims.

VBS's petition also presents the Court with an ideal opportunity to establish the constitutional limits on a court of appeals' discretion to issue non-precedential rulings. The panel's memorandum disposition (over the dissent of one of the panel's members, Judge Bybee) is non-precedential under Ninth Circuit Rules. The issuance of non-precedential dispositions—even over dissent—is growing more common in the federal courts of appeals. Yet this mode of adjudication is inconsistent with the limits inherent in Article III, due process, and common-sense notions of the rule of law in the adjudicatory process.

To be clear, the decision below is actually belied by binding Ninth Circuit precedent. Yet the panel majority's use of a non-precedential disposition allowed it to sidestep (and even misstate) the law by relegating its reasoning to a second-class stratum of judicial decision-making: non-published, non-precedential dispositions that neither bind parties moving forward nor invite further review. The resulting miasma of non-precedential yet "persuasive" caselaw raises questions

of due process for litigants as well as the metes and bounds of authority granted to Article III judges.

The panel's decision over dissent, moreover, highlights the constitutional problems inherent in rules that authorize judges issuing decisions to decide whether the law articulated in a particular case should be "the law" going forward. The decision below issued after full briefing and oral argument; and it split a panel of appellate judges on a question of law, in addition to one of the appellate judges voting for the panel to rehear the case and in spite of a non-party's request for publication. It is difficult to imagine what else could be required for a decision to merit the mantle of "real" precedential law. Rather, the practical consequences of the panel's decision to demote the effect of its disposition in this case is clear: It rendered a decision at odds with controlling law while at the same time insulating that decision from further review.

Whether to make clear that a false-advertising plaintiff need not show actual injury or to remedy the unconstitutional and deleterious practice of issuing non-precedential dispositions—at least, as here, when an appellate panel is divided on a question of law—this petition presents the Court with an ideal opportunity to resolve important questions of federal statutory and constitutional law.

I. The Court Should Grant Review To Make Clear That A False-Advertising Plaintiff Need Not Show Actual Injury

The Ninth Circuit's decision created a circuit split on whether a plaintiff seeking injunctive relief, as VBS did here, must show actual injury to proceed on a false-advertising claim under the Lanham Act.

The words of Section 43(a) of the Lanham Act are important: "Any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who *believes that he or she is or is likely to be damaged* by such act." 15 U.S.C. §1125(a) (emphasis added).

As the Second Circuit has observed, "[t]he passage of §43(a) represented a departure from the common law action for trade disparagement *and from the need to prove actual damages as a prerequisite* for injunctive relief." *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189 (2d Cir. 1980) (emphasis added). "This departure marked the creation of a 'new statutory tort' intended to secure a market-place free from deceitful marketing practices." *Id.* (quoting *Bose Corp. v. Linear Design Labs, Inc.*, 467 F.2d 304, 311 (2d Cir. 1972)).

All circuits to have addressed the issue have interpreted this statutory language to allow false-advertising claims to proceed without a showing of "actual injury." Generally, these cases distinguish between the showings required for injunctive relief and damages—or differentiate between showing injury from quantifying it. None, however, requires a showing of "actual injury" to secure injunctive relief as did the panel majority below.

In the First Circuit, "a showing that the defendant's activities are likely to cause confusion or to deceive customers suffices to warrant injunctive relief, but . . . a plaintiff must show actual harm to its business, a diversion of sales, for example, in order to recover damages." *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1st Cir. 1986) (citing *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 160 (1st Cir. 1977) ("[A] showing that the defendant's activities are likely to cause confusion or to deceive customers suffices to warrant relief, at least in cases where injunctive relief is requested.")).

In the Second Circuit, likewise, "a plaintiff seeking an injunction, as opposed to money damages, *need not quantify the losses actually borne*." *Johnson & Johnson*, 631 F.2d at 189 (emphasis added); *id.* at 190 ("The correct standard is whether it is likely that Carter's advertising has caused or will cause a loss of Johnson sales, not whether Johnson has come forward with specific evidence that Carter's ads actually resulted in some definite loss of sales."). "Failure to prove actual damages in an injunction suit, as distinguished from an action for damages, poses no likelihood of a windfall

for the plaintiff. The complaining competitor gains no more than that to which it is already entitled a market free of false advertising." *Id.* at 192.

In the Third Circuit, "a plaintiff seeking damages under § 43(a) must establish customer reliance but *need not quantify loss of sales* as that goes to the measure of damages, not plaintiff's cause of action." *Warner-Lambert Co. v. BreathAsure, Inc.*, 204 F.3d 87, 92 (3d Cir. 2000) (emphasis added) (citing *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958)); *id.* at 97 (holding district court abused its discretion in refusing to grant injunction where advertisement was false).

In the Fourth Circuit, "'a Lanham Act plaintiff . . . need not even point to an actual loss or diversion of sales'" for an injunction to issue. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 126 (4th Cir. 2011) (quoting *Coca-Cola Co. v. Tropicana Prods.*, 690 F.2d 312, 316 (2d Cir. 1982)).

In the Fifth Circuit, "injunctive relief is available even where a false advertising plaintiff cannot prove concrete enough damage to qualify for monetary relief." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 919 F.3d 869, 877 n.35 (5th Cir. 2019). "For example," the court has noted, "while we generally will require a plaintiff seeking monetary relief to demonstrate actual consumer confusion or deception, we relax that requirement for a plaintiff seeking purely injunctive relief—the latter need only prove that the advertisement *tends* to deceive consumers." *Id.*

In the Sixth Circuit, "the evidence of causation a plaintiff must introduce to establish a Lanham Act claim varies depending upon the relief sought." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999). "Regarding deception, injunctive relief may be obtained by showing only that the defendant's representations about its product have a tendency to deceive consumers while recovery of damages requires proof of actual consumer deception." *Id.* (internal quotation marks omitted). "This lower standard has arisen because when an injunction is sought, courts may protect the consumer without fear of bestowing an undeserved windfall on the plaintiff." *Id.* "A plaintiff seeking injunctive relief for false advertising faces a lower standard of showing only that the defendant's representations about its product have a tendency to deceive consumers." *Herman Miller, Inc. v. Palazzetti Imps. & Exps.*, Inc., 270 F.3d 298, 323 (6th Cir. 2001) (quotation marks omitted).

In the Eighth Circuit, "cases involving injunctive relief and those seeking monetary damages under the Lanham Act have different standards of proof." *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335 (8th Cir. 1997). "A plaintiff suing to enjoin conduct that violates the Lanham Act need not prove specific damage. In contrast, courts require a heightened level of proof of injury in order to recover money damages." *Id.*

The Ninth Circuit's decision here not only departs from this uniform chorus of circuit law; it also stands as an outlier in the Ninth Circuit's own precedent.

Under Ninth Circuit caselaw, *even monetary relief* is recoverable absent proof of harm in certain circumstances. Binding precedent (unlike the unpublished outlier issued by the panel majority below) is unequivocal: "Nothing in the Lanham Act conditions an award of profits on plaintiff's proof of harm, and we've held that profits may be awarded in the absence of such proof." *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 831 (9th Cir. 2011) (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040-42 (9th Cir. 1986)).

In the face of uniform circuit law to the contrary (and even more favorable law in the Ninth Circuit), the Ninth Circuit panel majority affirmed summary judgment against VBS—denying it the chance to secure an injunction to end Nutrivita's false advertising because, in the panel majority's view, VBS did not show "actual harm." That decision is plainly wrong. It also creates a split on a question of law as to what a plaintiff must show to get injunctive relief under the Lanham Act; it creates uncertainty as to when, if ever, a plaintiff must show actual injury to proceed on a false-advertising claim; it inhibits a plaintiff's ability to secure a marketplace free of deception under the Lanham Act; and it allows a panel (or, as in this case, a panel majority) of the Ninth Circuit to ignore settled law in rendering an unpublished decision that is otherwise insulated from review, *see* Part II, *infra*.

Knowing exactly what, if any, injury a plaintiff must show under the Lanham Act is vitally important

for the uniform achievement of a deception-free marketplace, in alignment with the statute's express mandate. The Court should grant VBS's petition to resolve the split created by the decision below and reverse the Ninth Circuit's decision.

II. The Court Should Grant This Petition To Clarify The Constitutional Limits On An Article III Court's Authority To Determine When Its Decisions Establish Precedential Law

The Ninth Circuit's rule on publication of decisions, in combination with its rule against the precedential effect of unpublished decisions, gives rise to the arbitrary and erratic creation of circuit law. The result is nothing short of a two-tiered system of review. *See* Judge Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 (Summer 1999) ("This unpublished-opinion practice is creating a vast underground body of law, fully accessible to the public at a reasonable cost by way of computers, but disavowed by the very judges who are producing it."). One track produces cases that are published and bind not only the panels that issue them, but any subsequent panels of the same court. The second track produces cases that are unpublished, non-precedential, and in effect judicially unaccountable. *See id.* at 226 ("When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised

properly be called 'judicial'?"). The appellate decisional tradition of achieving through an unpublished decision what cannot be achieved through a published decision is broken and cannot be sustained.

Whatever practical concerns animate the circuit's unequal treatment of cases, the results are clear: (a) panels are directed to publish cases based on an incoherent distinction between cases that "apply" and "make" law; (b) the result is a separate class of cases that adopt inconsistent law insulated from review; and (c) the decision whether to confer precedential effect on a decision is made *ad hoc* without any guarantee that such a decision will be based on consistently applied principles one case to the next. The net result is incompatible with any conception of a judicial system of laws—from the Founding Era to the present.

The memorandum disposition here is a case in point. The panel majority decided the case in direct contravention of established and binding precedent on the question of injury, as expressly pointed out by the panel's dissenting member. The panel chose not to publish the decision and even denied a third-party request for publication. And the choice not to publish raises its own concerns. On the very standards set out in the Ninth Circuit Rules, the decision *had to be* published; the rule provides no room for discretion.

A. This Court has never determined what, if any, constitutional limits circumscribe circuit courts' discretion to determine the precedential value of their decisions

The story of unpublished decisions in Article III appellate courts—at least in its current vintage—started in the latter half of the twentieth century. In 1964, the Judicial Conference of the United States resolved "[t]hat the judges of the courts of appeals . . . authorize the publication of only those opinions which are of general precedential value." *Report of the Proceedings of the Judicial Conference of the United States: March 16–17, 1964*, at 11 (1964). In 1973, the Advisory Council on Appellate Justice's Committee on Use of Appellate Court Energies issued a report recommending limited publication and citation. *See Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Energies of the Advisory Council on Appellate Justice* (1973). In the years that followed, circuit courts adopted rules regarding unpublished cases, making clear such dispositions were non-precedential. So began the experiment in the "legal laboratories" of the courts of appeals. *See Report of the Proceedings of the Judicial Conference of the United States: March 7-8, 1974*, at 12 (1974).

The results of the experiment have been clear and consistent: "two separate and unequal tracks by which cases are considered and resolved in our federal appellate courts." David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished*

Opinions, 62 WASH. & LEE L. REV. 1667, 1668 (Fall 2005). A "first class" of opinions "are carefully crafted," "published," and "treated as binding." Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1469 (Fall 2005). The "second class" are "not as carefully crafted," "not published," and "not treated as binding." *Id.* This two-tiered system of justice, which, along with the "body of secret law" proliferated through the growing number of second-class cases, has received heavy criticism. *See Cty. of L.A. v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting) (discussing the "extensive comment" on "the decision to promulgate a rule spawning a body of secret law").

The new regime also generated much scholarly debate. Judges even confirmed the fears of detractors: The mischief inherent in this regime was not just theoretical because judges had in fact used the cover of this body of secret law to "occasionally sweep troublesome issues under the rug." *See*, *e.g.*, Judge Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) (noting that "a double-track system allows for deviousness and abuse" and observing "wily would-be dissenters go[ing] along with a result they do not like so long as it is not elevated to a precedent").

As a result, the two-track review system exposes a class of litigants to outcomes that may not, in fact, reflect the fully reasoned determination of the entire panel of judges. And later parties appearing before the

same appellate court (or even lower courts) are denied the benefit of the legal analysis of would-be dissenters. The constitutional problems with such a regime are patent. Yet the practice did not garner significant judicial scrutiny until the turn of this century.

In *Anastasoff v. United States*, the Eighth Circuit declared unconstitutional a local rule that deemed unpublished opinions non-precedential. 223 F.3d 898, 899–00 (8th Cir. 2000). Drawing on historical sources, Judge Arnold, writing for a unanimous panel, concluded that the discretion to determine the precedential value of an opinion was outside the "judicial power" as that term is used in Article III. *Id.*

When the Framers gathered to draft the Constitution, Judge Arnold reasoned, "the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty." *Id.* at 900 (collecting sources). A rule that allowed a court to ignore its own precedent was, therefore, unconstitutional. *See id.* at 905. The holding was short-lived as the opinion was subsequently vacated on other grounds as moot. 235 F.3d 1054 (8th Cir. 2000).

A new flurry of scholarly debate ensued, and after years of consideration, the Advisory Committee on the Federal Rules of Appellate Procedure recommended and passed Rule 32.1, which took effect on December 1, 2006. Under the rule, "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions. . . ." This

rule, however, did not address the question of precedent or the constitutional implications of issuing non-precedential opinions. *See* Committee's Note ("Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as 'unpublished' or 'non-precedential'—whether or not those dispositions have been published in some way or are precedential in some sense.") (emphasis in original).

Since the adoption of Rule 32.1, the issue of non-published opinions and the related question of precedent have not been addressed by this Court. Meanwhile, the two-tiered system of appellate review has settled so deeply into the federal court system that it has nearly vanished from view. *See* Judge Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 474 (2009) (describing the "painful compromises" federal courts have made to cope with the volume of appeals as "uneasy truces," which "were once troubling exceptions to an idealized version of appellate justice but are now settled assumptions undergirding our system of appellate review").

The practice generates scholarly debate, especially as it disproportionately affects those who lack resources and representation. *See*, *e.g.*, Merritt E. McAlister, "*Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (compiling data and arguing for a minimum reason-giving expectation for most unpublished decisions to address the current two-track system's

significant disparate effects on indigent and *pro se* litigants).

Recent studies, moreover, have uncovered that a significant portion—at least 25% or more—of federal appellate courts' self-reported merits terminations are truly unpublished; they never make their way to navigable databases. *See*, *e.g.*, Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. ___ (forthcoming 2021). In other words, a full quarter of all circuit court decisions are effectively insulated from scrutiny.

Although this Court has, in passing, noted disdain for, and apprehension regarding, the practice, it has never squarely addressed the constitutionality of circuit court rules permitting panels, in their discretion, to decide whether to afford their decisions precedential effect. The proliferation of this practice among the federal courts of appeals cannot legitimize it, and the question should not go unexamined. *Cf. Yovino v. Rizo*, 139 S. Ct. 706 (2019) (reviewing the Ninth Circuit's practice of counting the vote of a judge who dies before the court issues its decision, and holding a deceased judge unable to exercise the judicial power of the United States); *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (invalidating a Ninth Circuit decision because that court's practice of allowing a non-Article III judge to sit on the court of appeals by designation is not authorized); *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (denouncing a Ninth Circuit panel's intervention to invite briefing that departed so drastically from the principle of party presentation as to constitute abuse of discretion).

The question is an important one and ripe for this Court to resolve. The panel majority's disposition of this case in a non-precedential memorandum raises serious questions of Article III authority and fundamental fairness to litigants.

B. The non-publication of circuit court decisions, particularly when they break with precedent or include a dissent, fosters division and confusion that is insulated from meaningful review

The Ninth Circuit's non-publication rules fracture and obfuscate caselaw in the circuit. To begin, its rule on publication of dispositions rests on an incoherent taxonomy of cases. Ninth Circuit Rule 36-2 mandates that a reasoned disposition be designated an opinion (and therefore precedential) if it, *inter alia*, "[e]stablishes, alters, modifies or clarifies a rule of federal law, or" "[c]riticizes existing law." It is not clear, however, that any disposition does not—at some level—"modify" the law. "[T]he determination of liability or no liability typically involves subtle, circumstance-based questions like whether the defendant's particular conduct, considered in light of decided cases, itself amounts to a breach of duty." Judge Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17, 23 (2000).

Even if there were a valid distinction between a case that merely "applies" law and one that "makes" law, the panel deciding a case is in a poor position to

recognize which task it is undertaking. *See*, *e.g.*, Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120-21 (2001). And as a general rule, there is no reliable mechanism to ensure—as far as the determination of making precedent—that courts are coherently categorizing their decisions. The result is confusion and caprice that make it likely to evade review.

A striking illustration of the problems with the discretionary publication scheme arose in *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000). At the request of the panel at oral argument, the parties "produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches" to the issue at bar. *See id.* at 1063. Publication of these prior decisions would have allowed for either a unified and consistent rule before the Ninth Circuit's opinion or *en banc* review to resolve an intra-circuit split. Instead, litigants were subject to conflicting rules on the same issue in the same circuit at the same time—a disparity uncovered apparently only at the request of the panel.

The problem with discretionary publication is self-evident. In a system with two classes of decision, a circuit may contradict itself through no fault of any one individual panel. That contradiction, moreover, may persist absent a meaningful mechanism for review. Where contradictory published cases can be harmonized *en banc*, unpublished cases create the risk that

like cases may be treated unalike without any mechanism to correct the disparity.

The problem is particularly pronounced in this case. After the panel issued its memorandum disposition, which included Judge Bybee's dissent, a third-party stranger to the suit requested publication. *See* App. 56–57. The grounds for the request highlight the significance of the opinion rendered by the court. The request noted the "mixed messages" the Ninth Circuit had sent regarding injury under the Lanham Act. *Id.* 56. "If published," the request concluded, "the Court's analysis will provide essential guidance for future cases involving the same federal issue presented here." *Id.* 57. Without offering reasons for its decision, the panel denied the request. *See id.* 54–55. Not only was this case insulated from review *en banc*, it was so insulated *in the face of a request for publication*.

At the highest level, moreover, discretionary publication rules threaten to shield review of decisions by this Court. The choice not to publish signals that a case is neither significant nor represents a novel legal pronouncement. For example, under Ninth Circuit Rule 36-2, a reasoned disposition "*shall* be designated as an OPINION"—that is, precedential—if, *inter alia*, it:

> (a) Establishes, alters, modifies or clarifies a rule of federal law, or
>
> (b) Calls attention to a rule of law that appears to have been generally overlooked, or
>
> (c) Criticizes existing law, or

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

Id. (emphasis added). A panel's choice not to publish reflects its judgment that none of these criteria has been met.

Compare these criteria with the relevant reasons for granting a petition for writ of certiorari. Under Rule 10, the Court considers whether:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10.

It is difficult to imagine a case that actually fails to satisfy the Ninth Circuit's publication criteria *and* satisfies the criteria for certiorari. As a result, granting

a petition for writ of certiorari to review an unpublished decision out of the Ninth Circuit requires this Court to essentially make *two* separate determinations: (1) the case implicates issues that merit review; and (2) the panel below erred in determining otherwise.

This Court has recognized the inconsistent application of publication decisions by lower courts. For example, in *United States v. Edge Broad. Co.*, the Court reversed the decision that a divided Fourth Circuit panel issued in an unpublished *per curiam* opinion. 509 U.S. 418 (1993). In passing on the constitutional question, the Court "deem[ed] 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* opinion." *Id.* at 425 n.3; *see also Smith v. United States*, 502 U.S. 1017, 1020 n.*, 112 S. Ct. 667, 669 (1991) (Blackmun, O'Connor, & Souter, JJ., dissenting from the denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion.").

The reality is that circuit courts, whether through inadvertence or other error, may insulate an important and erroneous decision from review simply by deciding not to publish it. Again, the result is a two-class system of justice: one in which litigants receive

the full-throated judicial consideration of the federal courts and all of the applicable mechanisms of review attendant to that consideration; and the other in which litigants receive the equivalent of "review light." This latter class quite simply receives less consideration than the former.

For this reason, the fact that the Ninth Circuit's decision below is unpublished and therefore non-precedential "in itself is yet another disturbing aspect of the [court's] decision, and yet another reason to grant review." *See Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas & Scalia, JJ., dissenting from the denial of certiorari). As in *Plumley*, "[t]he Court of Appeals had full briefing and argument on" VBS's claim and analyzed it in an "opinion written over a dissent." *Id.* at 1132. "By any standard . . . this decision should have been published." *See id.* "It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit." *See id.*

Members of this Court have criticized circuit courts for failing to publish a decision when appellate panels disagree on a legal question. *See*, *e.g.*, *L.A. Cty. v. Rettele*, 550 U.S. 609, 616 (2007) (Stevens & Ginsburg, JJ., concurring in summary reversal) ("The fact that the judges on the Court of Appeals disagreed on" the legal question of whether there was a genuine issue of material fact "convinces me that they should not have announced their decision in an unpublished opinion."). Yet the practice—and two-class system of judicial review—persists.

At a minimum, this disparate treatment of cases cannot be supported in a case including a dissent—and especially where, as here, one member of the panel voted to rehear the case and a third-party requested publication of the decision.

C. The current two-tiered publication scheme undermines the rule of law and destabilizes precedent

The unpublished nature of decisions like the one here creates an arbitrary precedential twilight zone for the reasoning they contain—a sort of gray market of judicial precedent. The Ninth Circuit has made clear that its unpublished memorandum dispositions are not precedent except as provided in Ninth Circuit Rule 36-3(a). *See*, *e.g.*, *Scott v. Gino Morena Enters., Ltd. Liab. Co.*, 888 F.3d 1101, 1108 n.7 (9th Cir. 2018). The reality, however, is that district courts and litigants within the Ninth Circuit routinely look to and rely on unpublished dispositions—especially in light of the Ninth Circuit's General Order that unpublished decisions do not clarify the law but simply restate well-settled rules. *See* Ninth Cir. General Order 4.3.a; Sarah E. 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, 232 (2006) (stating that "if doctrinal inconsistencies exist" between published and unpublished decisions, "there is a resulting risk of arbitrariness and unpredictability in district court decision-making").

The non-precedential yet citable nature of dispositions like the one below creates a two-fold paradigm of unpredictability to the resolution of individual cases. Specifically, "judges have two opportunities to exercise arbitrary discretion—first in deciding whether to designate a decision as a precedent, and second in deciding whether to follow a supposedly nonprecedent[ial] decision despite its designation." Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 707 (2018).

VBS suffered the consequences of this arbitrariness. Not only did the panel majority depart from established precedent within and without the circuit, it did so in a way that does not guarantee future litigants will be held to the same standard. Whatever the bounds of due process on appeal, such arbitrary treatment exceeds them. The haphazard creation and application of law raises serious questions as to whether a decision to publish can properly be considered within, or at least properly made in accordance with, the "judicial" power granted in Article III.

D. This case presents an ideal vehicle to address the constitutionality of the Ninth Circuit's publication rule and practice

As detailed in Part I, *supra*, the decision below directly conflicts with the uniform law of the circuits that proof of actual injury is not needed under the Lanham Act. Moreover, the use of a memorandum disposition

allowed the panel here to ignore that law as well as its own precedent *sotto voce*.

Under clear and binding Ninth Circuit precedent, VBS did not need to show actual injury regardless whether it was seeking injunctive relief or damages. Yet VBS was denied the force and effect of this caselaw. The panel majority's decision flies in the teeth of cases directly on point; and the fact that the panel chose to do so in an unpublished, non-precedential disposition (with a panel member dissenting) means it was able to discount its own law purportedly without upending precedent. Whatever authority Article III grants courts, that authority cannot credibly include the discretion to treat like cases unalike.

Ninth Circuit law could not be clearer on the dispositive question in the decision below: "Nothing in the Lanham Act conditions an award of profits on plaintiff's proof of harm, and we've held that profits may be awarded in the absence of such proof." *TrafficSchool.com, Inc.*, 653 F.3d at 831. Indeed, the plaintiffs in *TrafficSchool.com* did not prove past injury or causation. *Id.* They nonetheless prevailed on their Lanham Act claim.

In that case, the Ninth Circuit affirmed the district court's "holding that defendants violated the Lanham Act," approved in part an injunction against the defendants, and ruled that the district court abused its discretion in its denial of attorneys' fees to the plaintiffs—which are available only to a "prevailing party." *Id.* at 829, 831–32 (citing 15 U.S.C. §1117(a)). The

plaintiffs' failure to produce evidence of past injury barred only one particular remedy—recovery of profits. *Id.* at 831. Indeed, even though the plaintiffs in *TrafficSchool.com* actually prevailed despite their failure to produce any proof at trial of actual injury, the panel majority here inexplicably cited that case for the proposition that such a plaintiff "could not prevail under the Lanham Act." App. 3.

TrafficSchool.com is not an outlier. In *Southland Sod Farms*, "the district court ruled that Defendants were entitled to summary judgment because Plaintiffs had failed to present sufficient evidence upon which a reasonable factfinder could conclude that Plaintiffs were injured as a result of Defendants' advertising." 108 F.3d at 1145. The Ninth Circuit reversed, holding that "even if Plaintiffs had failed to raise a triable issue as to causation and injury, their Lanham Act claim would still be viable to the extent it sought an injunction." *Id.* at 1145–46. "[A]n inability to show actual damages does not alone preclude a recovery," because "the preferred approach allows the district court in its discretion to fashion relief, including monetary relief, based on the totality of the circumstances." *Id.* at 1146 (quotation marks omitted); *see also Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1411 (9th Cir. 1993) ("[A]n inability to show actual damages does not alone preclude a recovery under section 1117." (quotation marks omitted)).

The conflict of the panel majority's decision with this body of law is highlighted by Judge Bybee's dissent. As he pointed out, "[a] plaintiff's burden at the

summary-judgment stage to demonstrate injury caused by a false advertisement is quite lenient." App. 10. "Because VBS has presented some evidence of injury," he correctly concluded, Nutrivita's "summary-judgment motion should have been denied." App. 13. Even a non-party and complete stranger to the suit recognized the gravity of the decision in a request for publication and Judge Bybee voted to rehear the case.

It is fundamental that courts should not be allowed to ignore their own precedent. At a minimum, cases garnering dissent must be published. It strains credulity to think a case in which federal jurists disagree does not "make" law. And the disagreement among the panel members here was undoubtedly on a question of law—summary judgment may be granted only when a party is entitled to judgment as a matter of law, and the courts of appeals review that legal determination *de novo*. It is equally clear that courts should not be able to evade precedent in a manner that evades further mechanisms of judicial review, either *en banc* or before this Court. Denying certiorari in this case would condone both, and the Court should not allow this decision or the practice that enables it to stand.

* * *

The Ninth Circuit disposed of VBS's case in a way that is at odds with the law of every circuit to have addressed the question—even its own. At the heart of this error is a dubious practice that presumes Article III courts may decide whether the law they articulate in a given case will, in fact, be "the law" moving forward.

Both the content and form of the decision below raise important questions of federal statutory and constitutional dimension. The panel majority's decision was wrong as a matter of false-advertising law; and it was rendered in violation of Article III and the Due Process Clause. The Court should grant certiorari to answer either or both questions presented, lest bad law in this case and others proliferate under the questionable aegis of "unpublished" decision-making.

CONCLUSION

Petitioners respectfully request that this Court grant the writ of certiorari, review this case, and reverse the Ninth Circuit Court of Appeals' decision.

Respectfully submitted,

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