NO. 20-220

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR ERWIN CHEMERINSKY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2(b), Dean Erwin Chemerinsky, in his individual capacity, respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by petitioners VBS Distribution, Inc., VBS Home Shopping, and VBS Television, Inc. As required under Rule 37.2(a), Dean Chemerinsky timely provided notice to all parties' counsel of his intent to file this brief more than 10 days before its due date. Petitioners consented to the filing of this brief. Respondent did not.

Erwin Chemerinsky is the author of a leading casebook and treatise on federal courts and has published extensively in this area. His experience also gives him a unique perspective on how a two-tiered system of decision-making in the federal courts runs counter to the interests of litigants, courts, and the rule of law. Accordingly, this amicus brief addresses the issue of unpublished appellate opinions, and how appellate courts' increasing reliance on them have created a second tier of decisions, less susceptible to review, and disproportionately affecting the most vulnerable litigants. Those litigants are also the least able to navigate the secret world of unpublished decisions, many of which are accessible only through expensive databases, and some of which are not accessible at all.

Because this brief provides empirical information about the use of those decisions and addresses the rule-of-law concerns that their abuse can raise,

Amicus believes that it may be helpful to the Court as it considers the pending petition for certiorari. For these reasons, the Court should grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Erwin Chemerinsky is the Dean of Berkeley Law at the University of California, where he serves on faculty as the Jesse H. Choper Distinguished Professor of Law. He is the author of a leading casebook and treatise on federal courts and has published extensively in this area. As such, he has a particular interest in how federal courts issue their decisions, the role of precedent, and the importance of a single system of justice to the rule of law. His experience also gives him a unique perspective on how a two-tiered system of decision-making in the federal courts runs counter to the interests of litigants, courts, and the rule of law.

INTRODUCTION AND SUMMARY OF ARGUMENT

As Justice Scalia once explained, "the Rule of Law" demands "predictability." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." *Id.* But federal appellate courts' growing reliance on unpublished decisions "challenge[s] fundamental assumptions of lawyers and judges: that the law is findable, that the

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[1] Counsel for all parties received notice of *amicus*'s intent to file this brief 10 days before its due date. Because respondent did not consent, *amicus* has submitted a motion for leave to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

precedential value of a decision is readily ascertainable, and that past decisions provide sufficient information to guide citizens, attorneys, and judges in the future." Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Threat?,* 44 Am. U. L. Rev. 757, 760 (1995).

Take that last point—unpublished decisions, as currently (and increasingly) used by the courts of appeals, undermine predictability in several ways. Though unpublished decisions are technically not precedential, litigants may cite them, and courts rely on them as persuasive authority. This leaves litigants no way to determine whether or not they can rely on an unpublished decision to predict future results. Dragich, *Will the Federal Courts of Appeals Perish*, at 791–800. That is particularly true when multiple unpublished decisions from a single appellate court provide different answers to the same legal question. *Id.* Even worse, courts of appeals can—as the Ninth Circuit apparently did in this case—use unpublished decisions to ignore or superficially distinguish the court's own binding precedent. *See* Pet. 16–20; Pet. App. 10–13 (Bybee, J., dissenting). As a result, no litigant can ever be confident that its appeal will be decided according to the existing rules. And if it isn't, the decision's unpublished status protects it from further review in the court of appeals or this Court.

This unpredictability burdens all litigants, but it falls most harshly on the most vulnerable members of society. *See generally* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished*

Decisions in the Federal Courts of Appeals, 118 Mich. L. Rev. 533 (2020). The courts of appeals disproportionately use unpublished decisions to reject the claims of immigrants, prisoners, and other litigants who can't afford sophisticated counsel. *Id.* at 548. These litigants are also less able than represented parties to locate and research the unpublished decisions that may apply to their claims. Subjecting indigent litigants to such "second-class treatment," *id.* at 538, undermines the "appearance of equal treatment" essential to a legitimate "system of justice," Scalia, *Rule of Law*, at 1178.

The courts of appeals' misuse of unpublished decisions thus impairs the legitimacy of the entire legal system. If the public does not believe that the law is predictable and applied even-handedly, they "view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives." McAlister, *"Downright Indifference*," at 566 (quoting Tom R. Tyler, Why People Obey the Law 108 (1990)); *accord* Scalia, *Rule of Law*, at 1178. Published opinions, on the other hand, "lend [decisions] legitimacy, permit public evaluation, and impose a discipline on judges." Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 768 (1983). They should be the norm of decisionmaking in the federal courts of appeals, not the exception they have become.

The restraints imposed by precedent serve important societal interests in fairness, efficiency, and predictability, but the existence of a two-tiered system of decisionmaking fundamentally undercuts both

those restraints and the interests they serve. For these reasons, the Court should grant certiorari to impose some discipline on how the courts of appeals use unpublished decisions.[2]

ARGUMENT

I. The misuse of unpublished decisions undermines predictability in the law.

Predictability—the public's ability to anticipate, with reasonable certainty, what the law prohibits or permits—"is a needful characteristic of any law worthy of the name." Scalia, *Rule of Law*, at 1179. It is, indeed, the "first essential of due process," *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "[O]rdinary people" must have "fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

This requirement governs judicial decisionmaking through the doctrine of *stare decisis*. A "foundation stone of the rule of law," *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (internal quotation marks omitted). If courts were free to revisit the law anew in each decision, members of the public could have no confidence in the rules governing their conduct. And "[a]s laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted

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[2] This brief is limited to the second Question Presented. *Amicus* expresses no view on the first Question Presented.

uncertainty regarding what the law may mean." Scalia, *Rule of Law*, at 1179.

Yet, in the 31 years since Justice Scalia issued that warning, the federal courts of appeals have relied more and more on unpublished, nonprecedential decisions—even as their caseloads have declined. McAlister, *"Downright Indifference,"* at 551–54, 561. Take one example from one circuit: During the first week in October 2016, the U.S. Court of Appeals for the Fourth Circuit issued 104 decisions in pending appeals, 102 of which were "unpublished" dispositions. *Id.* at 534. Today, 87% of all federal appellate decisions are unpublished. Admin. Office of the U.S. Courts, U.S. Court of Appeals Judicial Business tbl. B-12 (2019).[3] Under the rules of every court of appeals, *none* of those decisions bind the courts' future decisions.[4] That is, nearly 90% of all the federal appellate decisions in the country tell the public nothing useful about the meaning of the law.

Correction: *less* than nothing. Because while courts need not follow unpublished decisions, they can choose to do so at their discretion. Fed. R. App. P. 32.1; McAlister, "*Downright Indifference,"* at 561. Federal courts of appeals and district courts routinely cite unpublished appellate decisions for their persuasive

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[3] Available at https://www.uscourts.gov/statistics/table/b-12/judicial-business/2019/09/30.

[4] *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219–20 (4th Cir. 2006); 1st Cir. L.R. 32.1.0; 2d Cir. L.R. 32.1.1; 3d Cir. I.O.P. 5.1, 5.2, 5.3; 5th Cir. L.R. 47.5.4; 7th Cir. L.R. 32.1(b); 8th Cir. L.R. 32.1A; 9th Cir. L.R. 36-3(a); 10th Cir. L.R. 32.1; 11th Cir. L.R. 36-5 & I.O.P. 6; D.C. Cir. L.R. 36(e)(2).

value.[5] Any given unpublished decision, therefore, *might* inform future decisions—or it might not. Indeed, a particular unpublished decision might inform one future decision, but be ignored, or worse yet, purposefully not followed, by another. There's no way to tell in advance. That is particularly true when different panels of the same court of appeals issue conflicting unpublished decisions on the same issue. *See, e.g.*, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) (identifying "twenty separate unpublished dispositions" adopting "a total of three different approaches" to the same question). In fact, the same court of appeals can even issue conflicting unpublished dispositions on the same issue regarding the same entity. *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260–61 (5th Cir. 2001) (Smith, J., dissenting from the denial of rehearing en banc) (recounting that one panel of the circuit had ruled, in an unpublished decision, that DART was a political subdivision of the state of Texas and therefore immune from suit under the Eleventh Amendment, while the panel of the case under review ruled, less than two years later and also in an unpublished decision, that DART was *not* a political subdivision of the state and therefore did not have immunity from suit).

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[5] A Westlaw search reveals that in 2020, the federal courts of appeals have cited cases from the *Federal Appendix*, West's compendium of unpublished appellate decisions, in at least 2,474 different decisions. In that same time period, district courts have cited the *Federal Appendix* in more than 10,000 decisions. (Westlaw can only display 10,000 search results at a time.)

As a result, litigants and attorneys who want to predict the outcome of their cases must research unpublished decisions, while having no clue which (if any) of those decisions could influence the result.[6] *See Cty. of L.A. v. Kling*, 474 U.S. 936, 938 & n.1 (1985) (Stevens, J., dissenting from summary reversal) (criticizing nonpublication as "spawning a body of secret law"). The effect of that unpredictability isn't limited to actual litigants—those who want to *avoid* ending up in litigation cannot predict which course of conduct is right when courts have endorsed multiple approaches in unpublished decisions. And those who *want* to bring litigation may have difficulty assessing the merits of doing so.

That lack of precedential value and predictability leads to forced inefficiency. Courts and parties end up having to relitigate issues over and over again, like an Article III version of the movie *Groundhog Day*. *See, e.g., 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. . . . Instead, both the parties and this

[6] Not to mention that nearly 30% of federal appellate decisions are unavailable through *any* commercial legal database. Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. (forthcoming 2021), manuscript at 19. These phantom decisions have all the value of the unreadable columns on which Emperor Nero "post[ed] his edicts." Scalia, *Rule of Law*, at 1179; *see* McAlister, *Missing Decisions*, at 59 ("[T]he existence of missing decisions frustrates the reasons why precedential constraint is desirable: fairness, efficiency, and predictability.").

court have been put through the time and expense of a fruitless second appeal").

While the courts' overreliance on unpublished decisions has led to a large body of unpublished law on which no litigant can confidently rely, the overuse of those decisions also means that litigants cannot rely on the increasingly small proportion of precedential published opinions. As Judge Wald reported first-hand 25 years ago, unpublished decisions "allow[] for deviousness and abuse." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995). Judges might use unpublished opinions to "sweep troublesome issues under the rug" and "avoid a time-consuming public debate about what law controls." *Id.*; *see also Nat'l Classification Comm.*, 765 F.2d at 173 n.2 (separate statement of Wald, J.) (unpublished decisions "increase the risk of nonuniformity" and "allow difficult issues to be swept under the carpet"); *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (criticizing court of appeals for not publishing decision "to avoid creating binding law"). Even worse, unpublished decisions might contradict or sidestep a court's own binding precedent. *Knape v. Berryhill*, 734 Fed. Appx. 500, 504 (9th Cir. 2018) (Ikuta, J., dissenting) (noting that binding precedent established that "the ALJ must resolve whether Knape's testimony is credible in light of the medical evidence in the record," and faulting the majority after it "ignores this precedent, determines on its own that Knape's testimony is credible, and concludes that the record unequivocally supports a disability determination"); *see also DeLeon v. Abbott*, 687 Fed.

Appx. 340, 348 (5th Cir. 2017) (Elrod, J., dissenting) (faulting the majority for ignoring binding precedent); *Hague v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 560 Fed. Appx. 328, 341 (5th Cir. 2014) (Dennis, J., dissenting in part) (same); *United States v. Mann*, 552 Fed. Appx. 464, 471 (6th Cir. 2014) (Cook, J., dissenting) (same); *United States v. Gonzalez-Gomez*, No. 93-2663, 1994 WL 102134, at *5 (7th Cir. Mar. 28, 1994) (Ripple, J., dissenting) (same); Dragich, *Will the Federal Courts of Appeals Perish*, at 786. According to the dissent, that is precisely what happened here. Pet. App. 10–13 (Bybee, J., dissenting).

But if unpublished decisions can disregard published opinions, then the public cannot completely rely on past precedents to predict future results. This is contrary to all the values *stare decisis* is meant to serve. It obstructs "the evenhanded, predictable, and consistent development of legal principles," precludes "reliance on judicial decisions," and encourages "endless relitigation" of "settled precedents." *Kimble*, 576 U.S. at 455 (cleaned up). Thus, while unpublished decisions may be more efficient for appellate courts in the short term, in the long term they are not. And because unpublished decisions can result in the proliferation of different approaches to the same question and thus in delayed or repetitive resolution of the underlying issues, a mechanism adopted in the interests of efficiency can make judges' jobs harder, not easier.

This lack of predictability and stability is intolerable in the courts of appeals, which have the final word in the vast majority of cases. Wald, *Rhetoric*, at 1375–76; Dragich, *Will the Federal Courts*

of Appeals Perish, at 766–68. This Court is able to review only a tiny fraction of all the cases decided by the courts of appeals, so it must be selective in the cases it chooses. Scalia, *Rule of Law*, at 1178–79. Unpublished cases are especially unlikely to be reviewed, since they usually don't provide sufficient explanation to "fault [their] reasoning or detect [their] error[s]." McAlister, "*Downright Indifference*," at 585; *see* Dragich, *Will the Federal Courts of Appeals Perish*, at 785 ("[C]ases without published opinions are less likely to be reviewed by the Supreme Court."). That's not just the case with unpublished decisions that don't explain their reasoning, but also with those that do: because unpublished decisions are viewed as less significant and incapable of creating an actual conflict in the law, they are less likely to be reviewed either by an en banc court or by this Court. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1203 (1978) (explaining reasons why unpublished opinions evade review by courts and commentators alike).

That's particularly problematic because unpublished decisions may be more prone to error—or to less than careful language that can introduce confusion into even otherwise clear-cut law. Indeed, "it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law." *Wilson v. Layne*, 141 F.3d 111, 124 n.6 (4th Cir. 1998) (en banc) (Murnaghan, J., dissenting),

aff'd, 526 U.S. 603 (1999). And while unpublished decisions should never be issued where the case deals with a novel issue of law, they sometimes are. *See* 9th Cir. L.R. 36-2, Criteria for Publication (requiring that "[a] written, reasoned disposition **shall** be designated as an OPINION [and therefore published] if it . . . [e]stablishes, alters, modifies or clarifies a rule of federal law") (emphasis added).

In short, the excessive use of unpublished decisions creates a "secret" body of law that undermines key values of stability, certainty, predictability, consistency, and fidelity to authority. Dragich, *Will the Federal Courts of Appeals Perish*, at 802. That two-tiered system in turn creates incentives to issue unpublished decisions, kicking the proverbial can down the road. And, as set forth below, that disproportionately affects the least powerful and most disadvantaged litigants.

II. The misuse of unpublished decisions disproportionately harms vulnerable and underprivileged litigants.

The unpredictability caused by unpublished opinions burdens the entire legal system. But it does not burden all litigants equally. Its harms fall disproportionately on the most vulnerable litigants: immigrants, prisoners, and other indigent parties who can't afford sophisticated counsel. *See generally* McAlister, "*Downright Indifference*." This creates "a two-tier system of appellate justice, which benefits the haves at the sake of the have-nots." McAlister, *Missing Decisions*, at 61.

The first disparity is one of resources. As explained above, effective advocacy requires litigants

and their lawyers to locate and pore over not only published opinions, but also a court's unpublished decisions, some of which can only be accessed at the litigants' expense, and others of which cannot be accessed at all. Indigent litigants in particular lack the resources to access most unpublished decisions, which are stored in expensive commercial databases, Wald, *Problem with the Courts*, at 783 n.41, or "lock[ed] . . . behind PACER's paywall," McAlister, *Missing Decisions*, at 23. Others are not available at all.[7] As a result, the vast majority of appellate courts' decisions are unavailable to an unrepresented litigant.

The second disparity is one of judicial attention. Federal courts of appeals overwhelmingly use unpublished decisions to reject appeals from pro se litigants. *See* McAlister, "*Downright Indifference*," at 554–61. Indeed, the rise of unpublished decisions can be traced to "judicial concern about significantly increased appeals in both civil rights and pro se prisoner cases." *Id.* at 547–48 (internal quotation marks omitted). Pro se litigants too often receive "second-class treatment" through "lightly reasoned unpublished decisions." *Id.* at 538. Meanwhile, the "elite"—whose "'important' cases [are] brought by 'serious counsel'"—receive "first-tier justice" rendered in "reasoned, published decisions." *Id.* at 547 (quoting William M. Richman & William L. Reynolds, Injustice

[7] The problem is perhaps most acute for immigrants. A significant percentage of unpublished immigration decisions are not available through commercial databases. Michael Kagan, Rebecca Gill, & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 Geo. L.J. 683, 698–99 (2018).

on Appeal: The United States Courts of Appeals in Crisis 119 (2013)).

This two-tier system of justice threatens the entire enterprise's legitimacy. *Id.* at 541, 563–66. As Justice Scalia explained, "if the system of justice is to be respected," it must create at least "the appearance of equal treatment." Scalia, *Rule of Law*, at 1178. But when courts habitually rebuff pro se litigants without explaining their decisions, litigants and the public lose confidence that courts "are neutral and unbiased and make their decisions using objective indicators." McAlister, "*Downright Indifference*," at 564 (quoting Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 298 (2003)); *see* Wald, *Problem with the Courts*, at 783 n.41 ("[U]npublished opinions . . . limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts."). "[T]hey then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives." McAlister, "*Downright Indifference*," at 566 (quoting Tyler, Why People Obey the Law 108).

III. This Court should impose reasonable limits on the issuance of unpublished opinions.

Because individual unpublished decisions are often "unreviewable by the Supreme Court," McAlister, "*Downright Indifference*," at 585, the most effective way for this Court to prevent abuse of the nonpublication practice is by imposing two common sense limits on the practice itself based on the substantial due process, equal protection, and Article III concerns it raises. The Court may impose those

limits to remedy those constitutional flaws, or simply as an exercise of its supervisory powers. Indeed, Congress has endowed the Court with the power to do just that. 28 U.S.C. § 2072(a) (providing that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure" for the "courts of appeals"). And the Court has in the past policed lower courts' compliance with their procedural rules. *See Calderon v. Thompson*, 523 U.S. 538, 551–52 (1998) (faulting the Ninth Circuit for abusing its discretion in recalling its mandate outside the prescribed time).

First, courts of appeals should only issue unpublished decisions in appeals that are genuinely, no-doubt-about-it resolved by binding precedent. Put another way, unpublished decisions, even in pro se cases, should be limited to appeals "so cut-and-dried that they genuinely do not need more than a few paragraphs explanation." Wald, *Problem with the Courts*, at 783. Second, courts should limit the use of unpublished decisions to cases where the court is unanimous; if a judge dissents, the decision should be published. *See id.* at 782 (proposing these restrictions); *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993) (criticizing court of appeals for not publishing divided "judgment that an Act of Congress was unconstitutional").

These two rules would go a long way toward restoring predictability to the federal appellate system, first, by ensuring that any proposition for which an unpublished decision could be cited also appears in a published opinion that can be cited instead, and second, by making it more likely for

judges to issue unpublished decisions only when they are in line with binding precedent and don't either address a novel question of law or depart from established answers to questions courts have already addressed. In all other cases, appellate courts should explain their decisions in published opinions, which "contain reasoned explanations . . . to lend them legitimacy, permit public evaluation, and impose a discipline on judges." Wald, *Problem with the Courts*, at 768.

Even if this Court is unwilling to consider the broader principles, it should at the very least police appellate courts' compliance with their own rules governing unpublished decisions. Here, for example, the decision below was not unanimous, and it is far from clear that the Ninth Circuit panel faithfully applied the court's precedent. Indeed, the decision not to publish has the effect of "avoid[ing] calling attention to the fact that its decision conflict[ed] with the holding of a prior panel"—and minimizing the importance of resolving that conflict on further review. Dragich, *Will the Federal Courts of Appeals Perish*, at 786. Given those flaws, both of which would be cured by a decision along the lines proposed in this brief, the Court should grant certiorari.

CONCLUSION

The Court should grant the petition for certiorari with respect to the second Question Presented.

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