No. _____

In The
Supreme Court of the United States

Montanans for Community Development,
Petitioner

v.

Jeffrey A. Mangan et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the First Amendment allows government to impose political-committee ("PAC") status, with its entity-based burdens, only on "organizations ... under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*," *id.* at 79 (emphasis added), to prevent "burdens ... certain to deter ... independent political speech," *id.* at 75 (citation omitted). This speech-chilling problem arose because "'political committee' [wa]s defined only in terms of the amount of annual 'contributions' and 'expenditures'" by the entity as Montana does, *id.* at 79, imposing entity-based burdens, not just activity-based reports.

This Court has repeatedly reaffirmed that test and recently declared entity-based burdens triggered by PAC-status "expensive," "extensive," and "onerous." *Citizens United v. FEC*, 558 U.S. 310, 335-39 (2010).

Montana imposes PAC-status without the major-purpose test, based only on a group's expenditure of just $251 or more on political speech. In a nonprecedential opinion, the Ninth Circuit rejected the major-purpose test in state elections, creating a 5-4 Circuit split on the constitutional requirement for the test. And the court below denied a motion for publication, which would have made its opinion precedential, creating private law for Petitioner but not others.

Petitioner presents two issues for review:

1. Whether states are barred by the First Amendment of the U.S. Constitution from imposing PAC-status, with its resulting entity-based burdens, on groups lacking *Buckley*'s "major purpose."

2. Whether declaring an opinion "not precedent"

violates Article III of the U.S. Constitution by giving courts power beyond "judicial," or undermines judicial integrity warranting the exercise of this Court's supervisory power.

Parties to the Proceeding Below

Plaintiff-appellant below was Montanans for Community Development ("MCD").

Defendants-appellees below were: (**1**) Jeffrey A. Mangan, in his official capacity as the Montana Commissioner of Political Practices ("COPP"); (**2**) Timothy Fox, in his official capacity as Montana Attorney General, and (**3**) Leo Gallagher, in his official capacity as Lewis and Clark County Attorney (collectively "Montana").

Corporate Disclosure

MCD is not incorporated.

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MCD requests review of

- *MCD v. Mangan*, No. 16-35997, 2018 U.S. App. LEXIS 13310 (9th Cir. May 22, 2018) (granting summary judgment to Respondents) (App. 1a), and
- *MCD v. Mangan*, No. 16-35997, 2018 U.S. App. LEXIS 17959 (9th Cir. June 29, 2018) (denying request to publish opinion, making it nonprecedential) (App. 74a).

Opinions Below

The district-court's preliminary-injunction opinion is at 54 F. Supp. 3d 1153. (App. 56a.) Its summary-judgment opinion is at 216 F. Supp. 3d 1128. (App. 9a.) The opinion below is at 2018 U.S. App. LEXIS 13310. (App. 1a.) The order denying en-banc rehearing and publication of the opinion below is at 2018 U.S. App. LEXIS 17959. (App. 74a.)

Jurisdiction

The opinion and judgment below were filed May 22, 2018. En-banc rehearing and publication were denied June 29, 2018. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutions, Statutes & Regulations

Appended are the U.S. Constitution's First Amendment and Article III, § 1, cl. 1 (App. 76a), along with relevant statutes and regulations (App. 76-102a).

Statement of the Case

MCD is an association of three Montana individuals. Consistent with its name—Montanans for *Community Development*—MCD's core issue is "promot[ing] and encourag[ing] policies that create jobs and grow

local economies throughout Montana," which it does by "grassroots advocacy and issue-oriented education campaigns" and political speech regarding Montana state candidates.

MCD wants to engage in political speech[1] without Montana-imposed PAC-status[2] and resulting entity-based burdens,[3] since its major purpose is not the nomination or election of candidates,[4] as required by

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[1] For purposes of this Petition, MCD waives its challenges to the Montana statutes defining political speech, made below, and acknowledges that MCD intended to engage in regulable political speech as defined by Montana by making "expenditures" for "electioneering communications." "Electioneering communications" are public communications within 60 days of a state election mentioning a state candidate without expressly advocating the election or defeat of a candidate. Mont. Code Ann. ("MCA") 13-1-101 (16)(a). (App. 92a.) If a communication expressly advocates the election or defeat of a state candidate, it is considered an "independent expenditure." MCA 13-1-101(25). (App. 93a.) Both are considered "expenditures," which trigger PAC-status if more than $250 is spent for them. MCA 13-1-101(18)(a)(ii). (App. 93a.)

[2] "PAC" ("political action committee") is widely used for "political committee." *See FEC Campaign Guide: Nonconnected Committees* 1 (2008), https://www.fec.gov/help-candidates-and-committees/guides/?tab=political-action-committees; COPP, *Calendars*, https://politicalpractices.mt.gov/calendars.

[3] Montana PACs "include ballot issue ..., incidental ..., independent ..., and political party committees." MCA 13-1-101(31)(b). (App. 94a.) MCD's political ads would make it an "incidental committee."

[4] The major-purpose test looks to an entity's central organizational purpose and its spending, whether expendi-

Buckley, 424 U.S. at 79.[5] MCD, however, is an incidental committee under Montana law (App. 93a), since incidental-committee PAC-status does not require an entity to meet the major-purpose test.

In September 2014, MCD wanted to send two mailers promoting Montana energy development and highlighting environmentalists' efforts to restrict development. (App. 103a (mailers).) Each mailer mentioned a state candidate and qualified as a Montana "expenditure,"[6] thereby triggering incidental-committee PAC-status and resulting entity-based burdens. MCD in-

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tures on political speech constitute a majority of its annual spending, to determine an organization's major purpose. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n.6, 262 (1986) ("*MCFL*").

[5] Of course, MCD, as a non-PAC group, could constitutionally be required to make activity-based, one-time, event-driven reports of its political speech, as required by federal campaign-finance law. *See* 52 U.S.C. 30104(c), (f), and (g). *See Buckley*, 424 U.S. at 74-84 (upholding independent-expenditure reports); *Citizens United*, 558 U.S. at 366-71 (upholding electioneering-communication reports). But Montana doesn't require these activity-based reports, instead imposing PAC-status and entity-based burdens on groups paying over $250 for political speech.

[6] In its 2014 order denying a preliminary injunction, the district court held that the mailers met Montana's "expenditure" definition because they were the functional equivalent of express advocacy. (App 63a, 68a.) In its 2016 summary-judgment order, the court held that the mailers were "expenditures" because they "at least" met the definition of an "electioneering communication" adopted in 2015. (App. 31a.) Either way, MCD acknowledges for present purposes that the mailers were political speech regulable as "expenditures" under Montana law and triggered PAC-status.

tends to spend over $250 for substantially similar future mailers but is chilled by Montana's statute imposing PAC-status and entity-based burdens and fear of enforcement for noncompliance.

On September 3, 2014, MCD raised the major-purpose test in the initial complaint. On October 22, 2014, the district court denied MCD's preliminary-injunction motion. (App. 56a.) On October 31, 2016, it denied MCD's summary-judgment motion, granting summary judgment to Montana. (App. 9a.) On May 22, 2018, the Ninth Circuit affirmed the district court in an unpublished, nonprecedential opinion. (App. 1a.) On June 29, 2018, the Ninth Circuit denied motions for rehearing en banc and to publish the opinion below, which would have made the opinion precedential if granted. (App. 74a.)

The district court had jurisdiction. 28 U.S.C. 1331 and 1343(a). The appellate court had jurisdiction. 28 U.S.C. 1291.

Reasons to Grant the Petition

The First Amendment protects political speech from being chilled by the imposition of PAC-status and entity-based (administrative and organizational) burdens by limiting these to only "organizations ... under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Otherwise PAC "'burdens ... deter ... speech,'" *id.* at 75 (quoting appellants), including by issue-advocacy groups such as MCD, *id.* at 79. But the court below upheld Montana's imposition of PAC-status and associated entity-based burdens on organizations without the required major purpose, which conflicts with decisions of this Court and creates a 5-4 Circuit split on whether the major-purpose test is

constitutionally required for state campaign-finance law, as it is for federal law.

This issue is of exceptional importance. This Court in *Citizens United* held that corporations cannot constitutionally be prohibited from engaging in political speech, condemned requiring that speech to be made by a PAC, and upheld an activity-based, one-time, event-driven report for political speech in federal elections. *Citizens United*, 558 U.S. at 366-71. This Court viewed promoting political speech by "every group" as "vitally important":

> "The people determine through their votes the destiny of the nation. It is therefore important—*vitally important*—that *all* channels of communications be open to them during every election, that no point of view be *restrained* or barred, and that the people have access to the views of *every group* in the community."

Id. at 344 (citation omitted) (emphasis added). But four Circuits refuse to apply these constitutional requirements in state elections, thereby approving onerous, entity-based burdens on groups spending as little as $251 on political speech, seriously chilling their speech.

Furthermore, the court below declared its opinion as "not precedent," creating private law for MCD, rather than public law applicable to all, and also creating a Circuit split. These are important questions not settled by this Court that merit review.

I.

This Case Presents the Important Question of Whether PAC-Status and Onerous, Entity-Based Burdens May Be Imposed Absent *Buckley*'s "Major Purpose" in State Elections.

This case presents the important question of whether this Court's major-purpose test, which controls *federal* PAC-status, controls imposition of PAC-status in *state* elections, on which Circuits split 5-4.

A. PAC-Status and Resulting Entity-Based Burdens Require *Buckley*'s "Major Purpose."

Imposing PAC-status and associated entity-based administrative and organizational burdens requires *Buckley*'s "major purpose." 424 U.S. at 79.

Buckley involved "constitutional challenges to ... provisions of the Federal Election Campaign Act of 1971 ["FECA"]," 424 U.S. at 6,[7] including the definition of "political committee," which triggered entity-based burdens, and other provisions that required the filing of certain activity-based, one-time, event-driven reports on political speech. These provisions were challenged for both vagueness and overbreadth.

FECA, reviewed in *Buckley*, regulated political speech in two ways relevant here by:

- PAC-status, which triggered *entity*-based (administrative and organizational) burdens, and
- *activity*-based, one-time, event-driven reports.

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[7] The FECA statutory provisions reviewed in *Buckley* have now been reclassified at 52 U.S.C. 30101 et seq. *See* http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html (reclassification table).

PAC-status imposes *entity*-based administrative and organizational requirements (selecting a government-approved name, appointing a treasurer with many required duties and personal liability, establishing a PAC account, and PAC registration with the Federal Election Commission ("FEC")); periodic reporting even when there is no political activity; enhanced reporting by requiring all spending by and all donations to the entity to be reported on the periodic reports, not just those associated with political speech; and termination requirements.

Activity-based reports are one-time, event-driven reports of the expenditures made and contributions received for a specific political communication, such as for an "independent expenditure," upheld in *Buckley,* 424 U.S. at 74-84, and for an "electioneering communication," upheld in *Citizens United*, 558 U.S. at 366-71.[8]

PAC-status and associated entity-based requirements—as opposed to activity-based, one-time, event-driven reports—pose a substantially increased potential for chilling a group's speech:

> These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formal-

[8] *See also* FEC, *Instructions for Preparing FEC Form 5* (independent-expenditure report); FEC, *Instructions for Preparing FEC Form 9* (electioneering-communication report); *both available at* https://www.fec.gov/help-candidates-and-committees/forms/.

> ized organization than many small groups could manage.

MCFL, 479 U.S. at 254-55 (four-Justice plurality) (footnote omitted).[9] Notably, the burdens described as chilling speech are the *administrative, organizational* and *reporting* burdens, not the *restrictions on fundraising*.[10]

And of these same burdens, the plurality said: "Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, ... it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id.* at 255 (footnote omitted).[11] Thus, entity-based administrative and organizational burdens chill political speech to a much greater extent than activity-based, one-time, event-driven reports.

The major-purpose test for PAC-status was this Court's solutions for two problems the Court had earlier identified in *Thomas v. Collins*, 323 U.S. 516

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[9] Justice O'Connor agreed with the plurality that "the significant burden on MCFL ... comes ... from the additional organizational restraints imposed upon it" because "engaging in campaign speech requires MCFL to assume a more formalized organizational form." *Id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment).

[10] FECA restricts PAC fundraising by imposing contribution limits, 52 U.S.C. 30116(a), and source limits, 52 U.S.C. 30118(a), and in some cases, restricting PAC fundraising to "members," 52 U.S.C. 30118 (b)(4)(C).

[11] "The state interest in disclosure ... can be met *in a manner less restrictive* than imposing the full panoply of regulations that accompany status as a political committee," by requiring activity-based, one-time, event-driven, political-speech reports. *Id.* at 262 (court) (emphasis added).

(1945). *Buckley*, 424 U.S. at 42-43, 75.

The first *Thomas* problem was that burdens on speech can chill speech. As *Buckley* noted, appellants raised the "very real, practical burdens ... certain to deter individuals from making expenditures for their independent political speech analogous to those held to be impermissible in *Thomas* ...." *Buckley*, 424 U.S. at 75 (citation omitted).[12] In the present case, MCD is chilled from doing political speech because it does not want to bear the entity-based burdens Montana imposes by PAC-status. By restricting PAC-status and its associated entity-based burdens to groups with *Buckley*'s "major purpose," *Buckley* protected the free speech and associational rights of groups from being chilled. *Id.* at 79-81.

The second *Thomas* problem was speech chilled by vague, overbroad speech definitions that sweep in issue advocacy and "'blanket[] with uncertainty whatever may be said.... [C]ompel[ling] the speaker to hedge and trim.'" 424 U.S. at 42-43 (citation omitted). A bright-line definition was required by the First Amendment to prevent vagueness and chill, *id.* at 41 n.48,[13] and protect issue advocacy:

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[12] *Cf. Wisconsin Right to Life v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (It's a "serious chill on public debate" and "a mistake to read *Citizens United* as giving the government a green light to impose political-committee status on every ... group that makes a communication about a political issue that also refers to a candidate.").

[13] Both due process and the First Amendment bar vagueness, but the latter requires greater precision to prevent chill: "'Because First Amendment freedoms need breathing space ..., government may regulate in this area only with narrow specificity.'" *Id.* (citation omitted).

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. In its major-purpose analysis, *Buckley* avoided this *Thomas* problem by removing issue-advocacy groups lacking *Buckley*'s "major purpose" from the possibility of PAC-status:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion.... To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.... They are, by definition, campaign related.

Id. at 79 (footnotes omitted). Since *Buckley*, federal PAC-status and associated entity-based burdens may only be imposed on groups that *both* meet a contribution or expenditure trigger, as Montana requires, *and* have *Buckley*'s "major purpose," which Montana does not recognize.

Citizens United reaffirmed that PAC-status-triggered, entity-based burdens are "onerous," 558 U.S. at

335, 339, *even apart from any restrictions on fundraising,* based on entity-based administrative and organizational requirements, such as PAC registration, appointing a treasurer, keeping detailed records:

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days....
>
> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur: [quoting at length from *MCFL* as to detail of reporting requirements].

Id. at 897 (citations omitted); *see also FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) (Roberts, C.J., joined by Alito, J.) ("PACs impose well-documented and onerous burdens, particularly on small nonprofits."(citing *MCFL*, 479 U.S. at 253-55)).

Furthermore, because a group has *Buckley*'s "major purpose," i.e., it is "under the control of a candidate or [its] major purpose ... is the nomination or election of a candidate," 424 U.S. at 79, PAC-status burdens survive scrutiny:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley,* 424 U.S., at 79. As

> such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

MCFL, 479 U.S. at 262 (court).

The Ninth Circuit, however, summarily rejected MCD's argument that Montana's PAC definition was unconstitutional for failure to incorporate the major-purpose test because it had been "rejected multiple times in this circuit." (App. 6a (citing *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1009-10 (9th Cir. 2010) ("*HLW*"), and *Yamada v. Snipes*, 786 F.3d 1182, 1198-99 (9th Cir. 2015)).) In *HLW*, the Ninth Circuit held that *Buckley* "does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee." 624 F.3d at 1010.

And some Circuits agreeing with the Ninth Circuit have gone so far as to hold that *Buckley's* major-purpose test was simply a statutory construction of a federal law, not binding on the states. *See Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014) ("When ... *Buckley* ... construed the relevant federal statute to reach only groups having 'the major purpose' of electing a candidate, it drew a statutory line. It was not holding that the Constitution forbade any regulations from going further." (citation omitted)); *National Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) ("so called 'major purpose' test ... is ... artifact of the Court's construction of a federal statute"); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487

(7th Cir. 2012) (major-purpose test was "creature of statutory interpretation, not constitutional command").

But those arguing that *states* may impose PAC-status and associated entity-based burdens without the major-purpose test must explain why the *same* constitutional problems that required a saving construction of the federal definition don't occur with the *same* state-law language. And the argument that the First Amendment doesn't apply in Montana, like it does everywhere else, has already been summarily rejected by this Court. *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012) (First Amendment applies in Montana). So the major-purpose test is required here.

B. The Decision Below Upholding Montana's Rejection of the Major-Purpose Test Conflicts with Decisions of this Court.

The decision below conflicts with this Court's requirement of the major-purpose test for PAC-status and associated entity-based burdens. Rule 10(c).

Montana imposes "incidental committee" PAC-status for spending $251 on political speech:

> (23) (a) "Incidental committee" means a political committee that is *not specifically organized or operating for the primary purpose of supporting or opposing candidates* or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.

MCA 131-1-101(23)(a) (emphasis added). So incidental committees, by definition, do *not* have *Buckley*'s major-purpose test. Yet they have PAC-status and associated entity-based burdens.

Though less is required of incidental committees than independent committees, both have substantial, entity-based, requirements. Incidental-committee disclosure is not activity-based, one-time, event-driven reporting, but rather is entity-based disclosure[14] as demonstrated by the following requirements.

First, "[p]olitical committees must name and identify themselves in a way that specifically identifies their economic, or special interest, or employer." *Manual* 5. Whether "Montanans for Community Development" suffices is unknown and subject to COPP rejection. For example, COPP says "Democratic Committee, Great Falls" and "Cascade County Democratic Committee" wouldn't suffice. *Manual* 23. "A statement of organization will be rejected if the name of the committee does not conform to the law. Until another statement is filed with a name that is acceptable, a committee is enjoined from making any expenditures ...." *Id.*

Second, "[e]ach political committee must appoint a committee treasurer," *Manual* 8-10, who:

- "must be registered to vote in Montana";
- may do nothing until certified through PAC registration;
- "must keep detailed accounts that must be current";
- must make deposits within specified time limits;
- must "prepare a statement of amounts received from each contributor";
- must "keep a detailed accounting of all contributors"; and
- must "preserve committee accounts and reports for

[14] *See* COPP, *Accounting and Reporting Manual for Political Committees*, *available at* https://politicalpractices.mt.gov/education ("*Manual*") (collecting statutory and regulatory requirements).

a minimum of four years."

Third, "[e]ach political committee must designate one primary depository," "completely separate from any personal accounts." *Manual* 8-9. Banks will want an employer identification number to open an account, which must first be obtained from the IRS.

Fourth, "[i]mmediately after designating ... a ... depository and ... appointing a treasurer, a political committee must ... file a Statement of Organization (Form C-2[15]) ...." *Manual* 9.

Fifth, incidental committees must file detailed periodic reports (Form C-4[16]), "even though no contributions or expenditures may have been received or made during the period." MCA 13-37-228. (App. 95a.)[17]

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[15] *Available at* https://politicalpractices.mt.gov/forms.

[16] *Available at* https://politicalpractices.mt.gov/forms.

[17] *All* incidental committees *at least* report "(a) on the 90th, 35th, and 12th days preceding the date of an election ...," "(b) within 2 business days of receiving a contribution ... of $500 or more if received between the 17th day before an election and the day of the election[,]" "(c) within 2 business days of making an expenditure of $500 or more for an electioneering communication if the expenditure is made between the 17th day before the election and the day of the election[,]" (d) not more than 20 days after the date of the election in which it participated," and "(e) on a date to be prescribed by the commissioner for a closing report at the close of each calendar year." MCA 13-37-226(5). (App. 95a.)

But for political committees "that receive a contribution or make an expenditure supporting or opposing a candidate for a *statewide* office" even more onerous reporting is triggered, with reports required quarterly, then monthly in an election year, then the 15th day before an election and within 2 days of a $200 contribution made within 20 days

Sixth, incidental committees must report *entity-based* information, not just information directly related to electioneering-communication or independent-expenditure *activity*. The full "[d]isclosure requirements for incidental committees" are set out at MCA 13-37-232. (App. 97a.)[18] Incidental committees must report: (a) details about each "expenditure"[19] and recipient; (b) details about "each person to whom an expenditure for personal services, salaries, and reimbursed expenses has been made during the reporting period" and about the "expenditure" and "the total amount of expenditures made to each person"; (c) total expenditures for the period; (d) details of any "transfers" to a "political

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of an election, and then twice a year the following year until the PAC is closed. MCA 13-37-226(1) (emphasis added). (App. 94a.)

[18] "[I]ncidental committees must disclose ... information concerning contributions to the committee that are designated ... for a specified candidate ... or ... in response to an appeal ... to support incidental committee election activity ...." MCA 13-37-232(1). If an incidental committee doesn't receive such contributions, it "report[s] only its expenditures." MCA 13-37-232(4).

[19] "[E]xpenditure" includes independent expenditures and electioneering communications, but for *political committees* it includes "anything of value ... made by a candidate or political committee to support or oppose a candidate or a ballot issue," MCA 13-1-101(18)(a), i.e., "just about anything a political committee expends in support of or in opposition to a candidate," *Manual* 17. *Cf. McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) ("actions taken by political parties are presumed to be in connection with election campaigns" because *Buckley* restricted political-committee status by the major-purpose test (citing *Buckley*, 424 U.S. at 79)).

committee or candidate"; (e) details of any loan made and recipient; (f) details of debts or obligations; and (g) "other information ... required by the commissioner." MCA 13-37-232(2). But federal law requires only disclosure of "direct costs" of producing or airing one or more electioneering communications," with direct costs defined to reach only charges by the vendor for preparing the communication and actual costs to air it. 11 C.F.R. 104.20(a)(1)-(2). Montana's requirements are not so limited and are entity-based, e.g., requiring reporting of all broadly defined "expenditures"—not just "direct costs"—including reporting expenditures for "personal services, salaries, and reimbursed expenses" for entity personnel. Incidental committees also must report details of "expenditures to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of an incidental committee." MCA 13-37-232(3). This reporting is not limited to services related to an electioneering communication or an independent expenditure, let alone "direct costs," so this is also entity-based, not activity-based, disclosure.

Seventh, after election-year activity, incidental committees must file a "closing report," ARM 44.11.306 (App. 100a), precluding further such speech until PAC-status is renewed. This is an entity-based burden not involved in activity-based, one-time, event-driven reporting.

Because Montana imposes entity-based requirements on incidental committees, as illustrated by the foregoing administrative and organizational requirements, this Court requires the application of *Buckley*'s major-purpose test.[20]

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[20] *Cf. Barland*, 751F.3d at 839-40 (similar list of entity-based burdens means "Wisconsin law suffers from the same

As a result, the decision below conflicts in two ways. First, the Ninth Circuit dismisses this Court's major-purpose test by moving to a higher level of generality—mere "disclosure":

> [T]he argument that disclosure laws are overbroad unless they apply only to groups whose major or primary purpose is political advocacy has been rejected multiple times in this circuit.

(App. 6a (citing *HLW*, 624 F.3d at 1009-10; *Yamada*, 786 F.3d at 1198-99).) Of course, activity-based, one-time, event-driven reports may be imposed for making a political communication, which provides "disclosure" of the speech. *See Buckley*, 424 U.S. at 74-84; *Citizens United*, 558 U.S. at 366-71. But the issue here is PAC-status and resulting entity-based administrative and organizational burdens going far beyond the disclosure of the political speech involved. So the decision below erred by saying that mere "disclosure" is at issue.

Second, the court below ignored this Court's holdings in *MCFL* and *Citizens United* that PAC-status and associated entity-based burdens are onerous and especially difficult for small groups, thereby chilling their issue advocacy. The Ninth Circuit's decision reduced the onerous, entity-based burdens to merely "filling out a short form and designating a treasurer and bank account" and declared this reductionist summary "not overly burdensome." (App. 6a (citing *HLW*, 624 F.3d at 1012-14).) But the First Amendment requires careful interest-tailoring scrutiny, not an undue-burden test, and—though the court below cited an informational

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kind of overbreadth as the federal statute at the time of *Buckley*, so the major-purpose limitation has the same significance here as it did there").

interest (App. 6a)—this Court already expressly held that PAC-status and resulting entity-based burdens are not necessary to serve the government's informational interest because activity-based, one-time, event-driven reports of political speech suffice. *MCFL*, 479 U.S. at 262 (court).

In sum, the decision below conflicts with this Court's decisions establishing the major-purpose test as a constitutional requirement for imposing PAC-status and associated entity-based burdens.

C. Circuits Are Split 5-4 on this Issue.

The Circuit Courts of Appeal are split 5-4 on whether this Court's major-purpose test applies to state imposition of PAC-status and associated entity-based burdens. This Court should grant review to resolve this circuit split. Rule 10(a).

The holding of the Ninth Circuit that "reject[s]" the constitutional requirement of the major-purpose test (App. 6a) exacerbates a clear and substantial circuit split over whether this Court's major-purpose test, which controls imposing *federal* PAC-status and associated entity-based burdens, also controls similar *state* laws. On one side, five Circuits *recognize* the major-purpose test as constitutionally required for state PAC-status laws—the Fourth, Seventh (2014 case), Eighth, Tenth, and Eleventh Circuits.[21] On the other side are

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[21] *See Leake*, 525 F.3d at 287 (4th Cir.); *Barland*, 751 F.3d at 839 (7th Cir.) (major-purpose test "continues in force and effect as an important check against regulatory overreach") (distinguishing *Madigan*, 697 F.3d 464, based on "political committee" definition); *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013); *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 872-77 (8th Cir. 2012) (en banc) ("*MCCL*"); *N.M. Youth Orga-*

four Circuits—the First, Second, Seventh (2012 case), and Ninth (present case)—holding that the test is not constitutionally required for state PAC-status laws.[22] Circuit courts have noted this split.[23]

The facts here and the Tenth Circuit's *NMYO* case are similar and illustrate the circuit-split in analysis. The Ninth Circuit upheld imposing PAC-status and associated entity-based burdens on MCD for doing a few incidental political communications. In *NMYO*, a nonprofit advocacy group (to educate youth on "healthcare, clean elections, the economy, and the environment") made five mailings regarding elected public officials' votes on NMYO's issues. 611 F.3d at 671-72. NMYO spent $6,000 of a million-dollar annual budget on the mailings, which triggered PAC-status under New Mexico law. The Tenth Circuit held that these mailings, while political communications under New Mexico law, could not trigger PAC-status, given the major-purpose test. *Id.* at 676-79. *NMYO* protected the

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nized v. Herrera, 611 F.3d 669, 677-78 (10th Cir. 2010) ("*NMYO*"); *Fla. Right to Life v. Lamar*, 238 F.3d 1288, 1289 (11th Cir. 2001) (*aff'g Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 U.S. Dist. LEXIS 16694 (M.D. Fla. 1999)).

[22] *See McKee*, 649 F.3d at 58-59 (1st Cir.); *Sorrell*, 758 F.3d at 135-36 (2d Cir.); *Madigan*, 697 F.3d at 487 (7th Cir.) ("not constitutional command").

[23] *See Tooker*, 717 F.3d at 591 ("The Courts of Appeals that have addressed the issue are split on whether state campaign-finance disclosure laws can impose PAC status or burdens on groups lacking *Buckley*'s major purpose."). *See also Sorrell*, 758 F.3d at 135-36 (noting split); *MCCL*, 692 F.3d at 872 (same); *Madigan*, 697 F.3d at 487 & n.230 (same); *Barland*, 751 F.3d at 839 n.23 (same).

issue-advocacy group from onerous entity-based requirements and penalties for failing to register as a PAC. *Id.* at 673.

But under the Ninth Circuit decision below, the NMYO story would have ended differently because of the court's rejection of the major-purpose test. NMYO would have been forced to register as a PAC and to suffer substantial, onerous, entity-based burdens for engaging in incidental political speech.

Though the major-purpose test is required by the First Amendment to protect small groups from having their speech chilled by entity-based burdens, *see, e.g.*, *MCFL*, 479 U.S. at 254-55 (plurality), the First Amendment also requires the test to prevent large entities from entity-based burdens for incidental speech. This is because the major-purpose test looks at the *nature of the entity* to see whether it is the *type* of entity for which entity-based burdens are properly tailored to a governmental interest in disclosure. *Buckley*, 424 U.S. at 79. If a multi-million-dollar entity spends substantial amounts on Montana political speech, but that is not its major purpose, then it is not the sort of entity that should be subject to entity-based burdens and, consequently, independent-expenditure and electioneering-communication reports satisfy the government's disclosure interest until such a time as the entity has *Buckley*'s "major purpose":

> [S]hould [the entity's] independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley,* 424 U.S., at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those

> groups whose primary objective is to influence political campaigns. In sum, there is *no need for the sake of disclosure* to treat [the entity] any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

MCFL, 479 U.S. at 262 (court) (emphasis added). This is especially appropriate after *Citizens United*, 558 U.S. 310, which held that the First Amendment requires that corporations (and unions) be able to make independent expenditures and electioneering communications *themselves*, without a PAC purportedly speaking for them (which notion this Court rejected, *id.* at 337). What *Citizens United* allowed should not be effectively reversed by state-imposed PAC-status and entity-based burdens forcing corporations (and unions) to either have the PAC that *Citizens United* rejected or become a PAC themselves.

Some Circuit courts say *Buckley*'s and *MCFL*'s major-purpose line "'yield[s] perverse results'" because small groups spending modest amounts might have *Buckley*'s "major purpose" while large groups spending substantial sums would not and so would avoid becoming PACs. *See, e.g.*, *Madigan*, 697 F.3d at 489 (citations omitted). But that ignores that disclosure could still be required by activity-based, one-time, event-driven reporting, so there is no circumvention concern. PAC-status and entity-based burdens are *not* required to satisfy a state's informational interest as this Court already decided in *MCFL*, 479 U.S. at 262 (court), in response to the FEC's similar argument.

Certiorari review should be granted by this Court to resolve this clear and substantial circuit split on this important issue. Rule 10(a).

II.
This Case Presents the Important Question of Whether Nonprecedential Decisions Violate Article III or Undermine Judicial Integrity, Requiring this Court to Exercise Its Supervisory Responsibility.

Ninth Circuit Rule 36-3(a) allows some of its decisions, including the decision below, to serve no precedential function: "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." Seven circuits have similar rules. *See* 3d Cir. I.O.P. R. 5.3; 5th Cir. R. 47.5.4; 6th Cir. R. 32.1(b); 7th Cir. R. 32.1(b); 8th Cir. R. 32.1(A); D.C. Cir. R. 36(e)(2); Fed. Cir. R. 32.1(b). One circuit establishes precedent by ruling type. *See* 2d Cir. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."). Three circuits limit the precedential value of unpublished cases to persuasive only. *See* 1st Cir. R. 32.1.0(a); 10th Cir. R. 32.1(A); 11th Cir. R. 36-2. And the Fourth Circuit treats all unpublished decisions as nonprecedential, although citations to unpublished pre-January 1, 2007, decisions are permitted where a party believes the decision is precedential and no published opinion would serve as well. 4th Cir. R. 32.1; *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 433 n.6 (4th Cir. 2012).

A. Circuits Are Split[24] on Whether They Can Constitutionally Choose Precedent.

The practice of choosing precedent, which began in 1964, was first questioned in this Court by Justice Stevens in his dissent in *County of Los Angeles v. Kling*, 474 U.S. 936 (1985). Justice Stevens criticized not only the Ninth Circuit's decision not to publish a precedential decision but also the Ninth Circuit's rule itself: "the decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong." *Id.* at 938.[25] Since then, Justice Thomas has also criticized the practice. *See Plumley v. Austin,* 135 S. Ct. 828, 831 (2015) (Thomas, J. dissenting) ("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."). And a circuit split emerged.

In 2000, the Eighth Circuit held the practice of Article III courts issuing nonprecedential decisions unconstitutional in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot,* 235 F.3d 1054 (8th Cir. 2000) (en banc). Judge Arnold, writing for the three-judge panel, reasoned that every judicial decision declares and interprets a general principle of law, is authoritative, and is applicable to subsequent cases with similarly-situated parties. *Id.* at 899-900 (citing *James B.*

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[24] The Ninth Circuit, aware that the Eighth Circuit had vacated its decision, nonetheless considered it to have persuasive force, *Hart v. v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001), so a Circuit split resulted from its decision.

[25] MCD objects to the nonprecedential nature of the decision below, not whether it is "published" in some book, which seems quaint, given recent technological developments.

Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991)). These principles form the doctrine of precedent, a historic method of judicial decision-making and a bulwark of judicial independence well-understood at the founding of this Nation. *Id.* at 900. Precedent derives from the nature of judicial power and serves as a limitation on the judicial power of Article III courts: the judge's duty to follow precedent means that judicial power is limited by it. *Id.* at 900-01. This keeps the law stable and separates judicial power from legislative power. *Id.* (citing 1 Blackstone, *Commentaries* *258-59).[26] This does not mean that every decision must be published in a book. *Id.* at 903. But it does mean that courts cannot "create an underground body of law good for one place and time only." *Id.* at 904. "In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds." *Id.* at 905.

The Eighth Circuit's decision drew national attention, was "cited by at least thirty-five courts in any number of broad contexts" by October 2001,[27] and

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[26] *See also* Richard S. Arnold, *Essay: Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 226 (1999) ("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'? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions?").

[27] William J. Miller, Note, *Chipping Away at the Dam:* Anastasoff v. United States *and the Future of Unpublished Opinions in the United States Courts of Appeals and Be-*

sparked a national debate.[28]

The Ninth Circuit waded into that debate in *Hart*, 266 F.3d 1155, when it rejected the Eighth Circuit's reasoning because the legal system has "evolved considerably since the early days of common law." It held that its rule only

> allow[ed] panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same thing as turning our back on all precedents, or on the concept of precedent altogether.

Id. at 1160. Article III's "Judicial Power" clause simply requires federal courts to "rule on cases or controversies assigned to them by Congress, comply with due process ... and generally comply with the specific constitutional commands applicable to judicial proceedings." *Id.* at 1161.

This circuit split is an important one because the effect nonprecedential decisions have on appellate review and equal justice under the law raise significant constitutional questions. This Court should grant review to consider and resolve this.

B. Choosing Precedent Undermines Appellate Review.

When a precedential decision issues:

> the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Su-

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yond, 50 Drake L. Rev. 181, 198 (2001) (providing citations to each of those cases).

[28] Miller, *supra* note 27, at 202 (discussing the debate that ensued).

> preme Court ... a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule ....

Id. at 1171. But the same cannot be said of nonprecedential decisions. A panel can attempt to avoid en-banc or Supreme Court review by issuing a summary, nonprecedential decision which does not lend itself to close scrutiny, *see Kling*, 474 U.S. at 938 (Stevens, J., dissenting), and minimizes its legal importance, as the court below attempted to do here.

Precedential opinions require due consideration of the relevant legal and policy considerations, with careful recitation of all the relevant facts, and explanation why a court is following a rule or rejecting another—an exacting and time-consuming task. *Id.* at 1176.[29] While a case decided without a precedential opinion may "not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented," *id.* at 1177, there is no way to know that is the case.[30] Nonprecedential decisions are "not written in a

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[29] *See also* Arnold, *supra* note 26, at 222-223 ("In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding is itself a conclusion of law with precedential significance.").

[30] Arnold, *supra* note 26, at 223 ("If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one

way that will be fully intelligible to those not familiar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases." *Id.* at 1178. Failures of a panel to properly follow the law may not be readily discernable.

And so, treating all decisions as precedent ensures judicial accountability, transparency, and restraint. Judges are deterred from ruling based on their own preferences or biases against parties and from implementing their own public-policy agendas. They are prevented from giving short shrift in their analysis while avoiding subsequent judicial scrutiny because they are required to faithfully apply the law.

The adverse effect to judicial review by choosing a nonprecedential decision is on full display in the decision below. As explained above, the decision below summarily rejected the major-purpose claim in one short conclusory paragraph: "the argument that disclosure laws are overbroad unless they apply only to groups whose major or primary purpose is political advocacy has been rejected multiple times in this circuit." (App. 6a (citations omitted).)

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will ever be the wiser. (I don't say that judges are actually doing this—only that the temptation exists.) Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. Again, I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.")

While it is true that the Ninth Circuit has repeatedly rejected the notion that "*the major* purpose" of a group must be the nomination or election of candidates, until the summary decision in this case, the Ninth Circuit had never held that the or a "*purpose*" of the group to engage in political speech was categorically irrelevant. The truncated analysis of the court below failed to consider the actual holdings, tests, and facts in *HLW, Yamada*, and *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), that preceded it and, as a result, the decision conflicted with, rather than followed, them.

In *HLW*, the Ninth Circuit approved the a-primary-purpose test, upholding a Washington State PAC requirement for "groups with '*a*' primary purpose of political advocacy, instead of being limited to groups with '*the*' primary purpose of political advocacy." 624 F.3d at 1008 (emphasis in original). The Ninth Circuit then upheld a Hawaii PAC requirement which dropped the term "primary" and just required that the group have "the purpose" of political advocacy. *Yamada*, 786 F.3d at 1198. But at least in both cases, the group needed a *purpose* of political advocacy and were not just "incidentally" engaged in "de minimis" political advocacy as was struck down in *Canyon Ferry*, 556 F.3d 1021, which involved an as-applied challenge to Montana's incidental committee definition at issue here.

The court below failed to explain how MCD and Montana law fit under existing Ninth Circuit precedent of *HLW, Yamada,* and *Canyon Ferry*, and, of course, they don't fit at all. The court below took existing law a substantial step further by eliminating altogether the *purpose* of the organization to engage in political speech, approved in *HLW* and *Yamada*, and by upholding Montana's onerous PAC-status law, which

applies to incidental political speech at a de-minimis, $250 threshold, contrary to *Canyon Ferry*.

This evasion of judicial review is contrary to Article III's judicial power.

C. Nonprecedential Decisions Deny Equal Justice Under the Law.

Nonprecedential decisions also allow federal circuit courts to create "private laws," applicable only to the parties at issue, without applying that decision in future cases involving similarly situated litigants. Here, MCD brought this case because Montana's law not only does not comply with Supreme Court precedent and conflicts with other circuits, but does not even comply with *Ninth Circuit* precedent. Yet by designating the decision below as nonprecedential, these conflicts can be masked with a summary, private decision that can only ever apply to MCD. MCD is bound by the decision below in the future under res judicata, but others similarly situated are not affected. It is forever a political committee under these facts.[31] But others might not be. So similarly situated persons can be treated differently, especially MCD's political opponents.

This is an unconstitutional outcome. As even *Hart* noted, Article III's "Judicial Power" includes the obligation of the court to afford constitutional protections, including due process. 266 F.3d at 1161. The courts cannot create precedential, "public laws" for most liti-

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[31] Federal Rule of Civil Procedure 60 authorizes "Relief from a Judgment or Order," but has very specific requirements that are difficult to meet. *See, e.g., Tapper v. Hearn,* 833 F.3d 166 (2d Cir. 2016) (declining to reverse a prior ruling upholding New York contribution limits in light of *McCutcheon* where plaintiff had previously lost but sought renewed First Amendment relief under Rule 60).

gants, but establish ad-hoc, "private laws" for others, without a compelling interest. Equal justice under the law means impartial governance and "is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Treating federal court decisions as precedential avoids "anarchy [from] prevail[ing] within the federal judicial system," *Wallace v. Jaffree,* 472 U.S. 38, 47 n.26 (1985), and serves as a check "on malicious action by judges" by "enhanc[ing] the reliability of information and the impartiality of the decision-making process," *Butz v. Economou,* 438 U.S. 478, 512 (1978). Circuit rules allowing nonprecedential decisions are not tailored to any cognizable compelling interest and instead undermine the stability of the law and a fundamental check on the court's judicial role. *Anastasoff,* 223 F.3d at 901. They undermine the Rule of Law.

The motivation for such rules is likely very practical: judges "do not have time to do a decent enough job ... to justify treating every opinion as precedent ...." *Anastasoff*, 223 F.3d at 904. But the solution "is to create enough judgeships to handle the volume, or ... for each judge to take enough time to do a competent job with the case," even "[i]f this means backlogs will grow." *Id.* at 904. Circuit courts could also simply adopt the reasoning of the district court, if its decision complies with existing precedent, or just explain that there are no material differences between the current case and previous cases, requiring the same result. In any event, due process does not yield to judicial economy.

A circuit split exists on the important question of the constitutionality of Article III courts issuing nonprecedential decisions. MCD requested that the deci-

sion below be published under Ninth Circuit Local Rule 36-4, which was denied. (App. 75a.) This Court should grant MCD's petition to rectify this unconstitutional error. Rule 10(a).

D. Nonprecedential Decisions Undermine Judicial Integrity, Requiring this Court to Exercise Its Supervisory Responsibility.

Even if nonprecedential decisions do not implicate Article III, this Court nonetheless should review the practice under its supervisory role over lower federal courts because it raises the important question of judicial integrity.

"[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (internal citations omitted). This "supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980). *See, e.g., Elkins v. United States,* 364 U.S. 206, 216-18 (1960) (observing that the exclusionary rule was adopted pursuant to "the Court's supervisory power over the administration of criminal justice in the federal courts" with the purpose "to compel respect for the constitutional guaranty" against lawless searches and seizures).

As described above, *supra* II(B) and (C), allowing the federal circuits to choose precedent can permit judges to rule based on their own policy preferences or on bias against parties, to give slipshod treatment to the cases before them, and to avoid judicial scrutiny as they establish inequitable, private law. This undermines judicial integrity as the transparency, account-

ability, and judicial restraint of judges is called into serious question.

All federal circuits have adopted rules allowing them to choose the precedential value of their decisions. The Eighth Circuit has questioned the practice. This Court should exercise its supervisory role and review this practice to preserve the judicial integrity of the lower courts.

Conclusion

This Court should grant this petition.

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