No. _____

# In the Supreme Court of the United States

EMILIANO EMMANUEL FLORES-GONZÁLEZ, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The right to direct review of a federal sentence is codified at 18 U.S.C. § 3742. The constitution obligates Article III courts to entertain cases they have jurisdiction over.

A First Circuit panel met these obligations: it reviewed and vacated a procedurally infirm sentence under binding circuit precedent.

But a three-act sequence of subsequent en banc orders nullified the panel's work.

First, the court granted a government-filed petition for rehearing en banc.

Second, it vacated the panel opinion and judgment.

Third, a six-judge en banc court deadlocked three-to-three, issuing an order affirming the sentence.

The cited justification for this affirmance was the disagreement over what to do about outcome-determinative circuit precedent. The questions presented are:

1. Did the court's fealty to ministerial en banc procedures justify abdication of its constitutional and statutory obligations to adjudicate an as-of-right sentence appeal?

2. If so, should this Court summarily vacate and remand with instructions to either conduct reasonableness review under applicable law or dis-en banc the case and reinstate the properly entered panel opinion and judgment?

## PARTIES

Emiliano Emmanuel Flores-González, Petitioner, was the defendant-appellant below.

The United States of America, Respondent, was the plaintiff-appellee below.

## RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

> *United States v. Flores-González*, No. 19-2204 (1st Cir. 2023) (en banc) (per curiam) (affirming judgment).
>
> *United States v. Flores-González*, 34 F.4th 103 (1st Cir. 2022) (vacating judgment and sentence) *reh'g en banc granted*, *op. withdrawn*, 46 F.4th 57 (1st Cir. 2022).

United States District Court (D.P.R.)

> *United States v. Flores-González*, No. 3:19-cr-00335-FAB (Oct. 24, 2019) (judgment).

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## PETITION FOR A WRIT OF CERTIORARI

## INTRODUCTION

En banc review in the federal courts of appeal was first approved by this Court in 1941. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 335 (1941). It was then incorporated into the Judicial Code and Federal Rules of Appellate Procedure. When rehearing of a panel decision is done by an even number of judges — as occurred below — deadlock leaves the court's duty to adjudicate cases unfulfilled. And it leaves review of an appeal as of right unexecuted. Worse, when precedent has dictated the outcome of an appeal, en banc rehearing — without the safeguards discussed below — nullifies proper panel review, generating a single decision that's arbitrarily out of step with precedent.

This Court should grant certiorari and summarily vacate and remand with instructions to the First Circuit to either conduct reasonableness review under applicable law or dis-en banc the case and reinstate the properly issued panel opinion and judgment. Alternatively, this Court should grant certiorari and evaluate what additional procedural safeguards should be imposed so that the virtues of en banc hearing and rehearing may be balanced against courts' duty to decide cases and controversies and appellants' right to direct appeal under 18 U.S.C. § 3742.

## OPINIONS BELOW

Emiliano Emmanuel Flores-González (Mr. Flores) respectfully petitions for a writ of certiorari to review the judgment of the First Circuit. App. 1a-90a. It's reported at 86 F.4th 399.

## JURISDICTION

The court of appeals entered judgment in a per curiam order dated November 7, 2023. App. 2a. Mr. Flores petitioned for en banc rehearing on November 13, 2023. *See* App. 109a-122a; 2023 WL 9958291. Rehearing was denied December 6, 2023. App. 91a.

By order dated February 22, 2024, this Court extended the time within which to file a petition for a writ of certiorari to April 4, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Cited constitutional and statutory provisions are included at App. 99a-108a.

## STATEMENT

### A. District of Puerto Rico Sentencing

In 2009, a then-19-year-old Emiliano Flores pleaded guilty to unlawfully possessing — but not illegally using — a Glock pistol altered to fire as a "machinegun." App. 18a. His possession was unauthorized because the firearm, a semiautomatic pistol, had been modified to fire in automatic mode. Such arms are unlawful to own unless manufactured before May 19, 1986, and held pursuant to a license. *See* 18 U.S.C. § 922(o)(2)(B).

Mr. Flores had no criminal priors. App. 18a. The district court calculated Mr. Flores's advisory sentencing range as 24 to 30 months. Mr. Flores and the government recommended sentences within that range. The judge, however, imposed a 48-month term — 60% above the top of the range. App. 19a.

Nothing about Mr. Flores's own past conduct or the individual way he committed the crime — other than his having committed it in Puerto Rico — drove the judge's sizable upward variance. App. 19a.

The judge's sentencing wording illustrated the court's reasons. "The [c]ourt," said the judge, did "not purport to establish that ... Flores'[s] crime itself was more harmful than others similar to his." App. 19a. Rather, the judge explained, what triggered the major variance was that Mr. Flores's crime fell "within a category of offenses, gun crimes, that the [c]ourt, considering the particular situation in Puerto Rico [involving

violence], views as more serious here than if they had occurred in a less violent society." App. 19a.

Before revealing Mr. Flores's sentence, the judge played an audio and video recording of a "recent" machine-gun "massacre" that even he agreed had no relation to Mr. Flores's own specific conduct apart from his having illegally possessed the gun in Puerto Rico. App. 19a.

### B. First Circuit Panel Opinion (Majority)

On appeal, the First Circuit's original panel vacated Mr. Flores's sentence as procedurally unreasonable under *United States v. Rivera-Berríos*, 968 F.3d 130 (1st Cir. 2020),[1] and *United States v. Carrasquillo-Sánchez*, 9 F.4th 56 (1st Cir. 2021). *See United States v. Flores-González*, 34 F.4th 103, 118 (1st Cir.), *withdrawn on grant of reh'g en banc*, 46 F.4th 57 (1st Cir. 2022).

To oversimplify slightly, the panel so ruled because the judge based Mr. Flores's upward variance solely on the community characteristics of the crime's locale — without connecting his decision to "a 'special characteristic attributable either to the offender' or the circumstances of 'the offense.'" *See id.* at 118 (quoting *Rivera-Berríos*, 968 F.3d at 137).

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[1] The First Circuit decisions that were alleged to conflict with precedent include *Rivera-Berríos* and *Carrasquillo-Sánchez*. App.16a. Additional decisions followed *Rivera-Berríos*, including *United States v. García-Pérez*, 9 F.4th 48 (1st Cir. 2021), and *United States v. Díaz-Diaz*, No. 19-1274 (1st Cir. Aug. 21, 2021). These all became final without the First Circuit choosing *sua sponte* to rehear any of those cases en banc. Nor did any of those cases see a petition for hearing en banc by the United States.

### C. First Circuit Panel Opinion (Concurrence)

A concurring panelist "*agree*[*d*] that" that the First Circuit's "most recent precedent under *Rivera-Berríos* and *Carrasquillo-Sánchez preclude[d]*" the panel "*from affirming*." *See id.* at 121 (Kayatta, J., concurring) (emphases added). But the concurring judge thought that those two decisions should be overruled when compared against *United States v. Flores-Machicote*, 706 F.3d 16 (1st Cir. 2013). *See Flores-González*, 34 F.4th at 119 (Kayatta, J., concurring). *Flores-Machicote* is a decade-old opinion that lets judges impose upwardly variant sentences based on "community characteristics," so long as they do not go "too far" by focusing "too much on the community and too little on the individual." *See Flores-Machicote*, 706 F.3d at 24.

### D. Government Petition for Rehearing En Banc

Similarly, federal prosecutors argued that *Rivera-Berríos* had injected "error into" First Circuit "caselaw that has since metastasized"; the government asked the circuit to cure that perceived flaw through en banc review. App. 20a.

### E. Rehearing En Banc and Panel Opinion Withdrawal

Without allowing Mr. Flores the opportunity to respond to the government's petition for rehearing, the court of appeals granted it and, citing "custom," ordered the panel opinion withdrawn.

Having granted the petition, the en banc court ordered the parties to brief twenty-four separate questions along with other corollary questions.

Among these questions, the First Circuit did not seek briefing as to what action was required under the Constitution, under 18 U.S.C. § 3742, and under precedent should the en banc conglomeration of judges lack a majority to overrule the cases and principles that underlay the panel opinion.

### F. Deadlock-Nullification Order

After briefing by the parties, the submission of four separate amicus briefs,[2] and oral argument, the en banc court issued a per curiam order replacing the panel opinion's order vacating judgment with an order affirming the district court judgment: "The judgment entered in the district court is affirmed by an equally divided en banc court." App. 3a (citing *Savard v. Rhode Island*, 338 F.3d 23, 25 (1st Cir. 2003) (en banc)). This unsigned affirmance order appears to have the backing of all six participating judges. *See* App. 1a-3a.[3]

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[2] *See* Br. of Macarthur Justice Ctr., et al., 2022 WL 16833185; Br. of NAACP Legal Def. Fund, 2022 WL 16833192; Br. of Federal Defenders for D. Mass., D.N.H., & D.R.I., 2022 WL 16833188; Br. of P.R. Assoc. Crim. Def. Lawyers, 2022 WL 16833194.

[3] The Appendix to this Petition contains the First Circuit's slip opinion. The printed opinion at 86 F.4th 399 erroneously placed the text of the per curiam order underneath the first concurrence by Kayatta, J., joined by Lynch, J., and Gelpí, J. While the error in West's printed reporter could not be corrected, we note that West's online version reflects the en banc's separate per curiam order *before* the start of the Kayatta, J., concurrence.

Following the six-judge per curiam order, the en banc judges issued two separate, three-judge concurring opinions. The first — by Kayatta, J., joined by Lynch, J., and Gelpí, J. — agrees with the per curiam order without analysis. "Given the unfortunate 3-3 split of our court in this case," Judge Kayatta wrote, "it is fair to ask, 'what next?'" App. 16a. The answer: "the sentence in this case is affirmed." App. 16a (citing *Savard*, 338 F.3d at 25).

Before reaching the conclusion that the en banc court had to automatically affirm the district court's "sentence in this case," the Kayatta, J. concurrence explained its three judges had "voted to proceed en banc in order to overrule those panel decisions" that the *Flores-González* panel had relied on to decide Mr. Flores's direct appeal. App. 7a. Unable to garner sufficient votes, however, the Kayatta, J. concurrence lamented that *Carrasquillo-Sánchez*, *Rivera-Berríos* and *Flores-Machicote* "remain controlling circuit precedent unless and until a majority in an en banc hearing or the Supreme Court rules otherwise." App. 16a; *see United States v. Rivera-Berríos,* 968 F.3d 130 (1st Cir. 2020), *United States v. Carrasquillo-Sánchez,* 9 F.4th 56 (1st Cir. 2021); *United States v. Flores-Machicote*, 706 F.3d 16 (1st Cir. 2013).

The second three-judge concurrence explained why existing circuit and Supreme Court precedent dictated the outcome of the three-judge panel decision. *See* App. 17a-90a (Thompson, J., joined by Barron, C.J., Montecalvo, J.).

Like the first concurrence, this one agreed with the per curiam statement that the district court judgment had to be

affirmed. *See* App. 90a. The Thompson, J. concurrence pointed out that the affirmance meant binding precedent — left unaltered by en banc rehearing — was not being applied to Mr. Flores's direct appeal. App. 90a. "[W]ith these opinions [*Rivera-Berríos* and *Carrasquillo-Sánchez*] still on the books, Flores's upward variance — lacking as it does that necessary case-specific connection — should not stand." App. 90a.

This second concurrence therefore argued the court should have "vacate[d] the disputed sentence and remand[ed] for resentencing" under applicable precedent. App. 90a. But, the Thompson, J. concurrence concluded, the First Circuit's intervening "grant of rehearing *en banc*" had irreversibly "vacated the prior panel's opinion," meaning the full court must "affirm[] the erroneous variance by operation of law." App. 90a. This meant nothing less than the denial to Mr. Flores of "the benefit of … preexisting and still-binding precedent." App. 90a.

### G. Mr. Flores's Petition for Rehearing En Banc

Less than a week later, Mr. Flores petitioned for rehearing en banc. Pet. for Reh'g, 2023 WL 9958291 (Nov. 13, 2023); App. 109a-122a. He argued, in part, that replacing a precedent-dictated panel decision with an en banc order whose outcome conflicts with such precedent "would effectuate a complete denial of Mr. Flores's right to appeal." App. 116a. Such denial would be unlawful under appellate courts' mandate to "'review all sentences' for reasonableness." *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007) (citing 18 U.S.C. § 3742)).

Mr. Flores further argued that the en banc order "had contravene[d] the long-established rule that 'federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.'" App. 116a (quoting *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989)). Mr. Flores added that more is needed "to fulfill 'the absolute duty of judges to hear and decide cases within their jurisdiction.'" App. 116a (quoting *United States v. Will*, 449 U.S. 200, 215 (1980)).

It was undisputed that Mr. Flores's direct appeal had invoked the court's jurisdiction under § 3742(a), so the court had "the obligation to evaluate the case and issue a decision." App. 116a.

Mr. Flores addressed the lack of foundation for the per curiam order's automatic affirmance. App. 117a-122a.

First, the case that purportedly drove the en banc's affirmance order did not call for rigid and permanent withdrawal of the panel opinion. *See Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003). *Savard* merely observed that panel-opinion withdrawal is "customary" when en banc rehearing takes place. *Savard*, 338 F.3d at 25. Such a "custom" should not prevail when it impedes direct review of a criminal judgment, which is a matter of right.

Because direct appeal in a criminal matter (*Savard* addressed a civil matter) is "'an integral part of the … system for finally adjudicating the guilt or innocence of a defendant,' … the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses

of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Indeed, argued Mr. Flores, the Federal Rules of Appellate Procedure and First Circuit rules shows flexibility in what *Savard* calls custom. App. 118a-119a (citing Fed. R. App. P. 2(a) (allowing courts of appeal to suspend their local rules "for good cause"); 1st Cir. Internal Op. Procedure X(D) ("Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.").

Second, Mr. Flores argued the *Savard*-driven affirmance was not a foregone conclusion because courts may "dis-en banc" a case. App. 119a-120a. In order to ensure review of the subject sentencing proceeding under § 3742, the en banc court could have simply issued an order to "dis-en banc" the case. *See Clarke v. United States*, 915 F.2d 699, 707 (D.C. Cir. 1990) (explaining the court "can dis-en banc a case that it has ordered heard en banc….") (citation omitted). Such a result, Mr. Flores further argued, would be highly appropriate because — without the votes to overrule precedent — the en banc court ultimately found itself without a Rule 35(a) justification to intervene in a direct appeal that had already been adjudicated by three judges who agreed unanimously that reversible error demanded vacatur.

With no basis for en banc intervention, a court is left only with the Rule 35 admonishment that "en banc hearing or rehearing is not favored and ordinarily will not be ordered…." Fed. R. App. P. 35(a).

This petition for a writ of certiorari follows.

## REASONS WHY IT'S IMPERATIVE TO GRANT CERTIORARI

As the en banc court of appeals diligently sought to reach the right answer on the merits of a sentencing appeal, it put virtually no effort into considering what it should do if the judges wishing to overrule precedent couldn't reach the necessary votes to do so. Whatever one may think of First Circuit precedent, the court of appeals needed to fulfill its obligation to review the sentence before it for reasonableness. *See Gall v. United States*, 552 U.S. 38, 41 (2007); 18 U.S.C. § 3742.

### I. The En Banc Court's Deadlock-Nullification Order Violates the Sentencing Reform Act of 1984, 18 U.S.C. § 3742, Article III, § 2, and En Banc Procedural Provisions.

In the most basic and obvious sense, the en banc affirmance order below fails to carry § 3742(e), which provides as follows: "Upon review of the record, the court of appeals shall determine whether the sentence" is reversible based on any of four enumerated factors. 18 U.S.C. § 3742(e)(1)-(4). This includes reviewing whether a sentence "was imposed in violation of law." *Id.*, § (e)(1). It includes assessing whether a sentence is "outside the applicable guideline range, and … based on a factor … not authorized under section 3553(b)" or "not justified by the facts of the case." *Id.*, § (e)(3). And it includes looking at whether "the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) … and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Id.* at (e)(3)(C).

The per curiam order — read alongside the two concurring opinions — illustrates the § 3742(e) mandate was not accomplished. Hence, the Kayatta, J. concurrence's lamentation that the split was "unfortunate." App. 16a. Similarly, the Thompson concurrence regretfully states that the circuit must "affirm[] the erroneous variance by operation of law," such that Mr. Flores would be denied "the benefit of … preexisting and still-binding precedent." App. 90a.

Review under § 3742(e) is not optional. Nor does any case or statute allow an en banc court — let alone one sitting in a small circuit, like the First — to arbitrarily supplant a reasoned panel decision.

### A. The Deadlock-Nullification Order Violates the Spirit of Rule 35(a), If Not the Letter of the Rule.

Consider the framework for en banc procedures, which was initially developed to resolve intra-circuit conflict. En banc review was first sanctioned by dictum in *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 335 (1941). Previously, en banc procedure was a device that the judges themselves fashioned. *See id.* at 334 n.14. Congress approved en banc proceedings only after the Supreme Court confirmed, in *Textile Mills*, the implied authority of all five judges of the Third Circuit to sit together. *See* Act of June 25, 1948, ch. 646, § 46, 62 Stat. 869, 871 (codified as amended at 28 U.S.C. § 46(c)).

The Judicial Code gives no detail on en banc procedure, and this Court has provided only general parameters. *See*

*Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953). Historically, the First Circuit and other small circuits[4] were not considered in the development of rules and guidance for en banc procedures. *See* Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeal*, 111 U. PA. L. REV. 220, 222 n.13 (1962).

While *Western Pacific*, § 46(c), and Rule 35(a) leave a large area of discretion for en banc procedures, nothing allows a court of appeals to shirk its duty to review a case before it, apply precedent to it, and, when necessary, remand for corrective action. *See* § 3742(e)-(f); *see also* 28 U.S.C. § 2106 (providing remedial discretion to reviewing courts "as may be just under the circumstances.").

Already, en banc decisions "are uniquely awkward among judicial acts." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1376 (2021) (footnote omitted). "By definition, a judge sitting en banc is sitting in judgment of a colleague on the same court…. An en banc decision literally nullifies a prior decision made by members of the same court …." *Id.* (footnotes omitted).

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[4] Today, the First Circuit, by statute, has six seats for active judges. *See* 28 U.S.C. § 44(a). It had only three seats until 1978 when a fourth was added. Pub. L. 95-486, § 3(a), 92 Stat. 1629, 1632 (Oct. 20, 1978). A fifth and sixth seat were added in 1984. Pub. L. 95-353, § 201(a)(1), 98 Stat. 333, 346 (Jul. 10, 1984).

### B. The Deadlock-Nullification Order Abdicates the Court's Duty to Decide Cases Before It.

Courts have an "absolute duty to hear and decide cases within their jurisdiction." *United States v. Will*, 449 U.S. 200, 215 (1980). In *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), this Court catalogued support for the proposition that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *Id.* at 358. This rule derives from Article III, § 2, which "declares, that 'the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.'" *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 375 (1821) (quoting U.S. Const., Art. III, § 2). As this Court reasoned, "We have no more right, to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.* at 404.

The en banc court's reflexive affirmance of an erroneous district court judgment abandoned the duty to adjudicate the case before it.

### C. The Deadlock-Nullification Order Reflects an Unreasonable Interpretation of Rule 35(a) and 28 U.S.C. § 46(c).

Under 28 U.S.C. § 46(c), "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges … , unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service."

Rule 35(a), in turn, states that "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless" one of two statements is true: either "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

As argued in Mr. Flores's petition for rehearing, the en banc order served no Rule 35(a) purpose and violates the mandate to hear and determine cases and controversies. *See* App. 120a-121a.

## II. Stare Decisis Principles and Due Process Cannot Be Protected If the Deadlock-Nullification Order Is Left Standing.

Alexander Hamilton declared that, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78 at 168 (Alexander Hamilton) (Frederick Quinn ed., 1997). As this Court similarly emphasizes: "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways & Pub. Transp.,* 483 U.S. 468, 494 (1987). "[A]ny departure from the doctrine … demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984).

"The 'law of the circuit' rule is a subset of stare decisis." *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010). A court of appeals sitting en banc may set aside its own circuit precedent "if, on reexamination of an earlier decision,

it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 876 (D.C.Cir.1992) (en banc).

Since an en banc decision nullifies a prior panel decision, only a majority of judges of judges should be able to change the outcome if precedent dictated the panel's decision. "The law of the circuit rule promotes important virtues, including humility, stability, and predictability of outcomes within a judicial circuit." *San Juan Cable*, 612 F.3d at 34.

Yet the en banc's per curiam order leaves the demands of stare decisis unmet. The panel did not withdraw its own opinion, and a majority of en banc jurists did not overrule it. The court's order therefore falls outside the lines of precedent with no "special justification" to do so. *Rumsey,* 467 U.S. at 212.

### A. Jurisprudence Regarding Divided Decisions Must Be Given a Carve-Out for Appeals as of Right and Panel Opinions Dictated By Precedent.

As all members of the *Flores-González* panel acknowledged, their decision was dictated by the panel opinions of *United States v. Rivera-Berríos*, 968 F.3d 130 (1st Cir. 2020), and *United States v. Carrasquillo-Sánchez*, 9 F.4th 56 (1st Cir. 2021). Yet the per curiam order en banc completely discarded this precedent.

"This is not only insulting to the" prior "panel[s] … , it is mutiny. It is heresy. It is illegal." *Atl. Thermoplastics Co. v. Faytex Corp.*, 974 F.2d 1279, 1281 (Fed. Cir. 1992) (Rich, J.,

dissenting from denial of rehearing en banc). Whatever gaps are left by Rule 35(a) and § 46(c), etcetera, they must be filled in with a rule that adequately promotes the application of binding precedent to appeals of right under § 3742.

Soon after the passage of § 46(c), this Court held its review is not just to interpret the scope of en banc review but that it also "decide[s] whether the en banc issue has been adequately treated by the Court of Appeals." *Western Pac.*, 345 U.S. at 263. Here, treatment by the court of appeals was completely inadequate for the reasons discussed throughout: appellate review cannot be said to have taken place if a procedurally infirm sentence is reflexively affirmed based solely on the a lower court's interpretation of an en banc procedural rule.

### B. The Deadlock-Nullification Order Is Critically Flawed and Warrants Immediate Summary Correction or Full Review by This Court.

The issue of en banc gridlock leading to affirmance has been an uncorrected problem since as early as 1962. That year, in the *Drake Bakeries* case, the Second Circuit en banc court was evenly divided on the merits after a panel had reversed the trial court. *Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 294 F.2d 399 (2d Cir. 1961) (per curiam) *aff'd*, 370 U.S. 254 (1962).

A year after *Drake Bakeries* was decided, a scholarly article observed the following: "A split decision by an en banc court cannot ensure the uniformity normally resulting from en banc decision since any change in the composition of the

court may alter the result of a similar case in the future." Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeal*, 111 U. PENN. L. REV. 220, 229-230 (1962).

The article continued, foreshadowing the arbitrary and unlawful decision in this case six decades later: once a group of en banc judges ascertain that they lack a majority to do majority-required business, the "[c]orrectness of decision in the particular case becomes, therefore, more significant than the goal of uniformity, and in theory, correctness of decision is more apt to occur when the view of a majority of the judges who have heard the case prevails." *Id.* at 230.

And, like in the 1961 *Drake Bakeries* case, "[a]ffirming the panel in this case would have given conclusive weight to the votes of the original panel members. But by affirming the trial court, the [First] Circuit reached the result supported by a majority consisting of one-half of the active circuit judges *and* the district court judge who originally heard the case." Labovitz, *supra*, 111 U. PENN. L. REV. at 222. Why is it that one could understand the district judge as casting the tie-breaker vote? Because appellate court deadlock preserves that judge's decision below. So the deciding factor in this case is that the district court erred such that a three-to-three appellate vote preserves that error. App. 90a.

The process applied here nullified a properly issued panel decision driven by precedent, which affirmed "the erroneous variance by operation of law," and deprived Mr. Flores of "the benefit of … preexisting and still-binding precedent." App. 90a.

### C. Circuit Courts Have Varying Approaches to Avoiding Actual and Perceived Intra-Circuit Conflicts.

Circuits take different approaches to ensure panels comply with stare decisis. Unlike in the First Circuit, in the Seventh Circuit, the doctrine of stare decisis is embodied in Circuit Rule 40(e), which requires a majority of the entire court to approve opinions rendered by three-judge panels that conflict with existing Seventh Circuit precedent or create a split with the precedent of the other courts of appeals. 7th Cir. R. 40(e). Analogous rules are embraced by the Second and D.C. Circuits. *See, e.g.*, *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007) (overruling prior panel precedent outside formal en banc process after consulting "all active members" of the court); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). While the First Circuit has stated that its judges occasionally circulate a "proposed panel opinion" to all active judges, it lacks such a formal rule. *Educadores Puertorriqueños En Acción v. Hernández*, 367 F.3d 61, 67 n.2 (1st Cir. 2004). Nor does the record show any such informal circulation of relevant opinions. Not in 2020 when *Rivera-Berríos* was decided. Not in 2021 when decision in *Carrasquillo-Sánchez*, *García-Pérez*, and *Díaz-Díaz* were issued. And not in 2022 when the now-vacated *Flores-González* panel opinion was published.

Had Mr. Flores's case, or *Rivera-Berríos*, or *Carrasquillo-Sánchez*, or other relevant decisions been addressed in those mandatory-draft-circulation circuits, judges concerned about a perceived intra-circuit conflict could have made their views

known before litigants and circuit judges had multiple years of precedent to base their expectations upon. This inconsistency is yet one more reason why this Court should take action to correct the at-issue deadlock-nullification order and prevent such orders from emerging in the future.

## CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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