No. 23-7165

IN THE SUPREME COURT OF THE UNITED STATES

EMILIANO EMMANUEL FLORES-GONZÁLEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether it was unlawful for the court of appeals, sitting en banc, to affirm the judgment of the district court by an equally divided court.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 23-7165

EMILIANO EMMANUEL FLORES-GONZÁLEZ, PETITIONER

v.

UNITED STATES OF AMERICA

_____

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

_____

BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

OPINIONS BELOW

The decision of the en banc court of appeals (Pet. App. 1a-90a) is reported at 86 F.4th 399. The order granting rehearing en banc and vacating the panel's judgment is reported at 46 F.4th 57. The initial panel opinion is reported at 34 F.4th 103.

JURISDICTION

The judgment of the en banc court of appeals was entered on November 7, 2023. Petitioner's subsequent petition for rehearing en banc was denied on December 6, 2023 (Pet. App. 91a). On February 22, 2024, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including April 4, 2024,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Puerto Rico, petitioner was convicted of unlawfully possessing a machinegun, in violation of 18 U.S.C. 922(o). Pet. App. 92a. The court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Id. at 93a-94a. A panel of the court of appeals vacated petitioner's sentence, 34 F.4th 103, but the full court then granted rehearing en banc and vacated the panel decision, 46 F.4th 57. The court thereafter affirmed petitioner's sentence "by an equally divided en banc court." Pet. App. 3a; see id. at 1a-90a.

1. Police officers in Ponce, Puerto Rico, arrested petitioner on a warrant for domestic-violence and weapons charges, detaining him after he had visited the drive-through of a McDonald's restaurant. See 34 F.4th at 108; C.A. Sealed App. 23. The officers found a satchel bag in the passenger seat where petitioner had been sitting, inside of which was a 9mm Glock pistol loaded with 33 rounds of ammunition, along with another magazine loaded with an additional 30 rounds. Ibid. The pistol, which petitioner admitted was his, had been altered so that it could fire fully automatically with the flip of a switch. Ibid. The officers also found a spent 9mm casing in the rear of the vehicle. Ibid.

2. A federal grand jury charged petitioner with one count of unlawfully possessing a machinegun. 34 F.4th at 108. Petitioner pleaded guilty without a plea agreement. Ibid.

The Probation Office prepared a presentence investigation report. The Probation Office determined that Sentencing Guidelines § 2K2.1(a)(4)(B) (2018), which specifies a base offense level of 20, applied to petitioner because the modified Glock was a "machinegun" under 26 U.S.C. 5845(a). 34 F.4th at 108-109; C.A. Sealed App. 31. After applying a three-level reduction for acceptance of responsibility, the Probation Office recommended a total offense level of 17. C.A. Sealed App. 25. That total offense level, combined with petitioner's Criminal History Category I, yielded an advisory guidelines range of 24 to 30 months of imprisonment. Id. at 26, 33.

At sentencing, the district court adopted the Probation Office's calculation of petitioner's advisory guidelines range. C.A. App. 19-20, 25-27. The court further determined that a within-guidelines sentence would not "reflect[] the seriousness of the offense, promote[] respect for the law, protect[] the public from further crimes by [petitioner]," or "address the issues of deterrence and punishment." Id. at 30; see 18 U.S.C. 3553(a). Based on its consideration of the Section 3553(a) factors, the court determined that an upward variance was appropriate and sentenced petitioner to 48 months of imprisonment, to be followed

by three years of supervised release. C.A. App. 31; Pet. App. 93a-94a.

In explaining its sentencing decision, the district court observed that petitioner had possessed a Glock "with a high capacity magazine, loaded with 33 rounds of ammunition," that was capable of operating "fully automatic by the function of [a] switch." C.A. App. 29. The court discussed petitioner's background and criminal conduct, including the facts that petitioner "was unemployed," had a "history of using marijuana," and had "no training in the proper use" of machineguns and no apparent "means to purchase them." Id. at 27-29. And the court also discussed "Puerto Rico's high firearms and violent crime rate," observing that machineguns "are present everywhere" in Puerto Rico and that "gun crime" is "pervasive throughout the island." Ibid. The court explained that "[t]he impact in Puerto Rico of this particular offense is more serious than that considered by the Sentencing Commission when it drafted the guidelines." Id. at 28.

3. A panel of the court of appeals vacated petitioner's sentence, applying circuit precedent to conclude that the district court had procedurally erred by varying upward from the advisory guidelines range based on the prevalence of violent machinegun crimes in Puerto Rico and the illegality and lethality of machineguns generally. 34 F.4th at 115-117. In an opinion by Judge Thompson, the panel held that the district court was required

to impose a within-Guidelines sentence of not more than 30 months of imprisonment. Id. at 118. Judge Kayatta concurred in light of recent circuit decisions "reject[ing] a district court's attempt to vary upward based on the conditions in Puerto Rico," but expressed concern that "it is difficult to see how" the panel's approach could be reconciled with the First Circuit's own earlier decision in United States v. Flores-Machicote, 706 F.3d 16 (2013), or the decisions of other circuits approving the consideration of local conditions in sentencing. 34 F.4th 119 (Kayatta, J., concurring); see id. at 118-121.

The government filed a petition for rehearing en banc. On June 22, 2022, a majority of the five then-active judges on the court of appeals voted to grant the government's petition for rehearing en banc. 46 F.4th at 58; see ibid. (describing the "issue presented to the en banc court" as "whether a district court, in its discretion, may rely on the characteristics of the specific community in which the defendant committed his offense * * * and certain aggravating factors that are also included in the sentencing guidelines * * * to impose a variant sentence"). "In accordance with customary practice, the panel opinion * * * [wa]s withdrawn, and the judgment * * * vacated." Ibid.; see 1st Cir. Internal Operating P. X.D. The case was set for reargument before the en banc court in November 2022. 8/22/22 C.A. Order 4.

In September 2022, Judge Thompson assumed senior status upon the confirmation and appointment of Judge Montecalvo to the court of appeals. See 168 Cong. Rec. S4588, S4588 (daily ed. Sept. 14, 2022) (Statement of Sen. Reed); id. at S4625. Because Judge Thompson had been part of the original panel, she participated in the en banc court's consideration of the case along with Judge Montecalvo and the four other active judges of the court of appeals at the time of the November 2022 oral argument. See Pet. App. 1a; 1st Cir. Local R. 35.0(a)(2)(A) (providing that "any senior circuit judge of this circuit shall be eligible to participate * * * as a member of an en banc court reviewing a decision of a panel of which that judge was a member") (emphasis omitted). Judge Lynch was an active judge on the court of appeals at the time of the en banc oral argument in November 2022, and continued to participate in the case after taking senior status in December 2022. See 1st Cir. Local R. 35.0(a)(2)(A) (permitting a senior circuit judge "to continue to participate in the decision of a case or controversy that was heard or reheard by the court en banc at a time when such judge was in regular active service") (emphasis omitted); see also 1st Cir. Local R. 35.0(a)(2)(B) (providing that "a case is heard or reheard by the court en banc when oral argument is held") (emphasis omitted).

The six judges participating in the court of appeals' en banc consideration affirmed the district court's judgment by an equally divided vote. Pet. App. 1a-90a. Three judges determined that the

upward variance imposed here "was within the district court's discretion." Id. at 3a (opinion of Kayatta, J., joined by Lynch and Gelpí, JJ.); see id. at 3a-16a. The three remaining judges would have vacated the sentence, on the view that the district court's upward variance lacked the "necessary case-specific connection." Id. at 90a (opinion of Thompson, J., joined by Barron, C.J., and Montecalvo, J.); see id. at 17a-90a.

Petitioner filed a petition for rehearing en banc, asking the court of appeals to vacate its en banc affirmance and reinstate the panel opinion. See Pet. En Banc Reh'g Pet. 1-9. The court denied the petition. Pet. App. 91a.

ARGUMENT

Petitioner contends (Pet. 1-2, 11-20) that the court of appeals was precluded from affirming the district court's judgment by an equally divided vote of the en banc court. That contention is incorrect and lacks support in any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals acted consistently with statutory authority, longstanding practice, and this Court's precedent when it vacated the judgment of the panel upon the grant of rehearing en banc and then affirmed the district court's judgment because the judges of the en banc court were equally divided.

Congress has established 13 circuit courts of appeals, each "consist[ing] of the circuit judges of the circuit in regular

active service." 28 U.S.C. 43(b); see 28 U.S.C. 41, 43. While those courts ordinarily arrange for "the hearing and determination of cases and controversies by separate panels, each consisting of three judges," 28 U.S.C. 46(b), a court of appeals may hear or rehear any case "before the court in banc" whenever "ordered by a majority of the circuit judges of the circuit who are in regular active service," 28 U.S.C. 46(c). See Fed. R. App. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.").

When a court of appeals elects to rehear a case en banc, the court ordinarily "do[es] 'not review the original panel decision, nor [does it] overrule the original panel decision,' but rather [it] 'act[s] as if [it] were hearing the case on appeal for the first time.'" Lee v. Fisher, 70 F.4th 1129, 1154 (9th Cir. 2023) (citation omitted). The courts of appeals therefore generally provide -- by local rule, internal operating procedure, or regular practice -- that the granting of a petition for rehearing en banc by a majority of the active judges of the court results in immediate vacatur of the panel's judgment.[1]

---

[1] See 1st Cir. Internal Operating P. X.D ("Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated."); 3d Cir. Internal Operating P. 9.5.9 (when rehearing en banc is ordered, "the chief judge enters an order which grants rehearing as to one or more of the issues, vacates the panel's opinion in full or in part and the judgment entered thereon, and assigns the case to the calendar for rehearing en

After vacatur of the panel's judgment and reargument of the case, the judges of an en banc court occasionally find themselves equally divided as to the proper disposition of the appeal -- a potentially more frequent occurrence when, as here, the composition of the court of appeals changes between the grant of rehearing en banc and the en banc court's resolution of the case. See p. 6, supra. As this Court long ago recognized, the "settled practice in such case[s] [is] to enter a judgment of affirmance" because "reversal cannot be had" without a majority. Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 112 (1869); see, e.g., LeDure v.

---

banc"); 4th Cir. Local R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel."); 5th Cir. R. 41.3 ("Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."); 6th Cir. R. 35(b) ("A decision to grant rehearing en banc vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal."); 7th Cir. Internal Operating P. 5(e) ("An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated."); 9th Cir. Advisory Committee Note to Rules 35-1 to 35-3, at 3 ("When the Court votes to rehear a matter en banc * * * * [t]he three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."); 10th Cir. R. 35.6 ("The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal."); 11th Cir. R. 35-10 ("Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment."); D.C. Cir. R. 35(d) ("If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated * * * ."); see also, e.g., Order, Arkansas Times LP v. Waldrip, No. 19-1378 (8th Cir. June 10, 2021) (granting petition for rehearing en banc, vacating panel opinion and judgment, and indicating that case would be set for oral argument before the en banc court).

Union Pac. R.R., 596 U.S. 242, 242 (2022) (per curiam); Washington v. United States, 584 U.S. 837, 838 (2018); Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545, 546 (2016).

Accordingly, the courts of appeals uniformly agree that the lack of a majority to set aside the decision of the district court results in affirmance by an equally divided court.[2] Such affirmances bind the parties to the case, but otherwise lack precedential force. See, e.g., Durant, 74 U.S. (7 Wall.) at 113 (explaining that the equally divided vote "prevents the decision from becoming an authority for other cases of like character"); United States v. Yarbrough, 852 F.2d 1522, 1538 n.8 (9th Cir.) ("Opinions which are affirmed by an equally divided en banc Court of Appeals have no precedential value."), cert. denied, 488 U.S. 866 (1988); Bricklayers & Allied Crafts Union, Local No. 4 v.

[2] See, e.g., Savard v. Rhode Island, 338 F.3d 23, 25 (1st Cir. 2003) (en banc); Alleghany Corp. v. Kirby, 340 F.2d 311, 312 (2d Cir. 1965) (en banc) (per curiam); FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 846 (3d Cir. 1994) (en banc); Jean v. Collins, 221 F.3d 656, 658 (4th Cir. 2000) (en banc), cert. denied, 531 U.S. 1076 (2001); United States v. McFarland, 311 F.3d 376, 377 (5th Cir. 2002) (en banc) (per curiam); Gun Owners of America, Inc. v. Garland, 19 F.4th 890, 896 (6th Cir. 2021) (en banc), cert. denied, 143 S. Ct. 83 (2022); West v. United States, 744 F.2d 1317, 1318 (7th Cir. 1984) (en banc), cert. denied, 471 U.S. 1053 (1985); United States v. Christenson, 424 F.3d 852, 852 (8th Cir. 2005) (en banc); United States v. Juarez-Rodriguez, 568 F.2d 120, 123 (9th Cir. 1976) (en banc), cert. denied, 538 U.S. 962 (2003); Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1162 (10th Cir. 2007) (en banc); Reshard v. Britt, 839 F.2d 1499, 1499 (11th Cir. 1988) (en banc) (per curiam); Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 752, 753 (D.C. Cir. 1978) (en banc) (per curiam), cert. denied, 441 U.S. 906 (1979); Marine Polymer Techs., Inc. v. HemCon, Inc., 672 F.3d 1350, 1354 (Fed. Cir. 2012) (en banc).

Associated Gen. Contractors, 711 F.2d 90, 93 (8th Cir. 1983) ("Because the judgment was affirmed by an equally divided en banc court, the case is not binding precedent.") (emphasis omitted).

The court of appeals' treatment of this case was consistent with those well-accepted principles. After a majority of the five then-active judges of the court voted to grant the government's petition for rehearing en banc, the court -- in accord with its established internal operating procedures -- vacated the panel's opinion and judgment. See 46 F.4th 58; 1st Cir. Internal Operating P. X.D. Judge Montecalvo thereafter joined the court, and the six judges participating in the en banc rehearing divided three-to-three about the proper disposition of the case. See Pet. App. 3a. Lacking a majority to reverse, the court of appeals affirmed the district court's judgment by an equally divided court. Ibid. All six judges recognized, however, that the disposition in this case would not be precedential in future cases. See id. at 16a (opinion of Kayatta, J.); id. at 17a (opinion of Thompson, J.).

2. Petitioner contends (Pet. 11-17) that the court of appeals' affirmance by an equally divided en banc court violated 18 U.S.C. 3742(e), 28 U.S.C. 46(c), Federal Rule of Appellate Procedure 35(a), Article III of the United States Constitution, and principles of stare decisis. Those contentions lack merit. None of the provisions cited by petitioner addresses the propriety of affirmance by an equally divided court, let alone prohibits that practice.

Section 3742(e), for example, merely sets forth the statutory bases for reversal of a sentence by a court of appeals. See 18 U.S.C. 3742(e)(1)-(4). Indeed, the following subsection, 18 U.S.C. 3742(f), directs the court of appeals to "affirm the sentence," 18 U.S.C. 3742(f)(3), unless it "determines" that a listed type of error has occurred, 18 U.S.C. 3742(f); see 18 U.S.C. 3742(f)(1) and (2). The court below, sitting en banc, did not make any such determination.

Section 46(c) and Rule 35(a) simply establish that a court of appeals may hear or rehear a case en banc when ordered by a majority of its active judges. See 28 U.S.C. 46(c); Fed. R. App. P. 35(a). They do not preclude the typical practice of vacating a panel decision upon the grant of en banc review. Nor does Article III preclude that practice, which fully coheres with the conception of an appeal as a request for affirmative relief from a disadvantageous judgment below. Cf. Camreta v. Greene, 563 U.S. 692, 702-703 (2011). In the absence of an appellate decision that the district court's judgment was improper, there is no basis for setting the court's judgment aside.

Moreover, each of the provisions on which petitioner relies (including Article III) was adopted against the backdrop of a "settled practice" that appellate tribunals will affirm the judgment of a lower court when they are evenly divided. Durant, 74 U.S. (7 Wall.) at 112; see id. at 110 (explaining that the practice "has long been the doctrine in this country and in

England" and discussing pre-Revolutionary English precedent). Contrary to petitioner's assertion (Pet. 14), adhering to that practice does not represent a court's "abandon[ment] [of] the duty to adjudicate the case before it." Instead, it reflects that where an appellant seeks "to set aside or modify an existing judgment or order [of a lower court], the [equal] division [of the judges] operates as a denial of the application" because a majority vote would be necessary to obtain reversal. Durant, 74 U.S. (7 Wall.) at 110.

Petitioner additionally argues (Pet. 15-17) that the en banc court's affirmance allows a result in his case that is inconsistent with recent circuit precedent and, in turn, principles of stare decisis. As a threshold matter, as the three judges voting for affirmance observed, an earlier line of never-overruled circuit decisions strongly supported the lawfulness of the sentence here. See Pet. App. 5a n.1, 10a-12a (discussing, inter alia, United States v. Politano, 522 F.3d 69 (1st Cir.), cert. denied., 555 U.S. 859 (2008), and United States v. Flores-Machicote, 706 F.3d 16 (1st Cir. 2013)). Vacating petitioner's sentence would therefore itself have been inconsistent with precedent. See Gov't Reh'g Pet. 1 (arguing that the panel's vacatur of petitioner's sentence was "irreconcilable with the [court of appeals'] earlier decisions").

In any event, it is well established that panel decisions like the ones petitioner relies on here are not binding when a

court of appeals is sitting en banc. See, e.g., Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 813 (3d Cir. 1991) (en banc) (Alito, J.) ("Because we are sitting in banc in this case, we are not bound by these precedents in the same way that a panel would be bound."), cert. denied, 504 U.S. 943 (1992). And the absence of any determination by a majority of judges on the en banc court that prior circuit decisions properly require appellate relief supports the longstanding practice of affirmance by an equally divided court.

3. Petitioner does not contend that the decision below directly implicates any conflict among the circuits. See Pet. 19-20. While he asserts that courts of appeals have adopted "different approaches to ensure panels comply with stare decisis," Pet. 19 (emphasis added), those differences have no bearing on the proper disposition in a case, like this one, in which rehearing en banc has been granted and the panel's judgment vacated.

Moreover, any differences to which petitioner points (Pet. 19-20) would simply reflect that, under Federal Rule of Appellate Procedure 47, "[t]he courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (observing that courts of appeals may "vary considerably" in their procedural rules). Accordingly, even in a case in which

differences in circuit procedure were actually implicated, they would provide no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

PAUL T. CRANE
Attorney

JUNE 2024