No. 23-7165

# 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*

## REPLY BRIEF FOR THE PETITIONER

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The First Circuit replaced a unanimous panel judgment reversing the district court with an en banc per curiam order affirming it after circuit judges wishing to overturn outcome-determinative precedent failed to muster enough votes to do so. The government's opposition attempts to downplay the outright denial of Petitioner's right to direct appeal for reasonableness. In doing so, it seeks to reframe the issue in formalistic terms in a way that would excuse the First Circuit's resort to ministerial "custom" to deny Mr. Flores-González application of the same established precedents that led to vacatur in numerous cases proceeding his—all decided without so much as whisper from the government about the need for rehearing or certiorari. More incredibly, the government has

flipflopped between the filing of its en banc petition in 2022 and this Court's 2024 order for it to file a response in this matter. This means the government has sought and obtained an order that directly conflicts with binding circuit precedent only to inexplicably ask this Court to leave that precedent-violating order in place. If left uncorrected by the judiciary, this action will perpetuate an unintelligible state of affairs where the outcome of individual appeals will depend not necessarily on the merits of a given case but upon whether prosecutors choose to petition for en banc rehearing.

While the government is expected not just to seek "wins" *but to do justice*, its arguments defending the per curiam order below ruthlessly ignore the lack of principle-driven procedure to enforce as-of-right direct appeal of a criminal judgment when a circuit takes the rare step of granting en banc review.

### A. Review is warranted because the First Circuit's adherence to "custom" facilitated the denial of reasonableness review, a right on direct appeal.

If an en banc court lacks a quorum to do business, it need simply dis-en banc a case and proceed as usual with panel review. The government has no answer to this simple path toward the review mandated by statute. The opposition nevertheless parades several unmeritorious distractions.

First, the government argues that rules governing en banc review and review of sentences, and even Article III came into being while the *Drake Bakeries* conundrum was already known. Oppo. 12-13. But is there any universe in which Con-

gress would have wished for a completely arbitrary exception to stare decisis in intermediate courts, whereby courts could leave individual cases outside binding precedent just because the government filed a petition for rehearing en banc but couldn't convince enough judges to overrule the line of cases that compelled vacatur?

The more likely explanation is that the latter-20th century innovation of en banc sittings generated an emerging problem, causing a deep, though infrequent, wound to the legitimacy of federal appellate proceedings.

For, even the *Durant* case—held up by the government—shows the common law tradition valued mechanisms to avoid even-jurist gridlock in matters of review. Oppo. 9; *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1869) The opinion in *Durant* illustrates the great lengths the courts would go to break ties. "By a law of England," wrote Justice Field for the Court, "passed as long ago as 14 Edward III, if the judges of the King's Bench, or Common Pleas, are equally divided, the case is to be adjourned to the Exchequer Chamber, and be there argued before all the justices of England." 74 U.S. (Wall.) at 112. But that wasn't the end of it. "If these are equally divided, it is to be determined at the next Parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor, and treasurer, the judges, and other of the king's council." *Id.* (footnote omitted).

If the ancient origins of multi-judge decisional deadlock provide any lesson at all, it's not the lesson proposed by the opposition. Instead, it's that intermediate appellate tribunals

need some mechanism to avoid or break ties just as the English courts referred ties to the Exchequer Chamber or some combination of earls and barons. At the very least, the Founders—and later this Court in approving en banc proceedings and Congress in passing 28 U.S.C. § 46, *see* Pet. 12-13—left the expectation that intermediate courts would avoid a rigid rule in which a tie goes to the losing party in contravention of the common law. This is especially so with the right to appeal under the Sentencing Reform Act of 1984. As Senator Kennedy noted after the passage of the 1984 Act: "Appellate review is the cornerstone of the new system, because it will lead to the development of a common law of sentencing." Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 36 FED. SENTENCING REPORTER 238, 238 (2024) (originally published in 3 FED. SENTENCING REPORTER 271 (1991)). It would be an unacceptable deviation from this system's cornerstone to allow case-by-case diversions from a robust line of common law simply because a handful of judges tried but failed to overrule that ever-growing line of cases.

To be sure, as the government postulates, this Court tends to affirm cases upon even division of Justices. Oppo. 9-10. But this Court sits above state supreme courts and intermediate appellate courts. So matters that must be reviewed, at the very least, will have already received at least one layer of review in all but the most idiosyncratic situations. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not of first view.") Thus, the opposition's citation of then-Circuit Judge Alito's 1991 opinion in *Bolden* does not justify its proposed loophole for the First Circuit's per curiam or-

der to disobey precedents. Oppo. 14 (citing *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991) (en banc)). It would pervert the en banc exception to the law of the circuit to widen it to cover what the First Circuit's per curiam order did here. If an en banc court lacks quorum to establish new precedent, resolve an important issue, or overrule existing precedent, it should have a duty to dis-en banc and reinstate any properly issued panel opinion and judgment. *See* Pet. 19-20.

What is more, the Supreme Court, unlike appellate courts that default to three-judge panels, 28 U.S.C. § 46(c), necessarily has no other option when facing deadlock because all available justices take part in review of each case. Yet, for unresolved questions, Supreme Court deadlock remains a serious issue that should not be exported to intermediate courts. *See, e.g.*, William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 31 (1983) ("problems created by an equal division can be serious").

To its credit, the government acknowledges there is at least one situation where an evenly divided intermediate court order mustn't stand: where the intermediate court acknowledges the district court erred. Oppo. 12. But, the government's brief insists, "[i]n 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." Oppo. 12.

Respectfully, this is merely wordplay given the unanimous panel opinion in this case and the positions spelled out by the

two concurrences. *See* App. 90a (expressing the belief that the court of appeals had to "affirm[] the [sentencing court's] erroneous variance by operation of law," such that Mr. Flores-González would be denied "the benefit of … preexisting and still-binding precedent").

Certainly, the district-court decision offends an entire line of First Circuit jurisprudence along with related common law of this Court, and the government fails to coherently identify a conflict between the impeccable reasoning applied throughout the *Rivera-Berríos* line of cases. *United States v. Rivera-Berríos*, 968 F.3d 130 (1st Cir. 2020); *United States v. Carrasquillo-Sánchez*, 9 F.4th 56 (1st Cir. 2021); *see* Pet. 19-20. From *Rivera-Berríos* through the now-vacated panel opinion, the First Circuit decided at least four related cases without a single disagreement from the government in the form a petition for en banc rehearing or certiorari. *See* Pet. 4 n.1, 19-20. Nor did the First Circuit vote *sua sponte* to rehear any case ranging from *Rivera-Berríos* to *Carrasquillo-Sánchez* to *United States v. García-Pérez*, 9 F.4th 48 (1st Cir. 2021), and *United States v. Díaz-Díaz*, No. 19-1274 (1st Cir. Aug. 21, 2021).

This background leaves the government's statement to the contrary an empty one that ignores the doctrine of stare decisis, which "rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (citation omitted). So the government's pointing backward to the woefully generic statements in *Flores-Machicote* is to point to nothing at

all: because all that occurred in *Flores-Machicote* was affirmance under reasonableness review when a sentenced defendant had a number of aggravating circumstances that justified a higher sentence. *See* App. 20a-21a, 46a, 49a-58a.

Tellingly, the government gives away that game by not asking for this Court's review of what it does not even refer to as an intra-circuit split of authority. Because, as the Thompson, J. concurrence explained, there isn't an intra-circuit split. "Regarding the judge's sentencing rationale, the parties agree that the judge relied *exclusively* on community characteristics in varying upward from the guidelines." App. 57a. And First Circuit caselaw, including *Flores-Machicote*, "lets judges impose upwardly variant sentences based on community characteristics" only "so long as they do not go 'too far' by focusing 'too much on the community and too little on the individual.'" App. 20a (quoting *United States v. Flores-Machicote*, 706 F.3d 16, 24 (1st Cir. 2013)).

So, since it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), it must also be this Court's responsibility to state what the law ***isn't***. And the law in American courts certainly cannot be ***tie-goes-to-the-loser*** when the losing party mounts an unsuccessful challenge to an adverse panel opinion that straightforwardly applies circuit precedent. *See* App. 72a (noting that "neither the government nor" any circuit judges challenged the district court's finding that Mr. Flores-González simple possession offense was "no more harmful than similar offenses").

### B. Last term's *Moyle* decision supports vacating and remanding this case so the First Circuit can assess whether it should "dis-en banc."

The opposition has no answer to the proposition that circuits courts may simply "dis-en banc" a case upon changed circumstances. *See* Pet. 1, 10 (citing *Clarke v. United States*, 915 F.2d 699, 707 (D.C. Cir. 1990) (citation omitted)). And less than two weeks ago, this Court dismissed previously granted writs of certiorari upon determination that they were "improvidently granted." *Moyle v. United States*, 603 U.S. ----, No. 23-726, 2024 WL 3187605, at *1 (U.S. June 27, 2024). In a concurrence joined by Chief Justice Roberts and Justice Kavanaugh, Justice Barrett wrote that dismissal was warranted since "the shape of the[] cases ha[d] substantially shifted since" this Court "granted certiorari." *Id.* *3 (Barrett, J., concurring). Granted, the shifting terrain in *Moyle* included changes in state law making resolution imprudent at this time. *Id.* at *4. But the shift along the way here was even more profound ahead of the First Circuit's per curiam order once briefing and oral argument brought relevant considerations "into proper focus." *Id.* at *5 (cleaned up). Just as this Court should "not jump ahead of the lower courts," an en banc court, sitting without a rectifiable Rule 35a concern, should follow Rule 35's directive that "en banc hearing or rehearing is not favored and ordinarily will not be ordered…." Fed. R. App. P. 35(a).

This is to avoid the destructive results of en banc deadlock explicated by jurists and scholars since *Drake Bakeries* and beyond. *See* Pet. 17-20. Just as *Moyle* thought it would be un-

wise to depart "from normal appellate practice" by sidestepping lower court review, *id.* at *6 (citing Supreme Court Rule 11), it would be unwise for this Court to allow a divided en banc order to affirm an erroneous sentence when a three-judge panel had already conducted appellate review and unanimously vacated the challenged sentence as procedurally unreasonable. *See* 18 U.S.C. § 3742(a). The inevitable, non-precedential per curiam order in conflict with *Rivera-Berríos* and its progeny was a circumstance "not fully apprehended at the time [rehearing en banc] was granted." *Moyle*, 2024 WL 3187605, at *7 (Jackson, J., concurring in part and dissenting in part) (cleaned up). It must be vacated.

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The petition for a writ of certiorari should be granted.

**RESPECTFULLY SUBMITTED.**

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