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THE SECOND CIRCUIT’S EN BANC CRISIS

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TABLE OF CONTENTS

INTRODUCTION 33

I. EN BANC PRACTICE IN THE COURT OF APPEALS FOR THE SECOND
CIRCUIT 35

 A. *Hearings En Banc* 35

 B. *The Mini En Banc* 42

 C. *The Dissent from the Denial of Rehearing En Banc* 44

 D. *The Views of the Current Second Circuit Judges* 48

II. ANALYSIS 52

 A. *The Judicial Economy Function* 52

 B. *The Audience for Judicial Opinions* 54

 C. *The Judicial Economy Function Applied to Dissents* 55

 D. *Signalling, Developing the Issue for the Supreme Court, and Article
 III Concerns* 57

III. PROPOSAL 61

 A. *Adopt a Nonmajority En Banc Procedure* 61

 B. *Conduct En Banc on the Briefs* 62

 C. *Vote Publishing* 63

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| | |
|---------------------|----|
| IV. CONCLUSION..... | 63 |
| V. APPENDIX..... | 64 |

INTRODUCTION

In federal courts, most appeals from the district courts are decided by three-judge panels, which are randomly drawn from the entire membership of the circuit.¹ However, through a procedure called “en banc,” a majority of the judges on that circuit may determine that a panel’s decision should be reconsidered by the full court.² The Federal Rules of Appellate Procedure suggest that the en banc procedure should be reserved for cases of exceptional importance.³ The United States Court of Appeals for the Second Circuit, deeming very few cases worthy of en banc rehearing, hears the fewest cases en banc of any circuit by a substantial margin.⁴ The original justification for this policy, the preservation of judicial resources, has been undermined by the frequent published opinions dissenting from—and concurring with⁵—the denial of rehearing en banc. Chief Judge of the Ninth Circuit Alex Kozinski has coined the terms “dissental” and “concurral” to refer to such opinions.⁶ These opinions are often used as a signaling device intended to encourage the Supreme Court to grant certiorari, prompting one commentator to describe Kozinski’s own “dissentals” as the “Bat Signal to the Supreme Court.”⁷

¹ See 28 U.S.C. § 46(c) (2006) (“Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . .”).

² FED. R. APP. P. 35. An en banc hearing can also be called in lieu of a three-judge panel, but this is extremely rare. See, e.g., *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc); *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (en banc).

³ See FED. R. APP. P. 35 (“An en banc hearing or rehearing is not favored.”).

⁴ See discussion *infra* Part I.A.

⁵ This is also known as a “counter-dissenting” opinion. See, e.g., *Int’l Bus. Machs. Corp. v. United States*, 480 F.2d 293, 303–05 (1973) (Timbers, J., dissenting).

⁶ John Roemer, *Chief Judge Coins New Words for Failed Enbanc Calls*, DAILY JOURNAL, Sept. 8, 2011, at 1; see also Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601 (2012), <http://yalelawjournal.org/2012/04/10/kozinski&burnham.html>; David Lat, *Grammer Pole of the Weak: ‘I Respectfully Dissental,’ ABOVE THE LAW* (Sept. 8, 2011, 3:34 PM), <http://abovethelaw.com/2011/09/grammer-pole-of-the-weak-i-respectfully-dissental> (describing different terms for opinions regarding the denial of rehearing en banc).

⁷ Kashmir Hill, *Judge Kozinski Doesn’t Track with the Ninth Circuit on GPS and the Fourth Amendment*, ABOVE THE LAW (Aug. 13, 2010, 2:00 PM),

The increasing prevalence—or in the case of the Second Circuit, resurgence—of these opinions is an inefficient use of judicial resources. In every year since 2004, the Second Circuit has produced at least one opinion dissenting from the denial of rehearing en banc, including eight since 2010.⁸ As the number of judges in active service on the Second Circuit has increased,⁹ the length and contentiousness of these opinions have also risen. Modifying the standards for en banc review would divert the judicial energy that is being expended on these opinions towards the generation of precedential opinions, while reducing the number of dissents and concurrences regarding the denial of rehearing en banc.

Part I of this Note is an empirical survey of the history of the en banc practice in the Second Circuit.¹⁰ First is an explanation of the en banc process and an examination of the hearings en banc that did take place and their outcomes in the Supreme Court. Second is a discussion of the mini en banc, which is the practice of circulating opinions that serves as an abbreviated substitute for full en banc hearings. Third is an examination of the myriad opinions that have been inspired by the denials of rehearing en banc, with special attention to the circumstances surrounding the individual opinions and the tendencies of individual judges, past and present.

Part II of this Note analyzes the underlying decision-making processes judges employ when deciding whether to author opinions related to the denial of rehearing en banc.¹¹ It begins by discussing the various elements of the judicial economy function focusing specifically on court of appeals judges. Next is an explanation of the various audiences for judicial opinions. Third is an examination of the dissent in the context of the judicial economy function. This Part concludes with an analysis of the signaling function and the “case or controversy” constitutionality concern that it raises.

Part III of this Note argues that the opinions related to denial of rehearing en banc are counterproductive because of their limited value and considerable cost in terms of time. Several methods that may preserve the benefits of a limited en banc tradition without needlessly hindering the prerogatives of the dissenting judges are explored.¹² First is a proposal to shift to a system that approximates

<http://abovethelaw.com/2010/08/judge-kozinski-doesnt-track-with-the-ninth-circuit-on-gps-and-the-fourth-amendmentcalls-his-fellow-judges-cultural-elitists-when-it-comes-to-privacy>.

⁸ See *infra* Table 2.

⁹ See *infra* note 29 and accompanying text.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part II.

¹² See *infra* Part III.

the Supreme Court's "Rule of Four," requiring less than a majority of judges to institute an en banc rehearing. The second proposal is a system where a precedential en banc rehearing could be conducted based on the original briefs, limiting the time and expense required to obtain an opinion of the full court. This Part concludes with a proposal providing that if the en banc vote is unsuccessful, any decision reaching the underlying merits should be barred from publication in the Federal Reporter, with publication of only the vote tally.

I. EN BANC PRACTICE IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT

A. *Hearings En Banc*

En banc rehearings are governed by Rule 35 of the Federal Rules of Appellate Procedure, and are typically reserved for cases of exceptional importance.¹³ An en banc hearing in federal courts of appeals can be initiated by a petition by one of the parties or by the judges *nostra sponte*, which means the court can initiate the procedure without the request of a litigant.¹⁴ However, even if a party petitions, no vote is taken unless a judge calls for it.¹⁵ The petition is merely a suggestion; the ultimate authority to determine which cases merit en banc rehearing is vested with the court of appeals.¹⁶ Whether a party petitioned for rehearing or not, when en banc is granted, the panel opinion is vacated and the en banc opinion nearly always reaches a contrary conclusion.¹⁷ Even when the vote is unsuccessful, it can prompt the panel to incorporate the concerns of

¹³ See FED R. APP. P. 35.

¹⁴ See *id.* The term *nostra sponte* is frequently used by the Second Circuit in situations where a single judge would be ruling *sua sponte*. See, e.g., *United States v. Stewart*, 597 F.3d 2010 (2d Cir. 2010) (Pooler, J., concurring in the denial of rehearing en banc) ("The *nostra sponte* en banc poll, predicated on the rationale set forth in the dissent, did not succeed."); *Hayden v. Paterson*, 594 F.3d 150, 155 (2d Cir. 2010) ("[O]ur Court, *nostra sponte*, ordered an *en banc* consideration").

¹⁵ FED R. APP. P. 35(f).

¹⁶ See *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971) (quoting *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 250 (1953)) ("§ 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings en banc. It goes no further.").

¹⁷ Because the opinion is vacated and replaced, rather than affirmed or reversed, the level of modification varies greatly and is not easily tracked. However, an empirical comparison of the en banc opinions listed in Table 1 and the corresponding panel opinions suggests that a contrary conclusion is reached in the majority of en banc opinions.

the judge seeking rehearing by amending the original panel opinion.¹⁸

Any statistical study of the Second Circuit's en banc practice should begin with a caveat: the official annual reports have historically failed to capture the accurate number of en banc hearings.¹⁹ The data regarding petitions and the judge-initiated polls for rehearing en banc are sparse, and the cases use conflicting terminology.²⁰ Because the en banc rehearing automatically vacates the panel opinion, comparing outcomes is not as simple as a reversal or affirmance. Nevertheless, thanks to a series of articles published by former Second Circuit Chief Judge Jon O. Newman, much of the behind the scenes machinations involved in the decision-making related to rehearings en banc in the Second Circuit has been elucidated.²¹ In addition, many of the opinions relating to the denial of rehearing en banc include individual judges' opinions on the advantages and disadvantages of the Second Circuit's policy to hear few en banc cases.²²

In the early twentieth century, the increase in judgeships authorized for each circuit court led to the development of a variant of *stare decisis* known as the "law of the circuit" doctrine, which bound panels within a circuit to follow legal precedents announced by other panels in that circuit.²³ It also led to en banc rehearings, the

¹⁸ See Jon O. Newman, *The Second Circuit Review—1982–1983 Term: Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 380 (1984) [hereinafter Newman I] ("A noteworthy aspect of the unsuccessful in banc polls is that on occasion the request for a poll and the indication of some support for an in banc rehearing has been followed by modification of the panel opinion.").

¹⁹ See FEDERAL BAR COUNCIL, SECOND CIRCUIT COURTS COMMITTEE, EN BANC PRACTICES IN THE SECOND CIRCUIT, TIME FOR A CHANGE? 2 (2011) ("The [Federal Court Management] statistics cannot be viewed as totally authoritative, because, at least for the Second Circuit, they do not accurately capture the number of cases in which *en banc* review occurs."), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

²⁰ *Id.* at 1 n.1 ("The Second Circuit at times uses the term '*in banc*,' which appeared in earlier versions of FED. R. APP. P. 35. The rule currently uses the term '*en banc*', and so we use that spelling other than in quoted excerpts from other written work."). This Note also adopts the current Rule's nomenclature, except within quotations.

²¹ See Newman I, *supra* note 188; Jon O. Newman, *In Banc Practice in the Second Circuit 1984–1988*, 55 BROOK. L. REV. 355 (1989) [hereinafter Newman II]; Jon O. Newman, *In Banc Practice in the Second Circuit 1989–1993*, 60 BROOK. L. REV. 491 (1994) [hereinafter Newman III].

²² See *infra* Part I.C.

²³ See *United States v. Valencia*, 645 F.2d 1158, 1176 (2d Cir. 1980) (Van Graafeiland, J., dissenting from denial of en banc) (describing "the commonly

first of which was heard by the Third Circuit in 1940.²⁴ By contrast, the Second Circuit adhered to a policy of never sitting en banc²⁵ until 1956, when the policy was abandoned.²⁶ Within seven years, the Second Circuit had heard thirty cases en banc,²⁷ prompting Chief Judge Lumbard to express alarm at the frequency of en banc hearings, reflecting a desire to strictly limit the amount of cases heard en banc.²⁸ During this period of frequent en banc hearings, Congress increased the authorized number of active judgeships from six to nine in 1961—this in turn increased the likelihood that a majority of circuit judges would disagree with a three-judge panel's conclusion.²⁹ By the mid-1970s, the Second Circuit had abandoned

accepted doctrine that one Court of Appeals panel cannot overrule the decision of a prior panel but that such disregard of *stare decisis* requires action by an en banc court"). See generally Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535 (2010).

²⁴ FEDERAL BAR COUNCIL, *supra* note 19, at 9; see *Comm'r v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941) (The court has the "power to provide for sessions of the court *en banc*."). In affirming, the Supreme Court paved the way for en banc hearings in every circuit. 314 U.S. at 335 ("Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."). The Court later clarified its views. See *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247 (1953).

²⁵ *Lopinsky v. Hertz Drive-Ur-Self Sys.*, 194 F.2d 422, 429 (2d Cir. 1951) ("[T]he practice of this circuit never to sit in banc."). However, in 1951, there were only five active judges in the Second Circuit, so the panel majority would consist of two-fifths of the judges unless a judge on senior status or sitting by designation was part of the panel majority. See Newman I, *supra* note 18, at 371.

²⁶ *In re Lake Tankers Corp.*, 235 F.2d 783 (2d Cir. 1956) (en banc), *aff'd sub nom.*, *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957).

²⁷ See *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 895–96 (2d Cir. 1963) (collecting cases). Judge Newman has stated that the Second Circuit sat en banc "rarely" after *Lake Tankers*. However, the rate of more than four cases a year between 1956 and 1963 is frequent when compared with the rarity of Second Circuit en banc rehearings since 1970. Compare Newman I, *supra* note 18, at 371 ("Since [1956], in banc hearings have occurred rarely, though, on occasion, memorably."), with *Walters*, 312 F.2d at 895–96 (listing thirty cases over seven years).

²⁸ *Walters*, 312 F.2d at 893–94.

²⁹ Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80 (amending 28 U.S.C. § 44(a) to allow nine circuit judges in the Second Circuit). For information regarding the expansion of the Second Circuit over time, see *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER,

its temporary increase in en banc rehearings, and has consistently heard very few cases ever since.³⁰

In order to harmonize the use of en banc across circuits, Rule 35 of the Federal Rules of Appellate Procedure was introduced in 1967 to standardize the use of en banc.³¹ However, despite this attempt at standardization, the circuits have continued to hear cases en banc with frequencies that vary considerably; and the Second Circuit has consistently heard the fewest cases en banc relative to total caseload, as well as in absolute terms.³²

The current statute requires a majority of non-disqualified judges in active service to initiate an en banc hearing.³³ If the vote is successful, the en banc court comprises all circuit judges in active service and any judge on senior status who participated in the original panel or who took senior status after the en banc hearing but before the decision.³⁴ However, this provision regulating the en banc court's composure has been a source of controversy over the years. Prior to an amendment in 2005, recusals and vacancies on the court made it possible for an en banc rehearing to be denied despite the support of a majority of voting judges favoring rehearing.³⁵ When

http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_02.html (last visited Apr. 7, 2013).

³⁰ See *infra* Table 1; see also FEDERAL BAR COUNCIL *supra* note 19, at 15.

³¹ See FEDERAL BAR COUNCIL, *supra* note 19, at 9 (“In view of the resulting uncertainty and inconsistency among the courts of appeals with regard to *en banc* review, Congress standardized the practice through the ratification of Federal Rule of Appellate Procedure 35 in 1967.”).

³² See *id.* at 5–6 (showing the disparity in the number of en banc hearings conducted by each circuit between 2000–2010); see also Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 818 tbl.2 (1993) (pointing out large differences between en banc rehearing rates between 1982–1991, including the Second Circuit's number of en banc decisions at 0.9 per year compared to an average across all courts of appeal of 7.5).

³³ 28 U.S.C. § 46(c) (2006) (“[A] hearing or rehearing before the court in banc [may be] ordered by a majority of the circuit judges of the circuit who are in regular active service.”). Senior status judges may not participate in this vote, even if they were on the original panel. See *Moody v. Albemarle City Bd. of Educ.* 417 U.S. 622, 627 (1974).

³⁴ 28 U.S.C. § 46(c) (“A court in banc shall consist of all circuit judges in regular active service . . . except that any senior circuit judge of the circuit shall be eligible (1) to participate . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.”).

³⁵ See *Zahn v. Int'l Paper Co.*, 469 F.2d 1033 (2d Cir. 1972) (en banc denied with four judges in favor of rehearing and three opposed); *Boyd v. Lefrak Org.*, 517 F.2d 918 (2d Cir. 1975) (same).

the number of participating judges is reduced because of recusals and vacancies, or increased by the presence of a senior judge from the original panel, a minority of authorized active judges may determine the outcome in an en banc hearing.³⁶ However, because a majority of active judges are required to initiate the en banc, judges who agree with the panel majority on the merits of the case have a strategic incentive to reject an en banc rehearing in spite of a belief that the case otherwise meets the standards for rehearing the case en banc.³⁷ In other words, because senior judges—who under certain circumstances are eligible to participate in an en banc rehearing—can never vote in the en banc poll, active judges who wish to preserve the holding of the panel opinion may need to use the en banc poll to express their position on the merits, even though the purpose of an en banc poll is simply to determine whether an en banc hearing is warranted.³⁸

Various justifications for drastically limiting the number of cases reheard have been advanced, including discretion and

³⁶ See *Int'l Bus. Machs. Corp. v. United States*, 480 F.2d 293, 303–04 (2d Cir. 1973) (Timbers, J., dissenting) (“Today’s en banc majority decision results in a turnabout of the 2-1 panel decision . . . Judge Mulligan’s panel dissenting opinion, joined now by Judges Hays, Feinberg and Oakes, becomes the en banc majority opinion by a 4-2 vote. Judge Moore’s panel majority opinion, concurred in by Judge Timbers, becomes now the en banc dissenting opinion. Thus the law of the Circuit on the substantial issues of unusual importance here involved is being determined by four active judges on a Court for which Congress has provided a nine-judge complement.”). The 2005 Amendment to Rule 35 did not eliminate the possibility of this outcome.

³⁷ In *International Business Machines*, three active judges were recused and the court had one vacancy. *Id.* at 303. The case was decided by the five non-recused active judges and Senior Judge Moore, who was eligible to participate since he had served on the original panel. The only judges eligible to vote in the en banc poll were the five non-recused active judges; all five votes were required to reach a majority of authorized judgeships. Had Judge Timbers voted against en banc rehearing despite his position on the merits, “there would be no en banc reconsideration of the important issues in the instant case.” *Id.* at 304–05.

³⁸ For example, if there are six active judges voting in the en banc poll and one senior status judge who would be eligible to participate only if the vote is successful, four of the six active judges are required to initiate an en banc rehearing. If successful, four of the seven participating judges are required to produce a precedential opinion. If a judge—who would otherwise support the panel opinion on the merits—feels that the issue is important enough to merit en banc rehearing, he runs the risk of being the fourth vote in the en banc poll, bringing the senior status judge into the equation. The senior status judge then might join with the three other judges who voted for en banc, creating a majority that could have been prevented by voting against en banc in the first place.

efficiency.³⁹ However, Second Circuit judges have frequently cited tradition as the reason for many denials of rehearing en banc.⁴⁰ Several chief judges of the Second Circuit have defended the tradition of only rarely hearing cases en banc.⁴¹ However, most of these chief judges have dissented from the denial of rehearing en banc on at least one occasion.⁴² In voting to deny rehearing en banc in *Ricci v. DeStefano*, Judge Katzmann approvingly referenced the Second Circuit's tradition and highlighted the value of deference to panel opinions.⁴³ However, Chief Judge Jacobs strenuously objected to the use of tradition to justify denial of rehearing en banc.⁴⁴

On several occasions, the Second Circuit has acknowledged the importance of a case, but decided to wait for the Supreme Court to decide on the certiorari petition before deciding whether to grant the en banc rehearing.⁴⁵ This first occurred in *Eisen v. Carlisle & Jacquelin*,⁴⁶ which was duly vacated by the Supreme Court.⁴⁷ In a

³⁹ See FEDERAL BAR COUNCIL, *supra* note 19, at 20–21 (listing justifications for the en banc that have been expressed by different judges).

⁴⁰ See Newman III, *supra* note 21, at 503 (describing the “firmly established tradition” of hearing few cases en banc).

⁴¹ See Michael B. de Leeuw & Samuel P. Groner, *En Banc Review in the Second Circuit*, N.Y. L.J., Dec. 18, 2009 (discussing the views of several former chief judges).

⁴² Since 1954, only Chief Judges Feinberg and Meskill have not authored at least one published opinion dissenting from the denial of rehearing en banc, but both have voted to rehear cases en banc. See *infra* Table 2. On the other hand, former Chief Judge Learned Hand stated that he never voted to rehear a case en banc. See James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 392 (1994) (“[A]ccording to Professor Gunther, Hand never voted to convene a court en banc.”).

⁴³ *Ricci v. DeStefano*, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc) (“[O]ur Circuit’s longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel’s disposition of the matter before it. Throughout our history, we have proceeded to a full hearing en banc only in rare and exceptional circumstances.”).

⁴⁴ *Id.* at 93 (Jacobs, C.J., dissenting from the denial of rehearing en banc) (“[T]o rely on tradition to deny rehearing *in banc* starts to look very much like abuse of discretion.”).

⁴⁵ See Newman I, *supra* note 18, at 383 (“On at least two occasions, a majority of the court has explicitly rejected in banc reconsideration of an important issue precisely because of its confidence that the issue would engage the attention of the Supreme Court.”).

⁴⁶ See 479 F.2d 1005, 1021 (2d Cir. 1973) (Kaufman, J., concurring with the denial of rehearing en banc) (“[W]e wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.”).

⁴⁷ 417 U.S. 156 (1974); see also *infra* notes 91–94 and accompanying text.

1973 case, the Second Circuit explicitly denied en banc with the expectation that the Supreme Court resolution was inevitable.⁴⁸ In 1991's *International Society for Krishna Consciousness, Inc. v. Lee*, Chief Judge Oakes expressed doubt about the soundness of deferring to a statutorily mandated en banc hearing.⁴⁹ In 2004, the Second Circuit originally denied the petition for rehearing en banc in *Muntaqim v. Coombe* "without prejudice" to renewal after the Supreme Court's disposition of the certiorari petition.⁵⁰ Judge Jacobs questioned the legitimacy of denying en banc rehearing without prejudice, which effectively circumvents the Supreme Court's position as "the Court of last resort."⁵¹ After the Supreme Court denied the petition for certiorari, the Second Circuit vacated the panel opinion and reheard the case en banc.⁵²

Between 2000 and 2010, the Second Circuit heard eight cases en banc.⁵³ This was roughly half the number of cases heard en banc by the next nearest circuit—the First Circuit—during the same period, despite the fact that the Second Circuit had nearly three times the

⁴⁸ *Green v. Santa Fe Indus., Inc.*, 553 F.2d 1309 (2d Cir. 1976) (per curiam) ("This Court has denied en banc . . . not because we believe these cases are insignificant, but because they are of such extraordinary importance that we are confident the Supreme Court will accept these matters under its certiorari jurisdiction, as we correctly anticipated in *Eisen v. Carlisle & Jacquelin*."), *rev'd*, 430 U.S. 462 (1977).

⁴⁹ 925 F.2d 576, 588 (2d Cir. 1991) (Oakes, C.J., dissenting from the denial of rehearing en banc) ("I should suppose that rehearing en banc could be denied here on the basis that the Supreme Court is sure to grant certiorari. That, it strikes me, is not sound justification; better that our house be put in order without Supreme Court intervention."), *aff'd*, 505 U.S. 672 (1992).

⁵⁰ *Muntaqim v. Coombe*, 385 F.3d 793, 795 (2d Cir. 2004) (Straub, Pooler, Sack, Katzmann, JJ., concurring in the denial of rehearing en banc) ("While we recognize that the suggestion to rehear this case *in banc* has failed, our concurrence is specifically without prejudice to renewal by a judge or party after the Supreme Court acts on the *certiorari* petitions now pending."), *cert. denied*, 543 U.S. 978 (2004), *and order amended and superseded by* 396 F.3d 95 (2d Cir. 2004) (granting rehearing en banc).

⁵¹ *Id.* (Jacobs, J., dissenting from the denial of rehearing en banc) ("Unless our *in banc* practice is to become a dead letter altogether, this is a circumstance in which our full Court should convene. It is no proper solution for us to forgo *in banc* review 'without prejudice,' and thus expressly reserve an opportunity to hear the case as a full court if the Supreme Court does not: the Court of last resort is on First Street, not on Foley Square.")

⁵² 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam).

⁵³ See FEDERAL BAR COUNCIL, *supra* note 19, at 6. Table 1, *infra*, lists ten cases, but *Brown v. Andrews* was dissolved before hearing, 220 F.3d 634, 635 (2d Cir. 2000) (per curiam), and *Hayden v. Pataki* and *Muntaqim v. Coombe* were consolidated for briefing and oral argument, 449 F.3d 371, 374 (2d Cir. 2004) (en banc) (per curiam).

caseload of the First Circuit.⁵⁴ In fact, year after year, the Second Circuit consistently hears fewer cases en banc than every other circuit in absolute terms, and *far* fewer cases when adjusted for caseload.⁵⁵

When the Second Circuit does endeavor to hear a case en banc, the Supreme Court very rarely grants certiorari; only five times since 1970, and not at all since 1988.⁵⁶ In three of those cases, the Supreme Court summarily vacated the en banc opinion.⁵⁷ The most recent, *United States v. Monsanto*, was an en banc hearing that produced a per curiam opinion and eight concurring and dissenting opinions.⁵⁸ The Second Circuit's en banc *Monsanto* decision, which created a circuit split, was reversed by the Supreme Court in a 5-4 decision.⁵⁹ The rare number of times that certiorari is granted from a Second Circuit en banc decision suggests that Second Circuit en banc courts generally adjudicate to the satisfaction of the Supreme Court; especially given the stringent standard the Second Circuit applies when deciding whether to rehear the case. Therefore, increased en banc review should actually *reduce* the number of cases the Supreme Court finds necessary to accept.

B. *The Mini En Banc*

In order to allow a three-judge panel to issue opinions that would otherwise require a full en banc hearing, nine of the thirteen federal circuits—including the Second Circuit—have adopted an informal version of en banc review, commonly known as the “mini en banc.”⁶⁰ Though the procedures vary by circuit, the mini en banc is typically employed when the panel is overruling the law of the

⁵⁴ The First Circuit heard eighteen en banc cases between 2000–2010, out of 9,773 total, compared to the Second Circuit's 27,856 total cases. See FEDERAL BAR COUNCIL, *supra* note 19, at 6.

⁵⁵ See *id.* at 5–8 for graphs and tables depicting the disparity in statistics between the Second Circuit and her sister circuits.

⁵⁶ See *infra* Table 1.

⁵⁷ *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd sub nom.*, *Preiser v. Rodriguez*, 407 U.S. 919 (1973); *United States v. Kaylor*, 491 F.2d 1133 (2d Cir. 1974) (en banc), *vacated sub nom.*, *United States v. Hopkins*, 418 U.S. 909 (1974); *Turpin v. Maillet*, 579 F.2d 152 (2d Cir. 1978) (en banc), *vacated sub nom.*, *City of West Haven v. Turpin*, 439 U.S. 974 (1978); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981).

⁵⁸ 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 491 U.S. 600 (1989).

⁵⁹ 491 U.S. 600 (1989).

⁶⁰ See Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 714–15 (2009).

circuit⁶¹ or creating a circuit split.⁶² In this procedure, a draft panel opinion is circulated among all active judges in the circuit and any judge may request a vote.⁶³ If the vote is successful, a formal en banc is conducted; otherwise the panel opinion is published.⁶⁴ Some circuits, such as the Seventh, require the published opinion to include a mention of fact that the opinion was circulated and whether no vote was requested or that a vote was conducted that did not result in a majority of judges voting to rehear the case en banc.⁶⁵ However, other circuits have been criticized for lacking transparency because they do not indicate the use of this procedure.⁶⁶

Since their first use of the mini en banc in 1966, the Second Circuit has employed the procedure on at least seventy occasions.⁶⁷ This level of usage is more than twice every other circuit apart from the Seventh.⁶⁸ Only the Second and Seventh Circuits utilize the mini en banc more often than the traditional formal en banc.⁶⁹ Yet, unlike the Seventh Circuit, the Second Circuit does not have a local rule addressing the mini en banc and does not have a consistent procedure for noting the use of the mini en banc in the opinion.⁷⁰ The mini en banc procedure does not preclude a dissent from denial of rehearing en banc; in fact after an opinion is circulated, a judge may institute an en banc vote.⁷¹

⁶¹ See *supra* note 23 and accompanying text.

⁶² See Sloan, *supra* note 60, at 766.

⁶³ See *id.* at 725–26.

⁶⁴ See *id.*

⁶⁵ See 7TH CIR. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows: This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe.*)”).

⁶⁶ See generally Sloan, *supra* note 60 (arguing that the use of the mini en banc procedure must be accompanied by an indication of its use).

⁶⁷ See *id.* at 728 fig.1.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at 756.

⁷¹ See *supra* note 15 and accompanying text.

C. *The Dissent from the Denial of Rehearing En Banc*

Typically, the votes of the individual judges in an en banc poll are not published. However, the publication of dissents from—and concurrences with⁷²—the denial of rehearing en banc is a method judges employ to circumvent that custom.⁷³ Some judges openly question the propriety of publishing such opinions.⁷⁴ The Second Circuit began publishing these opinions in 1958, two years after their first en banc rehearing.⁷⁵ No comprehensive list of dissents from denial of rehearing en banc has been previously published, so the cases generating these opinions are listed in tabular form in the appendix of this Note.⁷⁶

Over the next five years Judge Clarke authored seven dissents from the denial of rehearing en banc.⁷⁷ The first of those was *Glenmore v. Ahern*.⁷⁸ This opinion was criticized by Chief Judge Lumbard and Judges Friendly and Moore, who questioned whether Judge Clarke had the authority to publish a dissent, because he was

⁷² On most occasions, any concurrence is a direct response to the dissent. However, there have been occasions where the denial was accompanied by a purely explanatory opinion. *See, e.g.*, *Boudin v. Thomas*, 737 F.2d 261 (2d Cir. 1984) (Newman, J., concurring in the rejection of rehearing en banc); *United States v. Danzey*, 622 F.2d 1065 (2d Cir. 1980) (statement of Mansfield, Oakes, Newman, Kearse, JJ.).

⁷³ *See* Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 331 (2006) (“The issuance of such opinions as a safety valve to a strict rule forbidding the revelation of vote tallies on en banc petitions is not without controversy.”).

⁷⁴ *Id.* (“Judge James Hill of the Eleventh Circuit, in his own opinion dissenting from a denial of rehearing en banc, questioned whether such opinions should be issued at all.”).

⁷⁵ *Am.-Foreign S.S. Corp. v. United States*, 265 F.2d 136, 155 (2d Cir. 1958) (statement of Clark, C.J. & Waterman, J.) (disagreeing with the court’s interpretation of 28 U.S.C. § 46), *vacated*, 363 U.S. 685 (1960).

⁷⁶ *See infra* Table 2.

⁷⁷ *Matthies v. Seymour Mfg. Co.*, 271 F.2d 740 (2d Cir. 1959); *United States v. New York, N. H. & H. R. Co.*, 276 F.2d 525 (2d Cir. 1960); *Peter Pan Fabrics, Inc. v. Dixon Textiles Corp.*, 280 F.2d 800 (2d Cir. 1960); *Puodu v. Royal Netherlands S.S. Co.*, 303 F.2d 752 (2d Cir. 1962); *Nuzzo v. Rederi*, 304 F.2d 506 (2d Cir. 1962); *Walters v. Moore-McCormack*, 312 F.2d 893 (2d Cir. 1963); *Grayson-Robinson Stores v. S.E.C.*, 320 F.2d 940 (2d Cir. 1963).

⁷⁸ 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissenting) (“I am not enamored of in banc proceedings; in the particular cases where we have tried them, they appear to have raised more questions than they have settled. But so long as we do order them at least occasionally, it would appear that a decision such as this on a continually recurring issue of practice, against so many strong precedents and reasons of policy, is one made to order for such procedure if any case is.”), *overruled by* *Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966) (en banc).

not a member of the original three-judge panel.⁷⁹ Another case, *Puddu v. Royal Netherlands Steamship Co.*⁸⁰ was—after further reflection by the court—later reheard en banc, though the en banc court eventually adopted the panel opinion.⁸¹ In five of these seven dissents, Judge Clark garnered the vote of at least one other judge.⁸² However, after 1963, there were no recorded dissents from the denial of rehearing en banc for the remainder of the 1960s.

The early 1970s saw the appointment of Judges Timbers and Oakes to the Second Circuit by President Nixon.⁸³ That decade also saw a marked change in the volume of dissents from denial of rehearing en banc, with nineteen cases giving rise to a dissenting opinion.⁸⁴ At least fourteen of those dissenting opinions were authored by either Judge Timbers or Judge Oakes, which raises the inference that the Second Circuit's en banc history is strongly driven by a few individual judges.⁸⁵ Although vote counts are not available in all instances, at least six of these judges' opinions were explicitly joined by the other.⁸⁶ Furthermore, Judge Oakes has never authored

⁷⁹ *Id.* at 553 (statement of Friendly, J.) (“We feel obliged to note that the course which had brought this to us would mean that any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it en banc thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.”); *Id.* at 557 (“Chief Judge LUMBARD joins in this opinion. Judge MOORE, not having participated in the decision, deems it inappropriate that he comment as to the merits; however, he joins us in considering that an en banc should not have been granted here and also in regretting inauguration of a practice of writing opinions with respect to an en banc vote.”).

⁸⁰ 303 F.2d 752 (2d Cir. 1962).

⁸¹ 1962 A.M.C. 1194 (2d Cir. 1962) (en banc) (per curiam).

⁸² *Glenmore v. Ahern*, 276 F.2d 525 (2d Cir. 1960) (joined by Judge Waterman); *Nuzzo v. Rederi*, 304 F.2d 506 (2d Cir. 1962) (joined by Judge Smith); *Walters v. Moore-McCormack*, 312 F.2d 893 (2d Cir. 1963) (joined by Judges Smith & Marshall); *Greyson-Robinson Stores v. SEC*, 320 F.2d 940 (2d Cir. 1963) (joined by Judges Smith & Hays).

⁸³ Four Nixon appointees joined the Second Circuit in 1971. Along with Judges Timbers and Oakes, Judges Mansfield and Mulligan were also seated that year. By the end of 1974, the only remaining judges from before 1971 were (then Chief) Judge Kaufman and (now Senior) Judge Feinberg.

⁸⁴ See *infra* Table 2.

⁸⁵ See *id.*

⁸⁶ *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); *Chris-Craft v. Piper Aircraft*, 480 F.2d 341 (2d Cir. 1973), *cert. denied*, 444 U.S. 910 (1973); *Zahn v. Int'l Paper*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973) *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Scenic Hudson Preserv.*

or joined an opinion concurring with the denial of rehearing en banc. Judge Timbers has joined three such opinions—all of which featured Judge Oakes either authoring or concurring with the dissent from the denial of rehearing en banc.⁸⁷

There were four cases in the 1970s with published dissents from denial of rehearing en banc where the Supreme Court granted certiorari.⁸⁸ Of those four cases, the high court affirmed only one, *Zahn v. International Paper*.⁸⁹ In *Zahn*, despite the support of a majority of voting judges, rehearing was denied because the rules at the time required a majority of *all active* judges, regardless of whether they were participating in the en banc poll.⁹⁰

In *Eisen v. Carlisle & Jacquelin*, Judge Oakes, joined by Judges Hays and Timbers, dissented from the denial of rehearing en banc.⁹¹ Chief Judge Kaufman, in his concurrence with denial of rehearing en banc, agreed that the case was of national importance,⁹² but justified the denial of rehearing on banc by stating that the Supreme Court would surely grant certiorari and resolve this important issue.⁹³ Sure enough, the Supreme Court granted certiorari and eventually vacated the panel opinion, issuing a landmark decision regarding notice requirements for class action lawsuits.⁹⁴

In the same term, Judge Timbers also authored a dissent from

Conf. v. Fed. Power Comm'n, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

⁸⁷ *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 531 F.2d 5 (2d Cir. 1975); *Boyd v. Lefrak Org.*, 517 F.2d 918 (2d Cir. 1975); *Gilliard v. Oswald*, 557 F.2d 359 (2d Cir. 1977).

⁸⁸ See *infra* Table 2.

⁸⁹ 414 U.S. at 302. The holding in *Zahn* was later overturned by Congress's enactment of 28 U.S.C. § 1367. See *Exxon Mobil*, 545 U.S. at 566 (“We hold that § 1367 by its plain text overruled . . . *Zahn* . . .”).

⁹⁰ See *Newman I*, *supra* note 18, at 368 n.14 (“When the vote was taken to decide whether to hear *Zahn* in banc, the Second Circuit had one vacancy and one active judge was disqualified. Because the four active judges voting for an in banc were not a majority of either the seven active judges participating or the eight active judges then serving, *Zahn* may be viewed as a ruling that the base for determining a majority is the number of active judges serving, even if one is disqualified, rather than a majority of the authorized complement, even when one vacancy exists.”).

⁹¹ *Eisen*, 479 F.2d at 1021 (Oakes, J. dissenting from the denial of rehearing en banc).

⁹² See *id.* at 1020 (Kaufman, J. concurring) (“I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction.”).

⁹³ See *id.*

⁹⁴ 417 U.S. 156 (1974).

denial of rehearing en banc of a panel opinion in a civil rights case that was later granted certiorari and reversed.⁹⁵ Judge Timbers authored the dissent at the original panel level and his dissent was joined by three other members of the Second Circuit, leaving the vote tied—four votes for rehearing and four against. In fact, on at least five occasions in the 1970s, no majority existed for denying rehearing en banc.

Gilliard v. Oswald highlights the undermining effect of a dissent from the denial of rehearing en banc.⁹⁶ In that case, Judge Oakes authored the dissent and Chief Judge Kaufman authored a concurrence with the denial of rehearing en banc.⁹⁷ In a separate concurrence, Judge Timbers expressed the view that Kaufman's opinion undermined the panel opinion, especially since seven of nine judges voted against the en banc rehearing.⁹⁸

Judge Timbers left active service in 1979. Although Judge Oakes remained in active service through 1992, the frequency of dissents from the denial of rehearing en banc sharply fell during the period from 1980 through 1992. Thirteen cases produced such opinions, four of which resulted in certiorari grants.⁹⁹ The interesting feature of this decade was that Chief Judge Jon O. Newman, who often commented with disapproval on the practice,¹⁰⁰ authored opinions in six of these cases.

After 1992, it was over six years before the next dissent from denial of rehearing en banc appeared in the Second Circuit.¹⁰¹ However, since 1999 the practice of authoring dissents and concurrences from the denial of rehearing en banc has returned. In

⁹⁵ *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973).

⁹⁶ 557 F.2d 359 (2d Cir. 1977).

⁹⁷ *Id.*

⁹⁸ *Id.* at 360–61 (Timbers, J., concurring in the denial of rehearing en banc) (“I likewise disagree with the Chief Judge’s advance attempt to narrow the scope of the court’s panel majority holding With deference, I should think each case that comes before us should be decided on its own particular facts, as Judge Moore’s characteristically thoughtful panel majority opinion did in the instant case. And the precedential effect of a prior decision of this Court, in my view, should be determined by traditional considerations which are deeply rooted in our jurisprudence.”).

⁹⁹ *Pico v. Bd. of Educ.*, 646 F.2d 714 (2d Cir. 1980), *aff’d*, 457 U.S. 853 (1982); *McCray v. Adams*, 756 F.2d 277 (2d Cir. 1985), *vacated*, 478 U.S. 1001 (1986); *Int’l Soc’y for Krishna v. Lee*, 925 F.2d 576 (2d Cir. 1991), *aff’d*, 505 U.S. 672 (1992); *United States v. Salerno*, 952 F.2d 624 (2d Cir. 1991), *rev’d*, 505 U.S. 317 (1992).

¹⁰⁰ *See, e.g.*, *In re Drexel Burnham Lambert Inc.*, 869 F.2d 116, 119 (2d Cir. 1989) (Newman, J., dissenting from the denial of rehearing en banc) (“[A] statement of reasons for such a dissent is often neither needed nor useful.”).

¹⁰¹ *See infra* Table 2.

less than thirteen years, twenty cases produced dissents from denial of rehearing en banc.¹⁰² In contrast to the relatively high rate of certiorari grants in the 1980s, certiorari was denied in every case from 1999 until 2005.¹⁰³ This suggests that judges were initially authoring dissents from the denial of rehearing en banc for cases that were *not* of such exceptional importance that normally justifies rehearing.

However, since 2005, that analysis has shifted. In the past seven years, the Supreme Court has granted certiorari in six cases where there was a dissent from denial of rehearing en banc and denied certiorari in only five cases.¹⁰⁴ Of the six grants, three were reversed and three more are pending as of the time of this writing.¹⁰⁵ In these cases, the natural conclusion is that judges are now more accurately identifying cases that merit rehearing en banc.

D. *The Views of the Current Second Circuit Judges*

The current active judges on the Second Circuit have developed distinctive patterns reflecting their judicial philosophies regarding the en banc procedure in general, as well as the practice of authoring opinions relating to the denial of rehearing en banc. Table 3 compiles the publically available information regarding the voting records of the current judges.¹⁰⁶ Examining the relative frequency of these votes and the judges' published views on opinions relating to the denial of rehearing en banc provides insight into the differences of opinion that exist among the current judges in the Second Circuit.

In 2000, after eight years on the Second Circuit, current Chief Judge Dennis Jacobs expressed his opposition to opinions related to the denial of rehearing en banc.¹⁰⁷ However, he now has written six opinions dissenting and three concurring from the denial of rehearing en banc—more than any other current judge.¹⁰⁸ Despite the fact that

¹⁰² See *infra* Table 2.

¹⁰³ *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005), *rev'd sub nom.*, *Randall v. Sorrell*, 548 U.S. 230 (2006).

¹⁰⁴ See *infra* Table 2.

¹⁰⁵ See *id.*

¹⁰⁶ See *infra* Table 3.

¹⁰⁷ *Brown v. City of Oneonta*, 235 F.3d 769, 777 (2d Cir. 2000) (Jacobs, J., concurring in the denial of rehearing en banc) (“Opinions pro and con on the denial of rehearing belong to a deservedly neglected genre.”).

¹⁰⁸ *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 200 (2d Cir. 2011); *Rosario v. Ercole*, 617 F.3d 683, 685 (2d Cir. 2010); *Ricci v. DeStefano*, 530 F.3d 88, 92 (2d Cir. 2008); *Zhong v. U.S. Dept. of Justice*, 489 F.3d 126, 134 (2d Cir. 2007); *Landell v. Sorrell*, 406 F.3d 159, 174 (2d Cir. 2005); *Muntaqim v. Coombe*, 385 F.3d 793, 795 (2d Cir. 2004) and concurred with the denial of rehearing en banc in

the Second Circuit has continued to hear en banc cases at the same low rate, Judge Jacobs has recently been willing to express his frustration at the Second Circuit's traditional reluctance to rehear cases en banc. Judge Jacobs has authored or joined an opinion dissenting from or concurring with the denial of rehearing en banc on the majority of cases where such an opinion was published. By 2007, Judge Jacobs was openly bemoaning the cumbersome tradition that effectively immunized Second Circuit panel decisions from en banc review.¹⁰⁹ In a 2008 dissent from the denial of rehearing en banc in *Ricci v. Destefano*, he reiterated his frustration with the tradition, explaining that the Second Circuit should be willing to rehear cases that are clearly important enough to merit Supreme Court review.¹¹⁰

In 2009, the Second Circuit denied rehearing en banc in *Watson v. Geren*, issuing a per curiam opinion reiterating that en banc rehearing should be reserved for only the very most important cases that implicate “the development of law and the administration of justice.”¹¹¹ Judge Raggi, joined by Chief Judge Jacobs and Judges Cabranes and Livingston, dissented.¹¹² Judge Raggi primarily argued that the panel erred; she did not attribute her dissent from denial of rehearing en banc to the importance of the case or a circuit split.¹¹³

Since joining the Second Circuit in 2002, Judge Raggi has authored a dissent from denial of rehearing en banc in five of the cases that contained at least one such opinion.¹¹⁴ She has further joined five dissents authored by other judges.¹¹⁵ Judge Cabranes has

Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379, 380 (2d Cir. 2011); *United States v. Stewart*, 597 F.3d 514, 515 (2d Cir. 2010); *Brown*, 235 F.3d at 777.

¹⁰⁹ *Zhong*, 489 F.3d at 139 (Jacobs, C.J., dissenting from the denial of rehearing en banc) (“[O]ur *in banc* practice is so rusty and cumbersome that its desuetude will allow a single panel to skate past full court review.”).

¹¹⁰ *Ricci*, 530 F.3d at 93 (Jacobs, C.J., dissenting from the denial of rehearing en banc) (“I do not think it is enough for us to dilate on exceptionally important issues in a sheaf of concurrences and dissents arguing over the denial of *in banc* review. If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits.”).

¹¹¹ *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (“*En banc* review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice. We respectfully suggest that this is not one of those cases.”).

¹¹² *Id.* (Raggi, J., dissenting from the denial of rehearing en banc).

¹¹³ *Id.* at 164.

¹¹⁴ *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 172 (2d Cir. 2011); *Watson*, 587 F.3d 160; *Policiano v. Herbert*, 453 F.3d 79, 80 (2d Cir. 2006); *Landell v. Sorrell*, 406 F.3d 159, 179 (2d Cir. 2005).

¹¹⁵ *See infra* Table 3.

authored six dissents from denial of rehearing en banc since 1998.¹¹⁶ Like Judges Raggi and Jacobs, Judge Cabranes's dissents have been lengthy and reached the merits of the underlying cases.¹¹⁷

Judge Pooler has authored four dissents from denial of rehearing en banc since 1994.¹¹⁸ However, Judge Pooler's opinions regarding the denial of rehearing en banc differ from the other prolific dissenters because rather than addressing the underlying merits of the case, she frequently includes only a relatively short statement describing the reason for her position.¹¹⁹ In *United States v. Stewart*, she expressed unambiguous disdain for the practice of expounding on the issues and undermining the panel opinion, comparing the non-precedential nature of these opinions to "a letter to the editor of their favorite local newspaper."¹²⁰ In *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, Judge Pooler's panel opinion acknowledged that the three judge panel was constrained by the law of the circuit doctrine, but suggested that the appellants should

¹¹⁶ *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 678 F.3d 127, 128 (2d Cir. 2012); *United States v. Stewart*, 597 F.3d 514, 520 (2d Cir. 2010); *Ricci v. DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008); *Landell*, 406 F.3d at 179; *United States v. Lynch*, 181 F.3d 330, 332 (2d Cir. 1999).

¹¹⁷ See, e.g., *Ricci*, 530 F.3d at 93 (Cabranes, J., dissenting from the denial of rehearing en banc).

¹¹⁸ *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 625 F.3d 779, 779 (2d Cir. 2010); *Rosario v. Ercole*, 617 F.3d 683, 688 (2d Cir. 2010); *United States v. Fell*, 571 F.3d 264, 295 (2d Cir. 2009); *United States v. Martin*, 430 F.3d 73, 75 (2d Cir. 2005).

¹¹⁹ See, e.g., *Fell*, 571 F.3d at 295 (Pooler, J., dissenting from the denial of rehearing en banc) (noting in a brief opinion that while in favor of a rehearing en banc, he did not join Judge Calabresi's lengthy dissent); *Martin*, 430 F.3d at 75 (Pooler, J., dissenting from the denial of rehearing en banc) ("I would not dissent after being on the losing side of an in banc poll if I did not believe that the decision in *Martin* sets a perilous and plainly wrong precedent.").

¹²⁰ 597 F.3d at 519 (Pooler, J. concurring in the denial of rehearing en banc) ("The nostra sponte en banc poll, predicated on the rationale set forth in the dissent, did not succeed. The majority opinion therefore stands. As pointed out in the majority opinion, the district court should, of course, take account of the panel dissent. But the decision of the panel is the law of the Circuit for this case on remand and for future cases, unless and until it is overruled by the Supreme Court or by this Court en banc. Opinions dissenting from denial of rehearing en banc are not uncommon in this Circuit. They are nonetheless oddities. When such an opinion is filed, there is an extant panel decision resolving the appeal. The active judges declined to revisit that decision en banc. The panel decision is therefore the Court's decision. Other judges may have views on the matter, but the case is not before them, and what they may say about it has as much force of law as if those views were published in a letter to the editor of their favorite local newspaper.").

petition for en banc to allow the court to reexamine its precedent.¹²¹ When the Second Circuit denied the petition for rehearing en banc, Judge Pooler dissented and noted the agreement of the other two members of the panel, Senior Judges Newman and Parker.¹²² The panel could have used the mini en banc procedure instead of deferring to a poll of the entire court.¹²³ The subsequent opinion overturning the previous precedent would have likely remained undisturbed.¹²⁴

At the other end of the spectrum, Judge Katzmann had not authored or joined an opinion dissenting from the denial of rehearing en banc in over a decade of active service, when he authored a short opinion in 2011, dissenting from the denial of rehearing en banc in *Kiobel v. Royal Dutch Petroleum Co.*¹²⁵ Conversely, he has authored five opinions concurring with the denial of rehearing en banc and joined three more, the most among active judges.¹²⁶ These opinions, two of which were coauthored with Judge Sack, were each brief and simply defended the Second Circuit's tradition of rarely hearing cases en banc.¹²⁷

Judge Wesley has joined six dissents from denial of rehearing en banc, but authored only one dissent—a secondary dissent to Judge Raggi's dissent in *Policiano*—since 2004.¹²⁸ Judge Lynch has considered opinions usually unnecessary, but valuable in the absence

¹²¹ 604 F.3d 98, 110 (2d Cir. 2010) (per curiam) (“In sum, as long as *Tamoxifen* is controlling law, plaintiffs’ claims cannot survive. Accordingly, we AFFIRM the judgment of the district court. However, we believe there are compelling reasons to revisit *Tamoxifen* with the benefit of the full Court’s consideration of the difficult questions at issue and the important interests at stake. We therefore invite the plaintiffs-appellants to petition for rehearing in banc.”).

¹²² 625 F.3d 779, 779 & n.1 (2d Cir. 2010).

¹²³ See *supra* Part I.B.

¹²⁴ See *supra* note 109 and accompanying text.

¹²⁵ Judge Katzmann’s short dissent highlighted the 5-5 vote in the en banc poll and explained that the panel majority’s conclusion—relying primarily on an expansive reading of Katzmann’s reasoning made in a previous concurrence—was unfounded and not logically required. 642 F.3d 379, 380 (2d Cir. 2011) (Katzmann, J., dissenting from the denial of rehearing en banc).

¹²⁶ See *infra* Table 3.

¹²⁷ See, e.g., *Landell v. Sorrell*, 406 F.3d 159, 167 (2d Cir. 2005) (Sack, Katzmann, JJ., concurring in the decision to deny rehearing en banc) (“[W]e think the Court has rightly decided to respect what Judge Newman referred to as the ‘Virtues of Restraint.’”).

¹²⁸ Joined: *Amnesty Int’l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011); *Ark. Carpenters*, 629 F.3d 779; *Ricci*, 530 F.3d 88; *Landell*, 406 F.3d 159; *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2004). Authored: *Policiano*, 453 F.3d 79.

of a panel dissent.¹²⁹ His lone dissent occurred in *Kiobel*, where the concurring panel author was ineligible to participate in the en banc poll.¹³⁰ In Judge Hall's lone dissent, in *Amnesty International*, he appeared to distance himself from the three lengthy dissenting opinions written by his colleagues.¹³¹ Judge Livingston has authored two dissents from denial of rehearing en banc.¹³² The dissents cited circuit precedent or the creation of a circuit split as the Rule 35 justification for en banc rehearing. To date, the three newest judges on the Second Circuit, Judges Chin, Lohier, and Carney, have not authored opinions regarding the denial of rehearing en banc.

II. ANALYSIS

A. *The Judicial Economy Function*

In order to understand the reasons that dissents from denial en banc occur, it is important to understand the motivations that drive judicial decision-making. Only then can one truly analyze the costs and benefits of the practice of issuing such opinions. Judges, like all professionals, are members of a labor market, albeit one that differs significantly from the typical model.¹³³ The “buyers” are the politicians who appoint them on behalf of the constituents.¹³⁴ Federal circuit court of appeals judges—like all Article III judges—serve during “good behavior,” which essentially equates to a life term.¹³⁵

¹²⁹ *Amnesty Int'l*, 667 F.3d at 164 (Lynch, J., concurring in the denial of rehearing en banc) (“While I usually consider opinions concurring in a denial of en banc review unnecessary, I write briefly in response to my colleagues’ dissents from denial of rehearing en banc because, in the absence of any panel dissent, some of their criticisms have not previously been aired.”).

¹³⁰ 642 F.3d 379, 380 (2d Cir. 2011) (Lynch, J., dissenting from the denial of rehearing en banc) (short opinion referencing Senior Judge Leval’s “scholarly and eloquent concurring opinion”).

¹³¹ *Amnesty Int'l*, 667 F.3d at 204 (Hall, J., dissenting from the denial of rehearing en banc) (“I respectfully dissent from the denial of rehearing *in banc* solely because I believe this case ‘involves a question of exceptional importance’ warranting *in banc* review. FED. R. APP. P. 35(a)(2).”).

¹³² *Amnesty Int'l*, 667 F.3d 163; *United States v. Whitten*, 623 F.3d 125 (2d Cir. 2010).

¹³³ See RICHARD A. POSNER, *HOW JUDGES THINK* 57 (2008) (Theories of judicial behavior “can be integrated by conceiving of the judge as a worker, and thus a participant in a labor market . . .”).

¹³⁴ See *id.*

¹³⁵ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”); see also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (“[F]ederal judges appointments [are] during good Behaviour—the practical equivalent of life tenure.”) (internal quotation marks omitted).

After appointment and confirmation, they are no longer subject to the same external constraints present in most labor markets.¹³⁶ Excepting the infrequent case of a circuit judge aspiring for appointment to the Supreme Court, the executive and legislative branches have no control over a sitting judge.¹³⁷ Therefore, the “buying side” of the labor market is effectively out of the equation after appointment and Senate confirmation. Without the power to influence the decisions of the vast majority of federal judges, the legislative and executive branches are effectively making a long-term purchase. There is no opportunity for buyer’s remorse.¹³⁸

The “sellers” in this labor market—the judicial nominees and sitting judges—receive a far lower monetary compensation than their qualifications would permit them to earn in private practice or academia, so it is unlikely that many aspire to become judges for monetary gain.¹³⁹ They therefore must agree to provide their services for certain nonpecuniary compensation, such as deference, power, leisure, intellectual stimulation, public recognition, job security, independence, and, perhaps most importantly, the desire to be a “good judge.”¹⁴⁰

Judge Posner argues that the motivation to be a “good judge” is supported by the tremendous judicial output of many judges despite the apparent opportunity to live a “leisured judicial life” and to retire at full pay.¹⁴¹ Although this may be in part due to a desire for notoriety or promotion, most of these hard-working judges toil in relative obscurity.¹⁴² Posner asserts that judges are in this way similar to artists, who also derive significant intrinsic satisfaction from their work.¹⁴³ This notion of “good judging” is a driving force

¹³⁶ See POSNER, *supra* note 133, at 58 (“Once appointed . . . a federal judge, being well insulated from both carrots and sticks, has no incentive to decide cases in such a way as to advance anyone’s political goals besides his own—if he has such goals.”).

¹³⁷ See *id.* at 58–59.

¹³⁸ For an illustration of the classic case of buyer’s remorse, compare Thomas Jefferson’s pre-presidential belief that judicial terms should be for life with his post-*Marbury* argument that judges should be elected and serve six-year terms. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 715 (1995).

¹³⁹ *Id.* at 59 (“[Judges] could command a higher salary in a law practice or even in teaching law.”).

¹⁴⁰ *Id.* at 59–61.

¹⁴¹ *Id.* at 61 (explaining that if judges continue to work after retirement age, they are “working for nothing”).

¹⁴² *Id.* at 62.

¹⁴³ *Id.*; see also Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 2 (2009) (“A judicial opinion performs as well as it explains . . . [I]t becomes a performative utterance.”).

that shapes every stage of the decision-making process. The result of the decision-making process is manifested in the written opinion.

B. The Audience for Judicial Opinions

When a judge writes an opinion, he does so with a wide variety of audiences in mind.¹⁴⁴ The lawyers and parties, especially the losing party or a lower judge whose opinion is reversed, expect a justification for any adverse ruling.¹⁴⁵ Practicing attorneys rely on written opinions to craft future arguments and develop their understanding of the law.¹⁴⁶ Similarly, law students rely heavily on opinions to develop their understanding of legal principles.¹⁴⁷ Fellow judges on panels must be convinced to join an opinion or persuaded to abandon a contrary position.¹⁴⁸ While reviewing judges must be satisfied that the opinion was well grounded in law, judges in lower courts and sister circuits rely on the opinion's precedential or persuasive guidance.¹⁴⁹ Legislators and political scientists also use opinions in the political arena.¹⁵⁰ In cases of national prominence, members of the general public are exposed to the judiciary through the lens of the media.¹⁵¹ Finally the judge who writes the opinion may use the writing process as a method to develop a justification for the decisions he made before setting out to actually write.¹⁵²

¹⁴⁴ See Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961).

¹⁴⁵ See Aldisert, *supra* note 143, at 17.

¹⁴⁶ *Id.* at 19 (“Lawyers . . . look for prediction as to the course of future decisions.”).

¹⁴⁷ *Id.* (“Law school faculties and students also seek the opinions as study tools and research materials.”).

¹⁴⁸ *Id.* at 18 (“The opinion writer . . . should at all times consider . . . judge’s colleagues on the court.”).

¹⁴⁹ *Id.* at 19 (“[Secondary consumers of judicial opinions] vary. Some are institutions in the same judicial hierarchy, some are at a higher rung, some lower.”).

¹⁵⁰ *Id.* (stating that opinions are used by “state legislators and academics in many fields, among them political scientists”).

¹⁵¹ *Id.* (“Representatives of the print and electronic media are counted among opinion readers.”).

¹⁵² See Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957) (“I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge . . . often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.”); see also Leflar, *supra* note 144, at 814 (“[T]he writing judge [writes] to satisfy himself that his decision is right.”).

C. *The Judicial Economy Function Applied to Dissents*

The same potential audiences for opinions in general apply to dissents as well. A dissent tells the losing party that the legal issue was close, and may therefore encourage an appeal. Attorneys may perceive a dissent as an opportunity to persuade future panels or the en banc court to overrule the opinion's precedent or persuade a sister circuit to adopt a different rule of law.¹⁵³ The dissent may have been an attempt to persuade fellow panel members to abandon the view held by the majority and supplant the original putative majority opinion.¹⁵⁴ Conversely, some dissents began as draft majority opinions, but later became dissents after losing the support of one or more judges.¹⁵⁵ Dissents also help strengthen the majority opinion by forcing it to address counterarguments.¹⁵⁶ The threat of dissent ensures that ideologically opposed judges conform their opinions to existing precedent.¹⁵⁷

The varied readers of judicial opinions are affected by dissents in different ways. Law students read dissents and learn that there are other points of view beyond the rule set forth by the majority. Legislators and academics may perceive the dissent as a call to action, to remedy a perceived injustice of the majority opinion. The public learns of importance of judicial nominations through the knowledge that a case is closely divided. The dissenter may simply be satisfying his own desires to vindicate his beliefs. A judge's personal belief in the correctness of his minority view may lead him to author a dissent to propagate that view. This may result in a dilution of the effect of the majority opinion.¹⁵⁸ Most of these readers are indirectly influenced by the dissents they read over a relatively long term.

In the short term, a dissenting opinion at the court of appeals level—especially when the dissent is from the denial of rehearing en

¹⁵³ HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT 76 (2006).

¹⁵⁴ See BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 161 (1996) (describing the Supreme Court's decision-making process in *Lochner*, where Justice Peckham's circulated draft dissent convinced one of the Justices to abandon the original five Justice majority, relegating Justice Harlan's draft opinion of the Court to a dissent).

¹⁵⁵ See *id.* at 178–255 (describing several instances where a Supreme Court Justice switched his vote after the initial conference).

¹⁵⁶ See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1651 (2003).

¹⁵⁷ See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 176–78 (2003) (describing “whistleblower” effect).

¹⁵⁸ See Aldisert, *supra* note 143, at 29 (“[I]f the opinion writer is not careful in phrasing the issue, a dissenter may complain and dilute the efficacy of the opinion.”).

banc—can also have an influential short-term effect: signaling to the Supreme Court that certiorari should be granted and the majority opinion ought to be reversed.¹⁵⁹ The efficacy—or perceived efficacy—of this signaling effect¹⁶⁰ creates an important incentive for judges to author dissents.¹⁶¹

Though there are clearly benefits, the decision to dissent is not costless for the judges, so despite the many reasons a judge may choose to author a dissent, court of appeals judges generally avoid doing so.¹⁶² The time spent authoring a dissent detracts from time that could otherwise be spent improving other, precedential opinions or pursuing other non-judicial interests such as academic writing or leisure activities.¹⁶³ The dissent may magnify the majority opinion and paradoxically make it *more* significant.¹⁶⁴ Furthermore, the dissent could potentially lead to disharmony and lasting negative feelings among the judge's colleagues.¹⁶⁵ The importance of collegiality and managing workload at the court of appeals level results in far fewer dissents per opinion than at the Supreme Court, even though circuit-level panels are frequently composed of nominees from presidents of opposing political parties.¹⁶⁶

Because each judge places different values on these factors, there should be an observable propensity of certain judges to author dissents, while other judges tend to refrain from doing so. At the extreme, some judges may systematically avoid even joining published dissents, even when the immediate cost of doing so is quite low. This makes sense, especially when a judge holds a swing vote.

¹⁵⁹ See HETTINGER, *supra* note 153, at 76–77 (“[P]ersuasive evidence exists regarding the Supreme Court’s case-selection process to suggest that lower court dissent has significant meaning for the justices as well.”).

¹⁶⁰ See *infra* Part II.D.

¹⁶¹ See HETTINGER, *supra* note 153, at 77.

¹⁶² See POSNER, *supra* note 133, at 32.

¹⁶³ See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1733 (1997) (“[I]t may be that a judge who sits with two colleagues from the other party moderates his or her views in order to avoid having to write a dissent.”); see also Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1360 (2006) (“The most elementary cost of a dissenting opinion is incurred in valuable judicial time.”).

¹⁶⁴ See POSNER, *supra* note 133, at 32.

¹⁶⁵ See *id.*; see also Edwards, *supra* note 156, at 1659 (“[J]udges who are would-be dissenters go along with the views of the panel in order either to avoid having to write a dissent, or to help foster a climate in which they will be less likely to have to respond to future dissents when their preferred ideological position finds itself in the majority.”).

¹⁶⁶ See Edwards, *supra* note 156, at 1651; see also SUNSTEIN, *supra* note 157, at 167 (describing the conformity effect).

A judge will avoid triggering a rehearing in a situation where he otherwise agrees with the dissenting opinion. In a system like the Supreme Court's certiorari "rule of four," where a majority is not required to grant certiorari, the swing vote may refrain from providing the final vote to grant when the ultimate outcome is a *fait accompli*, which often occurs when the likely vote of the majority has already been made known in a previous opinion.¹⁶⁷

*D. Signalling, Developing the Issue for the Supreme Court,
and Article III Concerns*

The dissenting judge is often directing the opinion to the Supreme Court, especially the clerks who read the petitions for certiorari and have tremendous influence over the ultimate disposition.¹⁶⁸ Dissents—whether from the panel opinion or from the denial of rehearing en banc—will, at a minimum, prompt a closer read.¹⁶⁹ This is especially true when the dissent's author is known to

¹⁶⁷ For example, in *Liles v. Oregon*, Justice Stevens declined to become the fourth vote by joining Justices Brennan, Stewart, and Marshall, because the position of the other five Justices was clear. 425 U.S. 963, 963–64 (1976) (Stevens, J., concurring in the denial of certiorari) (“[T]here is no reason to believe that the majority of the Court which decided *Miller v. California*, is any less adamant than the minority. Accordingly, regardless of how I might vote on the merits after full argument, it would be pointless to grant certiorari in case after case of this character only to have *Miller* reaffirmed time after time.”) (citations omitted); see also Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1270–71 (1979) (explaining that Justice Brennan employed the same reasoning in the pornography cases in the 1970s).

¹⁶⁸ See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE* 90 (2006) (describing the influence of Supreme Court clerks because of their extensive role in reviewing certiorari petitions); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 126 (2006) (explaining that because of the delegation of analyzing certiorari petitions to clerks, Justice Stevens does “not even look at the papers in over eighty percent of the cases that are filed”).

¹⁶⁹ See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (“If further review is discretionary, as in the U.S. Supreme Court, a separate opinion may signal to the Court that the case is troubling and perhaps worthy of a place on its calendar.”); see also Sur, *supra* note 163, at 1347 (“[T]he Supreme Court, unable to monitor every decision churned out by the circuits, may rely on dissents in [lower] courts as red flags, warning it about especially urgent questions that need authoritative answers.”). There are at least thirty Supreme Court cases that quoted or mentioned the dissent from denial of rehearing en banc. All but three of these cases have been decided since 1990. See, e.g., *Jones v. Harris Associates*, 130 S. Ct. 1418, 1429 (2010) (citing Seventh Circuit Judge Posner’s dissent from denial of rehearing en banc); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 349 (2002) (Rehnquist, C.J., dissenting) (citing Ninth Circuit Judge Kozinski’s dissent from

the clerk, through reputation or personal knowledge.¹⁷⁰ Therefore, there is great incentive for a judge seeking to overturn the panel opinion to produce a dissent that captures the notice of the decision-makers at the Supreme Court.¹⁷¹ In any case, there is a statistical correlation between dissents from denial of rehearing en banc and grants of certiorari.¹⁷² In the cases where certiorari is granted, the Court frequently quotes from the dissent from denial of rehearing en banc.¹⁷³

Websites and blogs have added a new dimension to this effect. The operators of SCOTUSblog¹⁷⁴ and How Appealing¹⁷⁵ scour the opinions of the courts of appeals searching for dissents and circuit splits.¹⁷⁶ Parties, assuming that the clerks take note of this information, lobby to have their petitions for certiorari featured on the blogs.¹⁷⁷

En banc opinions further develop the issues for the Supreme Court.¹⁷⁸ Because an order regarding the denial of rehearing en banc

denial of rehearing en banc); *Miller v. French*, 530 U.S. 327, 346 (2000) (citing Seventh Circuit Judge Easterbrook's dissent from denial of rehearing en banc). A Second Circuit dissent from denial en banc has been cited only once, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 180 (1974) (Douglas, J., dissenting in part) (citing Judge Oakes's dissent from denial of rehearing en banc).

¹⁷⁰ Of the thirty cases located, nine of the references were to opinions authored by just three judges: Judges Posner and Easterbrook of the Seventh Circuit and Judge Kozinski of the Ninth Circuit.

¹⁷¹ See Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 758 (2001) ("The data indicate that the Supreme Court was more likely to grant certiorari when at least one judge issued a dissenting opinion in the court immediately below the Supreme Court than when no judge issued a dissenting opinion.").

¹⁷² See Solimine, *supra* note 73, at 335.

¹⁷³ Sur, *supra* note 163, at 1317–18.

¹⁷⁴ SCOTUSBLOG, <http://www.scotusblog.com> (last visited Apr. 7, 2013).

¹⁷⁵ HOW APPEALING, <http://howappealing.law.com> (last visited Apr. 7, 2013).

¹⁷⁶ See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 177 n.15 (2007) (explaining how SCOTUSblog founder Tom Goldstein built his Supreme Court litigation practice based on his understanding that the Supreme Court's decision of whether to grant certiorari relies heavily on circuit split). Carter Phillips, who has argued over fifty cases in front of the Supreme Court, relies on dissents from denial of rehearing en banc to persuade the Supreme Court to grant certiorari. *Id.* at 184.

¹⁷⁷ See Rachel C. Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535, 1544 (2009) ("[A]pproximately five to ten times every year, a party seeking certiorari urges SCOTUSblog to highlight its case in a blog post.") (citations omitted).

¹⁷⁸ See *Ramos v. Town of Vernon*, 353 F.3d 171, 196–97 (2d Cir. 2003) (Walker, C.J., dissenting from the denial of rehearing en banc) ("These issues and the arguments set forth in the majority opinion and Judge Winter's dissent, which I

is not intended to be a disposition on the merits, it may contain one judge's opinions on the merits and another's opinion on the importance of the case and whether it deserves en banc consideration. The original panel opinion was authored and approved by the panel of judges who considered the parties' briefs and were present at the oral argument. Contrast this to a dissent from the denial of rehearing en banc, where a judge may be approaching the issue with no more information than anyone else presented with the panel opinion. When a panel dissent exists, the dissent from denial of rehearing en banc often does not add significantly to the original dissenting opinion.¹⁷⁹

The cost of these opinions is significant. Rather than simply conducting a poll to determine whether a majority of judges favors en banc rehearing, a dissenting opinion frequently prompts the panel majority author to defend his opinion.¹⁸⁰ When that author is unavailable, another judge opposed to rehearing frequently performs this task.¹⁸¹ This serves as an invitation to other judges in the circuit to weigh in on the issues. Essentially, as judges join the various opinions, the court performs a de facto en banc. However, this de facto en banc produces non-precedential opinions, outside the normal adversarial process.

Not only are the opinions non-precedential, they can seriously undermine the panel opinion. At the conclusion of the publication of

believe merit Supreme Court review, would have benefitted from consideration by the full court before they are presented by certiorari to the Supreme Court.”)

¹⁷⁹ See, e.g., *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 678 F.3d 127, 131 (2d Cir. 2012) (Pooler, J., concurring in the denial of rehearing en banc) (“I write in response to the dissent from the denial of rehearing en banc, which adds little to Judge Straub’s dissent from the panel’s opinion.”).

¹⁸⁰ See *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 13 (2002) [hereinafter “Kozinski Statement”] (statement of Alex Kozinski, Circuit Judge, United States Court of Appeals for the Ninth Circuit) (“[A]n en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion . . . Frequently, other judges circulate memoranda in support or opposition before the vote. Many of these memos are as complex and extensive as the opinion itself.”); see also *Sur, supra* note 163, at 1327 (“[A] judge who disfavors rehearing will often write a response to defend the panel.”).

¹⁸¹ In *Alliance for Open Soc’y*, Senior Judge Parker wrote the panel opinion. 651 F.3d 218 (2d Cir. 2011). Because of his senior status, he was ineligible to participate in the en banc poll, though he would have been able to participate in the en banc rehearing if the poll had been successful. See *supra* notes 33–34 and accompanying text. Judge Pooler, who joined Judge Parker’s original panel opinion, wrote the opinion concurring in denial of rehearing en banc. 651 F.3d at 131.

the opinions regarding the en banc poll, the panel opinion remains the precedential law of the circuit. However, the non-precedential opinions often compete with the original panel opinion for the attention of the media, the academy, sister circuits, and the Supreme Court.¹⁸² The non-precedential opinions sometimes even purport to “clarify” the panel opinion, without actually modifying it.¹⁸³ These have been criticized as highly political rants.¹⁸⁴

When the en banc poll is not prompted by a petition by one of the parties, the opinions may not even be legitimate. Judge Randolph of the D.C. Circuit has suggested that dissents from denial of rehearing en banc may constitute advisory opinions, which would exceed the scope of Article III’s “case or controversy” requirement for justiciability.¹⁸⁵ This argument has greater force in cases where the poll is conducted *nostra sponte*,¹⁸⁶ because a petition for rehearing en banc is a legitimate part of the adversarial process.¹⁸⁷ No court has yet ruled that these opinions are unconstitutional.¹⁸⁸

Even if the opinions related to en banc denial are constitutional and worth the expenditure of time and effort, they are a strain on collegiality.¹⁸⁹ The occasional publication of an opinion regarding a failed en banc poll would not necessarily have any serious impact on the collegiality of the court. However, the Second Circuit’s use of these opinions has exceeded the threshold. To the extent that some of the judges are attempting to overturn the tradition of hearing few cases en banc, the goal is laudable. But in light of the continued intransigence of the circuit over the years, other methods are called for.

¹⁸² Solimine, *supra* note 73, at 335–36.

¹⁸³ See Jones v. Buchanan, 325 F.3d 520, 538 (4th Cir. 2003) (Luttig, J., dissenting) (“In recent years, it has become more common on our circuit to attempt to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion, or even to fine-tune, if not fundamentally reshape, the legal analysis undertaken by the original panel, *in the course of opinions respecting the denial of rehearing en banc*.”).

¹⁸⁴ David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 578 (2001) (“En banc missives sometimes make a good point, but in general they resemble political tracts.”).

¹⁸⁵ *Indep. Ins. Agents of Am., Inc. v. Clarke*, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (statement of Randolph, J.) (“All of this may be good for the soul. But it rubs against the grain of Article III’s ban on advisory opinions.”).

¹⁸⁶ See *supra* note 14 and accompanying text.

¹⁸⁷ See Solimine, *supra* note 73, at 333 (noting that the opinions are “usually the result of the adversarial process”).

¹⁸⁸ See Sur, *supra* note 163, at 1330.

¹⁸⁹ See *id.* at 1361–63.

III. PROPOSAL

A. *Adopt a Nonmajority En Banc Procedure*

The current rule requiring a majority vote to initiate en banc proceedings is too stringent. The Supreme Court requires just four votes to grant certiorari.¹⁹⁰ A similar policy for en banc rehearings would allow the courts of appeals to consider cases in a precedential setting, even when a majority of judges may have agreed with the panel opinion. Eliminating evenly split denials of rehearing en banc would drastically decrease the number of contentious cases producing dissents from the denial of rehearing en banc. While an evenly divided vote signals a close issue, a dissent that fails to garner much support suggests to external audiences that the issue is settled to the satisfaction of a large majority.

The rule governing the en banc procedures applies equally to all circuits.¹⁹¹ However, the courts of appeals vary in size, from six to twenty-nine.¹⁹² One potential solution is to eliminate the majority rule and delegate en banc procedures to the individual circuits. However, in light of the Second Circuit's reluctance to hear cases en banc, that is unlikely to change anything.

The Supreme Court, through the Federal Rules of Appellate Procedure, could set the threshold for granting en banc for each circuit. Rather than specifying the number of votes required, the new rule could utilize a fixed fraction, such as two-fifths (rounding down). This would allow the rule to adapt to any changes in the size of the circuits. A two-fifths threshold translates into the required vote of five judges in favor of rehearing en banc in the Second Circuit. Though the precise votes in en banc polls are not always published, a five-vote threshold would have forced an en banc rehearing in *every* case since 1999 where the Supreme Court granted certiorari.¹⁹³ In contrast, based on the published decisions, only one case where

¹⁹⁰ This is merely a convention, not required by statute or Supreme Court Rules. See Lyle Denniston, Yale Law School Panel Discussion: Is the "Rule of Four" Fully Intact? (Sep. 18, 2009), available at http://www.law.yale.edu/documents/pdf/Clinics/Lyle_Denniston.pdf.

¹⁹¹ FED R. APP. P. 35.

¹⁹² United States Courts, *U.S. Courts of Appeals Additional Authorized Judgeships* (2010) available at <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/authAppealsJudgeships.pdf>.

¹⁹³ *Kiobel v. Royal Dutch Petroleum*, 642 F.3d 379 (2d Cir. 2011) (five against en banc, five for en banc); *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008) (7-6); *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005) (7-5); *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011) (6-6); *In re Am. Express Merchs.' Litig.*, 681 F.3d 139 (2d Cir. 2012) (8-5).

certiorari was denied would have been reheard en banc.¹⁹⁴ En banc would have been granted in two further cases where certiorari was not sought.¹⁹⁵

The Second Circuit's practice of delaying the decision on whether to hear a case en banc until the Supreme Court has ruled on the certiorari petition is not consistent with the purpose of en banc hearings. Because the Supreme Court can grant very few petitions for certiorari, the cases they hear nearly always involve issues of exceptional importance or disharmony among the circuits.¹⁹⁶ Because circuit unity and issues of exceptional importance are precisely the Rule 35 standards for rehearing a case en banc, the Second Circuit could have arguably heard en banc every case where certiorari was granted.¹⁹⁷ A certiorari petition should not toll the time for the circuits to decide whether to rehear a case en banc.

B. Conduct En Banc on the Briefs

An en banc rehearing need not require any significant expenditure of judicial resources beyond what is currently being expended on opinions related to en banc rehearing. The preparation of dissents and concurrences consumes as much time as the usual en banc opinion-writing procedure.¹⁹⁸ Given the tremendous sunk cost involved in preparing these dissents and concurrences, the marginal effort required to convert the drafts into precedential opinions could actually be minimal. There is no requirement that the parties must re-brief and argue the issues in front of the en banc court, though the court is free to require additional briefing and argument.¹⁹⁹ If re-

¹⁹⁴ *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000) (at least five judges voted for rehearing en banc (Kearse, Calabresi, Parker, Straub, Sotomayor, JJ.), at least four voted against it (Walker, C.J., Jacobs, Sack, Katzmann, JJ.)).

¹⁹⁵ *Policiano v. Herbert*, 453 F.3d 79 (2d Cir. 2006) (8-5), *United States v. Lynch*, 181 F.3d 330 (2d Cir. 1999) (6-6).

¹⁹⁶ See *Smith*, *supra* note 171, at 748 (noting that when dissenting court of appeals judges point out a circuit split, there is a statistically significant effect on the likelihood of certiorari being granted).

¹⁹⁷ In deciding whether to grant certiorari, the Supreme Court considers whether a "decision [is] in conflict with the decision of another [circuit] on the same important matter." SUP CT. R. 10; *cf.* FED. R. APP. P. 35 (stating that en banc rehearing "ordinarily will not be ordered unless en banc consideration is necessary to secure or maintain uniformity of the court's decisions or the proceeding involves a question of exceptional importance").

¹⁹⁸ See *Kozinski Statement*, *supra* note 180, at 13 ("Frequently, other judges circulate memoranda in support or opposition [before the en banc vote]. Many of these memos are as complex and extensive as the opinion itself.").

¹⁹⁹ See *Newman I*, *supra* note 18, at 369-70 ("An in banc rehearing in the Second Circuit does not require oral argument Customarily, parties are invited

briefing and arguing is too cumbersome, there is no reason why the case should not be resolved on the briefs. This is essentially the crux of the mini en banc procedure when the majority of judges are in agreement with the panel majority.²⁰⁰ Expanding the mini en banc to allow for resolution on the merits would address the primary concern of those who fear that any usage of the increased en banc procedure would consume an unwarranted amount of judicial resources.

C. *Vote Publishing*

Because results of en banc polls are not otherwise published, dissenting from denial of rehearing en banc has been considered a safety valve, allowing judges to register their opinion on the record.²⁰¹ Judge Reinhardt believes the practice of the Ninth Circuit prohibiting the release of the vote tallies is simply wrong.²⁰² Publishing the votes from an en banc poll would largely serve the same purpose as the dissent from denial of rehearing en banc. Publicizing the fact that the circuit's judges are closely divided on an issue would have much the same benefits of a dissent from denial of rehearing en banc, while avoiding the costly and fractious process of drafting opinions related to the denial. Even though some judges may choose to continue to author dissents from denial of rehearing en banc, the incentive to do so would be decreased.

IV. CONCLUSION

The en banc process is a statutorily mandated procedure for resolving issues of exceptional importance, and has fallen into disuse by the Second Circuit. This disuse is a failure to meet the responsibilities that Congress assigned to them. Second Circuit judges have authored a large quantity of opinions dissenting from the denial of rehearing en banc in an effort to increase the use of the en banc rehearing. However, the Circuit has generally maintained its aversion to en banc hearings.

On first glance, opinions regarding the denial of rehearing en banc seem to do little harm. Yet upon closer examination, these opinions have the potential to do serious harm to the judicial process.

to submit new briefs to the in banc court, although in banc reconsiderations sometimes are decided on the original papers.”).

²⁰⁰ See *supra* Part II.B.

²⁰¹ See Solimine, *supra* note 73, at 326–30.

²⁰² *Harris v. Vasquez*, 949 F.2d 1497, 1539–40 (9th Cir. 1990) (Reinhardt, J., dissenting from denial of rehearing en banc) (“We do not reveal whether the vote was close or even whether a majority of the eligible judges voted against en banc review . . . I believe the answer is that the rule is wrong under all circumstances.”).

Judicial resources and collegiality are difficult to quantify, but both suffer from excessive publication of nondispositive opinions. Because these opinions have not previously been examined as a whole, it has been easy to minimize the extent of the harm.

This Note has attempted to raise the concerns with opinions regarding denial of rehearing en banc and suggested several methods to curb their propagation. Relaxing the majority requirement to initiate en banc would both increase the number of en bancs and reduce the number of dissents from denial of rehearing en banc. Allowing disposition of en banc rehearings without oral argument would allow the courts of appeals to fulfill their statutorily mandated duty without an undue increase in workload. Publishing vote counts without allowing nondispositive opinions regarding en banc denial would provide some of the same signaling benefits without the negative effects of the published dissents.

V. APPENDIX

Table 1
Second Circuit En Bancs since 1970²⁰³

| Year | Case | Supreme Court disposition |
|------|--|---------------------------|
| 1970 | United States ex rel Witt v. LaVallee ²⁰⁴ | Not sought |
| 1970 | Scanapico v. Richmond, F. & P. R. Co. ²⁰⁵ | Not sought |
| 1971 | Williams v. Adams ²⁰⁶ | Reversed |
| 1971 | Sostre v. McGinnis ²⁰⁷ | Cert. denied |
| 1971 | United States v. N.Y. Times Co. ²⁰⁸ | Reversed |
| 1971 | United States v. Manning ²⁰⁹ | Cert. denied |
| 1972 | Drachman v. Harvey ²¹⁰ | Not sought |
| 1972 | Rodriguez v. McGinnis ²¹¹ | Reversed |

²⁰³ Second Circuit en bancs prior to 1963 are collected in *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 895 (2d Cir. 1963).

²⁰⁴ 424 F.2d 421 (2d Cir. 1970) (en banc).

²⁰⁵ 439 F.2d 17 (2d Cir. 1970) (en banc).

²⁰⁶ 441 F.2d 394 (2d Cir. 1971) (en banc), *rev'd*, 407 U.S. 143 (1972).

²⁰⁷ 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied sub nom.*, *Sostre v. Oswald*, 404 U.S. 1049 (1972).

²⁰⁸ 444 F.2d 544 (2d Cir. 1971) (en banc) (per curiam), *rev'd*, 403 U.S. 713 (1971) (per curiam). This is the Pentagon Papers case.

²⁰⁹ 448 F.2d 992 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 995 (1971).

²¹⁰ 453 F.2d 722 (2d Cir. 1971) (en banc).

| | | |
|------|--|-------------------|
| 1973 | Hilbert v. Dooling ²¹² | Cert. denied |
| 1973 | Lanza v. Drexel ²¹³ | Not sought |
| 1973 | Int'l Bus. Machs. Corp. v. United States ²¹⁴ | * |
| 1974 | Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp. ²¹⁵ | Cert. denied |
| 1974 | United States v. Kaylor ²¹⁶ | Summarily vacated |
| 1977 | United States v. Robin ²¹⁷ | Not sought |
| 1977 | United States v. Robinson ²¹⁸ | Cert. denied |
| 1977 | East Hartford Ed. Ass'n v. Bd. of Ed. ²¹⁹ | Not sought |
| 1978 | Oreck Corp. v. Whirlpool Corp. ²²⁰ | Cert. denied |
| 1978 | Turpin v. Mailet ²²¹ | Summarily vacated |
| 1979 | Turpin v. Mailet ²²² | Not sought |
| 1980 | Armstrong v. McAlpin ²²³ | Summarily vacated |
| 1980 | United States v. Muse ²²⁴ | Cert. denied |
| 1980 | Alcoa S.S. Co. v. M/V Nordic Regent ²²⁵ | Cert. denied |
| 1982 | Daye v. Attorney Gen. of N.Y. ²²⁶ | Not sought |
| 1983 | New York by Abrams v. 11 Cornwell Co. ²²⁷ | Not sought |
| 1984 | United States v. O'Grady ²²⁸ | Not sought |

²¹¹ 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd sub nom.*, Preiser v. Rodriguez, 407 U.S. 919 (1973).

²¹² 476 F.2d 355 (2d Cir. 1973) (en banc), *cert. denied*, 414 U.S. 878 (1973).

²¹³ 479 F.2d 1277 (2d Cir. 1973) (en banc).

²¹⁴ 480 F.2d 293 (2d Cir. 1973) (en banc), *motion for leave to file petition of certiorari denied sub nom.*, Int'l Bus. Machs. Corp. v. Edelstein, 416 U.S. 979 (1974), *and motion to file petition of mandamus and/or prohibition denied*, 416 U.S. 980 (1974).

²¹⁵ 496 F.2d 800 (2d Cir. 1974) (en banc), *overruled by*, Armstrong v. McAlpin, 625 F.2d 443 (2d Cir. 1980) (en banc). *But see infra* note 223 (noting that the Supreme Court subsequently vacated *Armstrong*).

²¹⁶ 491 F.2d 1133 (2d Cir. 1974) (en banc), *vacated sub nom.* United States v. Hopkins, 418 U.S. 909 (1974).

²¹⁷ 553 F.2d 8 (2d Cir. 1977) (en banc) (per curiam).

²¹⁸ 560 F.2d 507 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978).

²¹⁹ 562 F.2d 838 (2d Cir. 1977) (en banc).

²²⁰ 579 F.2d 126 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1978).

²²¹ 579 F.2d 152 (2d Cir. 1978) (en banc), *vacated sub nom.*, City of West Haven v. Turpin, 439 U.S. 974 (1978).

²²² 591 F.2d 426 (2d Cir. 1979) (en banc) (per curiam) (on remand).

²²³ 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981).

²²⁴ 633 F.2d 1041 (2d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 984 (1981).

²²⁵ 654 F.2d 147 (2d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 890 (1980).

²²⁶ 696 F.2d 186 (2d Cir. 1982) (en banc).

²²⁷ 718 F.2d 22 (2d Cir. 1983) (en banc).

| | | |
|------|---|-------------------|
| 1986 | In re Grand Jury Subpoena Served upon Doe ²²⁹ | Cert. denied |
| 1987 | United States v. Capo ²³⁰ | Not sought |
| 1988 | Albert v. Carovano ²³¹ | Not sought |
| 1988 | United States v. Monsanto ²³² | Reversed |
| 1988 | Black v. Red Star Towing & Transp. Co. ²³³ | Not sought |
| 1989 | United States v. Indelicato ²³⁴ | Cert. denied |
| 1989 | Beauford v. Helmsley ²³⁵ | Summarily vacated |
| 1990 | United States v. MacDonald ²³⁶ | Cert. denied |
| 1991 | United States v. Monsanto ²³⁷ | Cert. denied |
| 1991 | United States v. Chestman ²³⁸ | Cert. denied |
| 1992 | Asherman v. Meachum ²³⁹ | Not sought |
| 1992 | Bellamy v. Cogdell ²⁴⁰ | Cert. denied |
| 1993 | In re Extradition of McMullen ²⁴¹ | Cert. denied |
| 1993 | United States v. DiNapoli ²⁴² | Not sought |
| 1996 | Baker v. Pataki ²⁴³ | Not sought |
| 1997 | Fisher v. Vassar College ²⁴⁴ | Cert. denied |
| 1997 | Ayala v. Speckard ²⁴⁵ | Cert. denied |
| 1998 | Eastwood Auto Body & Garage, Inc. v. City of Waterbury ²⁴⁶ | Not sought |

²²⁸ 742 F.2d 682 (2d Cir. 1984) (en banc), *overruled by* Evans v. United States, 504 U.S. 255 (1992).

²²⁹ 781 F.2d 238 (2d Cir. 1986) (en banc), *cert. denied sub nom.*, Roe v. United States, 475 U.S. 1108 (1986).

²³⁰ 817 F.2d 947 (2d Cir. 1987) (en banc).

²³¹ 851 F.2d 561 (2d Cir. 1988) (en banc).

²³² 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 491 U.S. 600 (1989).

²³³ 860 F.2d 30 (2d Cir. 1988) (en banc).

²³⁴ 865 F.2d 1370 (2d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 811 (1989).

²³⁵ 865 F.2d 1386 (2d Cir. 1989) (en banc), *vacated*, 492 U.S. 914 (1989).

²³⁶ 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991).

²³⁷ 924 F.2d 1186 (2d Cir. 1991) (en banc), *cert. denied*, 502 U.S. 943 (1991).

²³⁸ 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 503 U.S. 1004 (1992).

²³⁹ 957 F.2d 978 (2d Cir. 1992) (en banc).

²⁴⁰ 974 F.2d 302 (2d Cir. 1992) (en banc), *cert. denied*, 507 U.S. 960 (1993).

²⁴¹ 989 F.2d 603 (2d Cir. 1993) (en banc), *cert. denied*, 510 U.S. 913 (1993).

²⁴² 8 F.3d 909 (2d Cir. 1993) (en banc).

²⁴³ 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam) (vacating panel decision and affirming decision below by an equally divided court).

²⁴⁴ 114 F.3d 1332 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998), *and abrogated by* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

²⁴⁵ 131 F.3d 62 (2d Cir. 1997) (en banc), *cert. denied*, 524 U.S. 958 (1998).

²⁴⁶ 157 F.3d 137 (2d Cir. 1998) (en banc) (per curiam).

| | | |
|-------------|---|--------------|
| 1999 | Benjamin v. Jacobson ²⁴⁷ | Cert. denied |
| 2000 | Brown v. Andrews ²⁴⁸ | Not sought |
| 2001 | Iragorri v. United Techs. Corp. ²⁴⁹ | Not sought |
| 2001 | United States v. Thomas ²⁵⁰ | Cert. denied |
| 2003 | United States v. Rybicki ²⁵¹ | Cert. denied |
| 2004 | United States v. Penaranda ²⁵² | Other |
| 2006 | Hayden v. Pataki ²⁵³ ; Muntaqim v. Coombe ²⁵⁴ | Cert. denied |
| 2007 | Shi Liang Lin v. Dep't of Justice ²⁵⁵ | Cert. denied |
| 2008 | United States v. Cavera ²⁵⁶ | Cert. denied |
| 2009 | Arar v. Ashcroft ²⁵⁷ | Cert. denied |
| 2010 | Portalatin v. Graham ²⁵⁸ | Cert. denied |

²⁴⁷ 172 F.3d 144 (2d Cir. 1999) (en banc), *cert. denied sub nom.*, Benjamin v. Kerik, 528 U.S. 824 (1999).

²⁴⁸ 220 F.3d 634 (2d Cir. 2000) (per curiam) (“At the *in banc* argument [New York abandoned its position]. Because there was no dispute between the parties . . . , the *in banc* court dissolved itself.”).

²⁴⁹ 274 F.3d 65 (2d Cir. 2001) (en banc).

²⁵⁰ 274 F.3d 655 (2d Cir. 2001) (en banc).

²⁵¹ 354 F.3d 124 (2d Cir. 2003) (en banc), *cert. denied*, 543 U.S. 809 (2004).

²⁵² 375 F.3d 238 (2d Cir. 2004) (en banc), *certified questions dismissed*, 543 U.S. 1117 (2005).

²⁵³ 449 F.3d 305 (2d Cir. 2006) (en banc).

²⁵⁴ 449 F.3d 371 (2d Cir. 2006) (en banc), *cert. denied*, 543 U.S. 978 (2004).

²⁵⁵ 494 F.3d 296 (2d Cir. 2007) (en banc), *cert. denied sub nom.*, Zhen Hua Dong v. Dep't of Justice, 553 U.S. 1053 (2008).

²⁵⁶ 550 F.3d 180 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009).

²⁵⁷ 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

²⁵⁸ 624 F.3d 69 (2d Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1693 (2011).

Table 2
Second Circuit Cases Producing Dissents from the Denial of
Rehearing En Banc

| Year | Case | Opinion Author(s) | Reasoning ²⁵⁹ | Subsequent History of panel opinion ²⁶⁰ |
|------|--|-------------------|--------------------------|--|
| 1958 | Am.-Foreign S.S. Corp. v. United States ²⁶¹ | Clark, Waterman | E | Vacated |
| 1959 | Matthies v. Seymour Mfg. Co. ²⁶² | Clark | E | Cert. denied |
| 1960 | Glenmore v. Ahern ²⁶³ | Clark | I | Cert. denied |
| 1960 | Peter Pan Fabrics, Inc. v. Dixon Textiles Corp. ²⁶⁴ | Clark | C, S, SC | Not sought |
| 1962 | Puddu v. Royal Neth. S.S. Co. ²⁶⁵ | Clark | C, SC | Cert. denied |
| 1962 | Nuzzo v. Rederi ²⁶⁶ | Clark | SC | Not sought |
| 1963 | Walters v. Moore-McCormack Lines, Inc. ²⁶⁷ | Clark | C, SC | Not sought |

²⁵⁹ Abbreviations: C-overturns circuit precedent, E-erroneous conclusion, I-issue of exceptional importance, S-creates circuit split, SC-inconsistent with Supreme Court precedent.

²⁶⁰ Because rehearing en banc was denied, the actual writ of certiorari was filed with respect to the undisturbed panel opinion, rather than order denying rehearing. In the earlier cases, this order was often published together with the panel opinion. For simplicity, the citations to the panel opinions are omitted and the Supreme Court disposition is noted relative to the order denying rehearing en banc. All writs of certiorari at a different procedural stage (such as when a case returns to a three judge panel after a remand to a District Court) are omitted.

²⁶¹ 265 F.2d 136, 155 (2d Cir. 1958) (statement of Clark, C.J. & Waterman, J.), *vacated*, 363 U.S. 685 (1960).

²⁶² 271 F.2d 740 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960).

²⁶³ 276 F.2d 525 (2d Cir. 1960) (Clark, J., dissenting), *cert. denied sub nom*, *Tri-Continental Financial Corp. v. Glenmore*, 362 U.S. 964 (1960).

²⁶⁴ 280 F.2d 800 (2d Cir. 1960), *overruled by Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir.) (en banc).

²⁶⁵ 303 F.2d 752 (2d Cir. 1962), *cert. denied*, 371 U.S. 840 (1962).

²⁶⁶ 304 F.2d 506 (2d Cir. 1962).

²⁶⁷ 312 F.2d 893 (2d Cir. 1963).

| | | | | |
|------|--|--------------------|----------|--------------|
| 1963 | Grayson-Robinson Stores v. S.E.C. ²⁶⁸ | Clark | C, SC | Not sought |
| 1970 | Chasins v. Smith Barney ²⁶⁹ | Friendly | I | Not sought |
| 1971 | Scenic Hudson Pres. Conference v. Fed. Power Comm'n ²⁷⁰ | Timbers | I | Cert. denied |
| 1972 | Zahn v. Int'l Paper Co. ²⁷¹ | Timbers | I | Affirmed |
| 1973 | United States v. Pucio ²⁷² | Friendly | C, SC | Cert. denied |
| 1973 | Boraas v. Vill. of Belle Terre ²⁷³ | Timbers | C, I | Reversed |
| 1973 | Eisen v. Carlisle & Jacquelin ²⁷⁴ | Oakes | I | Vacated |
| 1973 | Galella v. Onassis ²⁷⁵ | Timbers | I | Not sought |
| 1974 | Jackson v. Statler Found. ²⁷⁶ | Friendly | E, I | Cert. denied |
| 1974 | United States v. Toscanino ²⁷⁷ | Mulligan | C, I, SC | Not sought |
| 1975 | Boyd v. Lefrak Org. ²⁷⁸ | Kaufman, Oakes | C, I | Cert. denied |
| 1975 | Morgan v. Montanye ²⁷⁹ | Oakes | I, S, SC | Cert. denied |
| 1975 | Kirkland v. N.Y. State Dep't of Corr. Servs. ²⁸⁰ | Mansfield, Kaufman | C, S | Cert. denied |

²⁶⁸ 320 F.2d 940 (2d Cir. 1963).

²⁶⁹ 438 F.2d 1167 (2d Cir. 1970).

²⁷⁰ 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

²⁷¹ 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

²⁷² 476 F.2d 1099 (2d Cir. 1973), *cert. denied*, 414 U.S. 844 (1973).

²⁷³ 476 F.2d 806 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

²⁷⁴ 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

²⁷⁵ 487 F.2d 986 (2d Cir. 1973).

²⁷⁶ 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

²⁷⁷ 504 F.2d 1380 (2d Cir. 1974).

²⁷⁸ 517 F.2d 918 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975).

²⁷⁹ 521 F.2d 693 (2d Cir. 1975), *cert. denied*, 424 U.S. 973 (1976).

²⁸⁰ 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

| | | | | |
|------|--|-------------------------------|----------|----------------------|
| 1977 | Arthur Lipper Corp. v. SEC ²⁸¹ | Oakes | I | Cert. denied |
| 1977 | Gilliard v. Oswald ²⁸² | Oakes | C, SC | Not sought |
| 1977 | United States v. Grasso ²⁸³ | Timbers | C, I, SC | Vacated |
| 1978 | United States v. Ramos ²⁸⁴ | Timbers | C | Not sought |
| 1978 | Wilson v. Henderson ²⁸⁵ | Oakes | C, I | Cert. denied |
| 1979 | United States v. Barnes ²⁸⁶ | Oakes | I | Cert. denied |
| 1979 | Katherine Gibbs Sch. v. FTC ²⁸⁷ | Oakes | I | Not sought |
| 1980 | Pico v. Bd. of Educ. ²⁸⁸ | Mansfield | C, I, S | Affirmed |
| 1981 | United States v. Valencia ²⁸⁹ | Van Graafeiland | C | Not sought |
| 1982 | Langone v. Smith ²⁹⁰ | Oakes | I, S | Cert. denied |
| 1982 | United States v. Margiotta ²⁹¹ | Winter | I | Cert. denied |
| 1984 | Consumers Union v. General Signal Corp. ²⁹² | Oakes | E, I | Cert. denied |
| 1985 | McCray v. Abrams ²⁹³ | Winter, Van Graafeiland | I | Summarily vacated |
| 1987 | Freeman v. Rideout ²⁹⁴ | Oakes, Newman | C, SC | Cert. denied |

²⁸¹ 551 F.2d 915 (2d Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978).

²⁸² 557 F.2d 359 (2d Cir. 1977).

²⁸³ 568 F.2d 899 (2d Cir. 1977), *vacated*, 438 U.S. 901 (1978).

²⁸⁴ 572 F.2d 360 (2d Cir. 1978).

²⁸⁵ 590 F.2d 408 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979).

²⁸⁶ 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

²⁸⁷ 628 F.2d 755 (2d Cir. 1979).

²⁸⁸ 646 F.2d 714 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

²⁸⁹ 645 F.2d 1158 (2d Cir. 1980).

²⁹⁰ 682 F.2d 287 (2d Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

²⁹¹ 811 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

²⁹² 730 F.2d 47 (2d Cir. 1984), *cert. denied*, 469 U.S. 823 (1984).

²⁹³ 756 F.2d 277 (2d Cir. 1985), *vacated*, 478 U.S. 1001 (1986).

²⁹⁴ 826 F.2d 194 (2d Cir. 1987), *cert. denied*, 485 U.S. 982 (1988).

| | | | | |
|-------------|---|----------------------|---------|-----------------------------------|
| 1988 | United States v. Melendez-Carrion ²⁹⁵ | Newman | C | Not sought |
| 1989 | In re Drexel Burnham Lambert Inc. ²⁹⁶ | Newman | I | Cert. denied |
| 1989 | New Era Publ'ns Int'l v. Henry Holt, Co. ²⁹⁷ | Newman | I | Cert. denied |
| 1991 | Int'l Soc'y for Krishna Consciousness, Inc. v. Lee ²⁹⁸ | Oakes | C, E, S | Affirmed |
| 1991 | United States v. Salerno ²⁹⁹ | Newman | C, S | Reversed |
| 1992 | United States v. Concepcion ³⁰⁰ | Newman | I | Cert. denied |
| 1999 | United States v. Lynch ³⁰¹ | Cabranes | I | Not sought |
| 2000 | Brown v. City of Oneonta ³⁰² | Calabresi, Straub | E, I | Cert. denied |
| 2000 | Koehler v. Bank of Berm. ³⁰³ | Sotomayor, Calabresi | I | Certified to NY COA |
| 2004 | Ramos v. Town of Vernon ³⁰⁴ | Walker | I | Not sought |
| 2004 | Muntaqim v. Coombe ³⁰⁵ | Jacobs | I | Cert. denied then reheard en banc |

²⁹⁵ 837 F.2d 61 (2d Cir. 1988).

²⁹⁶ 869 F.2d 116 (2d Cir. 1989), *cert. denied*.

²⁹⁷ 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

²⁹⁸ 925 F.2d 576 (2d Cir. 1991), *aff'd*, 505 U.S. 672 (1992).

²⁹⁹ 952 F.2d 624 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

³⁰⁰ 983 F.2d 369 (2d Cir. 1992), *cert. denied sub nom.*, *Frias v. United States*, 510 U.S. 856 (1993).

³⁰¹ 181 F.3d 330 (2d Cir. 1999).

³⁰² 235 F.3d 769 (2d Cir. 2000), *cert. denied*, 543 U.S. 816 (2001).

³⁰³ 229 F.3d 187 (2d Cir. 2000).

³⁰⁴ 353 F.3d 171 (2d Cir. 2003).

³⁰⁵ 385 F.3d 793 (2d Cir. 2004), *cert. denied*, 543 U.S. 978 (2004) & *vacated* by 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam).

| | | | | |
|------|--|--|----------|---------------|
| 2005 | Landell v. Sorrell ³⁰⁶ | Walker, Jacobs, Cabranes, Raggi | E, SC, I | Reversed |
| 2005 | United States v. Martin ³⁰⁷ | Pooler | I | Cert. denied |
| 2006 | Policiano v. Herbert ³⁰⁸ | Raggi, Wesley | E | Not sought |
| 2007 | Zhong v. Dep't of Justice ³⁰⁹ | Jacobs | C | Not sought |
| 2008 | Ricci v. DeStefano ³¹⁰ | Jacobs, Cabranes | I | Reversed |
| 2009 | United States v. Fell ³¹¹ | Calabresi, Pooler, Sack | I | Cert. denied |
| 2009 | Watson v. Geren ³¹² | Raggi | E | Not sought |
| 2010 | United States v. Stewart ³¹³ | Cabranes | C, E | Cert. denied |
| 2010 | Rosario v. Ercole ³¹⁴ | Jacobs, Pooler | SC | Cert. denied |
| 2010 | United States v. Whitten ³¹⁵ | Livingston | C, S, SC | Not sought |
| 2010 | Ark. Carpenters Health & Welfare Fund v. Bayer AG ³¹⁶ | Pooler | E | Cert. denied |
| 2011 | Kiobel v. Royal Dutch Petroleum ³¹⁷ | Lynch, Katzmann | E, I, S | Cert. granted |

³⁰⁶ 406 F.3d 159 (2d Cir. 2005), *rev'd sub nom.*, Randall v. Sorrell, 548 U.S. 230 (2006).

³⁰⁷ 430 F.3d 73 (2d Cir. 2005), *cert. denied*, 547 U.S. 1192 (2006).

³⁰⁸ 453 F.3d 79 (2d Cir. 2006).

³⁰⁹ 489 F.3d 126 (2d Cir. 2007).

³¹⁰ 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

³¹¹ 571 F.3d 264 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

³¹² 587 F.3d 156 (2d Cir. 2009).

³¹³ 597 F.3d 514 (2d Cir. 2010), *cert. denied sub nom.*, Sattar v. United States, 130 S. Ct. 1924 (2010).

³¹⁴ 617 F.3d 683 (2d Cir. 2010), *cert. denied sub nom.*, Rosario v. Griffin, 131 S. Ct. 2901 (2011).

³¹⁵ 623 F.3d 125 (2d Cir. 2010).

³¹⁶ 625 F.3d 779 (2d Cir. 2010), *cert. denied sub nom.*, La. Wholesale Drug Co., Inc. v. Bayer AG, 131 S. Ct. 1606 (2011).

³¹⁷ 642 F.3d 379 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

| | | | | |
|------|--|---------------------------------|----------------|---------------|
| 2011 | Amnesty Int'l USA v. Clapper ³¹⁸ | Raggi, Livingston, Jacobs, Hall | C, E, I, S, SC | Reversed |
| 2012 | Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. ³¹⁹ | Cabranes | SC | Cert. granted |
| 2012 | In re Am. Express Merchs.' Litig. ³²⁰ | Jacobs, Cabranes, Raggi | C, E, SC | Cert. granted |

Table 3
Published En Banc Voting Records of Current Second Circuit Judges

| Judge | Dissents | Concurs ³²¹ | Opinions Authored | Possible Cases |
|----------------------|----------|------------------------|-------------------|----------------|
| Dennis G. Jacobs | 10 | 4 | 10 | 22 |
| José A. Cabranes | 12 | 3 | 7 | 22 |
| Rosemary S. Pooler | 6 | 9 | 9 | 20 |
| Robert Katzmann | 1 | 8 | 6 | 19 |
| Reena Raggi | 11 | 2 | 6 | 17 |
| Richard C. Wesley | 7 | 5 | 3 | 17 |
| Peter W. Hall | 2 | 3 | 1 | 16 |
| Debra Ann Livingston | 6 | 1 | 2 | 12 |
| Gerard E. Lynch | 2 | 1 | 2 | 9 |
| Denny Chin | 2 | 1 | 0 | 7 |
| Raymond Lohier, Jr. | 0 | 1 | 0 | 4 |

³¹⁸ 667 F.3d 163 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138 (2013).

³¹⁹ 678 F.3d 127 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 928 (2013).

³²⁰ 681 F.3d 149 (2d Cir. 2012), *cert. granted sub nom.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

³²¹ This figure includes cases where the judge was known to have voted against rehearing en banc (because otherwise a majority would have voted to rehear), but did not join a published opinion. *See, e.g., Amnesty Int'l* (Six of the twelve active judges dissented or joined dissents, so the remaining six judges necessarily voted to deny rehearing en banc or abstain.). Because of the rule regarding en banc polls, abstaining (but not a recusal) has the same effect as a concurrence. *See supra* note 33.

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|------------------------------|---|---|---|---|
| Susan L. Carney | 0 | 1 | 0 | 3 |
| Christopher F. Droney | 0 | 0 | 0 | 2 |