
APPELLATE PROCEDURE — EN BANC REVIEW — SECOND
CIRCUIT DECLINES TO REHEAR IMMIGRATION CASE EN BANC,
DESPITE CIRCUIT SPLIT. — *New York v. U.S. Department of Justice*,
964 F.3d 150 (2d Cir. 2020).

Since the first dissent from a denial of rehearing en banc — or dissent¹ — in 1943,² dissents have become increasingly common in the courts of appeals,³ and, consequently, the propriety of dissents has become a subject of scholarly and judicial debate.⁴ Amid this focus on dissents, their counterparts, concurrences (opinions concurring in a denial of rehearing en banc), have received comparatively less attention. However, the Second Circuit’s recent decision in *New York v. U.S. Department of Justice*⁵ suggests that concurrences are worth a closer look. While a majority of the circuit declined to rehear en banc whether the Attorney General had authority to enact immigration-related stipulations on a federal grant program, the court issued three concurrences and two dissents dividing on the merits of the appellate panel’s opinion.⁶ Rather than dissent(al), a pair of judges used a “tactical concurrence” to express disagreement and call for Supreme Court review.⁷ Although “tactical concurrences” may be appealing judicial tools for expeditiously resolving circuit splits, this potential benefit is outweighed by the harm such opinions may pose to judicial legitimacy if they are unsuccessful.

The Edward Byrne Memorial Justice Assistance Grant Program was created in 2006 to provide federal funding for state and local criminal justice programs.⁸ On July 25, 2017, the U.S. Department of Justice (DOJ) enacted three immigration-related requirements for receipt of Byrne funds, which were designed to encourage sanctuary jurisdictions to facilitate enforcement of federal immigration policy.⁹ First, a “Certification Condition” requires grantees to certify compliance with

¹ This comment adopts the shorthand “concurrence” for “concurring in the denial of rehearing en banc” and “dissent” for “dissenting from the denial of rehearing en banc.” See Alex Kozinski & James Burnham, *I Say Dissent, You Say Concurrence*, 121 YALE L.J. ONLINE 601, 601 (2012).

² See Jeremy D. Horowitz, *Not Taking “No” for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 66 & n.43 (2013).

³ *Id.* at 69–70, 70 fig.1.

⁴ Compare, e.g., Kozinski & Burnham, *supra* note 1, at 607–09 (listing the benefits of dissents), with Marsha S. Berzon, *Dissent, “Dissents,” and Decision Making*, 100 CALIF. L. REV. 1479, 1491 (2012) (arguing that dissents have “minimal benefits” and “several important drawbacks”).

⁵ 964 F.3d 150 (2d Cir. 2020).

⁶ See *id.* at 150 (Cabranes, J., concurrence); *id.* at 153 (Lohier, J., concurrence); *id.* at 156 (Sullivan, J., concurrence); *id.* at 157 (Pooler, J., dissent); *id.* at 166 (Katzmann, C.J., dissent).

⁷ See *id.* at 153 (Lohier, J., concurrence).

⁸ *New York v. U.S. Dep’t of Just.*, 951 F.3d 84, 92 (2d Cir. 2020); see 34 U.S.C. §§ 10151–10158.

⁹ *New York v. U.S. Dep’t of Just.*, 343 F. Supp. 3d 213, 221 (S.D.N.Y. 2018). Although the DOJ claimed that policies of “sanctuary jurisdictions” impede federal immigration enforcement, the district court found that this claim is incorrect. See *id.* at 221 n.2.

8 U.S.C. § 1373, which in turn prevents jurisdictions from restricting officials from sharing information regarding citizenship or immigration status with immigration authorities.¹⁰ A “Notice Condition” requires grant recipients to have a mechanism for informing federal authorities of the release dates of aliens in their custody.¹¹ Finally, an “Access Condition” requires program participants to grant federal agents access to aliens in their correctional facilities to inquire about their immigration statuses.¹² Following the implementation of these conditions, the DOJ informed grantee New York City that it did not appear to be in compliance with § 1373 and was at risk of being ineligible for Byrne funding.¹³ The city, along with seven states that had received funding since the program’s inception,¹⁴ filed suit against the DOJ and the Attorney General, challenging the conditions under the Administrative Procedure Act¹⁵ (APA) and the Constitution.¹⁶

The district court granted the plaintiffs’ motion for partial summary judgment and enjoined the DOJ from enforcing the immigration-related conditions in their jurisdictions.¹⁷ Judge Ramos, following courts in the Third, Seventh, and Ninth Circuits,¹⁸ held that the DOJ lacked statutory authority to enact the conditions.¹⁹ Furthermore, Judge Ramos found the application of § 1373 to states and localities to be facially unconstitutional under the Tenth Amendment, as § 1373 directs state and local government officials, rather than private parties, in violation of the anticommandeering doctrine.²⁰ He also held that the conditions violated separation of powers principles by allowing the executive branch the power of the purse.²¹ Finally, the court determined that the challenged conditions were “arbitrary and capricious” under the APA because the defendants had failed to address in the administrative record the “detrimental effects” that would result from them.²² The defendants appealed.

¹⁰ *Id.* at 222; see 8 U.S.C. § 1373.

¹¹ *New York*, 343 F. Supp. 3d at 222.

¹² *Id.*

¹³ *New York*, 951 F.3d at 100.

¹⁴ See *New York*, 343 F. Supp. 3d at 223. The city brought suit alongside Connecticut, Massachusetts, New Jersey, New York, Rhode Island, Virginia, and Washington. *Id.*

¹⁵ 5 U.S.C. §§ 551, 553–559, 701–706.

¹⁶ *New York*, 951 F.3d at 100.

¹⁷ *New York*, 343 F. Supp. 3d at 245–46.

¹⁸ *Id.* at 224–25 (citing decisions from the Seventh Circuit and district courts in the Third and Ninth Circuits).

¹⁹ See *id.* at 221. Judge Ramos rejected both of the DOJ’s proffered bases of authority, finding that the DOJ’s construction of 34 U.S.C. § 10102(a)(6) contravened that statute’s plain meaning and that Congress did not speak clearly to impose funding conditions in 34 U.S.C. § 10153(a)(5)(D). See *New York*, 343 F. Supp. 3d at 227–31.

²⁰ See *New York*, 343 F. Supp. 3d at 234–35.

²¹ See *id.* at 238.

²² *Id.* at 241.

The Second Circuit reversed and vacated the district court's injunction.²³ Writing for a unanimous panel, Judge Raggi²⁴ acknowledged that the case "implicate[d] several of the most divisive issues confronting" the United States, but found that "[a]t its core," it involved "questions of statutory construction."²⁵ Judge Raggi concluded that the Attorney General had statutory authority to enact the challenged restrictions under the plain text of several provisions authorizing the Byrne program.²⁶ Although "mindful that three sister circuits" had decided otherwise, the court concluded that those circuits had either neglected to consider the appropriate statutes, or had held an overly limited view of the scope of the Attorney General's authority.²⁷ The panel also disagreed with the district court's analysis of § 1373, as that statute's constitutionality should have been "assessed . . . not on the face of the statute, but as applied to clarify a federal funding requirement."²⁸ As applied to the Byrne program, § 1373 was a valid exercise of Congress's spending power.²⁹ Lastly, the challenged conditions were not arbitrary or capricious, as the Certification Condition merely made an existing law applicable to the Byrne program, and the Notice and Access Conditions applied only to persons convicted of crimes, not law-abiding crime victims or witnesses, such that detrimental effects were unlikely.³⁰

The plaintiffs filed petitions for rehearing en banc, and a majority of the active judges on the Second Circuit voted to deny review by the full court.³¹ The twelve participating judges issued five opinions — three concurrences and two dissents — regarding the denial of rehearing en banc. Concurring in the denial of rehearing en banc, Judge Cabranes,³² a member of the panel, reiterated that the case involved mere "questions of statutory construction."³³ Although he noted the circuit split, he argued that "[i]t does happen from time to time that our perspective differs from that of other [c]ircuits"³⁴ and that "reasonable judicial minds"

²³ *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 92, 124 (2d Cir. 2020).

²⁴ Judge Raggi was joined by Judges Winter and Cabranes.

²⁵ *New York*, 951 F.3d at 90.

²⁶ *Id.* at 104–06, 117–21. Judge Raggi reasoned that the Certification Condition was statutorily authorized by 34 U.S.C. § 10153(a)(5)(D), *New York*, 951 F.3d at 104; that the Notice Condition was authorized by 34 U.S.C. §§ 10153(a)(4), 10153(a)(5)(C), and 10155, *New York*, 951 F.3d at 116; and that the Access Condition was authorized by 34 U.S.C. §§ 10153(a)(5)(C) and 10155, *New York*, 951 F.3d at 121.

²⁷ *New York*, 951 F.3d at 102; *see id.* at 102–04 (critiquing decisions from the Third, Seventh, and Ninth Circuits).

²⁸ *Id.* at 111.

²⁹ *Id.* at 116.

³⁰ *Id.* at 122–23.

³¹ *See New York*, 964 F.3d at 150 (Cabranes, J., concurring).

³² Judge Cabranes was joined by Judges Livingston, Sullivan, Bianco, Nardini, and Menashi.

³³ *New York*, 964 F.3d at 151 (Cabranes, J., concurring) (quoting *New York*, 951 F.3d at 90).

³⁴ *Id.* at 152.

could differ as to the DOJ's statutory authority.³⁵ Judge Cabranes concluded that there was "little doubt that, in the fullness of time, the conflict among the [c]ircuits [would] be resolved by our highest tribunal."³⁶

In his concurring, Judge Lohier, joined by Judge Hall, remarked that "twelve judges . . . appointed by six different presidents, sitting in four separate circuits" had found that the Attorney General lacked the authority to impose the challenged conditions.³⁷ Judge Lohier argued that many of his concurring colleagues had voted inconsistently in granting rehearing en banc the year before in *New York State Citizens' Coalition for Children v. Poole*,³⁸ where they had emphasized that states must "voluntarily and knowingly" accept conditions on federal grants.³⁹ He also criticized the panel's statutory interpretation and highlighted that the Byrne program "was designed to aid [s]tates and cities in fighting crime, not immigration."⁴⁰ Judge Lohier concurred in the denial of rehearing en banc due to his belief that "[t]he task of remedying these very serious errors will now fall to the Supreme Court," and a denial of rehearing would allow the Court to "do so sooner rather than later."⁴¹

Judge Sullivan⁴² filed a short concurring to address the "erroneous" and "gratuitous point" Judge Lohier raised with respect to the court's decision in *Poole*.⁴³ He argued that, in contrast to the grant at issue in *Poole*, the Byrne program gave applicants clear notice of relevant conditions and a fair exchange for federal funds.⁴⁴

Judge Pooler⁴⁵ found the denial of rehearing en banc "[a]stonishing[]"⁴⁶ and "astound[ing]."⁴⁷ In her dissent, she disagreed with the panel's interpretation of the Attorney General's statutory authority, arguing that it violated the canon against surplusage, ignored the statutory context, and was unfaithful to the legislative history of § 1373.⁴⁸ She also maintained that § 1373 had been rendered facially unconstitutional by the Supreme Court's recent anticommandeering jurisprudence.⁴⁹ For

³⁵ *Id.* at 151.

³⁶ *Id.* at 153.

³⁷ *Id.* at 153 (Lohier, J., concurring).

³⁸ 935 F.3d 56 (2d Cir. 2019).

³⁹ *New York*, 964 F.3d at 153 (Lohier, J., concurring) (quoting *Poole*, 935 F.3d at 59).

⁴⁰ *Id.* at 155; *see id.* at 154–55.

⁴¹ *Id.* at 153.

⁴² Judge Sullivan was joined by Judges Cabranes, Livingston, and Bianco.

⁴³ *New York*, 964 F.3d at 156 (Sullivan, J., concurring).

⁴⁴ *See id.* at 156–57.

⁴⁵ Judge Pooler was joined by Judges Chin and Carney.

⁴⁶ *New York*, 964 F.3d at 157 (Pooler, J., dissental).

⁴⁷ *Id.* at 159.

⁴⁸ *See id.* at 159–61.

⁴⁹ *Id.* at 163–65. Judge Pooler pointed to *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), which held that a provision of a federal statute violated the anticommandeering doctrine by "dictat[ing] what a state legislature may and may not do." *New York*, 964 F.3d at 164 (Pooler, J., dissental) (quoting *Murphy*, 138 S. Ct. at 1478); *see id.* at 163–65.

those reasons — and because of the “persuasive opinions from . . . sister circuits”⁵⁰ — Judge Pooler found the case worthy of en banc reconsideration. In closing, she noted, however: “Perhaps the Appellees will find the relief they seek at the Supreme Court.”⁵¹

In his dissent, Chief Judge Katzmann noted his “reluctan[ce] to vote in favor of rehearing en banc, informed by the institutional experience of [the] [c]ircuit and the explicit policy of the Federal Rules that en banc rehearing is ordinarily ‘not favored.’”⁵² However, he believed that “the panel did not adhere to the normal rules of appellate litigation” in reaching its result because it had considered two novel arguments that had not been properly raised on appeal.⁵³

The opinions concerning the denial of rehearing en banc illustrate the unique situation facing the Second Circuit in *New York*. As to the decision to deny rehearing, the judges reached a clear majority — eight of twelve active judges voted to deny the en banc petition.⁵⁴ However, behind the three concurrences and two dissents, the judges split six to six on the merits of the panel’s decision. Judge Lohier and Judge Hall stood at the middle of this dichotomy, as their concurrence vehemently *dissented* from the reasoning of the panel’s decision. Their opinion is a rare example of how a concurrence may be used to express disagreement in an effort to expedite Supreme Court review. Although “tactical concurrences” potentially offer beneficial signaling capabilities, they are a worrisome innovation in the courts of appeals. Should tactical concurrences fail, they may threaten judicial legitimacy.

At first glance, concurrences appear too rare or too unremarkable to merit further study.⁵⁵ Meanwhile, critics of dissents decry their threat to collegiality,⁵⁶ resemblance to unconstitutional advisory opinions,⁵⁷ and potential to cause confusion for lower courts.⁵⁸ Yet concurrences may

⁵⁰ *New York*, 964 F.3d at 158 (Pooler, J., dissental).

⁵¹ *Id.*

⁵² *Id.* (Katzmann, C.J., dissental) (quoting FED. R. APP. P. 35(a)).

⁵³ *Id.* at 166; *see id.* at 166–67.

⁵⁴ The thirteenth active judge, Judge Park, did not take part in the decision. *Id.* at 150.

⁵⁵ *See, e.g., Mitchell v. JCG Indus., Inc.*, 753 F.3d 695, 698 (7th Cir. 2014) (Posner, J., concurrence) (“Published opinions dissenting from denials of rehearing en banc are rare; published opinions concurring in denials of rehearing en banc are virtually unheard of.”).

⁵⁶ *See, e.g., Bartlett v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurrence) (“Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case *en banc* in order to vindicate that judge’s position.”).

⁵⁷ *See* Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1329.

⁵⁸ *See id.* at 1363; *see also* Mario Lucero, Note, *The Second Circuit’s En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 60 (“[Concurrences and dissents] often compete . . . for the attention of the media, the academy, sister circuits, and the Supreme Court.”).

also be susceptible to some of these very critiques⁵⁹ and have a greater potential to engender confusion. Concurrals have no binding effects on litigants, as the panel's decision remains the law of the circuit.⁶⁰ However, when a concurral explicates a panel's opinion — or is written by a panel member — its precedential effect may be misunderstood.⁶¹ In *New York*, Judge Cabranes, a member of the panel, devoted parts of his concurral to defending the panel decision against recent circuit court decisions, arguably extending the holding in the process.⁶² Similarly, Judge Sullivan's concurral provided guidance to lower courts regarding the decision in *Poole*.⁶³ In the future, a court might be tempted to rely upon these detours, even though they have no precedential status.⁶⁴

Unlike dissentals and other concurrals, however, tactical concurrals pursue a particular strategic objective — hastening Supreme Court review by voting to uphold the panel's decision despite disagreement with the outcome.⁶⁵ Tactical concurrals argue that cases that fit the judiciary's criteria for en banc review are — counterintuitively — less deserving of rehearing en banc. Under the Federal Rules of Appellate Procedure, even though rehearing en banc is “not favored,” it may be granted to “maintain uniformity” in a circuit or to rehear cases concerning questions of “exceptional importance.”⁶⁶ To be sure, what constitutes “exceptional importance” has not been conclusively defined, leaving the decision to proceed en banc within judges' discretion.⁶⁷ And the Second Circuit has traditionally resisted en banc

⁵⁹ For example, the tactical concurral in *New York* appeared to threaten collegiality. See *New York*, 964 F.3d at 151 n.4 (Cabranes, J., concurral) (criticizing Judge Lohier's opinion for being “oddly focused on scolding several of his colleagues”).

⁶⁰ Sur, *supra* note 57, at 1333. This point distinguishes opinions relating to a denial of rehearing en banc from opinions relating to the denial of certiorari. While a concurral competes with an opinion from the same court, when the Supreme Court denies certiorari, “the dispute never lands on the Court's agenda.” *Id.* at 1334; see *id.* at 1333–34.

⁶¹ See *id.* at 1363 (arguing concurrals may be more dangerous than dissentals if they “are understood as attempts to revise the legal analysis offered in the challenged panel opinion”).

⁶² See *New York*, 964 F.3d at 152 n.9 (Cabranes, J., concurral).

⁶³ See *id.* at 156–57 (Sullivan, J., concurral).

⁶⁴ As a potential solution to this issue, some observers argue that opinions relating to a denial of en banc review should simply address whether the requirements of Federal Rule of Appellate Procedure 35, which governs en banc proceedings, are met. See, e.g., Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 337 (2006). On this view, the merits should be discussed “only insofar as [they] bear[] on the application of the Rule 35 criteria.” *Id.*

⁶⁵ See, e.g., *New York*, 964 F.3d at 153, 156 (Lohier, J., concurral). Other judges that may vote tactically on a rehearing en banc often do not publicize their votes in a separate opinion. Cf., e.g., *United States v. Washington*, 864 F.3d 1017, 1034 (9th Cir. 2017) (Hurwitz, J., separate statement) (stating, on a denial of rehearing en banc, that “[w]hen a judge chooses not to indicate views on the merits of a controversy, colleagues should not invent them”).

⁶⁶ FED. R. APP. P. 35.

⁶⁷ See Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 371 (1984).

procedures.⁶⁸ While Judges Lohier and Hall decisively averred that *New York* contained issues of “exceptional importance,”⁶⁹ they nevertheless argued that “the better course” was “for the Supreme Court to grant certiorari and reverse.”⁷⁰ To them, the denial of en banc review was a tool for expediency — to usher *New York* toward swifter Court review — rather than a reflection of the implications of the case.

Although tactical concurrences are rarely used,⁷¹ this signaling feature may present an appealing tool to judges seeking a swifter path to finality and resolution of circuit splits. As the tactically concurring judges in *New York* acknowledged, the panel’s decision created a circuit split with “serious consequences.”⁷² The ruling allows the DOJ to withhold Byrne program funds from sanctuary cities in seven states, possibly depriving them of millions of dollars for criminal programs.⁷³ Conversely, the scope of the decision allows sanctuary jurisdictions outside of the Second Circuit’s purview to continue to receive Byrne funding — and, because funding is divided among grantees, potentially more funding than they would normally receive.⁷⁴ Finally, if the DOJ can impose immigration-related conditions on Byrne grantees’ criminal justice programs, it may impose other, noncriminal conditions on future funding.⁷⁵

If the tactical concurrence’s plea to the Court succeeds at gaining certiorari “next Term,”⁷⁶ it will limit the dangers that this circuit split poses to the administration of the law⁷⁷ and constitute an efficient use of judicial resources. Indeed, some tactical concurrences have met their goal by garnering Supreme Court review.⁷⁸ And as dissents proliferate, tactical concurrences may become more effective signals to the Court.

⁶⁸ See Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 807 n.103 (2020).

⁶⁹ *New York*, 964 F.3d at 155 n.5 (Lohier, J., concurrence).

⁷⁰ *Id.* at 156.

⁷¹ A review of circuit court (excluding the Federal Circuit, see Horowitz, *supra* note 2, at 97 n.184) concurrences published on Westlaw since 2000 revealed only nine cases with tactical concurrences (which expressly disagreed with the merits of the panel’s decision and called for Supreme Court certiorari). Spreadsheet on file with the Harvard Law School Library [hereinafter Spreadsheet]. Such concurrences are rare, but are not new. See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973) (Kaufman, J., concurrence) (“I vote against en banc . . . because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction.”).

⁷² *New York*, 964 F.3d at 155 n.5 (Lohier, J., concurrence).

⁷³ *New York v. U.S. Dep’t of Just.*, 951 F.3d 84, 116 (2d Cir. 2020).

⁷⁴ See *City of Chicago v. Barr*, 961 F.3d 882, 921–22 (7th Cir. 2020).

⁷⁵ *New York*, 964 F.3d at 155 n.5 (Lohier, J., concurrence).

⁷⁶ *Id.* at 153.

⁷⁷ See Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 996–98 (2020) (describing problems created by circuit splits).

⁷⁸ In the nine tactical concurrences written since 2000, see *supra* note 71, the litigants sought certiorari in all cases. Spreadsheet, *supra* note 71. The Court granted certiorari in five, with one petition still pending as of November 2020. *Id.* This compares favorably to studies of the efficacy

But this possibility stands in tension with the reality of the Supreme Court's shrinking docket,⁷⁹ which prevents tactically concurring judges from knowing that their strategy will pan out.⁸⁰ Should tactical concurrences fail, they undermine courts' perceived institutional legitimacy.⁸¹ Because the decision to deny rehearing en banc leaves untouched the law that sparked a tactical concurrence, denial of certiorari cements in place a precedent that faces open disagreement. Should the Court deny certiorari in *New York*, it will solidify precedent that the tactically concurring judges decried as unconstitutional,⁸² calling into question the judges' own faith in the circuit's decisionmaking process and legitimacy.⁸³ In addition, if certiorari isn't granted, a tactical concurrence suggests that a judge prioritized a tactical goal over the well-being of the litigants and, detrimentally, failed to achieve this goal.⁸⁴ This open disagreement and strategic maneuvering could decrease the courts' legitimacy in a way that ultimately limits the efficacy of the judiciary.⁸⁵

Judges Lohier and Hall, faced with a divisive issue and a divided circuit, likely viewed their tactical concurrence as a tool to accelerate certiorari. But even if their votes to deny en banc review did not have a decisive effect on the outcome of the en banc petition, their decision to tactically concur will have a decisive impact on the judiciary if certiorari is denied. For their part, the judges appeared confident that certiorari was forthcoming.⁸⁶ Only time will tell whether that assessment and the judges' tactical decisions were correct.

of dissents at garnering certiorari. See Horowitz, *supra* note 2, at 82 (finding that the Rehnquist and Roberts Courts granted approximately twenty-five percent of certiorari petitions in cases with dissents). More research is needed to substantiate this finding.

⁷⁹ Cohen & Cohen, *supra* note 77, at 991 ("The federal appellate courts face the highest caseloads in their history, while the Supreme Court heard fewer cases in the 2018–2019 Term than in almost any other Term in modern times.")

⁸⁰ See Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 57 (1988) ("The Supreme Court has great difficulty in deciding which cases among its burgeoning caseload to review . . . [I]t is no longer tenable, if it ever was, to shift en banc responsibility to the Supreme Court.")

⁸¹ This point is primarily based on sociological legitimacy. A decision "possesses [sociological] legitimacy . . . insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

⁸² See *New York*, 964 F.3d at 153 (Lohier, J., concurrence).

⁸³ See Berzon, *supra* note 4, at 1491–92 ("Dissents from the denial of rehearing en banc indicate that we . . . are unwilling to stand behind the results of our decision-making processes. That unwillingness signals a breakdown in the process of adversarial collaboration, as well as an institutional lack of confidence in it.")

⁸⁴ Cf. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 213 (2011) (arguing that the Court's "legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way")

⁸⁵ For example, legitimacy is needed to encourage people to abide by the law. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

⁸⁶ See *New York*, 964 F.3d at 169 (Katzmann, C.J., concurrence) ("All of my participating colleagues . . . seem to agree that Supreme Court review is now inevitable.")