STRATEGIC CONSIDERATIONS FOR GOING EN BANC IN THE TENTH CIRCUIT

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ABSTRACT[††††]

The vast majority of decisions of the U.S. Court of Appeals for the Tenth Circuit are rendered by a panel of three judges. But sometimes, all active members of the court, and any senior judge who was part of the original three-judge panel, will sit together to decide a particular issue. This process is called "en banc" review. Parties often ask the Tenth Circuit to "go en banc," as it has been colloquially dubbed, but the court rarely entertains such requests. The substantial disparity between the total number of appeals in the Tenth Circuit each year, the number of en banc petitions filed, and the number of petitions granted suggests that practitioners might benefit from a primer on some of the strategic and pragmatic considerations of seeking en banc review. That is what we aim to provide in this Article.

We begin by providing a brief overview of the governing standards for en banc proceedings in the Tenth Circuit. After laying the groundwork for our discussion, we share some statistics about the fate of most en banc petitions filed in recent years. The statistics reveal that en banc consideration truly is "extraordinary"—not only in theory but also in fact. Against this backdrop, we offer some pointers and considerations for appellate attorneys and their clients to keep in mind when contemplating whether their case merits the "extraordinary procedure" of en banc review. By discussing these considerations and providing examples of how they apply in practice, we hope that appellate attorneys and their clients will have a better sense of whether and how to urge the Tenth Circuit to go en banc.

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†††† The Authors stress that this Article is not a statement by the United States Court of Appeals for the Tenth Circuit or by Gibson, Dunn & Crutcher LLP. Nor does this Article reflect the views of either the court or the firm. The Authors also would like to thank the editorial staff at the *Denver Law Review* for their helpful suggestions and diligent work in preparing this Article for publication.

INTRODUCTION

No one wants to lose an argument at the U.S. Court of Appeals for the Tenth Circuit or any other federal appeals court. But it happens. And when it does, the losing party has a few options, some more appealing than others. These options include filing a petition for panel rehearing or a petition for writ of certiorari to the U.S. Supreme Court.[1] A third option is to file a petition for rehearing en banc—that is, consideration by the full circuit court.[2] Before deciding which path to tread, we hope litigants in the Tenth Circuit will consider the following food for thought.

En banc review is an important mechanism. Indeed, as one commentator put it, en banc cases are "arguably the most significant cases decided by the courts of appeals,"[3] receive "more attention in the legal community[,] and are more likely to be reviewed by the U.S. Supreme Court than are rulings by three-judge panels."[4] But en banc consideration, to put it mildly, is also disfavored. Under the governing standards, en banc decision-making is reserved for extremely narrow circumstances: resolving precedential conflicts within the circuit and addressing issues of exceptional importance that may not otherwise reach the Supreme Court.[5]

In fact, en banc review by the Tenth Circuit is "an extraordinary procedure."[6] Over the past decade, the Tenth Circuit has decided about 1,300 cases on the merits each year.[7] During that period, the en banc court decided less than one case per year on average.[8] Another way to think about the rarity of full court review in the Tenth Circuit is to compare the number of petitions for en banc rehearing filed to the number of orders granting such petitions. Since 2012, parties in the Tenth Circuit have filed, on av-

1. FED. R. APP. P. 40; SUP. CT. R. 12.
2. FED. R. APP. P. 35.
3. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 217 (1999).
4. Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (2006).
5. *See infra* Part I.
6. 10TH CIR R. 35.1(A).
7. *See infra* Table 1.
8. *Id.*

erage, approximately 193 petitions for en banc rehearing per year. Meanwhile, the court has granted en banc rehearing only ten times during that period.[9] The striking disparity between the number of en banc petitions filed and the number of petitions granted suggests that Tenth Circuit litigants might benefit from a primer on en banc review. That is what we set out to provide in this Article.

Others who have written about en banc review have focused on the propriety of such proceedings, argued for either increased or decreased use of the en banc tool, or attempted to divine the rationales that drive a court's decision to go en banc. This Article takes a different approach. It focuses instead on certain strategical and practical considerations that Tenth Circuit litigants should keep in mind when deciding whether to seek en banc review. By discussing these matters and providing examples of how they apply in practice, we hope to create awareness about what types of cases might be suitable for en banc review in the Tenth Circuit and how to best present a petition to the court.

To that end, Part I of this Article provides a brief overview of en banc proceedings and summarizes the standards that guide the Tenth Circuit's discretion in deciding whether to go en banc. Part II shares statistics that highlight the paucity of en banc decisions in the Tenth Circuit and reveals the small fraction of en banc petitions that the court agrees to grant. After supplying the relevant background information, Part III offers some strategic and pragmatic considerations about seeking en banc review that we hope will help appellate attorneys and their clients decide whether their case merits relief through the exercise of what the Tenth Circuit has called "an extraordinary procedure."

I. EN BANC 101

Others have already written at length about the history and purpose of en banc review in the federal courts of appeals,[10] so we instead focus our overview on the governing authorities, basic standards, and some of the procedural requirements that apply in the Tenth Circuit. We summarize those authorities, standards, and requirements here only to establish a foundation for those who might not be familiar with this niche area of appellate practice. A basic understanding of the applicable rules and requirements, after all, is necessary to appreciate the strategies and practical pointers that we later share about seeking en banc consideration in the Tenth Circuit.

The statutory basis for en banc review is 28 U.S.C. § 46(c). Under Section 46(c), federal courts of appeals generally decide cases by a "panel

9. *See infra* Table 1. As we will discuss in detail later, the Tenth Circuit vacated one of these grants of en banc rehearing as improvidently granted. Aposhian v. Wilkinson, 989 F.3d 890, 891 (10th Cir. 2021).

10. *See, e.g.*, George *supra* note 3, at 217–18; Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 30 (2001).

of not more than three judges" unless a majority of the active circuit judges order a hearing or rehearing en banc—that is, before the entire court.[11] The statute provides that an en banc court usually consists of all active circuit judges and any senior circuit judge who was part of the original three-judge panel.[12] Although each circuit court has their own particular rules and processes, all of them allow for en banc review in one form or another.[13]

Federal Rule of Appellate Procedure (FRAP) 35 is the general rule that governs en banc determination in the courts of appeals.[14] At the outset, the rule cautions that en banc review "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[15] To seek relief under FRAP 35, a party must file a "petition for a hearing or rehearing en banc."[16] The petition must begin with a statement that either (1) the three-judge panel decision conflicts with Supreme Court or circuit precedent such that en banc consideration is necessary to maintain uniformity, or (2) the appeal involves one or more questions of "exceptional importance" such as, for example, if the panel decision on an issue is contrary to authoritative decisions by other courts of appeals that have addressed the issue.[17] In other words, the petition must affirmatively and distinctively state that the high standard for en banc consideration is met.

Tenth Circuit Rule 35.1, which largely mirrors FRAP 35, is the local rule that lays out the standard and procedures for en banc review in the Tenth Circuit.[18] Tenth Circuit Rule 35.1(A) emphasizes the "extraordinary" nature of en banc procedure and restricts the en banc tool to deciding issues of "exceptional public importance" and settling conflicts with binding precedent—a decision of the Supreme Court or of the Tenth Circuit itself.[19] The rule also advises that a "request for en banc consideration is disfavored" and even admonishes counsel to carefully consider whether to seek rehearing en banc because published opinions are circulated to the full court for review and comment prior to publication.[20]

In most cases, petitions for en banc consideration are filed following a decision by a three-judge panel. Both 28 U.S.C. § 46(c) and FRAP 35,

11. 28 U.S.C. § 46(c).
12. *Id.*
13. Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 333–35 (1941) (holding that circuit courts have authority to sit en banc and expressing the view that such sittings would foster "effective judicial administration"). The Supreme Court's 1941 decision in *Textile Mills* was codified seven years later in 28 U.S.C. § 46(c).
14. FED. R. APP. P. 35.
15. FED. R. APP. P. 35(a).
16. FED. R. APP. P. 35(b).
17. *Id.*
18. 10TH CIR. R. 35.1.
19. 10TH CIR R. 35.1(A).
20. *Id.*

however, authorize courts of appeals to decide questions en banc without a prior panel opinion.[21] And in extremely rare circumstances, the Tenth Circuit (along with most of its sister circuits) has exercised its authority to streamline the appellate process and decide appeals in the first instance.[22] Although the same basic standards that apply to petitions for rehearing en banc—FRAP 35(a) and Tenth Circuit Rule 35.1(A)—apply to petitions for initial hearing en banc, the latter presents an even more unusual procedural posture and additional considerations that we touch on later.

Once an en banc petition is filed in the Tenth Circuit, the clerk will distribute the petition to all members of the court and, in the case of a petition for rehearing en banc, any visiting judge who sat on the initial merits panel.[23] The court's active judges, and any senior judge who sat on the original panel, will review the petition and decide whether to call a vote to determine the fate of the petition.[24] Unless one of the judges calls for a poll, the petition is denied.[25] If a poll is called, all the active judges who are not recused in the case will vote on the petition.[26] The court will grant en banc hearing or rehearing only if a majority of the active judges vote to do so.[27] If a majority of the active, non-disqualified Tenth Circuit judges vote in favor of en banc consideration, the constitution of the en banc court is straightforward.[28] The en banc court consists of all the active Tenth Circuit judges who are not disqualified and, in the case of rehearing en banc, any senior judge who was a member of the original panel, unless he or she decides not to sit.[29]

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21. 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing *or* rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.") (emphasis added); FED. R. APP. P. 35(a) (providing that "an appeal or other proceeding[s]" may be "*heard or reheard* by the court of appeals en banc") (emphasis added). *See also* W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 259 (1953) (recognizing that Section 46(c) "treats 'hearings' and 'rehearings' with equality.").

22. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013) (granting initial en banc consideration, on motion, in case challenging the contraceptive-coverage requirement under the Affordable Care Act); Williams v. Catoe, 946 F.3d 278, 279 (5th Cir. 2020) ("This court granted the state's petition for initial en banc hearing as an efficient means of revisiting the issue of immediate appealability without requiring the matter to percolate uselessly through a panel."); Mayor & City Council of Balt. v. Azar, 799 F. App'x 193, 195 (4th Cir. 2020) (Thacker, J., concurring) (noting that, "twice in the last three years, the majority of active judges of this court has voted to hear an appeal en banc in the first instance" in cases involving a challenge to an executive order banning United States entry from predominantly Muslim nations); Gratz v. Bollinger, 277 F.3d 803, 803 (6th Cir. 2001) (granting petition seeking initial hearing en banc in an affirmative-action challenge to race-based admissions policies).

23. PRAC.'S GUIDE TO THE U.S. CT. APPEALS FOR THE TENTH CIR. 64 (12th ed. 2022) [hereinafter PRAC.'S GUIDE].

24. *Id.*

25. *See* FED. R. APP. P. 35(f) ("A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.").

26. PRAC.'S GUIDE, *supra* note 23, at 64.

27. 10TH CIR. R. 35.5.

28. This is especially true as compared to other circuit courts, where not all the active, non-disqualified judges sit on the en banc court in each case. In the Ninth Circuit, for example, the en banc court consists "of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court." 9TH CIR. R. 35–3.

29. 10TH CIR. R. 35.5.

Practitioners should also be aware of what happens when rehearing en banc is granted. In this "extraordinary" situation, the initial panel's judgment is vacated, the mandate is stayed, and the case is restored on the docket as a live appeal.[30] It is important to keep in mind that, in the Tenth Circuit, the "panel decision is not vacated unless the court so orders."[31] It is also worth noting that the Tenth Circuit rehears *cases*—not specific issues—en banc. That said, when the court decides to en banc an appeal, it may limit the rehearing to particular issues or leave parts of the initial panel opinion intact, or both.[32] Thus, following rehearing en banc, the court may affirm parts of the panel decision without a new opinion or, if previously vacated, incorporate parts of the panel decision as the opinion of the en banc court.[33]

Having summarized the basic standards and the pertinent procedural requirements for seeking en banc consideration,[34] we now share some statistics on how en banc petitions have fared in the Tenth Circuit in recent years. Spoiler alert: they have not fared well.

II. SOBERING STATISTICS

With all the reasons stacked against granting en banc review, a party who has received an adverse decision during litigation or from a three-judge panel on appeal might wonder whether to file an en banc petition. How might such a petition fare in the Tenth Circuit? If numbers from recent years are any indication, the petition will not fare well.

Counsel considering filing a petition for en banc review should be aware of the low chance of success. The Tenth Circuit grants only a small fraction of en banc petitions each year. Between January 1, 2012, and August 10, 2022, the court received approximately 1,936 petitions for en banc rehearing.[35] Meanwhile, the court granted en banc rehearing only ten times during that period.[36] In other words, the Tenth Circuit has denied 99.5% of the en banc rehearing requests that it has resolved since January 1, 2012.

Another way to consider how few cases are heard by the full court is to compare the number of en banc decisions with the total number of appeals terminated on the merits. From October 2011 through September

30. 10TH CIR. R. 35.6.
31. *Id.*
32. *See* PRAC.'S GUIDE, *supra* note 23, at 65.
33. *See id.*
34. Our high-level overview does not discuss all the procedural requirements for filing an en banc petition in the Tenth Circuit. Rather, we focus on those that are most pertinent to the strategical considerations that we share. FRAP 35 and Tenth Circuit Rule 35.1, however, are informative as to the procedures for seeking en banc review. Accordingly, we encourage counsel—regardless of level of experience—to review the rules themselves when considering whether to file an en banc petition. *See generally* FED. R. APP. 35; 10TH CIR. R. 35.1.
35. Although the Administrative Office of the U.S. Courts (AOUSC) requires each court of appeals to file monthly statistical reports regarding the filing and disposition of en banc petitions, to the authors' knowledge the AOUSC does not routinely publish those statistics. Accordingly, this number was calculated by the Clerk of the Tenth Circuit using local data for the relevant time period.
36. *See infra* Table 1.

2021, the Tenth Circuit issued eleven en banc decisions out of 14,487 total appeals, representing only 0.076% of cases terminated on the merits.[37] The following table breaks down these numbers by showing the total number of Tenth Circuit appeals decided on the merits, the number of en banc decisions, and the percentage of en banc decisions for the eleven-year period from October 2011 through September 2021:

	Total Decisions	En Banc Decisions	Percent En Banc
Year:			
2011	1,207	2	0.166%
2012	1,351	4	0.296%
2013	1,490	1	0.067%
2014	1,457	0	0.000%
2015	1,301	1	0.077%
2016	1,604	0	0.000%
2017	1,320	1	0.076%
2018	1,233	0	0.000%
2019	1,159	1	0.086%
2020	1,253	0	0.000%
2021	1,112	1	0.090%
11-Year Total:	14,487	11	0.076%

TABLE 1. *Number of Decisions and En Banc Decisions by the Tenth Circuit (2011–2021)*[38]

The eleven en banc decisions by the Tenth Circuit from 2011 to 2021 address a wide range of issues, some of which we discuss later. For our purposes, however, the most salient aspect of these en banc decisions is their rarity—an average of just one per year.[39] Notably, these numbers are significantly lower than those a decade earlier. For the eleven-year period that ended September 2010, the Tenth Circuit decided forty-eight cases en

37. *See id.*

38. ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2011 tbl.S-1 (2011); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2012 tbl.S-1 (2012); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2013 tbl.S-1 (2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2014 tbl.B-10 (2014); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2015 tbl.B-10 (2015); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2016 tbl.B-10 (2016); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2017 tbl.B-10 (2017); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2018 tbl.B-10 (2018); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2019 tbl.B-10 (2019); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2020 tbl.B-10 (2020); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2021 tbl.B-10 (2021). For all S-1 and B-10 reports, see *Caseload Statistics Data tables*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=B-10&pn=77&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (last visited Dec. 18, 2022).

39. *See supra* Table 1.

banc out of 16,299 total appeals, representing 0.294% of the court's overall dispositions on the merits.[40] In other words, the Tenth Circuit heard more than four times as many cases en banc from 2000 through 2010 than it did from 2011 through 2021.[41] Although these numbers are sufficiently small that it is difficult to determine the full impact of this downward trend on the court's jurisprudence, they confirm that the Tenth Circuit has been consistently trending toward deciding fewer cases en banc each year over the last decade.

The takeaway from all this is clear: en banc review in the Tenth Circuit is "extraordinary," not only in theory but also in fact. Compared to all appeals decided by the Tenth Circuit over the past decade, fewer than 1% of the cases resolved on the merits were heard or reheard en banc.[42] So, statistically speaking, litigants have a greater shot (the odds are roughly 1%) at having the Supreme Court grant certiorari in their case than the Tenth Circuit granting their petition for en banc consideration.[43] Given the low chance of success, appellate attorneys and their clients should carefully consider whether it is worth the time and money to file a petition for hearing or rehearing en banc.

The statistics, of course, do not tell the whole story. They say nothing about the kinds of issues the Tenth Circuit might be inclined to consider en banc. Nor do they offer any guidance on how a litigant might best present an en banc petition to the court. Accordingly, we now turn to our discussion of certain strategies and pragmatic considerations that should guide those seeking answers to these questions.

III. STRATEGIES AND PRAGMATIC CONSIDERATIONS

The fate of most en banc petitions filed in the Tenth Circuit begs two related questions: First, How should a Tenth Circuit litigant facing an adverse ruling decide whether to request en banc review? And second, If en banc consideration appears to be an appropriate avenue for relief, how does the litigant make the best case to the court? In this Part, we share some strategies for seeking en banc review and pragmatic considerations that hopefully will provide some valuable answers to those questions. These strategies and considerations fall into three general buckets: (1) reasons why en banc review is proper; (2) content for an en banc petition; and (3) recognition that en banc review is discretionary. By discussing these

40. ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2010 tbl.S-1 (2010); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2009 tbl.S-1 (2009); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2008 tbl.S-1 (2008); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2007 tbl.S-1 (2007); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2006 tbl.S-1 (2006); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2005 tbl.S-1 (2005); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2004 tbl.S-1 (2004); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2003 tbl.S-1 (2003); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2002 tbl.S-1 (2002); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2001 tbl.S-1 (2001); ADMIN OFF. U.S. CTS., JUDICIAL BUSINESS 2000 tbl.S-1 (2000).

41. *See supra* note 38; *see also supra* Table 1.

42. *See supra* Table 1.

43. *See* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 3 & n.3 (2011).

considerations and illustrating how they apply in practice, we hope Tenth Circuit practitioners and their clients will be better equipped to decide whether and how to request en banc review.

A. Reasons Why En Banc Review Is Proper

The single most important aspect of an en banc petition is its justification for requesting that the Tenth Circuit exercise a "disfavored" and "extraordinary procedure." [44] Because en banc relief is discretionary, the court tends to review only those cases with legal issues that are cleanly presented and meet one of the grounds enumerated in FRAP 35 and Tenth Circuit Rule 35.1. Thus, a petitioner must show why—if the Tenth Circuit averages only about one en banc decision per year—their case is that rare one worthy of full court review. To do that, a petitioner should (1) follow the text of FRAP 35 and Tenth Circuit Rule 35.1; (2) recognize that error correction, standing alone, usually will not suffice; and (3) be aware of certain factors that may weigh against en banc review.

1. Stick to the Text of FRAP 35 and Tenth Circuit Rule 35.1

What makes a case en-banc worthy? When looking for the answer to this question, practitioners should start with the text of FRAP 35 and Tenth Circuit Rule 35.1. As discussed above, FRAP 35 limits the reasons for granting en banc review to (1) maintaining "uniformity of the court's decisions" and (2) resolving "a question of exceptional importance."[45] And the text of the Tenth Circuit's parallel rule likewise provides that en banc review is "intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court."[46] These standards of uniformity and exceptional importance guide the Tenth Circuit in exercising its discretion to grant or deny en banc consideration. Thus, we explore both how these rules apply in practice and what they do not make explicit in more detail below.

Remedying an intracircuit conflict—where two panel opinions on the same issue have produced inconsistent results—is the "principal utility" of en banc review. [47] "Uniformity has been described as 'the most basic principle of jurisprudence.'"[48] And under well-established Tenth Circuit precedent, one panel opinion cannot overrule a prior panel opinion.[49] Accordingly, when two panels ruling on the same issue produce conflicting results, not only is instability introduced into circuit precedent, but the

44. 10TH CIR. R. 35.1(A).
45. *See supra* Part I.
46. 10TH CIR. R. 35.1(A).
47. United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960).
48. 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, 821 (1993) (internal quotation marks omitted) (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).
49. United States v. C.D., 848 F.3d 1286, 1289–90 n.2 (10th Cir. 2017).

court's integrity as an institution is called into question.[50] In these situations, the Tenth Circuit may be called, or even decide *sua sponte*, to sit en banc in order to provide clarity in the law.[51]

To be clear, not all inconsistencies warrant full court review. Many en banc petitions will assert an intracircuit conflict, but the alleged conflict is illusory or does not threaten the uniformity of the court's decisions. Inconsistent statements of general principle or conflicting dicta generally fall in this latter category and usually will not justify en banc consideration. A persuasive en banc petition based on intracircuit conflict must therefore show that the conflict is a real one—meaning the holdings of the cases are truly at odds.

En banc consideration may also be necessary when a panel decision conflicts with Supreme Court precedent.[52] This criterion, enumerated in both FRAP 35 and Tenth Circuit Rule 35.1, is straightforward.[53] But as with a perceived intracircuit conflict, it is important to determine whether there is a real conflict between the panel decision and Supreme Court precedent rather than an inconsistency based on the panel's dicta or a situation where the cases are factually distinguishable. Such a conflict might not be immediately apparent. Sometimes the Supreme Court's decisions have an incremental effect on the law. As a result, another possible basis for hearing a case en banc is when Tenth Circuit authority is older and inconsistent, or at least in tension, with a noticeable trend in the Supreme Court.

The "exceptional importance" standard of Tenth Circuit Rule 35.1 and FRAP 35 also guide the court in deciding whether to grant en banc review. This criterion, of course, is subjective and somewhat nebulous. Virtually all attorneys and their clients think their case is exceptionally important, but that does not necessarily mean the case has broad importance for the court or the public at large. A savvy petitioner invoking this ground for en banc review will therefore show that the challenged decision will have significant consequences beyond the case in which it is issued.

The Tenth Circuit has gone en banc based on the "exceptional importance" standard in cases that present questions of national importance or a potential intercircuit conflict—that is, a conflict with the "authoritative decisions of the other United States Courts of Appeals that have addressed the issue."[54] For example, the court granted initial en banc consideration to review a district court's denial of a preliminary injunction in a

50. *See Am.-Foreign S.S. Corp.*, 363 U.S. at 686.

51. *See, e.g.*, United States v. Sturm, Nos. 09-1386, 09-5022, 2011 WL 6261657, at *1 (10th Cir. Apr. 4, 2011) (ordering en banc rehearing, *sua sponte*, "for purposes of consistency" where simultaneous panel decisions addressed "a common and important issue . . . .").

52. 10TH CIR. R. 35.1(A).

53. *Id.*; FED. R. APP. P. 35.

54. *See* FED. R. APP. P. 35(b)(1)(B) (indicating that an issue may be exceptionally important "if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.").

case challenging the Affordable Care Act's contraceptive-coverage requirement under the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, and the Administrative Procedures Act.[55] In their en banc request, the petitioners argued that the contraceptive-coverage mandate threatened not only their free exercise of religion "but also—as a result of possible fines—their ability to continue providing jobs and health benefits to more than 13,000 full-time employees who work in the company's 500 stores across the nation."[56] The en banc petition also emphasized that more than forty suits challenging the mandate had been filed across the country and that courts were reaching different results on the same issue.[57] This rapid development of conflicting judicial opinions on the same issue during nationwide litigation also supported the conclusion that the appeal presented issues of exceptional importance.

An intercircuit conflict is not one of Tenth Circuit Rule 35.1's enumerated grounds for en banc review, but it is another reason offered for en banc consideration under FRAP 35.[58] Since 1998, FRAP 35 "has incorporated intercircuit conflict as an example of a matter that may be of exceptional importance and therefore grounds for rehearing en banc."[59] An intercircuit conflict, or the possibility that a panel decision will create one, is an important consideration for en banc review because its presence is a key criterion for Supreme Court review.[60] Although an intercircuit conflict will not necessarily make a case en-banc worthy, en banc review is more likely when Tenth Circuit authority is an outlier compared to a large majority of other circuits that have addressed an issue.

On the one hand, many district court rulings and panel decisions affect only the case in which they are issued. Such rulings are undoubtedly important to the issuing courts and the litigants affected, but they rarely present issues of "exceptional public importance" in the Tenth Circuit. On the other hand, those decisions with broader consequences—either due to the national importance of the issue they address or because they create an intercircuit conflict—are more likely to attract the en banc court's attention.

2. Error, Standing Alone, Rarely Suffices

An oft-overlooked idiosyncrasy of en banc practice in the Tenth Circuit is that mere disagreement with a panel's decision is not a sufficient reason to grant full court review. Some petitions request en banc review without identifying a conflict with circuit or Supreme Court precedent or

55. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013).

56. Petition for Hearing in En Banc at 9, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294).

57. *Id.*

58. *Compare* 10TH CIR. R. 35.1, *with* FED. R. APP. P. 35.

59. JUDITH A. MCKENNA, LAURAL L. HOOPER, & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 22 (2000).

60. *See* SUP. CT. R. 10.

highlighting any question of exceptional importance. Instead, they request en banc consideration on the basis of error correction, usually rehashing arguments previously rejected by a three-judge panel. These petitions face an uphill battle.

As discussed above, the en banc standards require something more than mere disagreement with a panel decision to justify full court review.[61] And as the statistics we provided show, the Tenth Circuit does not use the en banc mechanism to exercise plenary review over panel decisions.[62] To the contrary, the Tenth Circuit calls en banc consideration a "disfavored" and "extraordinary procedure."[63] And for good reason. One judge aptly described granting en banc consideration as "unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel."[64] "Such a determination," the judge explained, "should be made only in the most compelling circumstances."[65]

In the Tenth Circuit (as in other circuits), a judge's decision to vote against en banc rehearing is not necessarily an endorsement of the panel decision. Rather, a judge may wholeheartedly disagree with a panel decision but nonetheless vote against en banc rehearing unless one of the elements of FRAP 35 or Tenth Circuit Rule 35.1—intra or intercircuit conflict, conflict with Supreme Court precedent, or exceptional importance—is present. This is not to say panel error doesn't matter when requesting en banc rehearing. It does. But in the mine-run of cases, that a panel simply "got it wrong" is not an adequate reason for en banc review. Alleged errors in the facts of the case or in applying correct precedent to the facts are matters for panel rehearing, not for rehearing en banc.[66]

3. Factors that Weigh Against En Banc Review

As we hope our discussion so far makes clear, petitions for en banc consideration should be filed sparingly and not as a matter of course. Practitioners in the Tenth Circuit should also be aware that some en banc petitions should not be filed at all. Again, the text of Tenth Circuit Rule 35 is instructive. Tenth Circuit Rule 35.7 provides that the "en banc court does not consider procedural and interim orders. These include, but are not limited to, stay orders; injunctions pending appeal; and denials of appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a

61. *See* FED. R. APP. P. 35(a); 10TH CIR. R. 35.1(A).
62. *See supra* Table 1.
63. 10TH CIR. R. 35.1(A).
64. Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., concurring) (agreeing to the denial of rehearing en banc).
65. *Id.*
66. *See* 10TH CIR. R. 40.

nonfinal order."[67] Needless to say, a practitioner should not file an en banc petition that falls within any of these categories.

Beyond the specific nonstarters enumerated in the Tenth Circuit's local rules, there are a few other considerations that can weigh against en banc review. For one, en banc petitions that dispute factual findings rather than determinations of law are unlikely to succeed. Such disputes, even when they may arguably involve injustice to the parties in the particular case, usually do not lend themselves to meeting the en banc standards of uniformity or exceptional importance. In a similar vein, the court may decline to take up a case en banc because of key factual disputes that muddy the water for resolving an important legal issue. And finally, procedural problems, such as forfeiture or waiver of salient issues or the failure to exhaust remedies, may also preclude en banc determination.[68]

B. Petition Practice

The next category of strategic and pragmatic considerations we share addresses what content should be included, and should not be included, in an en banc petition. The requirements for filing en banc petitions—including the time for filing and petition form—are set out in FRAP 35 and Tenth Circuit Rule 35.1, and we will not repeat them all here.[69] FRAP 35 provides clearly enough that the petition must begin with a statement that the en banc standard of either uniformity or exceptional importance is met.[70] Meanwhile, Tenth Circuit Rule 35.2 instructs litigants that, if they are requesting rehearing en banc, they must attach a copy of the three-judge panel decision to their petition.[71] And Tenth Circuit Rule 35.2 provides that "[n]o other attachments may be included unless the petition is accompanied by a motion seeking permission which identifies the attachments with particularity and the reason for their inclusion."[72] These rules are straightforward, and practitioners should be sure to follow them so that the court need not unnecessarily expend time and effort to have noncompliance issues corrected.

While FRAP 35 and Tenth Circuit Rule 35.1 are instructive as to basic requirements for filing an en banc petition, practitioners should also be aware of a few other considerations—some "dos and don'ts"—that are not made clear by the rules. The first set of considerations relates to the content of a persuasive petition, and the second addresses a couple of common pitfalls we urge practitioners to avoid when seeking rehearing en banc.

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67. 10TH CIR. R. 35.7.
68. *See, e.g.*, Gonzalez v. McKune, 279 F.3d 922, 923–25 (10th Cir. 2002).
69. Again, we stress that practitioners must always review the relevant Federal Rules of Appellate Procedure and Tenth Circuit Local Rules before filing a petition for hearing or rehearing en banc.
70. FED. R. APP. P. 35(b).
71. 10TH CIR. R. 35.2(B).
72. *Id.*

1. Be Brief, Be Pointed, and Stop

An effective en banc petition is short and to the point. Under the current rules, the petition may not exceed 3,900 words.[73] But practitioners should keep in mind that this word limit is a ceiling—not a suggestion that every en banc petition must be this long. On the contrary, an en banc petition should be as short as possible.

This is not to say that an en banc petition should contain conclusory arguments and omit critical facts. But the petition also should not simply restate all the facts, proceedings, and arguments that were included in prior briefs or, when seeking rehearing en banc, addressed in the original panel's opinion. Brevity is more persuasive. And because en banc consideration is extraordinary in nature, it follows that the reasons to grant en banc review should be fairly clear, if not obvious, and simply stated. Accordingly, a petitioner should include only the background information necessary for the active judges to make their decision and concisely explain why en banc consideration is warranted.

The last point deserves elaboration. Perhaps the most peculiar aspect of petitioning for en banc review is that the merits of the case are not the central concern. Indeed, at the en-banc petition stage, a straightforward relationship does not exist between the merits and whether the court decides to grant en banc review. That is because the en banc court does not see error correction as its primary role—an awkward concept for many practitioners who may have devoted countless hours to winning on the merits of a case. As discussed above, the correctness of a district court judgment or three-judge panel opinion is certainly of some importance, but it is rarely controlling.[74] An effective petition must not only demonstrate that the challenged decision is wrong but also show why an issue of uniformity or exceptional public importance is present.

Many en banc petitions filed in the Tenth Circuit reflect a fundamental misconception as to the role of the en banc court. Some petitions leave no doubt that the issues raised—while unquestionably important to the parties involved—are of little consequence beyond the particular facts of the case. Others merely contend that the adverse decision was wrong, rehashing the same arguments that a three-judge panel already rejected. Such petitions stand little, if any, chance of being granted because they fail to show that the issues for en banc review arise out of a conflict with binding precedent or involve an issue of exceptional public importance.[75]

Obtaining en banc review is a daunting task. Even when there are reasons to grant en banc review in a particular case, a petition for such

73. *See* FED. R. APP. P. 35(b)(2), 40(b)(1); PRAC.'S GUIDE, *supra* note 23, at 63 ("Petitions for initial hearing en banc or rehearing en banc should be in the same form and are subject to the same page and other limitations as a petition for rehearing by a panel . . . .").

74. *See supra* Subsection III.A.2.

75. *Cf.* FED. R. APP. P. 35(a); 10TH CIR. R. 35.1(A).

relief still faces long odds. To maximize the chance that a majority of the active judges will find the case en-banc worthy, a petition should focus on the en banc standards and succinctly explain why the case is of the rare breed that deserves the extraordinary relief requested.

2. Common Pitfalls to Avoid

Our final practice pointers about en banc petitions relate to common mistakes when requesting rehearing en banc. One of the most common pitfalls of petitions for rehearing en banc is assuming an adversarial posture with the three-judge panel. Although it is effective to challenge the position of an opponent in an argumentative way, doing so may become counterproductive when applied to the panel opinion.[76]

Petitions for en banc rehearing will sometimes take a tone that is defensive, aggressive, or even disrespectful. These tones—which often are expressed through certain adverbs such as "obviously" or "clearly," as well as any language with derogatory connotations—add nothing to the merits of the petition and may be counterproductive. Combative language or the use of hyperbole distracts from reasoned legal argument and obscures the point counsel is trying to make.

When filing a petition for en banc rehearing, a practitioner should remember that a three-judge panel made its decision after thoroughly reviewing the district court's opinion, the record, and the parties' appellate briefing. A unanimous panel decision usually is an indicator that a petition for en banc rehearing faces an uphill battle. Conversely, a strong dissenting opinion may signal that a case might be en-banc worthy. In the latter situation, there is a temptation to simply parrot the dissenting judge's opinion as to why the majority erred. But as we have discussed, the reasons for the dissent may not necessarily align with the grounds for granting en banc review. The judge, after all, was not applying the en banc standards when writing the dissent. To make the most out of a dissent, a savvy petitioner will not only highlight the key reasoning from the dissenting opinion explaining why the majority got it wrong but also, as necessary, build on that reasoning to show en banc review is warranted.

Writing a persuasive petition for rehearing en banc is challenging. It requires, on the one hand, explaining why the panel opinion's reasoning is incorrect while, on the other hand, not taking an adversarial stance against the panel itself. In our view, one of the best ways to strike this delicate balance is to respectfully identify the salient errors in the panel opinion and explain in neutral terms why the opinion conflicts with binding precedent or involves an issue of exceptional public importance.

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76. *See* PRAC.'S GUIDE, *supra* note 23, at 62.

C. Keep in Mind the Court's Discretion

Having addressed certain strategies and pragmatic considerations related to both the reasoning and content of effective en banc petitions, we have arrived at our final topic of discussion: recognizing the extent of the Tenth Circuit's discretion to sit, or not sit, en banc. Unlike an appeal as a matter of right from a final decision by a district court or administrative agency, the court's decision to use the en banc mechanism is a matter of discretion.[77] As a result of the relative infrequency in which the courts of appeals decide issues en banc, there are relatively few opinions governing en banc procedures and the scope of a circuit court's discretion to grant or deny en banc review. But the Supreme Court has signaled that the courts of appeals have considerable discretion in this context.

In *Shenker v. Baltimore & Ohio Railroad Co.*,[78] the petitioner argued that the Third Circuit improperly denied him rehearing en banc in violation of his rights under 28 U.S.C. § 46(c).[79] The Supreme Court disagreed, quoting from its prior opinion in *Western Pacific Rail Corp. v. Western Pacific Rail Co.*[80]:

> In our view, § 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. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.[81]

In other words, "the rights of the litigant go no further than the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case."[82] Because a federal appeals court is neither required to grant nor prohibited from granting en banc review under Section 46(c), and the Third Circuit followed its local rules in denying en banc review in *Shenker*, the Supreme Court rejected the petitioner's argument.[83]

Given the discretionary nature of en banc review, simply because a case appears to satisfy the standards of uniformity or exceptional importance under FRAP 35 or Tenth Circuit Rule 35.1 does not mean the Tenth Circuit will necessarily grant an en banc petition. Most of the Tenth Circuit en banc procedure occurs internally, and the court generally does not explain its reasons for denying full court review. At the same time, there are myriad reasons why the active judges may have voted to deny en

77. Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 333–35 (1941).
78. Shenker v. Baltimore & O. R. Co., 374 U.S. 1, 4 (1963).
79. *Id.* at 4.
80. 345 U.S. 247 (1953).
81. *Shenker*, 374 U.S. at 4–5 (quoting *W. Pac. R.R. Corp.*, 345 U.S. at 250).
82. *Id.* at 5.
83. *Id.*

banc review in a particular case. It could be that the case presents a procedural problem, such as the petitioner's failure to exhaust the salient issue presented. Or perhaps the petitioner failed to preserve a key argument by not making it to the district court or to the three-judge panel during the initial appeal. Other reasons for voting against en banc review may not be related to the merits of the case at all and instead be based on virtues of restraint or judicial economy.[84] Accordingly, in most cases, all one can know for certain about a denial of an en banc petition is that a majority of the active judges did not wish to hear the case en banc and, in some circumstances, an unsuccessful minority of judges felt otherwise.

One other point about the discretionary nature of en banc review deserves elaboration. The Tenth Circuit's discretion to decide or not decide a particular issue en banc does not diminish after rehearing en banc is granted.[85] On relatively rare occasions, the court may ultimately vote to not decide a case en banc, even after having deliberately chosen to do so in the first place, because a majority of the judges have concluded that an issue that once seemed en banc worthy suddenly seems less so.[86] In these situations, the court vacates its order for rehearing en banc as improvidently granted and reinstates either all or part of the panel opinion.[87]

Courts of last resort, including the U.S. Supreme Court, sometimes dismiss an appeal as improvidently granted ("DIG" to the inside baseball crowd).[88] And at the circuit-court level, dissenting or concurring judges will occasionally urge their en banc court to vacate an order for rehearing en banc as improvidently granted.[89] But over the past thirty years, only one federal court of appeals has actually vacated an order granting en banc review: the Tenth Circuit.[90]

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84. *See* Solimine, *supra* note 4, at 325.

85. *See, e.g.*, N. Arapaho Tribe v. Wyoming, 429 F.3d 934 (10th Cir. 2005).

86. *Id.* at 934.

87. *See, e.g.*, Gonzales v. McKune, 279 F.3d 922, 923–25 (10th Cir. 2002).

88. Howell v. Mississippi, 543 U.S. 440, 441, 445 (2005) (per curiam); Rangel v. State, 250 S.W.3d 96, 98 (Tex. Crim. App. 2008) (per curiam).

89. *See, e.g.*, Henriquez-Rivas v. Holder, 707 F.3d 1081, 1095 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("The far wiser course would be for us to vacate the order taking the case en banc as improvidently granted and reinstate the three-judge panel's disposition."); Bell v. Bell, 512 F.3d 223, 251 (6th Cir. 2008) (Moore, J., dissenting) (emphasis omitted) ("Because I believe that Federal Rule of Appellate Procedure 35(a) and Sixth Circuit Rule 35(c) preclude us from reviewing en banc the panel's decision, I would DISMISS the petition for rehearing en banc as improvidently granted."); United States v. Sanchez, 269 F.3d 1250, 1290 n.1 (11th Cir. 2001) (Tjoflat, J., concurring) (citation omitted) ("Rule 35 of the Federal Rules of Appellate Procedure advises that an en banc hearing 'is not favored . . . unless (1)[it] is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. . . .' This appeal satisfies neither test. Therefore, the court should vacate the order taking this case for rehearing en banc as improvidently granted.").

90. Josh Blackman, *In Bump Stock Case, Tenth Circuit Dismisses Grant of Rehearing En Banc as Improvidently Granted*, VOLOKH CONSPIRACY (Mar. 6, 2021, 1:50 PM), https://reason.com/volokh/2021/03/06/in-bump-stock-case-tenth-circuit-dismisses-grant-of-rehearing-en-banc-as-improvidently-granted/. Looking beyond the past three decades, two other circuit courts—the Ninth and Seventh Circuits—have also vacated an order for rehearing en banc as improvidently granted. *See* United

The Tenth Circuit DIGed a grant of rehearing en banc for the first time in *Gonzalez v. McKune*.[91] There, the court unanimously vacated its order granting rehearing en banc because the appellant failed to exhaust the issue in state court.[92] Approximately three years later, in *Northern Arapaho Tribe v. Wyoming*,[93] the en banc court again vacated an order of rehearing en banc as improvidently granted.[94] And the court provided the reason for its DIG, explaining that the en banc petitioner had done a bait-and-switch by presenting arguments to the en banc court that were inconsistent with the arguments and concessions it made to the three-judge panel.[95] Three judges dissented and would have certified the relevant questions of state law to the Wyoming Supreme Court.[96] Then, in *Forest Guardians v. U.S. Forest Service*,[97] the court voted unanimously to vacate its prior order granting en banc review.[98] In doing so, the court referred the case back to the original three-judge panel, which in turn unanimously granted panel rehearing and issued a revised opinion.[99]

In *Gonzales*, *Northern Arapaho Tribe*, and *Forest Guardians*, the Tenth Circuit gave some indication of why it DIGed the grant of rehearing en banc.[100] And in each of these cases, a broad consensus existed among the active circuit judges not to decide a particular issue en banc. But the same cannot be said about the Tenth Circuit's most recent decision to vacate an order granting en banc review as improvidently granted.

In *Aposhian v. Barr*,[101] a divided three-judge panel of the Tenth Circuit affirmed the district court's denial of a preliminary injunction that would have enjoined enforcement of a regulation that classifies bump stock as machine guns under the National Firearms Act.[102] In September 2020, a few months after the panel decision came down, the court granted rehearing en banc.[103] Although the court indicated that the entire case

States v. Zolin, 842 F.2d 1135, 1136 (9th Cir. 1988), *amended*, 850 F.2d 610 (9th Cir. 1988) (vacating order for rehearing en banc as improvidently granted and reinstating panel opinion where en banc court determined that intracircuit conflict was illusory); United States v. Rosciano, 499 F.2d 173, 174–75 (7th Cir. 1974) (per curiam) (dismissing rehearing en banc as improvidently granted on grounds that issue was neither the subject of conflict nor of exceptional importance).

91. 279 F.3d at 924.

92. *Id.* at 923–24 ("At en banc oral argument, the State asserted for the first time that Gonzales had failed to exhaust the *Strickland-Brady* cumulation issue in state court. Because we agree that Gonzales failed to raise this issue in state court and thus procedurally defaulted it, we vacate our order granting rehearing en banc as improvidently granted.").

93. 429 F.3d 934 (10th Cir. 2005).

94. *Id.* at 935.

95. *Id.* at 934–35.

96. *Id.* at 935.

97. 641 F.3d 423 (10th Cir. 2011).

98. *Id.* at 426.

99. *Id.*

100. *See* Gonzales v. McKune, 279 F.3d 922, 924 (10th Cir. 2002); *N. Arapaho Tribe*, 429 F.3d at 934–35; *Forest Guardians*, 641 F.3d at 426.

101. 958 F.3d 969 (10th Cir. 2020).

102. *Id.* at 974.

103. Aposhian v. Barr, 973 F.3d 1151, 1151 (10th Cir. 2020).

would be reheard en banc, it directed the parties to file supplemental briefs addressing five specific questions:

> 1. Did the Supreme Court intend for the *Chevron* framework to operate as a standard of review, a tool of statutory interpretation, or an analytical framework that applies where a government agency has interpreted an ambiguous statute?
>
> 2. Does *Chevron* step-two deference depend on one or both parties invoking it, i.e., can it be waived; and, if it must be invoked by one or both parties in order for the court to apply it, did either party adequately do so here?
>
> 3. Is *Chevron* step-two deference applicable where the government interprets a statute that imposes both civil and criminal penalties?
>
> 4. Can a party concede the irreparability of a harm; and, if so, must this court honor that stipulation?
>
> 5. Is the bump stock policy determination made by the Bureau of Alcohol, Tobacco, and Firearms peculiarly dependent upon facts within the congressionally vested expertise of that agency?[104]

The parties in *Aposhian* fully briefed the issues, and the Tenth Circuit held en banc argument.[105] But in March 2021, the court changed course. By a vote of six to five, the court vacated its order granting rehearing en banc as improvidently granted and reinstated the three-judge panel opinion.[106] Five judges dissented, and there were lengthy dissentals from four of those judges.[107] The lead dissent, authored by Chief Judge Tymkovich, began with the following statement: "I dissent from the majority's decision to vacate the en banc order as improvidently granted. The issues that initially led this court to grant en banc rehearing remain unresolved and it is important that they be addressed to give guidance to future panels and litigants."[108] The rest of Chief Judge Tymkovich's dissent, and others, explain why (in their view) the three-judge panel wrongly decided the case on the merits.[109]

To be sure, some of the questions raised in *Aposhian*—particularly, the waivability of *Chevron* deference and the doctrine's applicability in

104. *Id.* at 1151.
105. Blackman, *supra* note 90.
106. Aposhian v. Wilkinson, 989 F.3d 890, 891 (10th Cir. 2021) ("Having now considered the parties' supplemental briefs and heard oral argument in this matter, a majority of the en banc panel has voted to vacate the September 4, 2020 order as improvidently granted. As a result, the court's September 4, 2020 order granting en banc rehearing is VACATED, the court's May 7, 2020 opinion is REINSTATED, and the Clerk shall reissue this court's judgment as of the date of this order.").
107. *See id.*
108. *Id.* (Tymkovich, J., dissenting).
109. *Id.* at 891–92, 904, 906, 908.

the criminal context—are hot-button issues.[110] But given the Tenth Circuit's decision not to rehear the case before the full court, a litigant in Mr. Aposhian's shoes can know for certain only one thing: the dissentals from the order vacating en banc review are, by definition, an expression of the views of the five subscribing judges that the three-judge panel's resolution of the case presents issues of exceptional importance and a misapplication of binding precedent. By contrast, the order itself DIGing the grant of rehearing en banc without any elaboration may or may not reflect the substantive views of certain judges in the six-judge majority that ultimately voted against rehearing. That is because even when the criteria enumerated in FRAP 35 and Tenth Circuit Rule 35.1 are satisfied—and even after the court has granted an en banc petition—the active judges nonetheless have considerable discretion to vote against deciding a case en banc.[111]

At the end of the day, the key lesson here is that the Tenth Circuit has substantial discretion to grant or deny an en banc petition. And considering how the Tenth Circuit has historically exercised such discretion, practitioners should be aware that en banc review is far from a guarantee—even when the applicable standards of uniformity or exceptional importance appear satisfied.

CONCLUSION

So there you have it: a primer on en banc review in the Tenth Circuit. The en banc standards are difficult to meet. And as the statistics we provided show, the Tenth Circuit rarely exercises its discretion to hear a case en banc, even when it may appear from the outside that the applicable standards are met. En banc consideration by the Tenth Circuit truly is an "extraordinary procedure." For these reasons, practitioners would do well not only to learn the idiosyncrasies of en banc practice in the Tenth Circuit, but also to be realistic about the long odds of obtaining full court review, a promise that Justice Felix Frankfurter warned long ago "arouses false hopes in defeated litigants and wastes their money."[112]

We hope this Article's discussion of certain strategies and pragmatic considerations will assist practitioners in the Tenth Circuit to make better-informed decisions as to whether and how to request en banc review. Practitioners who take these considerations seriously, at the very least, will have a better perspective as to what types of issues are properly presented in an en banc petition. They will also know how to focus their arguments on why the Tenth Circuit should exercise its discretion to grant en banc

110. On October 3, 2022—after the petition for certiorari was pending for more than a year and relisted for distribution at conference twenty times—the Supreme Court ultimately denied review in *Aposhian*. *Aposhian v. Garland*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/aposhian-v-garland/ (last visited Jan. 18, 2022).

111. *See* FED. R. APP. P. 35(a), Advisory Committee Notes (1998 Amendments) (indicating that this provision's title was changed from "when hearing or rehearing in banc *will* be ordered" to "When Hearing or Rehearing En Banc *May* Be Ordered" to "emphasize[] the discretion a court has with regard to granting en banc review.").

112. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953).

review rather than simply harping on the alleged error in the decision they seek to overturn. True, even when the considerations we have shared are taken seriously, there is no guarantee the Tenth Circuit will grant en banc review in any given case. But keeping such considerations in mind following an adverse decision should dispel unrealistic expectations about the likelihood of success and give practitioners a better sense of when it might be worthwhile to ask the Tenth Circuit to go en banc.