José A. Cabranes, *Circuit Judge*, dissenting from the order denying rehearing en banc:

I respectfully join in Judge Livingston's opinion. The dissenters having failed to persuade a majority of the active judges to rehear this appeal, our concerns necessarily now rest in the hands of our highest court. I write separately, and in my name alone, for the sole purpose of re-stating some earlier observations regarding aspects of the en banc practice of the Second Circuit. *See generally United States v. Taylor*, 752 F.3d 254, 255–57 (2d Cir. 2014) (Cabranes, *J.*, dissenting from order denying rehearing en banc).

As I observed on that earlier occasion, an observer can draw only one firm conclusion from our decision not to rehear this case before the full court of active judges—namely, that the opinion dissenting from the denial of en banc review (here, by Judge Livingston) is, by definition, an expression of the view of the five subscribing judges that the panel's resolution of this case presents legal issues of exceptional importance.

By contrast, the order denying rehearing without elaboration may, or may not, reflect the substantive views of the particular judges in the six-judge majority voting against rehearing.

In light of how judges in the Second Circuit have historically exercised their discretion, the decision not to convene the en banc court does not necessarily mean that a case either lacks significance or was correctly decided. Indeed, the contrary may be true. The story of our vaunted en banc "traditions" is fully described in my dissent from the denial of rehearing in *Taylor*. Suffice it to say that this tradition is a sometime thing, and some who invoke it have no difficulty abandoning it when convenient.

All one can know for certain about a vote like this one is that six active circuit judges did not wish to rehear this case—perhaps because of a general aversion to en banc rehearings, perhaps out of confidence that the Supreme Court will solve our problem, or perhaps because doing so would signal their investment in "collegiality"—while the five other active circuit judges strongly believed that the panel opinion presented multiple legal errors of exceptional importance warranting correction.