

Dennis Jacobs, *Circuit Judge*, dissenting:

I have no qualm about the panel's scholarly opinion; but I vote in favor of the poll nevertheless, because a majority now expresses- or signals- an interest in hearing this appeal *in 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.