

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
) Petitioner,
) v.) No. 17-312
RENE SANCHEZ-GOMEZ, ET AL.,)
) Respondents.)

Pages: 1 through 72

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UNITED STATES,)

Petitioner,)

v.) No. 17-312

RENE SANCHEZ-GOMEZ, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Monday, March 26, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

ALLON KEDEM, Assistant to the Solicitor General,
Department of Justice, Washington, D.C. ;
on behalf of the Petitioner.

REUBEN C. CAHN, ESQ., San Diego, California ;
on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-312,
5 United States versus Sanchez-Gomez.

6 Mr. Kedem.

7 ORAL ARGUMENT OF ALLON KEDEM

8 ON BEHALF OF THE PETITIONER

9 MR. KEDEM: Mr. Chief Justice, and may
10 it please the Court:

11 An appellate court must have
12 statutory, as well as constitutional, authority
13 for its decisions, and, here, the Ninth Circuit
14 had neither.

15 Appellate review was not authorized
16 under Section 1291, which applies only to
17 district court decisions that are final, nor
18 under the All Writs Act. And because the
19 Respondents' criminal cases had ended long
20 before the court of appeals ruled, their due
21 process claims were accordingly moot.

22 JUSTICE GINSBURG: On your first
23 point, you -- you didn't mention the
24 collateral-order doctrine. What about that? I
25 mean, that's an exception to the 1291 final

1 judgment rule?

2 MR. KEDEM: That's correct. It's a
3 construction that this Court has given to the
4 final judgment rule. We don't think that that
5 applies here, most notably because Respondents'
6 due process claims could be reviewed following
7 final judgment, which is one of the
8 preconditions for application of the
9 collateral-order doctrine.

10 In Deck versus Missouri --

11 JUSTICE SOTOMAYOR: Reviewed to do
12 what?

13 JUSTICE KENNEDY: But -- but that --
14 that assumes that the trial would somehow have
15 been affected. It seems to me there may well
16 be a legal violation in shackling people,
17 particularly people with disabilities and so
18 forth, and that doesn't have anything to do
19 with the trial. They're not shackled during
20 the trial. So I -- it seems to me it's a
21 different issue.

22 MR. KEDEM: Justice Kennedy, I don't
23 think it necessarily has to affect the trial.
24 Recall here, for instance, that the Ninth
25 Circuit's decision in this case created a split

1 with the Second and Eleventh Circuits, and in
2 both of those cases, there were challenges to
3 the use of physical restraints that came from
4 -- came after the fact.

5 JUSTICE KENNEDY: But what are -- the
6 -- the person is convicted and has a -- let's
7 say that he does or she does have an appeal on
8 -- on some different points. And they add:
9 And, incidentally, I was shackled during the --
10 the pretrial. What -- what difference does
11 that make to the outcome? I don't get it.

12 MR. KEDEM: Well, it wouldn't
13 necessarily affect the outcome of the trial,
14 but, for instance, they could have a claim that
15 it affected some part of the pretrial process.
16 They had a suppression motion that was affected
17 because they couldn't contribute to their own
18 defense. They couldn't communicate with
19 counsel.

20 CHIEF JUSTICE ROBERTS: How did that
21 -- I saw that argument. How can -- how do the
22 shackles affect their ability to communicate
23 with counsel?

24 MR. KEDEM: Well, I would refer you to
25 the allegations that Respondents have made

1 throughout this litigation. So they've made
2 allegations, for instance, that there were
3 criminal defendants who were unable to raise
4 their hands and get the attention of their
5 counsel.

6 JUSTICE BREYER: All right. Suppose
7 it didn't. I mean, that's the question you're
8 being asked. I mean, suppose that shackling a
9 person, arms and legs, before -- when he goes
10 before the magistrate does not affect the
11 outcome of his trial where he wasn't shackled.
12 All right?

13 MR. KEDEM: So --

14 JUSTICE BREYER: That's certainly
15 possible.

16 MR. KEDEM: Sure.

17 JUSTICE BREYER: The first thing you
18 ask or would be in that case, the appeals court
19 says: What's the prejudice? There's no
20 prejudice to his outcome. Fine. How does he
21 raise the issue?

22 MR. KEDEM: The question under the
23 collateral-order doctrine is not whether a
24 particular litigant or even most litigants who
25 want to raise that type of claim should -- are

1 able to get relief after final judgment because
2 they can show prejudice.

3 The question is whether the type of
4 claim by its very nature is one for which a
5 post-conviction --

6 JUSTICE BREYER: That's not the
7 question I asked you. I asked you, how does he
8 raise the issue?

9 MR. KEDEM: I think it would be very
10 difficult in an instance in which there was no
11 allegation that it had any effect on the way
12 that the proceedings unfolded.

13 JUSTICE BREYER: All right. So you're
14 saying if, in fact -- it wouldn't -- I'm being
15 very hypothetical, absolutely hypothetical. I
16 don't believe it would ever happen. But if, by
17 some chance, they have a policy in a court, a
18 federal court of the United States, that people
19 will come in bound and gagged in body armor,
20 hung upside down, okay, you're saying even if
21 that's so, that person in this country has no
22 way of challenging that order. Is that your
23 point? And if that is not your point, what
24 does he have by way of procedure to challenge
25 the order?

1 MR. KEDEM: The collateral-order
2 doctrine wouldn't apply, but they could get --

3 JUSTICE BREYER: I didn't ask you
4 that.

5 MR. KEDEM: No, I -- I understand,
6 Justice --

7 JUSTICE BREYER: I asked you, what
8 does apply?

9 MR. KEDEM: They could get mandamus in
10 that case. There would be a clear abuse of
11 discretion.

12 JUSTICE BREYER: If they could get
13 mandamus in that case, why can't they ask for
14 mandamus in this case, where, after all, he has
15 been bound without an opportunity -- they bind
16 everybody, arms and legs? Now you can say:
17 Well, he won't win. I don't know. Maybe he
18 will win.

19 But that's your point, they should ask
20 for mandamus?

21 MR. KEDEM: The preconditions for
22 mandamus are, first of all, that you have to
23 show clear entitlement to the writ, which
24 Respondents can't show, in part, because the
25 district court complied with the Ninth

1 Circuit's existing precedent and with precedent
2 of this Court.

3 JUSTICE ALITO: Wouldn't he have --

4 JUSTICE BREYER: But is that -- is
5 that definite? I mean, is it -- is it the case
6 that -- that where, for example, nobody ever
7 thought anybody would do anything like this --

8 MR. KEDEM: Well --

9 JUSTICE BREYER: -- to a prisoner, but
10 they do something really terrible, but it isn't
11 absolutely clear. And now you're saying
12 because it isn't absolutely clear, there's no
13 remedy whatsoever. Is that what you're saying?

14 MR. KEDEM: Let me push back just a
15 little bit, Justice Breyer, on the premise of
16 your question. This is something that happens
17 in district courts all around the country.
18 It's a practice in roughly half of the U.S.
19 Marshal field offices. Other field offices use
20 leg restraints at initial hearings. So I -- I
21 don't want to accept the premise that this is
22 something truly exceptional.

23 JUSTICE BREYER: I know --

24 CHIEF JUSTICE ROBERTS: But couldn't
25 they --

1 JUSTICE BREYER: -- but my -- my
2 question is procedural.

3 MR. KEDEM: Sure.

4 JUSTICE BREYER: I'm still trying to
5 get an answer.

6 MR. KEDEM: So -- so --

7 JUSTICE BREYER: Many cases are not
8 absolutely clear. And I want to be sure what
9 you're telling me is there is no remedy.

10 MR. KEDEM: So, in a case where a
11 litigant can't show or even allege prejudice, I
12 think it would be very difficult to get a
13 remedy. But that doesn't differentiate this
14 claim from any number of hundreds of different
15 decisions that a district court makes
16 throughout the course of litigation, which are
17 very difficult to get review of.

18 JUSTICE KAGAN: But, Mr. -- Mr. Kedem,
19 I think that the question that's being asked of
20 you is there are a set of -- of claims,
21 potentially, that would not have anything to do
22 with the outcome of a trial or the outcome of a
23 sentencing or even the outcome of a pretrial
24 proceeding but would implicate a person's
25 interest in liberty.

1 And, you know, whether you want to do,
2 you know, shackling or we've had claims that
3 have to do with forced medication or excessive
4 bail. All of these things arise in the context
5 of a criminal proceeding but don't have
6 anything to do with the outcomes of that
7 proceeding, just have to do with independent
8 liberty interests that are implicated in that
9 proceeding.

10 And what I think people are asking you
11 is it seems harsh to say that there's really no
12 way of presenting those claims.

13 MR. KEDEM: So I take the point,
14 Justice Kagan, but that is not the due process
15 interest that Respondents have invoked
16 throughout this litigation.

17 JUSTICE KAGAN: I take that point, but
18 it seems as though Respondents have changed
19 their minds a little bit. So, I mean --

20 MR. KEDEM: Sure.

21 JUSTICE KAGAN: -- I think that that's
22 the interest that they're now asserting.

23 MR. KEDEM: Right. So I would say
24 that nearly everything that a district court
25 does is designed to serve multiple interests,

1 not just adjudicating guilt or innocence, but
2 promoting values such as the autonomy and
3 dignity of the litigants, promoting respect for
4 the judicial process and the rule of law.

5 JUSTICE ALITO: Could a detainee --

6 MR. KEDEM: If he were able --

7 JUSTICE ALITO: Could a detainee in
8 this situation bring a civil action?

9 MR. KEDEM: So --

10 JUSTICE ALITO: Just as a detainee
11 could challenge conditions of confinement in a
12 civil action?

13 MR. KEDEM: I think if what they were
14 challenging was, in fact, just the liberty
15 component, abstracted away from anything
16 related to the way that their criminal
17 proceedings actually unfold, then they might be
18 able to bring a civil suit. And you would --

19 JUSTICE KAGAN: All right. But that
20 seems -- I mean, I don't know another case
21 where we've said that the collateral-order
22 doctrine rides on whether you have a way of
23 bringing the same claim in an entirely separate
24 proceeding.

25 You know, here, something's happening

1 to you in the criminal process, and you're
2 saying, your brief said, oh, no worries, just
3 go file a civil class action. But that seems
4 like a requirement that we've never
5 countenanced before.

6 MR. KEDEM: That's correct. But the
7 reason is because no litigant has ever claimed
8 that their claim has nothing to do with the way
9 that their proceedings unfolded --

10 JUSTICE KENNEDY: Well, your answer --

11 JUSTICE GINSBURG: Well, suppose --

12 JUSTICE KENNEDY: -- your answer to
13 Judge Alito indicated to me that you have some
14 doubt whether the civil class action could
15 work.

16 MR. KEDEM: Justice Kennedy --

17 JUSTICE KENNEDY: Would you agree that
18 if prisoners who were still in the pretrial
19 phase of the proceedings brought a class
20 action, and their case later becomes moot --
21 brought a civil class action, a civil class
22 action -- and their case later becomes moot,
23 that it would still be an existing class,
24 because new people would be in the class, would
25 the government object to that class action on

1 grounds that it's an improper class action?

2 MR. KEDEM: No.

3 JUSTICE GINSBURG: There's a problem
4 for these people with a class action, isn't
5 there, because they are being represented by
6 the federal defender. The federal defender, as
7 I understand it, by statute may not bring a
8 class action.

9 MR. KEDEM: That's correct.

10 JUSTICE GINSBURG: And these people
11 are not likely to have the wherewithal to hire
12 counsel on their own. So it seems that the
13 class action remedy is more imaginary than
14 real.

15 MR. KEDEM: I disagree, Justice
16 Ginsburg. There's no suggestion that they
17 wouldn't be able to get pro bono counsel if
18 what they're challenging is a general
19 district-wide policy.

20 JUSTICE BREYER: Who do they say --

21 JUSTICE SOTOMAYOR: I'm sorry, how do
22 they --

23 CHIEF JUSTICE ROBERTS: Is it --

24 JUSTICE BREYER: Who do they say --

25 CHIEF JUSTICE ROBERTS: -- do they

1 have an entitlement to attorney's fees?

2 MR. KEDEM: Pardon?

3 CHIEF JUSTICE ROBERTS: Is there an
4 entitlement to attorney's fees if the class
5 action is successful?

6 MR. KEDEM: I think that they -- they
7 might be entitled to attorney's fees.

8 CHIEF JUSTICE ROBERTS: So it doesn't
9 even have to be pro bono counsel, right?

10 MR. KEDEM: Not necessarily.

11 JUSTICE SOTOMAYOR: Counsel, I -- I,
12 frankly, have never heard of a class action
13 that would interfere with the -- with a pending
14 case, as this one appears it might be trying to
15 do.

16 Part of the claim here is that there's
17 an automatic shackling and that district courts
18 are not, pursuant to the -- to the statute,
19 giving individualized consideration to whether
20 people should be released or not.

21 That second issue will not be
22 susceptible to class treatment of any kind.

23 MR. KEDEM: That's correct. And the
24 reason that I was somewhat hesitant in
25 referring to the -- to the possibility of a

1 civil suit was I think you have to make sure
2 that what the civil suit is challenging is the
3 general policy and not some case-specific
4 decision.

5 But I took the premise of --

6 JUSTICE SOTOMAYOR: So it's only a
7 partial -- it's only a partial solution to this
8 problem?

9 MR. KEDEM: That's right. But if the
10 Court is concerned that there's a policy that
11 generally applies that would never have
12 appellate review -- and I took that to be the
13 premise of Justice Kagan's question -- then
14 that's what a civil suit would respond to.

15 JUSTICE BREYER: How? Who do you sue?
16 And -- I mean, it's not a 1983 action. This is
17 federal.

18 MR. KEDEM: Sure.

19 JUSTICE BREYER: You sue the
20 individual marshals, there may be an immunity,
21 In re Neagle, et cetera.

22 MR. KEDEM: So I think --

23 JUSTICE BREYER: Who do you sue?

24 MR. KEDEM: I think it would be an ex
25 --

1 JUSTICE BREYER: Do you sue the judge?
2 The magistrate.

3 MR. KEDEM: -- ex parte suit against
4 the marshal. And the marshal has --

5 JUSTICE BREYER: Against the marshal?

6 MR. KEDEM: That's right. The
7 Marshals Service has authority, under 28 U.S.C.
8 566, for maintaining courtroom security. And
9 they're the ones who are applying the policy
10 that's alleged to be unconstitutional.

11 JUSTICE BREYER: Fine, but what is the
12 cause of action? A Bivens action?

13 MR. KEDEM: It's a -- it's a -- it's a
14 cause of action, as this Court recognized in
15 Armstrong, directly under the Constitution.

16 JUSTICE BREYER: A direct -- so that's
17 a Bivens action?

18 MR. KEDEM: It's -- it's an Ex parte
19 Young type of action.

20 JUSTICE BREYER: So the lawsuit hasn't
21 been brought before. And if it unfortunately,
22 perhaps, or fortunately -- look, the Court has
23 held we're not creating new Bivens actions.

24 MR. KEDEM: So --

25 JUSTICE BREYER: So -- so are you sure

1 that you can bring a Bivens action against the
2 individual marshal? What is it?

3 MR. KEDEM: Just -- just to be clear,
4 Justice Breyer, it's not a Bivens action --

5 JUSTICE BREYER: What is it?

6 MR. KEDEM: -- in that you're not
7 seeking damages. It's an Ex parte Young suit.

8 JUSTICE BREYER: An Ex parte Young
9 suit. Great. Thank you.

10 MR. KEDEM: That's right, which is
11 relatively well established.

12 JUSTICE BREYER: Thank you. Thank
13 you.

14 JUSTICE SOTOMAYOR: How strange there
15 --

16 JUSTICE KENNEDY: One more question
17 and you've had a lot of questions. Let --
18 let's assume that we -- that the Court does
19 hold that mandamus -- mandamus is proper
20 because this is extraordinary and so forth.

21 Then a writ of mandamus is brought and
22 it goes to the court of appeals. And six weeks
23 elapse, but by that time the trial is over. Is
24 it -- is it now moot?

25 MR. KEDEM: It's not moot if

1 Respondents keep their criminal cases alive. I
2 refer you back to the Second and Eleventh
3 Circuit decisions. Those decisions were just
4 regular appellate decisions following in one
5 case, there was a guilty plea, in the other
6 case, they proceeded to final judgment after a
7 jury trial.

8 So had Respondents appealed, their
9 cases wouldn't have become moot. The only
10 reason that their cases are moot here is
11 because three of them decided to plead guilty
12 and then not appeal. And then charges were
13 dismissed against the fourth. So there's no
14 reason to assume that there wouldn't be an
15 opportunity for appellate review.

16 I would also note that if this Court
17 is concerned in individual cases that there
18 might be a decision with respect to use of
19 restraints against a particular defendant, and
20 then there would be no opportunity for that
21 defendant to get immediate appellate review,
22 this Court already has authority under the
23 Rules Enabling Act, 28 U.S.C. Section 2072, to
24 issue rules authorizing interlocutory appeals
25 in certain categories of cases.

1 That would be far preferable to
2 creating a new fifth category under the
3 collateral-order doctrine.

4 First of all, this Court could bring
5 to bear the collective wisdom of the bar. It
6 could make sure that the exception was
7 constructed in such a narrow and specific way.
8 Whereas when this Court recognizes a new
9 category under the collateral-order doctrine --

10 JUSTICE GINSBURG: You're -- you're
11 suggesting a -- a civil rule amendment to take
12 care of this kind of order that comes up in a
13 criminal case only?

14 MR. KEDEM: Well --

15 JUSTICE GINSBURG: Let me go back to
16 the collateral -- collateral order, because it
17 seems to me that really does fit this. It's
18 totally to the side of guilt or innocence of
19 the claim. So it's -- it's discrete.

20 I don't see why the collateral order
21 wouldn't -- wouldn't fit.

22 MR. KEDEM: So, in response to -- to
23 the first thing that you said, the Rules
24 Enabling Act allows this Court to make rules,
25 not just in the civil context, but in the

1 appellate and criminal contexts as well.

2 But to your question about why the
3 collateral-order doctrine doesn't apply, I want
4 you to imagine, for instance, a criminal
5 defendant who wants to represent himself, and
6 he says: I know that this is not likely to
7 affect the outcome of the proceedings. In
8 fact, I'm willing to stipulate that it
9 absolutely will not.

10 However, I have a liberty, autonomy,
11 and dignitary interest in being able to
12 represent myself, and those are values I can't
13 get back if I'm forced to go to final judgment
14 and appeal after the fact.

15 JUSTICE ALITO: Is there any reason
16 why we would have to address the question of
17 statutory jurisdiction if there's no Article
18 III jurisdiction?

19 MR. KEDEM: No. Mootness would be
20 probably the most straightforward way to
21 resolve the question.

22 JUSTICE KAGAN: Can I -- can I just
23 ask you to finish what you were saying?

24 MR. KEDEM: Sure.

25 JUSTICE KAGAN: I didn't understand.

1 You -- you have this hypothetical.

2 MR. KEDEM: Sure.

3 JUSTICE KAGAN: And what would we do
4 with a case like that?

5 MR. KEDEM: Well, my point is that
6 there's nothing that differentiates the
7 dignitary and autonomy and liberty interests
8 that Respondents are asserting from similar
9 interests that could be asserted.

10 JUSTICE KAGAN: I know. But it just
11 left me hanging.

12 MR. KEDEM: Sure.

13 JUSTICE KAGAN: Because it seems to me
14 that he should have a way --

15 MR. KEDEM: Right.

16 JUSTICE KAGAN: -- of -- of getting
17 that claim, you know, thought about.

18 MR. KEDEM: I think this Court has
19 recognized that because the final judgment rule
20 has its most ardent application in the criminal
21 context, that it is extraordinarily reluctant
22 to undermine the authority of the district
23 judge to cause disruption, to invite
24 gamesmanship from litigants who want to press
25 pause on -- on their proceedings while they get

1 an appeal, that it is extremely reluctant to
2 allow a mid-stream interlocutory appeal.

3 And remember that Respondents have
4 been conspicuously silent about what should
5 happen during this course of this appeal,
6 whether they have to stop all the proceedings.

7 But if what they're really arguing is
8 that these are interests I can't get back if
9 I'm forced to wait, then it strongly seems to
10 suggest that you would have to halt all the
11 proceedings.

12 And I think it's very hard to imagine
13 a case like Stack about bail claims coming out
14 the same way if every time someone wanted to
15 challenge bail, a denial of bail on appeal, you
16 had to pause the underlying criminal
17 proceedings.

18 There are other differences between
19 the cases that this Court has recognized under
20 the collateral-order doctrine as well.

21 First of all, going to the nature of
22 the right, the right that Respondents have
23 invoked -- and I understand that they've
24 changed their argument a little bit -- but
25 throughout this litigation, they have invoked

1 the right under -- under Deck versus Missouri,
2 which is a right that's grounded in the
3 fairness and accuracy of the underlying
4 proceedings. That's very different from a bail
5 claim.

6 A bail claim, also, as Justice Jackson
7 emphasized in his concurrence in Stack, it's
8 the sort of thing that you never have to stop
9 the underlying proceedings in order to review
10 on appeal.

11 And, it -- it's also distinct from
12 claims like this Court has recognized in Sell
13 versus United States, where the severity of the
14 physical interest was completely different.

15 In Sell versus United States, which
16 concerned the forcible administration of
17 antipsychotic medication, the argument there
18 was it's such a severe intrusion on my personal
19 integrity that you can never order this against
20 my will, no matter what. Whereas, here,
21 Respondents' argument is the same restraints
22 that can be applied against me in the detention
23 center, as I'm being transported to the
24 courthouse, being held in a cell within the
25 courthouse, and being transported to the

1 courthouse door nevertheless have to be taken
2 off of me during the course of my hearing
3 within the courtroom.

4 Now that's a completely different
5 order of magnitude.

6 If the Court has no further questions
7 about the collateral-order doctrine, moving on
8 to the question of mootness, as I said, I think
9 this is probably the most straightforward way
10 for the Court to resolve the case for --

11 JUSTICE GINSBURG: How about the
12 voluntary cessation doesn't moot the case --
13 now this rule is no longer in effect.

14 MR. KEDEM: That's correct.

15 JUSTICE GINSBURG: So -- but there's
16 many situations in which voluntary cessation
17 does not moot a case.

18 MR. KEDEM: That's correct. We -- we
19 are not arguing that the case is moot as a
20 result of the voluntary cessation, and the
21 reason is because the policy was ended here as
22 a direct consequence of the Ninth Circuit panel
23 ruling. We are instead saying that the case is
24 moot because Respondents' criminal cases ended,
25 no Respondent took an appeal, and for that

1 reason, there was no live controversy with
2 respect to their due process claims.

3 Now the Ninth Circuit in its en banc
4 ruling said that the reason that the case is
5 not moot is because it was a functional class
6 action. Respondents have entirely abandoned
7 that argument here.

8 They rest instead on the exception to
9 mootness for cases that are capable of
10 repetition yet evading review. Their argument
11 is that some of Respondents are reasonably
12 likely to commit future crimes, to get caught,
13 to be prosecuted within the Southern District
14 again, and then to be forced to undergo
15 physical restraints again.

16 But this Court has consistently
17 refused to allow a litigant to keep a
18 controversy alive by making a prediction of his
19 own future criminality.

20 CHIEF JUSTICE ROBERTS: Well --

21 JUSTICE GINSBURG: What about --

22 CHIEF JUSTICE ROBERTS: -- it turned
23 out to be true, right? Two of the four were,
24 in fact, arrested again and did go through the
25 shackling again?

1 MR. KEDEM: That's correct, but it was
2 true in cases such as Lane. I think it may
3 have also been true in Spencer versus Kemna.

4 JUSTICE GINSBURG: What about -- what
5 about Turner, the person who didn't pay, what
6 was it, child support?

7 MR. KEDEM: Sure. There were a few
8 differences with Turner. First of all, that
9 was a case involving civil standards of
10 conduct, not criminal ones. Second of all, in
11 that case, there was an allegation that the
12 litigant had an inability to conform his
13 behavior to the required standards of conduct.
14 He was more than \$13,000 in arrears on child
15 support payments with no evident means to pay.

16 In this case, Respondents make no
17 allegation that they're unable to prevent
18 themselves from committing future crimes.

19 Furthermore --

20 JUSTICE KAGAN: There -- there is
21 something a little bit different with respect
22 to this crime than most. I mean, this is an
23 illegal entry crime, and I suspect you, in
24 fact, see extremely high levels of recidivism
25 for that crime because people often have their

1 families here. So it's not uncommon that
2 people continue to try to get into the country.

3 MR. KEDEM: That's -- that's right.
4 But this Court has never relied solely on
5 probabilities. The point is, in Turner,
6 another distinction is that what was being
7 challenged there was the right of the court to
8 apply those standards to the litigant. In
9 other words, the litigant's argument was you
10 cannot apply civil contempt against me under
11 these circumstances because I don't have a
12 right to an attorney and I have no evident
13 means to -- to pay.

14 Here, there's no argument that the
15 rule prohibiting -- the -- the criminal law
16 prohibiting reentering the country illegally
17 can't be applied to Respondents. That's --
18 that's never been their argument, and that
19 isn't their argument here.

20 And this Court has consistently be --
21 been unwilling to assume that litigants will
22 flout laws that they concede to be valid and,
23 in fact, has assumed the opposite is true.

24 JUSTICE KENNEDY: Just one -- one --

25 JUSTICE BREYER: Is --

1 JUSTICE KENNEDY: -- just one -- one
2 small question. On a pretrial motion to
3 suppress, where the defendant's in the room, is
4 he in shackles there?

5 MR. KEDEM: He -- he might be. It
6 depends on the -- the district. You're asking
7 under this policy?

8 JUSTICE KENNEDY: Right.

9 MR. KEDEM: I believe that they would
10 be under this policy.

11 JUSTICE BREYER: You've withdrawn --
12 the United States has withdrawn the policy. If
13 you win, though, will you reinstate it?

14 MR. KEDEM: I think the intention
15 would be to reinstate the policy --

16 JUSTICE BREYER: All right. Why --
17 why is it -- if a -- if a person is denied bail
18 and -- by the magistrate and he thinks that was
19 unlawful, what's his remedy there?

20 MR. KEDEM: Bail denial under this
21 Court's decision --

22 JUSTICE BREYER: Yes.

23 MR. KEDEM: -- in Stack can be
24 immediately appealed.

25 JUSTICE BREYER: Because it's

1 collateral order?

2 MR. KEDEM: It's under the
3 collateral-order doctrine.

4 JUSTICE BREYER: Well, why is this
5 different?

6 MR. KEDEM: So I think it's different
7 in a few respects. First of all --

8 JUSTICE BREYER: You've said -- you've
9 said several times, but if you would just
10 summarize the main reasons why it's different.

11 MR. KEDEM: Sure. So, first of all,
12 bail is not a decision about courtroom
13 procedure. By definition, it affects things
14 that happen only outside of the courtroom.

15 And the reason that that matters,
16 Justice Breyer, is because the collateral-order
17 doctrine is based on the premise that there are
18 certain orders that can be decided immediately
19 on appeal without having to know anything about
20 the way that the case unfolds.

21 JUSTICE BREYER: I got that point, but
22 the -- the analogy that I was thinking of is
23 after all, you deny bail, the person's liberty
24 is constrained, he is in a cell.

25 MR. KEDEM: Right.

1 JUSTICE BREYER: And, here, the
2 person's liberty is constrained. He is in a
3 shackle. And both are fairly important to him.
4 And -- but the difference, you say, is you can
5 continue with the proceedings.

6 MR. KEDEM: So that -- that was the
7 difference Justice Jackson emphasized. There's
8 another difference as well, which is that, for
9 a bail claim, the interest at stake is far more
10 substantial. We're talking about whether the
11 litigant will be --

12 JUSTICE BREYER: Well, I don't know
13 there. I mean --

14 MR. KEDEM: Well --

15 JUSTICE BREYER: -- there the person's
16 in a cell and here the person's in physical
17 shackles.

18 MR. KEDEM: Right. But the --

19 JUSTICE BREYER: I -- I'm not sure
20 about that.

21 MR. KEDEM: The difference, though, is
22 with a bail claim, you're talking about whether
23 the litigant will be at liberty or behind bars
24 for the entire duration of their criminal
25 proceedings, which could be weeks or possibly

1 even months.

2 Here, we're talking about individual
3 hearings which last minutes or possibly hours.
4 So I think it is a very different -- the
5 difference is -- is pretty significant.

6 And, similarly, we -- we think, the
7 nature of the right is very different. Again,
8 I understand that they've changed a little bit
9 what they're conceiving of the right as, but
10 the right that they've invoked under Deck
11 versus Missouri is a right about accuracy and
12 fairness, and that's very different from the
13 bail right.

14 If there are no further questions, I'd
15 like to reserve the balance of my time. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Cahn.

20 ORAL ARGUMENT OF REUBEN C. CAHN

21 ON BEHALF OF THE RESPONDENTS

22 MR. CAHN: Thank you. Mr. Chief
23 Justice, and may it please the Court:

24 When a district court takes the
25 extraordinary step of shackling every defendant

1 at every pretrial proceeding taking place over
2 a period of months, courts of appeals have
3 authority to review those actions under either
4 the collateral-order doctrine or via
5 extraordinary writ.

6 Now collateral order review under
7 Cohen exists because the decisions here
8 conclusively determine an important question
9 that was entirely separate from the merits,
10 having nothing to do with the guilt or
11 innocence of these particular Respondents. And
12 it was effectively unreviewable on appeal from
13 a final judgment.

14 JUSTICE KAGAN: Could -- could you
15 speak to the government's view that this is
16 kind of a new theory for you?

17 MR. CAHN: Well, I think the
18 government's simply wrong. From the district
19 court on, we argued this as a deprivation of
20 liberty under the Due Process Clause.

21 The district court chose to address it
22 as a Fourth Amendment violation, but that was
23 not our theory. The Ninth Circuit, of course,
24 decided this as a deprivation of liberty.
25 They're quite clear about that. They talk

1 about Youngberg versus Romeo and that this is a
2 deprivation of the fundamental right to be free
3 of restraints.

4 Now we've talked about Deck because
5 Deck talks about what goes on in the courtroom.
6 And the Court said that in Deck, that right,
7 that liberty interest, protects other rights,
8 including the presumption of innocence, the
9 right to consult with counsel and participate
10 in one's own defense, and, of course, the
11 dignity and decorum of the court and the --

12 JUSTICE GINSBURG: But that was --
13 that was during -- shackling during trial?

14 MR. CAHN: Yes, it was during the
15 penalty phase of a capital case, Your Honor.

16 JUSTICE BREYER: What about their --

17 JUSTICE GINSBURG: There was a -- a
18 suggestion by Mr. Kedem that if the
19 collateral-order doctrine were available, that
20 would mean that the criminal proceeding would
21 be stopped in its tracks. Do you agree with
22 that?

23 MR. CAHN: I think that's just wrong.
24 I mean, there's no stay as a matter of right in
25 these cases. In every case, if somebody wanted

1 a stay, then they'd have to make that decision,
2 because, of course, these individuals are
3 individuals not who are detained but who simply
4 couldn't afford bail.

5 So they are in jail while this is
6 happening. And it's up to them to make a
7 decision whether to ask for a stay, and it's up
8 for the district court in the first instance to
9 decide whether or not it's proper, and then the
10 court of appeals in the second instance,
11 whether or not to allow a stay under equitable
12 principles.

13 And I don't think -- if you look at
14 this case, in none of these cases did the
15 individuals ask for a stay of proceedings for
16 just that reason. They were already in jail.

17 JUSTICE BREYER: But the government
18 has said, I think, if I interpret it correctly,
19 that, of course, you have a right to challenge
20 this policy. But there are three ways that you
21 can do it.

22 One way is when you appeal a
23 conviction, the person says: And one other
24 thing that hurt me in this process was the
25 shackle before the magistrate.

1 The second way is, if this is an
2 extreme case, you're entitled to mandamus. But
3 he thinks it's not an extreme case.

4 The third way is you get your client
5 and, with a group of others, you bring an Ex
6 parte Young action, which is actually the most
7 straightforward, and you challenge the policy
8 against the Marshals Service and you say just
9 what you've said.

10 So I guess now my question is going
11 the opposite of where I was, is why not use one
12 of those three? At least if you brought all
13 three, one of them should work because, of
14 course, you should have a method of challenging
15 the policy.

16 MR. CAHN: Well, let me see if I can
17 -- if I can hit those seriatim quickly.

18 So, in the first instance, this Court
19 has said in Arizona versus Fulminante that when
20 one attacks a final judgment of conviction
21 seeking to overturn the -- the final judgment
22 of conviction, the court will do that only for
23 two reasons: One for trial error that occurs
24 in the presentation of the case to the finder
25 of fact, and the other is in cases of

1 structural error having to do with the
2 constitution of the trial process. Deprivation
3 of this right doesn't seem to fit into either
4 of those categories.

5 The second suggestion, I believe, was
6 the class action suggestion. And I note that
7 this Court has never said that the availability
8 of some right -- or some forum to pursue
9 litigation outside of the instant proceeding
10 was relevant to collateral-order jurisdiction
11 or to mandamus, and I'd point to both Stack and
12 Sell as being contrary to that. In Stack --

13 JUSTICE KENNEDY: I don't wish to
14 interrupt the seriatim because -- but are --
15 are -- is there any doubt that you as a public
16 defender could bring a civil class action?

17 MR. CAHN: It's in my mind quite
18 unclear.

19 JUSTICE KENNEDY: All right.

20 MR. CAHN: So I -- and I'm not an
21 expert on civil class actions and it's
22 something that we're just unclear about based
23 upon the statute and the rules.

24 But in Stack and Sell -- in Stack,
25 this Court specifically said that the bringing

1 of a separate habeas action in that case was
2 improper.

3 In Sell, Justice Scalia in his dissent
4 suggested that the forced medication order
5 could have been challenged in another
6 proceeding, an Administrative Procedure Act
7 challenge, to the order of the Bureau of
8 Prisons to medicate the individual there.

9 And what the -- the Court said that
10 wasn't relevant to the availability of
11 collateral-order jurisdiction in that case.

12 CHIEF JUSTICE ROBERTS: Well, all of
13 these difficulties that you're mentioning,
14 you'll have the benefit in all these that the
15 government has said it's okay, right? I mean,
16 you've made a lot of progress this morning
17 already. The government has said in all of
18 those three instances, as I understand it, that
19 they think this is something you can do.

20 MR. CAHN: Well, I think -- I think
21 they've said that --

22 CHIEF JUSTICE ROBERTS: I mean, I know
23 that doesn't mean it's -- it's done, but it
24 certainly makes it a lot easier for you.

25 MR. CAHN: We certainly appreciate

1 that concession and we'd certainly examine the
2 alternatives. But I think it -- it's clear
3 that -- it's certainly clear that we couldn't
4 do this after final judgment, despite what
5 they've said. I -- I think we can do it from
6 mandamus, and I think this is an exceptional
7 case, as this Court has set it out, because
8 every defendant was shackled without any
9 individualized cause in every pretrial
10 proceeding over a period of months. That's
11 hearings that last five minutes, hearings that
12 last many days, through the entirety of their
13 pretrial proceeding.

14 JUSTICE KAGAN: But usually when we
15 think about writs of mandamus, it's -- it's not
16 that we give them when an issue is super
17 important. It's that we give them when we
18 think the outcome is super clear. And no one
19 could say that about this case, could -- could
20 they?

21 MR. CAHN: Well, there's two sorts of
22 mandamus that this -- two sorts of -- types of
23 mandamus cases where this Court has allowed or
24 affirmed the issuance of mandamus.

25 One are those cases where there's an

1 absolutely clear rule and the district court
2 seems to be violating that rule. But another
3 species of mandamus is that that the Court
4 authorized in Schlangenhauf and in Mallard and,
5 indeed, I'd say even in Cheney, where there's a
6 fundamental unresolved question about the
7 authority of the district court.

8 And we believe the district court had
9 no authority to shackle all these individuals
10 without making an individualized determination
11 that they presented a risk of violence or
12 escape in the courtroom --

13 JUSTICE GORSUCH: So, counsel, why
14 doesn't that take care of your problem?

15 MR. CAHN: Well, the court of appeals
16 did, in fact, go forward on the basis of
17 mandamus jurisdiction. And we're perfectly
18 comfortable with that and would be happy if
19 this Court affirmed on the basis of mandamus
20 jurisdiction.

21 JUSTICE GORSUCH: So mandamus is -- is
22 available you think in these circumstances?

23 MR. CAHN: Yes.

24 JUSTICE GORSUCH: And not a problem?

25 MR. CAHN: We think it's -- it's a

1 viable route to get review of these matters.

2 JUSTICE GINSBURG: Did the -- did the
3 three judge panel -- they didn't -- they didn't
4 go on mandamus, did they?

5 MR. CAHN: No, there was established
6 precedent in the Ninth Circuit that
7 collateral-order jurisdiction existed to review
8 this sort of claim, and the Ninth Circuit found
9 -- and the Ninth Circuit panel found collateral
10 -order jurisdiction.

11 The court of appeals said that: We're
12 going to leave that precedent undisturbed, but
13 because we're not going to address the
14 individual shackling decisions, we're only
15 going to address the policy, we see mandamus as
16 a better route to get at that.

17 JUSTICE GORSUCH: Counsel, the -- the
18 government suggests that the functional class
19 action theory to get around the mootness
20 problem you've abandoned. Is that a fair
21 characterization?

22 MR. CAHN: So I -- I don't know that
23 I'd say we've abandoned it, but we fit squarely
24 within a very clearly established exception to
25 the mootness doctrine, that this matter is

1 capable of repetition yet evading review.

2 JUSTICE GORSUCH: Well, before we get
3 to that, if I could just -- if you haven't
4 abandoned it, I don't see it briefed. So what
5 am I supposed to do about that?

6 MR. CAHN: Well, I think this Court's
7 free to affirm on the basis of the Ninth
8 Circuit's opinion without our briefing on the
9 issue.

10 JUSTICE GORSUCH: Do you think it's
11 right? You haven't defended it.

12 MR. CAHN: Well, this Court did
13 something very similar in Richardson versus
14 Ramirez where there was no certification of a
15 class action and the Court found that wasn't
16 essential to Article III jurisdiction.

17 But because we have a simple, clear
18 route, we don't want to ask this Court to break
19 new ground for us. So --

20 JUSTICE GORSUCH: Okay. That --
21 that's helpful right there. Thank you.

22 JUSTICE ALITO: But you have a
23 decision from the en banc Ninth Circuit saying
24 that this case is not moot based on the fact
25 that it is a functional class action.

1 MR. CAHN: Yes, Your Honor.

2 JUSTICE ALITO: And it's pretty
3 remarkable that, whether you've abandoned the
4 -- the point or not, you certainly have not
5 made any effort to defend it.

6 MR. CAHN: That's correct, Your Honor.

7 JUSTICE ALITO: What does that say
8 about this theory, which is adopted by the --
9 the en -- an en banc court of appeals?

10 MR. CAHN: Well, as to us, it says
11 that we're more comfortable staying within a
12 firmly established exception to mootness that
13 this Court has ruled on many times.

14 JUSTICE GINSBURG: But it -- it isn't,
15 because capable of repetition, evasive review,
16 I don't know of any case that has allowed: I'm
17 going to do it again, that I'm a recidivist,
18 therefore, I mean, it will be evasive of review
19 because I'll do it again and again. I don't
20 know any decision that allows you to say: I
21 will commit the same offense again, therefore,
22 the case isn't moot.

23 MR. CAHN: Well, let me note that in
24 Gerstein in Footnote 11, this Court said that
25 pretrial detention is necessarily brief,

1 speaking to the individual named plaintiffs, so
2 that no one individual would have an
3 opportunity to fully litigate their claim. And
4 yet the individual could suffer repeated
5 deprivations, making the matter capable of
6 repetition yet evading review.

7 So this -- beyond that, I'd point that
8 -- point out that the Article III personal
9 stake requirement is no different for a
10 criminal defendant than a civil plaintiff or a
11 civil defendant.

12 And what this Court has always looked
13 to is whether there's a reasonable expectation
14 or a reasonable likelihood as a factual matter
15 based upon the facts in the particular case
16 involving the particular litigants.

17 It's not a rule that's intended to
18 control the conduct of litigants outside of the
19 courtroom. It's simply a rule that allows this
20 Court to determine whether or not there remains
21 a live controversy that can be appropriately
22 decided in this Court.

23 JUSTICE BREYER: So we're -- at the
24 moment, it's very interesting and helpful, but
25 I'm thinking if we -- if we -- if we go with

1 you on mootness, I don't know what door that's
2 opening up because it's really not moot because
3 there are other people that will be subjected
4 to it, not your clients.

5 Then I'm thinking: Well, if we go on
6 the mandamus, I'm going to hear just what I
7 heard, that there are a bunch of districts that
8 have this and it isn't as far out as my
9 imaginary example.

10 And then, if I go on collateral order,
11 I'm going to run into the problem that we just
12 said, that this would delay the proceeding
13 rather than his like being in bail. And then
14 they say: But bring an Ex parte Young action,
15 that's fine.

16 And -- and how long would that take?
17 I mean, you find five people down there who are
18 going to be subject to it, and you go into
19 court, we already have the orders, and there we
20 are, we win.

21 Okay. How -- how long -- I mean, is
22 it -- am I thinking -- you don't think I'm
23 thinking correctly on this. And I guess I want
24 to know what --

25 MR. CAHN: No, no, I think in a sense

1 you're right that the government's argument is
2 really that there is no way to ever obtain --

3 JUSTICE BREYER: No, no, they say Ex
4 parte Young.

5 MR. CAHN: They say that, but, you
6 know, the truth is that doesn't obtain review
7 of the decisions to shackle these individuals
8 in their cases. And, of course, this Court has
9 already said -- I mean, speaking of O'Shea,
10 this Court said in O'Shea that it's certainly
11 not a favored course of action to enter
12 injunctions that will interfere with the
13 conduct of criminal cases.

14 In the normal way, the appropriate way
15 of reviewing decisions in individual criminal
16 cases has always been through appeals in those
17 individual criminal cases.

18 JUSTICE ALITO: What is the difference
19 between -- what -- what is the difference
20 between a case involving allegedly unlawful
21 shackling when a person is brought to a
22 proceeding in court where there is no jury, on
23 the one hand, and a case involving, let's say,
24 allegedly unconstitutional shackling while in
25 the jail?

1 MR. CAHN: Well --

2 JUSTICE ALITO: In -- in the latter
3 case, would that fall within the
4 collateral-order doctrine?

5 MR. CAHN: No, I -- I don't believe so
6 because courts don't make decisions in criminal
7 cases about what happens in detention centers.
8 Courts do make decisions about how individuals
9 come before them, about how they're presented
10 in a public courtroom where they --

11 JUSTICE ALITO: Well, I mean, insofar
12 as there -- there are two possibilities for
13 your claim. One is that it has some effect on
14 the criminal case. And if that's the claim,
15 then that does not fall within the collateral
16 -order doctrine because that could be reviewed
17 after a conviction.

18 But if the claim is, irrespective of
19 any effect on the criminal case, this is a
20 violation of my constitutional rights because
21 it violates a -- a liberty interest, a
22 dignitary interest, then explain to me what is
23 the difference between those two situations.
24 It's just the happenstance that one occurs in
25 court and one occurs across the street in the

1 jail?

2 MR. CAHN: Well, we think the fact
3 that it occurs in court is meaningful. I mean,
4 it is -- you know, we -- we believe the
5 courtroom really is a sacred space. We believe
6 judges control that space and -- and assure
7 that individuals come before the court with
8 dignity and with autonomy and with their
9 liberty interest protected, and that there was
10 a well-established right at common law that,
11 under this Court's precedents, is incorporated
12 in the Due Process Clause to appear before
13 courts free of bonds.

14 And this happened regularly at the
15 common law, individuals would come from prison
16 -- from Newgate prison, terrible conditions,
17 shackled hand and foot, and without question,
18 their bonds would be struck off for their
19 arraignments.

20 CHIEF JUSTICE ROBERTS: Well, there is
21 the countervailing interest, which, of course,
22 is the safety of those in the courtroom and the
23 safety of the judges. And your scenario of the
24 person coming in from Newgate, I -- I
25 understand, that's one individual.

1 Here, according to the -- the -- the
2 record from the marshals, you have many
3 situations where there are a lot of people, and
4 the idea that they're going to undertake an
5 individualized determination in every case is
6 just something that they don't have the
7 resources or time for.

8 MR. CAHN: Well, I disagree and I
9 think that the record here shows that not to be
10 the case. I mean, so for nearly 50 years of
11 the district's existence, this procedure was
12 followed. It's the procedure that's been
13 followed since May of 2017 in the district that
14 individuals come to court, that if the marshals
15 have a reason to shackle them, they -- usually,
16 what happens today is that they come and they
17 tell the lawyer: We're going to bring your
18 client out in shackles for these reasons, and
19 the lawyer can either decide to challenge that
20 before the judge or not as they choose to.

21 So this procedure has worked through,
22 you know, centuries of common law --

23 CHIEF JUSTICE ROBERTS: Well, but
24 there are situations where in term -- for
25 pretrial decisions, you do have more than one

1 person. I mean, there -- there are --
2 according to what the marshals say, there are
3 many people in the courtroom, or waiting to get
4 in the courtroom, and presumably, in many
5 cases, the lawyer is going to say: I don't
6 want the client to be shackled.

7 And then you have to have an
8 individual determination, right, where the --
9 the -- the -- the assistant U.S. attorney,
10 whoever it is, comes in and says: Well, here's
11 why we think you should. And the lawyer says
12 no. And then the judge has to make a decision
13 on that --

14 MR. CAHN: Well, it's --

15 CHIEF JUSTICE ROBERTS: -- for every
16 one of however many people are there.

17 MR. CAHN: So it's just not a why he
18 should or why he shouldn't. It's that there's
19 evidence, or there isn't, that the individual
20 presents a danger of escape or violence in the
21 courtroom.

22 All I can say is this is done day in
23 and day out and it's done without a problem.
24 In some districts, for instance, the District
25 of Arizona, particular procedures have been

1 adopted to address these matters before the
2 individual first comes to court. In other
3 districts, like ours, the matters are dealt
4 with in court, where necessary.

5 CHIEF JUSTICE ROBERTS: Well, I
6 suppose -- I suppose there are many situations
7 where people don't know much about the
8 individual, right? The situation we have here
9 where, for example, there are many people --
10 like the recidivist clients, obviously, you
11 know something, but they arrest somebody and
12 bring them in and the question is should they
13 be detained, and they don't know anything about
14 them.

15 MR. CAHN: Well, in -- in our
16 district, they know quite a bit about them by
17 the time they get to court. In our district,
18 individuals don't come straight to court. They
19 go to the MCC. They're interviewed about
20 social issues, which include gang history, that
21 sort of thing. They meet with pretrial -- with
22 pretrial services, which runs a criminal
23 history check. They're strip-searched. So, by
24 the time people actually get to court, they
25 know quite a bit about them.

1 But I'd say also that that's reversing
2 a little bit the presumption of the common law.
3 The common law presumes that individuals won't
4 be shackled unless there's cause. And so it's
5 for the marshals or the government to bring up
6 that evidence of cause. And I think they've
7 been able to do that where it's been
8 appropriate, that the individual is acting out
9 in the holding cell, that the individual in the
10 course of his arrest was violent with the
11 officers, that the individual has a mental
12 illness that makes him in some way more likely
13 to be violent, some particular examples of it,
14 not just that they're mentally ill.

15 JUSTICE SOTOMAYOR: Of the -- what are
16 there, 99 districts in the country?

17 MR. CAHN: Yes.

18 JUSTICE SOTOMAYOR: How many of them
19 have had a shackling policy similar to this
20 one?

21 MR. CAHN: So we don't know that with
22 certainty. The record evidence in this case
23 pertains only to the southwest border and the
24 Ninth Circuit, and some of it was disputed.
25 But what's clear is that the courts along the

1 southwest border from Texas through Arizona had
2 this policy prior to 2013, and then the
3 Southern District of California instituted that
4 policy in 2013. The --

5 JUSTICE SOTOMAYOR: Is it fair to say
6 that that's a small percentage compared to the
7 whole?

8 MR. CAHN: Certainly, it seems that
9 way to me based upon the record we've got.

10 JUSTICE SOTOMAYOR: And in -- in the
11 whole, the individualized determinations are
12 made?

13 MR. CAHN: Yes. I mean, certainly,
14 that's my understanding of many -- from
15 surveying my fellow defenders, that that's the
16 case in many of the districts around the --

17 CHIEF JUSTICE ROBERTS: You have a
18 higher -- a much higher volume of people, don't
19 you, in those -- that part of the country than
20 elsewhere?

21 MR. CAHN: We do, indeed, Your Honor,
22 but we've had that same high volume for pretty
23 much the entirety of -- well, I shouldn't say
24 the entirety of the history of the district,
25 but certainly from the '70s on.

1 JUSTICE BREYER: Is this -- What's the
2 difference --

3 JUSTICE KENNEDY: Can you address the
4 question about capable of repetition yet
5 evading review? It's very difficult for this
6 Court, as a matter of the dignity of the law,
7 to say that, well, we're going to presume
8 there's going to be another violation. We
9 understand that with the aliens with the
10 families, that they have this strong temptation
11 to try to come in anyway. But it's very
12 difficult for us to write an opinion, oh, he
13 might violate the law again.

14 MR. CAHN: Well, let me be clear,
15 we're not asking the Court to presume anything,
16 and that's simply because the most likely
17 evidence that something can happen is that it
18 has happened. The most likely evidence that
19 something -- or the most probative evidence
20 that something is likely to reoccur is that it
21 already has.

22 And this dispute between Respondents
23 and the government has already repeated itself,
24 so it's not merely a probability, it's not
25 merely a presumption or an assumption, but

1 there's actual facts that show it's likely
2 to reoccur.

3 JUSTICE KAGAN: But -- but that
4 suggests if I look at somebody and he has a
5 very, very, very long rap sheet, I'd say, well,
6 you know, he clearly does this every month,
7 he's just going to be here again, and give him
8 a different rule from somebody who's a first
9 offender.

10 MR. CAHN: Well, the Court has always
11 said that in applying the capable of repetition
12 yet evading review exception, the court looks
13 at the individual case and the individual
14 litigant in determining whether or not it's
15 likely to repeat itself.

16 So the Court isn't creating some rule
17 for all criminal cases in some way, courts
18 looking at these cases. I mean, let me note
19 there's also one other Respondent who I think
20 is relevant to this consideration because the
21 government's made the argument, though I think
22 it's wrong, that both Mr. Smith in Honig versus
23 Doe and -- and -- and Mr. Turner in the -- in
24 the Turner versus Rogers were unable to avoid
25 coming back in -- into that situation.

1 But we have an individual here,
2 Mr. Ring, the Respondent, the disabled Iraqi
3 combat vet, who has chronic and severe PTSD,
4 causing him to overperceive and overreact to
5 threats, and it's as a result of that that he
6 came into conflict with the VA, where he lives
7 in a VA home and relies on the VA for services.
8 So I think there's also that individual who is
9 likely to come into that same conflict.

10 And the other thing I'd point out is
11 that these individuals, when they come back
12 into court, they are indeed presumed innocent.
13 So the government says we're asking you to say
14 that they are going to commit new crimes. No,
15 we're asking this Court to find that it's
16 reasonably likely, reasonably expected, that
17 they may find themselves in the Southern
18 District of California as a defendant --

19 JUSTICE BREYER: Go back to the merits
20 for a second. I'm just curious, because I did
21 have to write this case of the shackling
22 before.

23 MR. CAHN: Yes, Your Honor.

24 JUSTICE BREYER: And -- and there's a
25 full page, more than a page, of citations that

1 are not simply from Blackstone, but almost all
2 of them are from American courts, and the
3 conclusion is trial courts -- that what they
4 show, for like a century, is trial courts may
5 not shackle defendants routinely but only if
6 there is a particular reason to do so.

7 MR. CAHN: Yes.

8 JUSTICE BREYER: Now were those all
9 jury cases? I don't remember. Were they all
10 -- I mean, I know that there's a magistrate
11 here and it isn't a -- it isn't a district
12 court judge, but magistrate judges are in
13 courtrooms. But did all those cases involve
14 juries? Do you know?

15 MR. CAHN: I -- I -- I don't know with
16 certainty, and I don't want to answer, Your
17 Honor.

18 I would point out, though, that this
19 shackling occurred not only before the
20 magistrate judges in the initial proceedings
21 but before district court judges in substantive
22 motion hearings and evidentiary hearings. So
23 it went on.

24 JUSTICE BREYER: Do you know if
25 Blackstone was, in fact, just talking about

1 jury cases or if --

2 MR. CAHN: It --

3 JUSTICE BREYER: -- Blackstone was
4 talking about cases in courtrooms?

5 MR. CAHN: Well, I think it's clear
6 that Blackstone wasn't talking just about jury
7 cases. The very quote that's mentioned in Deck
8 comes from his chapter of arraignment and its
9 incidents. And it talks about the arraignment,
10 about coming into court, being called to the
11 bar, asked to state one's true name, and being
12 informed of the charges and asked to plead.

13 And Blackstone states the rule was
14 that individuals were to appear free of bonds
15 and fetters, absent some evidence that they
16 were a risk of escape.

17 JUSTICE KENNEDY: Is it your
18 experience that there's shackling during a
19 pretrial motion to suppress?

20 MR. CAHN: There was shackling at
21 every proceeding, Your Honor, with the
22 exception of one district judge. One district
23 judge out of 30 magistrate and district judges
24 chose not to shackle anyone in her courtroom.

25 Every other district judge, every

1 other magistrate judge, shackled individuals.
2 Sometimes there would be partial relief in --
3 in motion hearings where people would have, you
4 know, handcuffs taken off. But on the whole,
5 five-point shackling was the rule in every
6 court.

7 And you can see that in some of the
8 examples in the record and in our briefs where,
9 for instance, the district court judge who
10 says: I've got a lot to do today, I don't have
11 time to make individual determinations, that's
12 a district court judge talking about what's
13 going on in his courtroom.

14 The woman in the wheelchair who we
15 talk about in the brief in dire and
16 deteriorating condition, that occurred in
17 district court, not in the magistrate court,
18 Your Honor.

19 JUSTICE ALITO: I mean, suppose the
20 rule --

21 JUSTICE KENNEDY: In the Central
22 District of California, does this policy
23 prevail, do you know?

24 MR. CAHN: Well, it prevails nowhere
25 in the Ninth Circuit any longer. But in the

1 Central District --

2 JUSTICE KENNEDY: Before the state.

3 MR. CAHN: In the Central District of
4 California, there was a policy of using leg
5 shackles only in the initial appearances only,
6 and that was the Howard case, which was the
7 begin -- the first litigation ever concerning
8 shackling that established the right to
9 collateral-order jurisdiction in the circuit on
10 -- over these matters.

11 JUSTICE ALITO: If -- if there is no
12 rule, there's no blanket rule, but an
13 individual district judge orders that a
14 detainee be shackled, do you think that could
15 be contested via the collateral-order doctrine?

16 MR. CAHN: Well, I think the only
17 thing before this Court is a complete denial of
18 an individual determination on the basis of
19 violence or risk of escape. And so that is
20 clearly a due process violation and subject to
21 the collateral-order doctrine.

22 The Court did say in Stack that
23 there's a distinction between the discretionary
24 calls that a judge makes in setting the amount
25 of bond versus the refusal to reduce an

1 excessive bond. And so the Court could --
2 could -- could construct the jurisdictional
3 rule in that manner.

4 JUSTICE ALITO: But here there could
5 be -- you could get an individualized
6 determination, could you not? Couldn't -- I --
7 I thought under this rule any judge could order
8 that the shackles be removed.

9 MR. CAHN: Any judge could order that
10 the shackles be removed, but no judge made an
11 individual determination on the basis of danger
12 or risk of escape. And we asked for it many
13 times and were told again and again and again
14 you're not going to get that, you don't have a
15 right to that.

16 Some judges said we'll consider
17 medical extremity in determining whether or not
18 we'll remove shackles in whole or in part. But
19 the record is really clear and the Ninth
20 Circuit en banc found that there was really
21 very little variance and there was no
22 individualization in a meaningful way, that
23 this was a blanket --

24 JUSTICE SOTOMAYOR: Counsel, going
25 back to what the Ninth Circuit said in their

1 majority opinion, they didn't deal with the
2 mootness issue except through the class action
3 argument.

4 MR. CAHN: That's correct, Your Honor.

5 JUSTICE SOTOMAYOR: They do state in
6 their opinion, however, the principle that was
7 mentioned earlier, that we generally don't
8 presume in their case law that someone will
9 commit a criminal act.

10 The government points to that --

11 MR. CAHN: So -- So --

12 JUSTICE SOTOMAYOR: -- in saying,
13 absent the class action mechanism, you really
14 can't get past that circuit case law --

15 MR. CAHN: So --

16 JUSTICE SOTOMAYOR: -- if -- if -- it
17 seems to me that shouldn't we let the Ninth
18 Circuit figure that out?

19 MR. CAHN: Well --

20 JUSTICE SOTOMAYOR: If we don't accept
21 the class action mechanism they use -- it's a
22 big but, it -- hypothetically, if we don't
23 accept that, shouldn't we just remand and let
24 them decide whether this is capable of
25 repetition or not?

1 MR. CAHN: So I -- I certainly think
2 that this Court has done that in the past in
3 its appropriate course. What's -- what
4 happened here was that no one in front of the
5 court of appeals contend -- contended that the
6 matter was moot because the Respondents had
7 lost their personal stake.

8 And so the Ninth Circuit was never
9 made aware of the underlying facts, including
10 many facts that are in the record, there -- all
11 of the facts concerning Mr. Ring and Mr.
12 Sanchez-Gomez are in the record, but they
13 weren't litigated, they weren't brought before
14 the court, because neither the government nor
15 we contended that Respondents had lost their
16 personal stake. And it just wasn't discussed.

17 So it would certainly be appropriate
18 to remand to the Ninth Circuit for them to make
19 an initial determination.

20 The other thing I'd say is I want to
21 come back a little bit to O'Shea and the
22 government. The government's pushing very hard
23 on the idea that this Court has said that it's
24 never appropriate to consider the possibility
25 that an individual will come back into court in

1 a criminal case. And the Court has never said
2 the doctrine doesn't apply in criminal cases.

3 And, in fact, the language in Gerstein
4 is directly to the contrary of the rule, the
5 new rule that the government is suggesting this
6 Court adopt.

7 JUSTICE ALITO: And do you think we
8 could say: Well, we don't know whether we have
9 jurisdiction under the Constitution, but we're
10 going to write an opinion on various other
11 interesting legal issues that are presented in
12 this case?

13 JUSTICE BREYER: No.

14 MR. CAHN: No, I don't believe so,
15 Your Honor. I don't believe that's possible.

16 Let me --

17 JUSTICE KAGAN: May -- may I ask
18 something? It might -- it's probably not
19 legally relevant. I'm just curious about it.

20 At -- at -- at some point, why didn't
21 one of the lawyers in your office pick up the
22 phone -- there are a host of organizations that
23 I can imagine bringing a suit like this one
24 outside of any individual criminal case -- why
25 didn't that call get made to one of those

1 organizations?

2 MR. CAHN: Well, there's no evidence
3 in the record about this, Your Honor. But
4 since -- if I might, there -- there has been --
5 we've had this and other issues that have come
6 up where we felt that it would be appropriate
7 to litigate them through class actions, many of
8 which have never led to challenges because we
9 thought they could only be brought through
10 class actions or civil litigation. And the --
11 the lawyers, the resources just aren't there to
12 bring those cases in San Diego. It's that
13 simple.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Kedem, you have six minutes
17 remaining.

18 REBUTTAL ARGUMENT OF ALLON KEDEM
19 ON BEHALF OF THE PETITIONER

20 MR. KEDEM: Thank you. I have a
21 number of individual points, but I think it's
22 worth pausing to just acknowledge the breadth
23 of Respondents' argument.

24 Respondents' argument is that every
25 single decision to use restraints in any

1 criminal case, and possibly other case
2 management decisions as well, can get an
3 interlocutory appeal, that compliance with
4 circuit precedent by a district court qualifies
5 for mandamus relief, and that, under Article
6 III, a litigant can point to his likelihood of
7 committing a future crime in order to keep his
8 case live.

9 Starting first with the question of
10 mootness, my friend several times brought up
11 Gerstein as an application of the exception for
12 cases capable of repetition yet evading review.
13 It was not.

14 Gerstein was based on the fact that
15 there was a certified class action there.
16 There is no certified class action here. It
17 makes a difference because a class has its own
18 interests that continues even after the
19 individual litigant's is over.

20 Respondents have said that it's just a
21 prediction based on general likelihood,
22 probability, that a future crime will be
23 committed. This Court has never relied on
24 those sorts of predictions and in cases like
25 O'Shea, Lane, and Spencer, has explicitly said

1 that a prediction of that sort is not
2 permissible.

3 Finally, he brought up Mr. Ring. At
4 no point during this litigation, not even at
5 the merits stage before this Court, has
6 Respondents ever suggested that Mr. Ring is
7 likely to commit another crime.

8 Going now to the question of the
9 collateral-order doctrine. Justice Kennedy,
10 you have several times asked a question:
11 Couldn't you have this -- this issue come up in
12 the context of a suppression ruling?

13 The answer is yes. And that would
14 survive final judgment. That could be
15 challenged on appeal, even if the litigant was
16 convicted or even if he pleaded guilty.

17 So there's no reason why you can't
18 challenge that as a result from final judgment.

19 Moving next to the question about
20 Justice Kennedy --

21 JUSTICE SOTOMAYOR: Assuming your
22 district, like most, doesn't have a waiver of
23 appeal rights with all of their plea
24 agreements.

25 MR. KEDEM: It's routine --

1 JUSTICE SOTOMAYOR: Which it's routine
2 to have the --

3 MR. KEDEM: Sure.

4 JUSTICE SOTOMAYOR: -- the waiver,
5 which means this issue is not likely.

6 MR. KEDEM: Well, it's routine for
7 litigants to preserve suppression objections
8 and to challenge that on appeal. That's
9 something that happens all of the time.

10 And there's no reason that that
11 couldn't happen in a case where someone
12 alleges, for instance, that they were unable to
13 contribute to their own defense, that they
14 couldn't write notes or get the attention of
15 their attorney, as Respondents have alleged
16 here.

17 Justice -- Justice Kagan, you asked
18 about whether this was a new theory. And my
19 friend said we've been arguing all along that
20 there's a liberty interest. That is completely
21 true. But it's a liberty interest within the
22 context of the common law right under Deck
23 versus Missouri, which is the right that
24 they've been invoking throughout this
25 litigation at all stages, including before this

1 Court.

2 There was a question about whether
3 this is truly an exceptional case sufficient to
4 justify mandamus. We did a survey of U.S.
5 Marshal field offices, and our understanding is
6 about half of them use restraints at all
7 initial appearances, about 150 out of the 300
8 field offices.

9 Another 100 or so --

10 JUSTICE GINSBURG: Is that -- is that
11 five-point restraints?

12 MR. KEDEM: That's full restraints.
13 It's both wrist restraints and also leg
14 restraints. Another 100 or so use only leg
15 restraints. And then about 50 field offices
16 don't have any restraints at initial
17 appearances.

18 So the Ninth Circuit is actually very
19 much the outlier here.

20 Furthermore, my friend brought up the
21 idea -- brought up the Schlagenhauf case. In
22 Schlagenhauf, the argument was that a type of
23 order that had never been issued before, an
24 order requiring the criminal defendant to
25 undergo a battery of psychological and mental

1 examinations, that --

2 JUSTICE GINSBURG: It was a civil
3 case, wasn't it?

4 MR. KEDEM: That was a civil case.
5 That was a mandamus case. And, Justice
6 Ginsburg, as you might be pointing to, this
7 Court has never recognized an appropriate use
8 of mandamus in a criminal case where the order
9 sought to be challenged was not the functional
10 equivalent of a dismissal.

11 Finally, back to the collateral-order
12 doctrine. The doctrine is a balancing of
13 interests. Everyone recognizes that it is
14 useful in certain cases to get an immediate
15 appellate ruling to deal with a particular
16 legal issue. But we also recognize that it can
17 come at a very steep cost.

18 It's incredibly disruptive, it invites
19 gamesmanship, and it undermines the authority
20 of the district judge. We're talking here
21 about a type of order, the use of restraints,
22 that happens hundreds of times in district
23 court cases all around the country.

24 And because they're trying to abstract
25 out the part of their argument related only to

1 dignitary interests or autonomy interests, that
2 argument can't be cabined. It could apply to
3 essentially any decision that a district court
4 makes regarding some sort of trial procedure,
5 as long as you can claim there's no way that
6 it's likely to prejudice me.

7 Usually, the assumption is opposite --
8 the opposite, that appellate review is there in
9 cases where there is prejudice, and we don't
10 want to change the rules merely because a
11 litigant can claim that there is no prejudice.

12 JUSTICE BREYER: Can you say -- I
13 don't know -- but can you say if the government
14 would -- I don't want to put cooperate, that's
15 too strong -- but at least would not oppose an
16 effort in any of those 150 districts by a
17 defense attorney's organization to try to
18 challenge this policy, either through, as you
19 suggested, an Ex parte Young proceeding or, as
20 you also suggested, an ordinary appeal where
21 they haven't waived the right to appeal and it
22 says explicitly like reserving the -- the
23 suppression motion, we reserve the right to
24 challenge the restraint motion?

25 MR. KEDEM: Well, starting --

1 JUSTICE BREYER: Now -- now -- there
2 -- yeah?

3 MR. KEDEM: So starting with the last
4 part of your question --

5 JUSTICE BREYER: Yeah.

6 MR. KEDEM: -- the government didn't
7 in Zuber or LaFond, which were the Second and
8 Eleventh Circuit decisions that were from final
9 judgments, didn't contend there that it was
10 improper for the litigant to argue that they
11 had been improperly restrained in those cases.

12 With respect to your question about
13 the civil suit, I can say only that the
14 government would not oppose it in an
15 appropriate case.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:07 a.m., the case
19 was submitted.)

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