No. 17-312

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Constitution:

Miscellaneous: Page

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The district judges in the Southern District of California, after carefully considering the facts on the ground and the input of many interested parties, agreed that the Marshals Service was justified in placing restraints on defendants during pretrial proceedings, subject to individualized objections to their necessity. 2 C.A. E.R. 259-260. That policy accorded with preexisting practices in every other judicial district on the southwest border. 1 C.A. Supp. E.R. 64. By a one-judge margin, however, the majority below "creat[ed] a blanket constitutional rule in this moot case" under which the Marshals Service must "either do the impossible (predict risks based on a dearth of predictive information) or sit idly by and suffer an identifiable, compelling harm (violence in the courtroom)." Pet. App. 69a-70a (Ikuta, J., dissenting). The Ninth Circuit's decision is flawed in multiple respects, cannot be squared with

the reasoning of other circuits, and has serious practical consequences. It warrants this Court's review.

1. Respondents' defense of the Ninth Circuit's assertion of jurisdiction over this case repeats the errors of the majority below and introduces new ones.

a. As the petition explains (Pet. 13-20), the majority below erred in inventing a "functional class action" writ of supervisory mandamus, Pet. App. 13a, that allowed it to sidestep the limitations on its authority. The conditions for mandamus relief, see *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004), were in no way satisfied by a district court ruling that "*complied* with [the Ninth Circuit's] last word on the matter"—a decision holding "that restraining pretrial detainees in proceedings before a judge did *not* violate due process." Pet. App. 53a (Ikuta, J., dissenting) (citing *United States* v. *Howard*, 480 F.3d 1005, 1012-1014 (9th Cir. 2007)) (emphasis added).

Respondents' view (Br. in Opp. 16) that a writ of mandamus is warranted whenever "the underlying question is subject to a debate resolved by issuance of the writ" would open the door to appellate review of any nonfrivolous legal claim at any point in any case. Contrary to respondents' contentions (*id.* at 14-16), that watered-down standard finds no support either in *Mallard* v. *United States District Court*, 490 U.S. 296 (1989), or in *United States* v. *United States District Court*, 407 U.S. 297 (1972) (*Keith*). In *Mallard*, the Court expressly found that "the District Court plainly acted beyond its 'jurisdiction'" in making a "coercive appointment[ ]" of an attorney who had asserted his incompetence to undertake the representation. 490 U.S. at 309; see *id.* at 299. The Ninth Circuit made no analogous finding in the very different circumstances here. And in *Keith*, "[n]o attack was made in this Court as to

the appropriateness of the writ of mandamus procedure," and the decision provides no basis for the far-reaching rule respondents advocate. 407 U.S. at 301 n.3.

Petitioners are also incorrect in asserting (Br. in Opp. 21) that the "collateral order doctrine provides an alternative basis" for the Ninth Circuit's assertion of jurisdiction. That doctrine provides a "narrow exception" to the "final judgment rule" that allows immediate appeal of certain "types of interlocutory orders" entered in a particular case. *Flanagan* v. *United States*, 465 U.S. 259, 265, 267 (1984). Whether or not particular orders in respondents' cases might fit within that doctrine, the majority below made clear that it was "*not* review[ing] the individual [respondents'] shackling decisions," but was instead reviewing their "district-wide challenges" to the security policy. Pet. App. 6a (emphasis added). Respondents identify no decision of this Court applying the collateral-order doctrine outside the context of a definitive case-specific order, and the majority below accordingly "s[aw] no reason" to consider the doctrine as a potential jurisdictional basis for its decision. *Ibid.*

b. Even if appellate review of respondents' claims had been proper in the first instance, the case became moot when respondents' criminal proceedings ended. Respondents suggest that their challenges fall within the capable-of-repetition-yet-evading-review exception to mootness because "there is more than a 'reasonable likelihood' they will again" be subject to criminal proceedings in which the Southern District's security policy is applied to them. Br. in Opp. 18 (quoting *Turner* v. *Rogers*, 564 U.S. 431, 440 (2011)). The court of appeals correctly rejected that argument, Pet. App. 12a, which is directly contrary to this Court's precedent. See *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974)

(exception does not apply "simply because [respondents] anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the allegedly illegal conduct charged"). Respondents' avowed commitment to criminal recidivism—whether brought to fruition or not, see Br. in Opp. 18—does not suffice to maintain a live controversy.

Respondents offer little defense of the Ninth Circuit's novel "functional class action" exception to mootness. Br. in Opp. 19; see *id.* at 19-20. They provide no justification for the court's misapplication of *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), a decision that expressly turned on the application of relation-back principles in an *actual* class action. See Pet. 15-18. Nor do they attempt to square the ruling below with *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976), which found mootness under circumstances similar to this case. See Pet. 18-20. Instead, respondents assert (Br. in Opp. 19-20) only that mootness is "flexible" and that the Ninth Circuit has "placed clear limitations" on the use of its new jurisdictional invention. But federal courts are precluded from addressing the claims of litigants who have ceased to have a "personal stake in the outcome of the lawsuit," *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (citation omitted), even if they promise to do so only infrequently. And as respondents' citation to other Ninth Circuit decisions reflects, the three "limitations" they tout (Br. in Opp. 19-20)—a challenge to broad policies or practices, a rotating group of potential challengers, and common representation—in practice combine to allow for precisely the sort of non-individualized litigation that Article III's case-or-controversy requirement precludes.

As noted in the petition (Pet. 20), respondents could have challenged the policy by filing an actual civil class action suit. Doing so would have obviated the need to rely on mandamus relief, avoided concerns about respondents' individual claims becoming moot, and relied on recognized mechanisms for judicial review. See, *e.g.*, *Florence* v. *Board of Chosen Freeholders*, 566 U.S. 318 (2012) (class action challenge to detainee strip-search policy). Respondents' speculation (Br. in Opp. 22) that they might be unable to "attract civil attorneys willing to bring a class-action for them" does not justify creation of a new mechanism for expanding appellate jurisdiction.

2. The Ninth Circuit committed its jurisdictional errors in service of an equally erroneous ruling on the merits. Respondents provide no sound reason why the majority below should have the last word on the highly consequential courtroom-security questions that this case presents.

The majority below precluded the judges in the Southern District from implementing a deliberate and considered district-specific security policy, under which defendants may be restrained during pretrial proceedings so long as consideration of "all appropriate factors" does not warrant a case-specific exception. 2 C.A. E.R. 260; see *id.* at 258-260; Pet. App. 30a. Respondents attempt to shift focus from the security policy itself—the sole subject of the Ninth Circuit's consideration—to assertions about how that policy may have been implemented. Respondents assert (Br. in Opp. 4) that, at least in certain instances, particular magistrate judges "refused to hear individualized objections." See *id.* at 4-6. The United States does not agree with respondents' description of those particular incidents, nor of the policy's implementation more generally. See, *e.g.*,

1 C.A. E.R. 47 (authorizing use of restraints against respondent Ring "under the circumstances of this case as stated by the Marshals," including his "psychological issues"); 2 C.A. E.R. 198 (blind defendant "d[id] not have arm shackles on"); *id.* at 219 (judge permitted defendant to make individualized showing "as to any extenuating circumstance"); *id.* at 234 (defendant with diabetes told judge restraints were not "hurting [her] in a way that [she's] not able to go forward"); see also *id.* at 224, 231-232, 252-253 (judges permitting individualized consideration); 4 C.A. E.R. 615-616, 638 (same). But even setting aside such disputes, respondents at most suggest *deviations* from the policy, which would in no way support the Ninth Circuit's holding that the policy is legally invalid on its face. And because that holding rests solely on conclusions of law, it would—if left unreviewed—preclude the Southern District from ever again adopting such a policy, no matter how strong the record of courtroom violence that might justify it.

As the petition explains (Pet. 21-22), the Ninth Circuit was not entitled to premise its legal conclusions on a view of the common law at odds with this Court's decision in *Deck* v. *Missouri*, 544 U.S. 622 (2005). The Court in *Deck* recognized that the Due Process Clause incorporates a "version of" a common-law anti-shackling rule "meant to protect defendants appearing at trial before a jury." *Id.* at 626-627. The Court explained that "Blackstone and other English authorities recognized that the rule did not apply at the time of arraignment, or like proceedings before the judge." *Id.* at 626 (citation and quotation marks omitted). The Court further explained that the constitutional version of the rule is premised on "three fundamental legal principles," namely, preserving the defendant's appearance of inno-

cence before the jury, allowing him to assist in his defense, and achieving the "symbolic" objective of a "dignified process." *Id.* at 632-633. As the dissent below recognized, the pretrial proceedings at issue here are the exact type of pretrial proceedings to which the rule does not apply, and the challenged security policy does not significantly infringe upon the principles that underlie the rule. See Pet. App. 63a.

Respondents' efforts (Br. in Opp. 22-33) to relitigate the relevant portion of *Deck* neither justify the Ninth Circuit's decision to disregard it nor demonstrate that the security policy here is unconstitutional. To the extent that historical sources suggest the removal of restraints in pretrial nonjury proceedings, they do not reflect the principles underlying the rule whose incorporation is described in *Deck*. They instead reflect the separate need to "ensure[] that a defendant was not so distracted by physical pain during his trial that he could not defend himself." *Deck*, 544 U.S. at 638 (Thomas, J., dissenting). "[T]he irons of that period were heavy and painful," *ibid.*, and Sir Edward Coke, for example (cited Br. in Opp. 24), advocated removal of a defendant's "Irons, and all manner of Bonds, so that their pain shall not take away any manner of reason, nor them constraint to answer, but at their free will." 3 Edward Coke, *Institutes of the Laws of England* 34 (6th ed. 1680); see 2 *A Complete Collection of State-Trials, and Proceedings upon High-Treason, and Other Crimes and Misdemeanors* 299 (2d ed. 1730) (recognizing that restraints should be removed so that defendants "be not in any Torture while they make their Defence"). As the Court made clear in *Deck*, however, while "[j]udicial hostility to shackling may once primarily have reflected concern for the suffering—the 'tortures' and 'torments'—

that 'very painful' chains could cause," the rule incorporated into the Due Process Clause is premised not on "the need to prevent physical suffering (for not all modern physical restraints are painful)," but instead on a different—jury-focused—set of concerns. 544 U.S. at 630 (citation omitted); see *id.* at 630-632.

Because those concerns are largely absent from the proceedings at issue here, the rule does not apply to them. See *Deck*, 544 U.S. at 626, 630-632. Respondents do not, and could not, contend that pretrial restraints undermine the presumption of innocence by "suggest[ing] to the jury that the justice system itself sees a need to separate [the] defendant from the community at large." *Id.* at 630 (citation and internal quotation marks omitted). Respondents do assert (Br. in Opp. 33) that "shackled defendants were hamstrung in communicating with their counsel," but the cited portions of the record identify no actual hindrance—only speculation of such by defense counsel and recognition by the presiding judges that such "very unusual" circumstances would justify the removal of restraints. 2 C.A. E.R. 251; see *id.* at 251-252; 4 C.A. E.R. 756. And the concern for "the dignity and decorum of the courtroom" (Br. in Opp. 32) is far diminished in the context of a preliminary nonjury proceeding, which does not determine "guilt or innocence" or require that "a man plead for his life," *Deck*, 544 U.S. at 631 (citation and internal quotation marks omitted).

As the petition explains (Pet. 22-24), the precedent most relevant to the proceedings at issue here is *Bell* v. *Wolfish*, 441 U.S. 520 (1979), which articulated the standard for "evaluating the constitutionality of conditions or restrictions of pretrial detention." *Id.* at 535. Respondents argue (Br. in Opp. 33) that *Bell* has no application in the courtroom, where "due process is * * *

the central mission." But as *Deck* itself recognizes, not all courtroom proceedings are the same, see 544 U.S. at 630-632, and respondents offer no justification for a blanket rule that would treat an arraignment the same as a capital sentencing or other jury proceeding. Nor can respondents explain why the security concerns that justify use of restraints during transportation from the detention facility to the courthouse, and from the holding cell to the courtroom, become any less acute when the defendant enters the courtroom and comes into close proximity with the judge, courtroom personnel, and the public. See Pet. 24.

In contrast to the decision below, two other courts of appeals have permitted the use of restraints in nonjury proceedings without a showing of individualized need. See *United States* v. *LaFond*, 783 F.3d 1216 (11th Cir.), cert. denied, 136 S. Ct. 213 (2015); *United States* v. *Zuber*, 118 F.3d 101 (2d Cir. 1997). Respondents attempt to distinguish those decisions by hypothesizing that "had [an individualized] inquiry occurred" in either case, "the information derived would have justified the shackles." Br. in Opp. 34-35 (brackets, citations, and internal quotation marks omitted). But the express rationale of those decisions is that no such inquiry is necessary in this context. See *LaFond*, 783 F.3d at 1225 ("[T]he rule against shackling pertains only to a jury trial."); *Zuber*, 118 F.3d at 102 (rejecting defendant's request for an "independent evaluation of the need for these restraints"). The majority below reached the opposite conclusion. See Pet. App. 30a.

3. In the absence of further review, that conclusion will continue to cause major practical problems in the Southern District and other jurisdictions within the Ninth Circuit. Because it will generally not be feasible to make an individualized showing of necessity at the

early stages of a case, the Ninth Circuit's rule means that defendants will almost always appear in the courtroom without restraints. As a result, continued reliance on multi-defendant proceedings will become all but impossible in the Southern District, severely taxing the resources of the Marshals Service and imposing burdensome delays on judges, litigants, attorneys, and other courtroom personnel. See Pet. 28-32.

When "several judges" and a "court-established committee" in the District of Arizona tried to avoid those problems by adhering to that District's similar security policy while the mandate in this case was stayed, the Ninth Circuit made clear that they were not allowed to do so. *In re Zermeno-Gomez*, 868 F.3d 1048, 1051 (2017). Respondents assert (Br. in Opp. 35) that "[t]he sky has not fallen" because no major incidents have occurred in the months since the Ninth Circuit's ruling. That is incorrect. This Office has been informed that a criminal defendant recently attacked a deputy marshal during a magistrate proceeding and had to be forcibly removed from the courtroom, which resulted in injury to the marshal. But even if respondents' assertion were correct, it would show only that the Marshals Service has taken extraordinary measures—putting great strain on its resources—to rework its practices in a manner that preserves courtroom safety despite the ruling. Respondents relay (*id.* at 35-36) favorable sentiments from various Federal Defenders about the way the Ninth Circuit's ruling is being implemented. But respondents' assurances about the ease of compliance with the new regime are contradicted by record evidence of the practical concerns that motivated the now-invalidated policy. 1 C.A. E.R. 146; 4 C.A. E.R. 690-691, 823, 907, 922.

Respondents' assertions are also contrary to observations from amici, who report that judges have already

found themselves unable to operate at "capacity" as a result of the decision below. Flake Amicus Br. 16. And notwithstanding respondents' suggestion that the Ninth Circuit's due process holding might not affect state courts, see Br. in Opp. 36 n.7, the effects have already spread out of the federal sphere to "reverberat[e] throughout courtrooms in California," Cal. State Sheriffs' Ass'n Amicus Br. 2, which are subject to due process constraints under the Fourteenth Amendment. A decision with such far-reaching and deleterious effects warrants this Court's immediate review.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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