

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
                  Petitioner, )  
                  v. ) No. 17-312  
RENE SANCHEZ-GOMEZ, ET AL., )  
                  Respondents. )  
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Pages: 1 through 72

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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 collateral  
24 order doctrine. What about that? I mean,  
25 that's an exception to the 1291 final judgment

1 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 collateral  
9 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 -- the --  
6 the person is convicted and has a -- let's say  
7 that he does or she does have an appeal on --  
8 on some different points. And they add: And,  
9 incidentally, I was shackled during the -- the  
10 pretrial. What -- what difference does that  
11 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 understand.

6 JUSTICE BREYER: I asked you what does  
7 apply?

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

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

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

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

1 of this Court.

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

6 MR. KEDEM: Well --

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

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

21 JUSTICE BREYER: I know --

22 CHIEF JUSTICE ROBERTS: But couldn't  
23 they --

24 JUSTICE BREYER: -- but my -- my  
25 question is procedural.

1 MR. KEDEM: Sure.

2 JUSTICE BREYER: I'm still trying to  
3 get an answer.

4 MR. KEDEM: So -- so --

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

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

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

24 And, you know, whether you want to do,  
25 you know, shackling or we've had claims that

1 have to do with forced medication or excessive  
2 bail. All of these things arise in the context  
3 of a criminal proceeding but don't have  
4 anything to do with the outcomes of that  
5 proceeding, just have to do with independent  
6 liberty interests that are implicated in that  
7 proceeding.

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

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

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

18 MR. KEDEM: Sure.

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

21 MR. KEDEM: Right. So I would say  
22 that nearly everything that a district court  
23 does is designed to serve multiple interests,  
24 not just adjudicating guilt or innocence, but  
25 promoting values such as the autonomy and

1 dignity of the litigants, promoting respect for  
2 the judicial process and the rule of law.

3 JUSTICE ALITO: Could a detainee --

4 MR. KEDEM: If he were able --

5 JUSTICE ALITO: Could a detainee in  
6 this situation bring a civil action?

7 MR. KEDEM: So --

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

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

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

23 You know, here, something is happening  
24 to you in the criminal process, and you're  
25 saying, your brief said, oh, no worries, just

1 go file a civil class action. But that seems  
2 like a requirement that we've never  
3 countenanced before.

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

8 JUSTICE KENNEDY: Well, your answer --

9 JUSTICE GINSBURG: Well, suppose --

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

14 MR. KEDEM: Justice Kennedy --

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

25 MR. KEDEM: No.

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

7 MR. KEDEM: That's correct.

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

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

18 CHIEF JUSTICE ROBERTS: Who do they  
19 say --

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

22 CHIEF JUSTICE ROBERTS: Is it -- do  
23 they have an entitlement to attorney's fees?

24 MR. KEDEM: Pardon?

25 CHIEF JUSTICE ROBERTS: Is there an

1 entitlement to attorney's fees if the class  
2 action is successful?

3 MR. KEDEM: I think that they -- they  
4 might be entitled to it.

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

7 MR. KEDEM: Not necessarily.

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

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

18 That second issue will not be  
19 susceptible to class treatment of any kind.

20 MR. KEDEM: That's correct. And the  
21 reason that I was somewhat hesitant in  
22 referring to the -- to the possibility of a  
23 civil suit was I think you have to make sure  
24 that what the civil suit is challenging is the  
25 general policy and not some case-specific



1 decision.

2 But I took the premise of --

3 JUSTICE SOTOMAYOR: So it's only a  
4 partial -- it's only a partial solution to this  
5 problem?

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

12 JUSTICE BREYER: How? Who do you sue?  
13 I mean, it's not a 1983 action. This is  
14 federal.

15 MR. KEDEM: Sure.

16 JUSTICE BREYER: You sue the  
17 individual marshals, there may be an immunity,  
18 In re Neagle, et cetera.

19 MR. KEDEM: So I think --

20 JUSTICE BREYER: Who do you sue? Do  
21 you sue the judge? The magistrate?

22 MR. KEDEM: I think it would be an ex  
23 -- ex parte suit against the marshal. And the  
24 marshal has --

25 JUSTICE BREYER: Against the marshal?

1 MR. KEDEM: That's right. The  
2 Marshals Service has authority, under 28 U.S.C.  
3 566, for maintaining courtroom security. And  
4 they're the ones who are applying the policy  
5 that's alleged to be unconstitutional.

6 JUSTICE BREYER: Fine, but what is the  
7 cause of action? A Bivens action?

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

11 JUSTICE BREYER: A direct -- so that's  
12 a Bivens action.

13 MR. KEDEM: It's -- it's an ex parte  
14 Young, actually.

15 JUSTICE BREYER: And, thus, it hasn't  
16 been brought before. And if it unfortunately,  
17 perhaps, or fortunately -- look, the Court has  
18 held we're not creating new Bivens actions.

19 MR. KEDEM: So --

20 JUSTICE BREYER: So -- so are you sure  
21 that you can bring a Bivens action against the  
22 individual marshal? What is it?

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

25 JUSTICE BREYER: What is it?

1 MR. KEDEM: -- in that you're not  
2 seeking damages. It's an Ex Parte Young suit.

3 JUSTICE BREYER: An Ex Parte Young  
4 suit. Great. Thank you.

5 MR. KEDEM: That's right, which is  
6 relatively well established.

7 JUSTICE BREYER: Thank you.

8 JUSTICE SOTOMAYOR: It's strange there  
9 --

10 JUSTICE KENNEDY: One more question  
11 and you've had a lot of questions. Let's  
12 assume that we -- that the Court does hold that  
13 mandamus -- mandamus is proper because this is  
14 extraordinary and so forth.

15 Then a writ of mandamus is brought and  
16 it goes to the court of appeals. And six weeks  
17 elapse, but by that time the trial is over. Is  
18 it -- is it now moot?

19 MR. KEDEM: It's not moot if  
20 Respondents keep their criminal cases alive. I  
21 refer you back to the Second and Eleventh  
22 Circuit decisions. Those decisions were just  
23 regular appellate decisions following in one  
24 case, there was a guilty plea. In the other  
25 case, they proceeded to final judgment after a

1 jury trial.

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

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

20           That would be far preferable to  
21 creating a new fifth category under the  
22 collateral order doctrine.

23           First of all, this Court could bring  
24 to bear the collective wisdom of the bar. It  
25 could make sure that the exception was

1 constructed in such a narrow and specific way.  
2 Whereas when this Court recognizes a new  
3 category under the collateral order doctrine --

4 JUSTICE GINSBURG: You're -- you're  
5 suggesting a -- a civil rule amendment to take  
6 care of this kind of order that comes up in a  
7 criminal case only?

8 MR. KEDEM: Well --

9 JUSTICE GINSBURG: Let me go back to  
10 the collateral order, because it seems to me  
11 that really does fit this. It's totally to the  
12 side of guilt or innocence of the claim. So  
13 it's -- it's discrete.

14 I don't see why the collateral order  
15 wouldn't -- wouldn't fit.

16 MR. KEDEM: So, in response to -- to  
17 the first thing that you said, the Rules  
18 Enabling Act allows this Court to make rules  
19 not just in the civil context but in the  
20 appellate and criminal context as well.

21 But to your question about why the  
22 collateral order doctrine doesn't apply, I want  
23 you to imagine, for instance, a criminal  
24 defendant who wants to represent himself, and  
25 he says: I know that this is not likely to

1 affect the outcome of the proceedings. In  
2 fact, I'm willing to stipulate that it  
3 absolutely will not.

4 However, I have a liberty, autonomy,  
5 and dignitary interest in being able to  
6 represent myself, and those are values I can't  
7 get back if I'm forced to go to final judgment  
8 and appeal after the fact.

9 JUSTICE ALITO: Is there any reason  
10 why we would have to address the question of  
11 statutory jurisdiction if there's no Article  
12 III jurisdiction?

13 MR. KEDEM: No. Mootness would be  
14 probably the most straightforward way to  
15 resolve the question.

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

18 MR. KEDEM: Sure.

19 JUSTICE KAGAN: I didn't understand.  
20 You -- you have this hypothetical.

21 MR. KEDEM: Sure.

22 JUSTICE KAGAN: And what would we do  
23 with a case like that?

24 MR. KEDEM: Well, my point is that  
25 there's nothing that differentiates the

1 dignitary and autonomy and liberty interests  
2 that Respondents are asserting from similar  
3 interests that could be asserted.

4 JUSTICE KAGAN: I know. But it just  
5 left me hanging.

6 MR. KEDEM: Sure.

7 JUSTICE KAGAN: Because it seems to me  
8 that he should have a way --

9 MR. KEDEM: Right.

10 JUSTICE KAGAN: -- of -- of getting  
11 that claim, you know, thought about.

12 MR. KEDEM: I think this Court has  
13 recognized that because the final judgment rule  
14 has its most ardent application in the criminal  
15 context, that it is extraordinarily reluctant  
16 to undermine the authority of the district  
17 judge to cause disruption, to invite  
18 gamesmanship from litigants who want to press  
19 pause on -- on their proceedings while they get  
20 an appeal, that it is extremely reluctant to  
21 allow a mid-stream interlocutory appeal.

22 And remember that Respondents have  
23 been conspicuously silent about what should  
24 happen during this course of this appeal,  
25 whether they have to stop all the proceedings.

1           But if what they're really arguing is  
2           that these are interests I can't get back if  
3           I'm forced to wait, then it strongly seems to  
4           suggest that you would have to halt all the  
5           proceedings.

6           And I think it's very hard to imagine  
7           a case like Stack about bail claims coming out  
8           the same way if every time someone wanted to  
9           challenge bail, a denial of bail on appeal, you  
10          had to pause the underlying criminal  
11          proceedings.

12          There are other differences between  
13          the cases that this Court has recognized under  
14          the collateral order doctrine as well.

15          First of all, going to the nature of  
16          the right, the right that Respondents have  
17          invoked -- and I understand that they've  
18          changed their argument a little bit -- but  
19          throughout this litigation, they have invoked  
20          the right under -- under Deck versus Missouri,  
21          which is a right that's grounded in the  
22          fairness and accuracy of the underlying  
23          proceedings. That's very different from a bail  
24          claim.

25          A bail claim, also, as Justice Jackson



1 emphasized in his concurrence in Stack, it's  
2 the sort of thing that you never have to stop  
3 the underlying proceedings in order to review  
4 on appeal.

5 And, you know, it's also distinct from  
6 claims like this Court has recognized in Sell  
7 versus United States where the severity of the  
8 physical interest was completely different.

9 In Sell versus United States, which  
10 concerned the forcible administration of  
11 antipsychotic medication, the argument there  
12 was it's such a severe intrusion on my personal  
13 integrity that you can never order this against  
14 my will, no matter what. Whereas, here,  
15 Respondents' argument is the same restraints  
16 that can be applied against me in the detention  
17 center, as I'm being transported to the  
18 courthouse, being held in a cell within the  
19 courthouse, and being transported to the  
20 courthouse door nevertheless have to be taken  
21 off of me during the course of my hearing  
22 within the courtroom.

23 Now that's a completely different  
24 order of magnitude.

25 If the Court has no further questions

1 about the collateral order doctrine, moving on  
2 to the question of mootness, as I said, I think  
3 this is probably the most straightforward way  
4 for the Court to resolve the case for --

5 JUSTICE GINSBURG: How about the  
6 voluntary cessation doesn't moot the case --  
7 now this rule is no longer in effect.

8 MR. KEDEM: That's correct.

9 JUSTICE GINSBURG: So -- but there's  
10 many situations in which voluntary cessation  
11 does not moot a case.

12 MR. KEDEM: That's correct. We -- we  
13 are not arguing that the case is moot as a  
14 result of the voluntary cessation, and the  
15 reason is because the policy was ended here as  
16 a direct consequence of the Ninth Circuit panel  
17 ruling. We are instead saying that the case is  
18 moot because Respondents' criminal case has  
19 ended, no Respondent took an appeal, and for  
20 that reason, there was no live controversy with  
21 respect to their due process claims.

22 Now the Ninth Circuit in its en banc  
23 ruling said that the reason that the case is  
24 not moot is because it was a functional class  
25 action. Respondents have entirely abandoned

1 that argument here.

2 They rest instead on the exception to  
3 mootness for cases that are capable of  
4 repetition yet evading review. Their argument  
5 is that some of Respondents are reasonably  
6 likely to commit future crimes, to get caught,  
7 to be prosecuted within the Southern District  
8 again, and then to be forced to undergo  
9 physical restraints again.

10 But this Court has consistently  
11 refused to allow a litigant to keep a  
12 controversy alive by making a prediction of his  
13 own future criminality.

14 CHIEF JUSTICE ROBERTS: Well --

15 JUSTICE GINSBURG: What about --

16 CHIEF JUSTICE ROBERTS: -- it turned  
17 out to be true, right? Two of the four were,  
18 in fact, arrested again and did go through the  
19 shackling again?

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

23 JUSTICE GINSBURG: What about -- what  
24 about Turner, the person who didn't pay, what  
25 was it, child support?

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

10           In this case, Respondents make no  
11 allegation that they're unable to prevent  
12 themselves from committing future crimes.

13           Furthermore --

14           JUSTICE KAGAN: There -- there is  
15 something a little bit different with respect  
16 to this crime than most. I mean, this is an  
17 illegal entry crime, and I suspect you, in  
18 fact, see extremely high levels of recidivism  
19 for that crime because people often have their  
20 families here. So it's not uncommon that  
21 people continue to try to get into the country.

22           MR. KEDEM: That's -- that's right.  
23 But this Court has never relied solely on  
24 probabilities. The point is, in Turner,  
25 another distinction is that what was being

1 challenged there was the right of the court to  
2 apply those standards to the litigant. In  
3 other words, the litigant's argument was you  
4 cannot apply civil contempt against me under  
5 these circumstances because I don't have a  
6 right to an attorney and I have no evident  
7 means to -- to pay.

8 Here, there's no argument that the  
9 rule prohibiting -- the criminal law  
10 prohibiting reentering the country illegally  
11 can't be applied to Respondents. That's --  
12 that's never been their argument and that isn't  
13 their argument here.

14 And this Court has consistently be --  
15 been unwilling to assume that litigants will  
16 flout laws that they concede to be valid and,  
17 in fact, has assumed the opposite is true.

18 JUSTICE KENNEDY: Just one -- one --

19 JUSTICE BREYER: Is --

20 JUSTICE KENNEDY: -- just one -- one  
21 small question. On a pretrial motion to  
22 suppress, where the defendant's in the room, is  
23 he in shackles there?

24 MR. KEDEM: He -- he might be. It  
25 depends on the -- the district. You're asking

1 under this policy?

2 JUSTICE KENNEDY: Right.

3 MR. KEDEM: I believe that they would  
4 be under this policy.

5 JUSTICE BREYER: You've withdrawn --  
6 the United States has withdrawn the policy. If  
7 you win, though, will you reinstate it?

8 MR. KEDEM: I think the intention  
9 would be to reinstate the policy.

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

14 MR. KEDEM: Bail denial under this  
15 Court's decision --

16 JUSTICE BREYER: Yes.

17 MR. KEDEM: -- in Stack can be  
18 immediately appealed.

19 JUSTICE BREYER: Because it's a  
20 collateral order?

21 MR. KEDEM: It's under the collateral  
22 order doctrine.

23 JUSTICE BREYER: Well, why is this  
24 different?

25 MR. KEDEM: So I think it's different

1 in a few respects. First of all --

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

5 MR. KEDEM: Sure. So, first of all,  
6 bail is not a decision about courtroom  
7 procedure. By definition, it affects things  
8 that happen only outside of the courtroom.

9 And the reason that that matters,  
10 Justice Breyer, is because the collateral order  
11 doctrine is based on the premise that there are  
12 certain orders that can be decided immediately  
13 on appeal without having to know anything about  
14 the way that the case unfolds.

15 JUSTICE BREYER: I got that point, but  
16 the -- the analogy that I was thinking of is  
17 after all, you deny bail, the person's liberty  
18 is constrained, he is in a cell.

19 MR. KEDEM: Right.

20 JUSTICE BREYER: And, here, the  
21 person's liberty is constrained. He is in a  
22 shackle. And both are fairly important to him.  
23 And -- but the difference, you say, is you can  
24 continue with the proceedings.

25 MR. KEDEM: So that -- that was the

1 difference Justice Jackson emphasized. There's  
2 another difference as well, which is that, for  
3 a bail claim, the interest at stake is far more  
4 substantial. We're talking about whether the  
5 litigant will be --

6 JUSTICE BREYER: Well, I don't know  
7 there. I mean --

8 MR. KEDEM: Well --

9 JUSTICE BREYER: -- there the person's  
10 in a cell and here the person's in physical  
11 shackles.

12 MR. KEDEM: Right. But the --

13 JUSTICE BREYER: I -- I'm not sure  
14 about that.

15 MR. KEDEM: The difference, though, is  
16 with a bail claim, you're talking about whether  
17 the litigant will be at liberty or behind bars  
18 for the entire duration of their criminal  
19 proceedings, which could be weeks or possibly  
20 even months.

21 Here, we're talking about individual  
22 hearings which last minutes or possibly hours.  
23 So I think it is a very different -- the  
24 difference is -- is pretty significant.

25 And, similarly, we -- we think, the



1 nature of the right is very different. Again,  
2 I understand that they've changed a little bit  
3 what they're conceiving of the right as, but  
4 the right that they've invoked under Deck  
5 versus Missouri is a right about accuracy and  
6 fairness. And that's very different from the  
7 bail right.

8 If there are no further questions, I'd  
9 like to reserve the balance of my time. Thank  
10 you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Cahn.

14 ORAL ARGUMENT OF REUBEN C. CAHN

15 ON BEHALF OF THE RESPONDENTS

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

18 When a district court takes the  
19 extraordinary step of shackling every defendant  
20 at every pretrial proceeding taking place over  
21 a period of months, courts of appeals have  
22 authority to review those actions under either  
23 the collateral order doctrine or via  
24 extraordinary writ.

25 Now collateral order review under

1 Cohen exists because the decisions here  
2 conclusively determine an important question  
3 that was entirely separate from the merits,  
4 having nothing to do with the guilt or  
5 innocence of these particular Respondents. And  
6 it was effectively unreviewable on appeal from  
7 a final judgment.

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

11 MR. CAHN: Well, I think the  
12 government's simply wrong. From the district  
13 court on, we argued this as a deprivation of  
14 liberty under the Due Process Clause.

15 The district court chose to address it  
16 as a Fourth Amendment violation, but that was  
17 not our theory. The Ninth Circuit, of course,  
18 decided this as a deprivation of liberty.  
19 They're quite clear about that they talk about  
20 Youngberg versus Romeo and that this is a  
21 deprivation of the fundamental right to be free  
22 of restraints.

23 Now we've talked about Deck because  
24 Deck talks about what goes on in the courtroom.  
25 And the Court said that in Deck, that right,

1 that liberty interest, protects other rights,  
2 including the presumption of innocence, the  
3 right to consult with counsel and participate  
4 in one's own defense, and, of course, the  
5 dignity and decorum of the court and the --

6 JUSTICE GINSBURG: But that was --  
7 that was during -- shackling during trial?

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

10 JUSTICE BREYER: What about their --

11 JUSTICE GINSBURG: There was a -- a  
12 suggestion by Mr. Kadem that if the collateral  
13 order doctrine were available, that would mean  
14 that the criminal proceeding would be stopped  
15 in its tracks. Do you agree with that?

16 MR. CAHN: I think that's just wrong.  
17 I mean, there's no stay as a matter of right in  
18 these cases. In every case, if somebody wanted  
19 a stay, then they'd have to make that decision,  
20 because, of course, these individuals are  
21 individuals not who are detained but who simply  
22 couldn't afford bail.

23 So they are in jail while this is  
24 happening. And it's up to them to make a  
25 decision whether to ask for a stay, and it's up

1 for the district court in the first instance to  
2 decide whether or not it's proper, and then the  
3 court of appeals in the second instance,  
4 whether or not to allow a stay under equitable  
5 principles.

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

10 JUSTICE BREYER: But the government  
11 has said, I think, if I interpret it correctly,  
12 that, of course, you have a right to challenge  
13 this policy. But there are three ways that you  
14 can do it.

15 One way is when you appeal a  
16 conviction, the person says: And one other  
17 thing that hurt me in this process was the  
18 shackle before the magistrate. The second way  
19 is, if this is an extreme case, you're entitled  
20 to mandamus. But he thinks it's not an extreme  
21 case.

22 The third way is you get your client  
23 and, with a group of others, you bring an Ex  
24 Parte Young action, which is actually the most  
25 straightforward, and you challenge the policy

1 against the Marshals Service and you say just  
2 what you've said.

3 So I guess now my question is going  
4 the opposite of where I was, is why not use one  
5 of those three? At least if you brought all  
6 three, one of them should work because, of  
7 course, you should have a method of challenging  
8 the policy.

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

11 So, in the first instance, this Court  
12 has said in Arizona versus Fulminante that when  
13 one attacks a final judgment of conviction  
14 seeking to overturn the final judgment of  
15 conviction, the Court will do that only for two  
16 reasons: One for trial error that occurs in  
17 the presentation of the case to the finder of  
18 fact, and the other is in cases of structural  
19 error having to do with the constitution of the  
20 trial process. Deprivation of this right  
21 doesn't seem to fit into either of those  
22 categories.

23 The second suggestion, I believe, was  
24 the class action suggestion. And I note that  
25 this Court has never said that the availability

1 of some right -- or some forum to pursue  
2 litigation outside of the instant proceeding  
3 was relevant to collateral order jurisdiction  
4 or to mandamus, and I'd point to both Stack and  
5 Sell as being contrary to that. In Stack --

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

10 MR. CAHN: It's in my mind quite  
11 unclear.

12 JUSTICE KENNEDY: All right.

13 MR. CAHN: So -- and I'm not an expert  
14 on civil class actions and it's something that  
15 we're just unclear about based upon the statute  
16 and the rules.

17 But in Stack and Sell -- in Stack,  
18 this Court specifically said that the bringing  
19 of a separate habeas action in that case was  
20 improper.

21 In Sell, Justice Scalia in his dissent  
22 suggested that the forced medication order  
23 could have been challenged in another  
24 proceeding, an Administrative Procedure Act  
25 challenge, to the order of the Bureau of

1 Prisons, to medicate the individual there.

2 And what the -- the Court said that  
3 wasn't relevant to the availability of  
4 collateral order jurisdiction in that case.

5 CHIEF JUSTICE ROBERTS: Well, all of  
6 these difficulties that you're mentioning,  
7 you'll have the benefit in all these that the  
8 government has said it's okay. Right? I mean,  
9 you've made a lot of progress this morning  
10 already.

11 The government has said in all of  
12 those three instances, as I understand it, that  
13 they think this is something you can do.

14 MR. CAHN: Well, I think -- I think  
15 they've said that --

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

19 MR. CAHN: We certainly appreciate  
20 that concession and we'd certainly examine the  
21 alternatives. But I think it's clear that --  
22 it's certainly clear that we couldn't do this  
23 after final judgment, despite what they've  
24 said. I think we can do it from mandamus and I  
25 think this is an exceptional case, as this

1 Court has set it out, because every defendant  
2 was shackled without any individualized cause  
3 in every pretrial proceeding over a period of  
4 months. That's hearings that last five  
5 minutes, hearings that last many days, through  
6 the entirety of their pretrial proceeding.

7 JUSTICE KAGAN: But usually when we  
8 think about writs of mandamus, it's -- it's not  
9 that we give them when an issue is super  
10 important. It's that we give them when we  
11 think the outcome is super clear. And no one  
12 could say that about this case, could -- could  
13 they?

14 MR. CAHN: Well, there's two sorts of  
15 mandamus that this -- two sorts of types of  
16 mandamus cases where this Court has allowed or  
17 affirmed the issuance of mandamus.

18 One of those cases where there's an  
19 absolutely clear rule and the district court  
20 seems to be violating that rule. But another  
21 species of mandamus is that that the Court  
22 authorized in *Schlangenhaut* and *Mallard* and,  
23 indeed, I'd say even in *Cheney*, where there's a  
24 fundamental unresolved question about the  
25 authority of the district court.



1           And we believe the district court had  
2 no authority to shackle all these individuals  
3 without making an individualized determination  
4 that they presented a risk of violence or  
5 escape --

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

8           MR. CAHN: Well, the court of appeals  
9 did, in fact, go forward on the basis of  
10 mandamus jurisdiction. And we're perfectly  
11 comfortable with that and would be happy if  
12 this Court affirmed on the basis of mandamus  
13 jurisdiction.

14           JUSTICE GORSUCH: So mandamus is -- is  
15 available you think in these circumstances?

16           MR. CAHN: Yes.

17           JUSTICE GORSUCH: And not a problem?

18           MR. CAHN: We think it's -- it's a  
19 viable route to get review of these matters.

20           JUSTICE GINSBURG: Did the -- did the  
21 three judge panel -- they didn't -- they didn't  
22 go on mandamus, did they?

23           MR. CAHN: No, there was established  
24 precedent in the Ninth Circuit that collateral  
25 order jurisdiction existed to review this sort

1 of claim, and the Ninth Circuit found -- and  
2 the Ninth Circuit panel found collateral order  
3 jurisdiction.

4 The court of appeals said that we're  
5 going to leave that precedent undisturbed, but  
6 because we're not going to address the  
7 individual shackling decisions. We're only  
8 going to address the policy. We see mandamus  
9 as a better route to get at that.

10 JUSTICE GORSUCH: Counsel, the  
11 government suggests that the functional class  
12 action theory to get around the mootness  
13 problem you've abandoned. Is that a fair  
14 characterization?

15 MR. CAHN: So I -- I don't know that  
16 I'd say we've abandoned it, but we fit squarely  
17 within a very clearly established exception to  
18 the mootness doctrine, that this matter is  
19 capable of repetition yet evading review.

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

24 MR. CAHN: Well, I think this Court's  
25 free to affirm on the basis of the Ninth

1 Circuit's opinion without our briefing on the  
2 issue.

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

5 MR. CAHN: Well, this Court did  
6 something very similar in Richardson versus  
7 Ramirez where there was no certification of a  
8 class action and the Court found that wasn't  
9 essential to Article III jurisdiction.

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

13 JUSTICE GORSUCH: Okay. That --  
14 that's helpful right there. Thank you.

15 JUSTICE ALITO: But you have a  
16 decision from the en banc Ninth Circuit saying  
17 that this case is not moot based on the fact  
18 that it is a functional class action.

19 MR. CAHN: Yes, Your Honor.

20 JUSTICE ALITO: And it's pretty  
21 remarkable that, whether you've abandoned the  
22 -- the point or not, you certainly have not  
23 made any effort to defend it.

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

25 JUSTICE ALITO: What does that say

1 about this theory, which is adopted by the --  
2 the en -- an en banc court of appeals?

3 MR. CAHN: Well, as to us, it says  
4 that we're more comfortable staying within a  
5 firmly established exception to mootness that  
6 this Court has ruled on many times.

7 JUSTICE GINSBURG: But it -- it isn't,  
8 because capable of repetition, evasive review,  
9 I don't know of any case that has allowed I'm  
10 going to do it again, that I'm a recidivist,  
11 therefore, I mean, it will be evasive of review  
12 because I'll do it again and again. I don't  
13 know any decision that allows you to say I will  
14 commit the same offense again, therefore, the  
15 case isn't moot.

16 MR. CAHN: Well, let me note that in  
17 Gerstein in Footnote 11, this Court said that  
18 pretrial detention is necessarily brief,  
19 speaking to the individual named plaintiffs, so  
20 that no one individual would have an  
21 opportunity to fully litigate their claim. And  
22 yet the individual could suffer repeated  
23 deprivations, making the matter capable of  
24 repetition yet evading review.

25 So this -- beyond that, I'd point that

1 -- point out that the Article III personal  
2 stake requirement is no different for a  
3 criminal defendant than a civil plaintiff or a  
4 civil defendant.

5 And what this Court has always looked  
6 to is whether there's a reasonable expectation  
7 or a reasonable likelihood as a factual matter  
8 based upon the facts in the particular case  
9 involving the particular litigants.

10 It's not a rule that's intended to  
11 control the conduct of litigants outside of the  
12 courtroom. It's simply a rule that allows this  
13 Court to determine whether or not there remains  
14 a live controversy that can be appropriately  
15 decided in this Court.

16 JUSTICE BREYER: So we're -- at the  
17 moment, it's very interesting and helpful, but  
18 I'm thinking if we -- if we -- if we go with  
19 you on mootness, I don't know what door that's  
20 opening up because it's really not moot because  
21 there are other people that will be subjected  
22 to it, not your clients.

23 Then I'm thinking: Well, if we go on  
24 the mandamus, I'm going to hear just what I  
25 heard, that there are a bunch of districts that

1 have this and it isn't as far out as my  
2 imaginary example.

3 And then, if I go on collateral order,  
4 I'm going to run into the problem that we just  
5 said, that this would delay the proceeding  
6 rather than his like being in bail. And then  
7 they say: But bring an Ex Parte Young action,  
8 that's fine.

9 And -- and how long would that take?  
10 I mean, you find five people down there who are  
11 going to be subject to it, and you go into  
12 court, we already have the orders, and there we  
13 are, we win.

14 Okay. How -- how long -- I mean, is  
15 it -- am I thinking -- you don't think I'm  
16 thinking correctly on this. And I guess I want  
17 to know what --

18 MR. CAHN: No, no, I think in a sense  
19 you're right that the government's argument is  
20 really that there is no way to ever obtain --

21 JUSTICE BREYER: No, no, they say Ex  
22 Parte Young.

23 MR. CAHN: They say that, but, you  
24 know, the truth is that doesn't obtain review  
25 of the decisions to shackle these individuals

1 in their cases. And, of course, this Court has  
2 already said -- I mean, speaking of O'Shea,  
3 this Court said in O'Shea that it's certainly  
4 not a favored course of action to enter  
5 injunctions that will interfere with the  
6 conduct of criminal cases.

7 In the normal way, the appropriate way  
8 of reviewing decisions in individual criminal  
9 cases has always been through appeals in those  
10 individual cases.

11 JUSTICE ALITO: What is the difference  
12 between -- what -- what is the difference  
13 between a case involving allegedly unlawful  
14 shackling when a person is brought to a  
15 proceeding in court where there is no jury, on  
16 the one hand, and a case involving, let's say,  
17 allegedly unconstitutional shackling while in  
18 the jail?

19 MR. CAHN: Well --

20 JUSTICE ALITO: In -- in the latter  
21 case, would that fall within the collateral  
22 order doctrine?

23 MR. CAHN: No, I -- I don't believe so  
24 because courts don't make decisions in criminal  
25 cases about what happens in detention centers.

1 Courts do make decisions about how individuals  
2 come before them, about how they're presented  
3 in a public courtroom where they --

4 JUSTICE ALITO: Well, I mean, insofar  
5 as there -- there are two possibilities for  
6 your claim. One is that it has some effect on  
7 the criminal case. And if that's the claim,  
8 then that does not fall within the collateral  
9 order doctrine because that could be reviewed  
10 after a conviction.

11 But if the claim is, irrespective of  
12 any effect on the criminal case, this is a  
13 violation of my constitutional rights because  
14 it violates a -- a liberty interest, a  
15 dignitary interest, then explain to me what is  
16 the difference between those two situations?  
17 It's just the happenstance that one occurs in  
18 court and one occurs across the street in the  
19 jail?

20 MR. CAHN: Well, we think the fact  
21 that it occurs in court is meaningful. I mean,  
22 it is -- you know, we -- we believe the  
23 courtroom really is a sacred space. We believe  
24 judges control that space and -- and assure  
25 that individuals come before the court with



1 dignity and with autonomy and with their  
2 liberty interest protected, and that there was  
3 a well-established right at common law that,  
4 under this Court's precedent, is incorporated  
5 in the Due Process Clause to appear before  
6 courts free of bonds.

7           And this happened regularly at the  
8 common law, individuals would come from prison  
9 -- from Newgate prison, terrible conditions,  
10 shackled hand and foot, and without question,  
11 their bonds would be struck off for their  
12 arraignments.

13           CHIEF JUSTICE ROBERTS: Well, there is  
14 the countervailing interest, which, of course,  
15 is the safety of those in the courtroom and the  
16 safety of the judges. And your scenario of the  
17 person coming in from Newgate, I -- I  
18 understand, that's one individual.

19           Here, according to the -- the -- the  
20 record from the marshals, you have many  
21 situations where there are a lot of people and  
22 the idea that they're going to undertake an  
23 individualized determination in every case is  
24 just something that they don't have the  
25 resources or time for.

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

14           So this procedure has worked through,  
15 you know, centuries of common law --

16           CHIEF JUSTICE ROBERTS: Well, but  
17 there are situations where in term -- for  
18 pretrial decisions, you do have more than one  
19 person. I mean, there -- there are --  
20 according to what the marshals say, there are  
21 many people in the courtroom, or waiting to get  
22 in the courtroom, and presumably in many cases  
23 the lawyer is going to say: I don't want the  
24 client to be shackled.

25           And then you have to have an

1 individual determination, right, where the --  
2 the -- the -- the assistant U.S. attorney,  
3 whoever it is, comes in and says: Well, here's  
4 why we think you should. And the lawyer says  
5 no. And then the judge has to make a decision  
6 on that --

7 MR. CAHN: Well it's --

8 CHIEF JUSTICE ROBERTS: -- for every  
9 one of however many people are there.

10 MR. CAHN: So it's just not a why he  
11 should or why he shouldn't. It's that there's  
12 evidence, or there isn't, that the individual  
13 presents a danger of escape or violence in the  
14 courtroom.

15 All I can say is this is done day in  
16 and day out and it's done without a problem.  
17 In some districts, for instance, the District  
18 of Arizona, particular procedures have been  
19 adopted to address these matters before the  
20 individual first comes to court. In other  
21 districts, like ours, the matters are dealt  
22 with in court, where necessary.

23 CHIEF JUSTICE ROBERTS: Well, I  
24 suppose -- I suppose there are many situations  
25 where people don't know much about the

1 individual, right? The situation we have here  
2 where, for example, there are many people --  
3 like the recidivist clients, obviously you know  
4 something, but they arrest somebody and bring  
5 them in and the question is should they be  
6 detained, and they don't anything about them.

7 MR. CAHN: Well, in -- in our  
8 district, they know quite a bit about them by  
9 the time they get to court. In our district,  
10 individuals don't come straight to court. They  
11 go to the MCC. They're interviewed about  
12 social issues, which include gang history, that  
13 sort of thing. They meet with pretrial -- with  
14 pretrial services, which runs a criminal  
15 history check. They're strip-searched. So by  
16 the time people actually get to court, they  
17 know quite a bit about them.

18 But I'd say also that that's reversing  
19 a little bit the presumption of the common law.  
20 The common law presumes that individuals won't  
21 be shackled unless there's cause. And so it's  
22 for the marshals or the government to bring up  
23 that evidence of cause. And I think they've  
24 been able to do that where it's been  
25 appropriate, that the individual is acting out

1 in the holding cell, that the individual in the  
2 course of his arrest was violent with the  
3 officers, that the individual has mental  
4 illness that makes him in some way more likely  
5 to be more violent, some particular examples of  
6 it, not just that they're mentally ill.

7 JUSTICE SOTOMAYOR: Of the -- what are  
8 there, 99 districts in the country?

9 MR. CAHN: Yes.

10 JUSTICE SOTOMAYOR: How many of them  
11 have had a shackling policy similar to this  
12 one?

13 MR. CAHN: So we don't know that with  
14 certainty. The record evidence in this case  
15 pertains only to the southwest border and the  
16 Ninth Circuit, and some of it was disputed.  
17 But what's clear is that the courts along the  
18 southwest border from Texas through Arizona had  
19 this policy prior to 2013, and then the  
20 Southern District of California instituted that  
21 policy in 2013. The --

22 JUSTICE SOTOMAYOR: Is it fair to say  
23 that that's a small percentage compared to the  
24 whole?

25 MR. CAHN: Certainly, it seems that

1 way to me based upon the record we've got.

2 JUSTICE SOTOMAYOR: And in -- in the  
3 whole, the individualized determinations are  
4 made?

5 MR. CAHN: Yes. I mean, certainly,  
6 that's my understanding of many -- from  
7 surveying my fellow defenders, if that's the  
8 case, in many of the districts around the  
9 country.

10 CHIEF JUSTICE ROBERTS: You have a  
11 higher -- a much higher volume of people, don't  
12 you, in those -- that part of the country than  
13 elsewhere?

14 MR. CAHN: We do, indeed, Your Honor,  
15 but we've had that same high volume for pretty  
16 much the entirety of -- well, I shouldn't say  
17 the entirety of the history of the district,  
18 but certainly from the '70s on.

19 CHIEF JUSTICE ROBERTS: What's the --

20 JUSTICE KENNEDY: Can you address the  
21 question about capable of repetition, yet  
22 evading review? It's very difficult for this  
23 Court, as a matter of the dignity of the law,  
24 to say that, oh, we're going to presume there's  
25 going to be another violation. We understand

1 that with the aliens with the families, that  
2 they have this strong temptation to try to come  
3 in anyway. But it's very difficult for us to  
4 write an opinion, oh, he might violate the law  
5 again.

6 MR. CAHN: Well, let me be clear,  
7 we're not asking the Court to presume anything.  
8 And that's simply because the most likely  
9 evidence that something can happen is that it  
10 has happened. The most likely evidence that  
11 something -- or the most probative evidence  
12 that something is likely to reoccur is that it  
13 already has.

14 And this dispute between Respondents  
15 and the government has already repeated itself,  
16 so it's not merely a probability, it's not  
17 merely a presumption or an assumption, but  
18 there's actual facts that show it's likely  
19 to reoccur.

20 JUSTICE KAGAN: But that suggests if I  
21 look at somebody and he has a very, very, very  
22 long rap sheet, I'd say, well, you know, he  
23 clearly does this every month, he's just going  
24 to be here again, and give him a different rule  
25 from somebody who's a first offender.

1           MR. CAHN: Well, the Court has always  
2 said that in applying the capable of  
3 repetition, yet evading review exception, the  
4 Court looks at the individual case and the  
5 individual litigant in determining whether or  
6 not it's likely to repeat itself.

7           So the Court isn't creating some rule  
8 for all criminal cases in some way, courts  
9 looking at these cases. I mean, let me note  
10 there's also one other Respondent who I think  
11 is relevant to this consideration because the  
12 government has made the argument, though I  
13 think it's wrong, that both Mr. Smith in Honig  
14 versus Doe and -- and -- and Mr. Turner in the  
15 -- in the Turner versus Rogers were unable to  
16 avoid coming back in -- into that situation.

17           But we have an individual here,  
18 Mr. Ring, the Respondent, the disabled Iraqi  
19 combat vet, who has chronic and severe PTSD  
20 causing him to over-perceive and over-react to  
21 threats and it's as a result of that that he  
22 came into conflict with the VA, where he lives  
23 in a VA home and relies on the VA for services.  
24 So I think there's also that individual who is  
25 likely to come into that same conflict.



1           And the other thing I'd point out is  
2           that these individuals, when they come back  
3           into court, they are indeed presumed innocent.  
4           So the government says we're asking you to say  
5           that they are going to commit new crimes. No,  
6           we're asking this Court to find that it's  
7           reasonably likely, reasonably expected, that  
8           they may find themselves in the Southern  
9           District of California --

10           JUSTICE BREYER: Forget the merits for  
11           a second. I'm just curious, because I did help  
12           to write this case of the shackling before.

13           MR. CAHN: Yes, Your Honor.

14           JUSTICE BREYER: And -- and there's a  
15           full page, more than a page, of the citations  
16           that are not simply from Blackstone but almost  
17           all of them from American courts, and the  
18           conclusion is trial courts -- that what they  
19           show, for like a century, is trial courts may  
20           not shackle defendants routinely but only if  
21           there is a particular reason to do so.

22           MR. CAHN: Yes.

23           JUSTICE BREYER: Now, were those all  
24           jury cases? I don't remember. I mean, I know  
25           that there's a magistrate here and it isn't --

1 it isn't a district court judge, but magistrate  
2 judges are in courtrooms. But did all those  
3 cases involve juries? Do you know?

4 MR. CAHN: I -- I -- I don't know with  
5 certainty, and I don't want to answer, Your  
6 Honor.

7 I would want to point out, though,  
8 that this shackling occurred not only before  
9 the magistrate judges in the initial  
10 proceedings but before district court judges in  
11 substantive motion hearings and evidentiary  
12 hearings. So it went on.

13 JUSTICE BREYER: Do you know if  
14 Blackstone was, in fact, just talking about  
15 jury cases or if --

16 MR. CAHN: It --

17 JUSTICE BREYER: -- Blackstone was  
18 talking about cases in courtrooms?

19 MR. CAHN: Well, I think it's clear  
20 that Blackstone wasn't talking just about jury  
21 cases. The very quote that's mentioned in Deck  
22 comes from his chapter of arraignment and its  
23 incidents.

24 And it talks about the arraignment,  
25 about coming into court, being called to the

1 bar, asked to state one's true name, and being  
2 informed of the charges and asked to plead.

3 And Blackstone states the rule was  
4 that individuals were to appear free of bonds  
5 and fetters, absent some evidence that they  
6 were a risk of escape.

7 JUSTICE KENNEDY: Is it your  
8 experience that there's shackling during a  
9 pretrial motion to suppress?

10 MR. CAHN: There was shackling at  
11 every proceeding, Your Honor, with the  
12 exception of one district judge. One district  
13 judge out of 30 magistrate and district judges  
14 chose not to shackle anyone in her courtroom.

15 Every other district judge, every  
16 other magistrate judge, shackled individuals.  
17 Sometimes there would be partial relief in --  
18 in motion hearings where people would have, you  
19 know, handcuffs taken off. But on the whole,  
20 five-point shackling was the rule in every  
21 court.

22 And you can see that in some of the  
23 examples in the record and in our briefs where,  
24 for instance, the district court judge who  
25 says: I've got a lot to do today, I don't have

1 time to make individual determinations, that's  
2 a district court judge talking about what's  
3 going on in his courtroom.

4 The woman in the wheelchair who we  
5 talk about in the brief in dire and  
6 deteriorating condition, that occurred in  
7 district court, not in the magistrate court,  
8 Your Honor.

9 JUSTICE ALITO: Suppose the --

10 JUSTICE KENNEDY: In the Central  
11 District of California, does this policy  
12 prevail, do you know?

13 MR. CAHN: Well, it prevails nowhere  
14 in the Ninth Circuit any longer. But in the  
15 Central District --

16 JUSTICE KENNEDY: Before the state.

17 MR. CAHN: In the Central District of  
18 California there was a policy of using leg  
19 shackles only in the initial appearances only,  
20 and that was the Howard case which was the  
21 begin -- the first litigation ever concerning  
22 shackling that established the right to  
23 collateral order jurisdiction in the circuit on  
24 -- over these matters.

25 JUSTICE ALITO: If -- if there is no

1 rule, there is no blanket rule, but an  
2 individual district judge orders that a  
3 detainee be shackled, do you think that could  
4 be contested via the collateral order doctrine?

5 MR. CAHN: Well, I think the only  
6 thing before this Court is a complete denial of  
7 an individual determination on the basis of  
8 violence or risk of escape. And so that is  
9 clearly a due process violation and subject to  
10 the collateral order doctrine.

11 The Court did say in Stack that  
12 there's a distinction between the discretionary  
13 calls that a judge makes in setting the amount  
14 of bond versus the refusal to reduce an  
15 excessive bond. And so the Court could --  
16 could -- could construct the jurisdictional  
17 rule in that manner.

18 JUSTICE ALITO: But here there could  
19 be -- you could get an individualized  
20 determination, could you not? Couldn't -- I --  
21 I thought under this rule any judge could order  
22 that the shackles be removed?

23 MR. CAHN: Any judge could order that  
24 the shackles be removed, but no judge made an  
25 individual determination on the basis of danger

1 or risk of escape. And we asked for it many  
2 times and were told again and again and again  
3 you're not going to get that, you don't have a  
4 right to that.

5 Some judges said we'll consider  
6 medical extremity in determining whether or not  
7 we will remove shackles in whole or in part.  
8 But the record is really clear and the Ninth  
9 Circuit en banc found that there was really  
10 very little variance and there was no  
11 individualization in a meaningful way, that  
12 this was a blanket --

13 JUSTICE SOTOMAYOR: Counsel, going  
14 back to what the Ninth Circuit said in their  
15 majority opinion, they didn't deal with the  
16 mootness issue except through the class action  
17 argument?

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

19 JUSTICE SOTOMAYOR: They do state in  
20 their opinion, however, the principle that was  
21 mentioned earlier, that we generally don't  
22 presume in their case law that someone will  
23 commit a criminal act.

24 The government points to that in  
25 saying, absent the class action mechanism, you

1 really can't get past that circuit case law.

2 MR. CAHN: So --

3 JUSTICE SOTOMAYOR: If -- if -- it  
4 seems to me that shouldn't we let the Ninth  
5 Circuit figure that out?

6 MR. CAHN: Well --

7 JUSTICE SOTOMAYOR: If we don't accept  
8 the class action mechanism they use -- it's a  
9 big but, it -- hypothetically, if we don't  
10 accept that, shouldn't we just remand and let  
11 them decide whether this is capable of  
12 repetition or not?

13 MR. CAHN: So I -- I certainly think  
14 that this Court has done that in the past in  
15 it's appropriate course. What's -- what  
16 happened here was that no one in front of the  
17 court of appeals contend -- contended that the  
18 matter was moot because the Respondents had  
19 lost their personal stake.

20 And so the Ninth Circuit was never  
21 made aware of the underlying facts, including  
22 many facts that are in the record, there are --  
23 all of the facts concerning Mr. Ring and Mr.  
24 Sanchez-Gomez are in the record, but they  
25 weren't litigated, they weren't brought before

1 the court, because neither the government nor  
2 we contended that Respondents had lost their  
3 personal stake. And it just wasn't discussed.

4 So it would certainly be appropriate  
5 to remand to the Ninth Circuit for them to make  
6 an initial determination.

7 The other thing I'd say is I want to  
8 come back a little bit to O'Shea and the  
9 government. The government's pushing very hard  
10 on the idea that this Court has said that it's  
11 never appropriate to consider the possibility  
12 that an individual will come back into court in  
13 a criminal case. And the Court has never said  
14 the doctrine doesn't apply in criminal cases.

15 And, In fact, the language in Gerstein  
16 is directly to the contrary of the rule, the  
17 new rule that the government is suggesting this  
18 Court adopt.

19 JUSTICE ALITO: And do you think we  
20 could say: Well, we don't know whether we have  
21 jurisdiction under the constitution but we're  
22 going to write an opinion on various other  
23 interesting legal issues that are presented in  
24 this case?

25 MR. CAHN: No, I don't believe so,



1 Your Honor. I don't believe that's possible.

2 Let me --

3 JUSTICE KAGAN: May -- may I ask  
4 something? It might -- it's probably not  
5 legally relevant. I am just curious about it.

6 At -- at -- at some point why didn't  
7 one of the lawyers in your office pick up the  
8 phone -- there are a host of organizations that  
9 I can imagine bringing a suit like this one  
10 outside of any individual criminal case -- why  
11 didn't that call get made to one of those  
12 organizations?

13 MR. CAHN: Well, there's no evidence  
14 in the record about this, Your Honor. But  
15 since -- if I might, there -- there has been --  
16 we've had this and other issues that have come  
17 up where we felt that it would be appropriate  
18 to litigate them through class actions, many of  
19 which have never led to challenges because we  
20 thought they could only be brought through  
21 class actions or civil litigation.

22 And the -- the lawyers, the resources  
23 just aren't there to bring those cases in San  
24 Diego. It's that simple.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Kedem, you have six minutes  
3 remaining.

4 REBUTTAL ARGUMENT OF ALLON KEDEM  
5 ON BEHALF OF THE PETITIONER

6 MR. KEDEM: Thank you. I have a  
7 number of individual points, but I think it is  
8 worth pausing to just acknowledge the breadth  
9 of Respondents' argument.

10 Respondents' argument is that every  
11 single decision to use restraints in any  
12 criminal case and possibly other case  
13 management decisions as well, can get an  
14 interlocutory appeal, that compliance with  
15 circuit precedent by a district court qualifies  
16 for mandamus relief, and that under Article  
17 III, a litigant can point to his likelihood of  
18 committing a future crime in order to keep his  
19 case live.

20 Starting first with the question of  
21 mootness. My friend several times brought up  
22 Gerstein as an application of the exception for  
23 cases capable of repetition, yet evading  
24 review. It was not.

25 Gerstein was based on the fact that

1 there was a certified class action there.  
2 There is no certified class action here. It  
3 makes a difference because a class has its own  
4 interests that continues even after the  
5 individual litigants is over.

6 Respondents have said that it is just  
7 a prediction based on general likelihood,  
8 probability, that a future crime will be  
9 committed. This Court has never relied on  
10 those sorts of predictions. And in cases like  
11 O'Shea, Lane, and Spencer, has explicitly said  
12 that a prediction of that sort is not  
13 permissible.

14 Finally, he brought up Mr. Ring. At  
15 no point during this litigation, not even at  
16 the merits stage before this Court, has  
17 Respondents ever suggested that Mr. Ring is  
18 likely to commit another crime.

19 Going now to the question of the  
20 collateral order doctrine. Justice Kennedy,  
21 you have several times asked a question:  
22 Couldn't you have this -- this issue come up in  
23 the context of a suppression ruling?

24 The answer is yes. And that would  
25 survive final judgment. That could be

1 challenged on appeal, even if the litigant was  
2 convicted or even if he pleaded guilty.

3 So there is no reason why you can't  
4 challenge that as a result from final judgment.

5 Moving next to the question about  
6 Justice Kennedy --

7 JUSTICE SOTOMAYOR: Assuming your  
8 district, like most, doesn't have a waiver of  
9 appeal rights with all of their plea  
10 agreements.

11 MR. KEDEM: It's routine --

12 JUSTICE SOTOMAYOR: It's routine to  
13 have the --

14 MR. KEDEM: Sure.

15 JUSTICE SOTOMAYOR: -- the waiver,  
16 which means this issue is not likely.

17 MR. KEDEM: Well, it's routine for  
18 litigants to preserve suppression objections  
19 and to challenge that on appeal. That's  
20 something that happens all of the time.

21 And there is no reason that that  
22 couldn't happen in a case where someone  
23 alleges, for instance, that they were unable to  
24 contribute to their own defense, that they  
25 couldn't write notes or get the attention of

1 their attorney, as Respondents have alleged  
2 here.

3 Justice Kenn -- Justice Kagan, you  
4 asked about whether this was a new theory. And  
5 my friend said we have been arguing all along  
6 that there is a liberty interest. That is  
7 completely true. But it's a liberty interest  
8 within the context of the common law right  
9 under Deck versus Missouri, which is the right  
10 that they've been invoking throughout this  
11 litigation at all stages, including before this  
12 Court.

13 There was a question about whether  
14 this is truly an exceptional case sufficient to  
15 justify mandamus. We did a survey of U.S.  
16 Marshal field offices. And our understanding  
17 is about half of them use restraints at all  
18 initial appearances, about 150 out of the 300  
19 field offices.

20 Another 100 or so --

21 JUSTICE GINSBURG: Is that -- is that  
22 five-point restraints?

23 MR. KEDEM: That's full restraints.  
24 It's both wrist restraints and also leg  
25 restraints. Another 100 or so use only leg

1 restraints. And then about 50 field offices  
2 don't have any restraints at initial  
3 appearances.

4 So the Ninth Circuit is actually very  
5 much the outlier here.

6 Furthermore, my friends brought up the  
7 idea -- brought up the Schlagenhauf case. In  
8 Schlagenhauf the argument was that a type of  
9 order that had never been issued before, an  
10 order requiring the criminal defendant to  
11 undergo a battery of psychological and mental  
12 examinations, that --

13 JUSTICE GINSBURG: It was a civil  
14 case, wasn't it?

15 MR. KEDEM: That was a civil case.  
16 That was a mandamus case. And, Justice  
17 Ginsburg, as you might be pointing to, this  
18 Court has never recognized an appropriate use  
19 of mandamus in a criminal case where the order  
20 sought to be challenged was not the functional  
21 equivalent of a dismissal.

22 Finally, back to the collateral order  
23 doctrine. The doctrine is a balancing of  
24 interests. Everyone recognizes that it is  
25 useful in certain cases to get an immediate

1 appellate ruling to deal with a particular  
2 legal issue. But we also recognize that it can  
3 come at a very steep cost.

4 It's incredibly disruptive, it invites  
5 gamesmanship and undermines the authority of  
6 the district judge. We're talking here about a  
7 type of order, the use of restraints, that  
8 happens hundreds of times in district court  
9 cases all around the country.

10 And because they're trying to abstract  
11 out the part of their argument related only to  
12 dignitary interests or autonomy interests, that  
13 argument can't be cabined. It could apply to  
14 essentially any decision that a district court  
15 makes regarding some sort of trial procedure,  
16 as long as you can claim there's no way that it  
17 is likely to prejudice me.

18 Usually the assumption is opposite --  
19 the opposite, that appellate review is there in  
20 cases where there is prejudice, and we don't  
21 want to change the rules merely because a  
22 litigant can claim that there is no prejudice.

23 JUSTICE BREYER: Can you say -- I  
24 don't know -- but can you say if the government  
25 would -- I don't want to put cooperate, that's

1 too strong -- but at least would not oppose an  
2 effort in any of those 150 districts by a  
3 defense attorney's organization to try to  
4 challenge this policy, either through, as you  
5 suggested, an Ex Parte Young proceeding or, as  
6 you also suggested, an ordinary appeal where  
7 they haven't waived the right to appeal and it  
8 says explicitly like reserving the -- the  
9 suppression motion, we reserve the right to  
10 challenge the restraint motion?

11 MR. KEDEM: Well, starting --

12 JUSTICE BREYER: Now -- now -- hmm?

13 MR. KEDEM: So starting with the last  
14 part of your question --

15 JUSTICE BREYER: Yeah.

16 MR. KEDEM: -- the government didn't  
17 in Zuber or LaFond, which were the Second and  
18 11th Circuit decisions that were from final  
19 judgments, didn't contend there that it was  
20 improper for the litigant to argue that they  
21 had been improperly restrained in those cases.

22 With respect to your question about  
23 the civil suit, I can say only that the  
24 government would not oppose it in an  
25 appropriate case.



1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.

3 (Whereupon, at 11:07 a.m., the case  
4 was submitted.)

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## Official - Subject to Final Review

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