

No. 17-312

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IN THE  
**Morris Tyler Moot Court of Appeals at Yale**

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UNITED STATES

*Petitioner,*

v.

SANCHEZ-GOMEZ, ET AL.

*Respondents.*

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**On Petition for Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF FOR PETITIONER**

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November 5, 2017

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## QUESTIONS PRESENTED

In July 2013, the Southern District of California, upon the recommendation of the United States Marshals Service, adopted a policy allowing the U.S. Marshals Service to produce in-house defendants in restraints during non-jury court proceedings. The policy gave district and magistrate judges discretion to opt out of the policy, or to remove or modify the restraints in individual cases. In November 2013, Respondents—four criminal defendants—raised a district-wide challenge to the policy. Respondents’ individual cases have since ended in guilty pleas and received final judgment. The questions presented are:

1. Whether the U.S. Court of Appeals for the Ninth Circuit erred in asserting authority to review respondents’ interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents’ individual claims were moot.

2. Whether the U.S. Court of Appeals for the Ninth Circuit erred in concluding that the Fifth Amendment forbids the U.S. Marshals Service for the Southern District of California, with the approval of district judges in that high-volume jurisdiction, from implementing a policy of placing pretrial detainees in physical restraints during non-jury court proceedings.

## **LIST OF ALL PARTIES**

Petitioner is the United States of America.

Respondents are Rene Sanchez-Gomez; Moises Patricio-Guzman; Jasmin Isabel Morales;  
and Mark William Ring.

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## **OPINIONS BELOW**

The Ninth Circuit’s en banc opinion is reported at 859 F.3d 649. The Ninth Circuit’s panel opinion is reported at 798 F.3d 1204. The district court’s order denying defendants-appellees’ emergency motion to revoke the district-wide policy is unreported. *See* Pet. App. 83a.

## **STATEMENT OF JURISDICTION**

The Ninth Circuit entered judgment en banc on May 31, 2017. The petition for writ of certiorari to this Court was timely filed on August 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Article III, Section 2 of the United States Constitution provides, in relevant part, “The judicial power shall extend to all “Cases,” and “Controversies.” U.S. Const. art. III, § 2, cl. 1.

The Fifth Amendment of the United States Constitution provides, in relevant part, “No person shall \* \* \* be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

These constitutional provisions, as well as all other statutory provisions cited, are included in Petitioner’s Appendix and quoted in full.

## **STATEMENT**

### **I. The District Court’s Policy**

In July 2013, the United States Marshals Service, pursuant to its charge “to provide for the security \* \* \* of the United States District Courts,” recommended that the judges of the Southern District of California allow the Marshals Service to produce all in-custody defendants in full restraints for non-jury proceedings. Pet. App. 32a (citing 28 U.S.C. § 566(a)). Its recommendation was based on several factors. First, several dangerous incidents had recently occurred inside the

courthouse. On two occasions, inmate-on-inmate assaults had broken out. As a result of one of those altercations, an inmate suffered a stab wound to the face. Pet. App. 33a. The Marshals Service also discovered that many detainees were arming themselves with makeshift weapons in their holding cells. One detainee with no recorded history of violence attempted to sneak in a razor blade in his shoe. *Id.*

Second, the Marshals Service further found it difficult to predict which detainees would pose a danger in the courtroom based on available information. *Id.* Even detainees with no history of violence, as well as those charged with non-violent offenses, later engaged in violence while in custody. *Id.* In 2013 alone, seven detainee-on-staff assaults occurred in the Southern District of California—six of which were committed by detainees charged with non-violent offenses. Five of those six detainees had no previous history of violence. *Id.* In addition, the Marshals Service could only access limited criminal background information on non-resident detainees, and the Southern District hears an unusually high number of cases involving such detainees. *Id.* Thus, the Marshal Service concluded it lacked the ability to distinguish between detainees who posed a danger in the courtroom and those who did not.

Unique dangers attending the logistical concerns of accommodating large numbers of criminal defendants appearing in the courthouse also influenced the Marshals Service's recommendation. *Id.* In the years prior to the policy, the Marshals Service facilitated the court appearances of roughly 40,000 in-custody defendants, amounting to an average of more than 200 defendants cycling through the cellblocks per day. *Id.* The close quarters in the courtrooms used by district judges, coupled with the high volume of in-custody criminal defendants, the courtrooms' physical layouts, and budgetary constraints in the district that forced the Marshals Service to reallocate funds away from courtroom protection all contributed to elevated security

concerns. Pet. App. 34a. All of these factors—many specific to the Southern District of California—drove the Marshals Service’s recommendation. *Id.*

In consultation with the Federal Defenders of San Diego, the United States Attorney’s Office, and a Criminal Justice Act panel representative, the district court decided to defer to the Marshals Service’s security recommendation. *Id.* However, some exceptions were made. First, the district court declined to adopt the policy in sentencing hearings and guilty plea colloquies. *Id.* Second, the district court carved out a sphere for the discretion of each individual judge in applying the policy. It permitted any of its individual judges to opt out wholesale, *id.*, and modify or remove restraints in any individual case. Pet. App. 85a. Thus, defendants were still permitted to ask any judge to remove the restraints and, in fact, judges often acceded to the request. *Id.*

In reaching its decision to implement the Marshals Service’s policy, the district court relied on the Ninth Circuit’s decision in *United States v. Howard*, 480 F.3d 1005, 1013 (9th Cir. 2008), and on the Second Circuit’s decision in *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997). Both cases held that deferring to the judgment of the Marshals Service on issues of courtroom security and detainee restraints during non-jury proceedings prior to trial did not violate the detainees’ constitutional rights. *Id.*

The restraints consist of handcuffs which can be linked to a waist-level “belly chain,” as well as leg restraints. Pet App. 85a. The chains are of sufficient length for defendants “to walk and move their feet around.” *Id.* As noted above, the restraints can also “be loosened if they are too tight,” and “it is conceded that judges have ordered them loosened” in a number of instances. *Id.*

## **II. Procedural Background**

Defendants brought their challenges to the policy shortly after its implementation. In October 2013, Jasmin Morales made her initial appearance before a magistrate judge in full

restraints pursuant to the new policy. Pet. App. 35a. Morales had been charged with felony importation of a controlled substance. When Morales’s counsel moved to have the restraints set aside during pretrial proceedings, the magistrate judge denied the motion. *Id.* As her criminal case proceeded, Morales filed an emergency motion in the district court challenging the policy. That motion was also denied and a notice of appeal was filed in November 2013. *Id.* A few months later, Morales’s criminal case ended in a guilty plea. The district court imposed an eighteen-month sentence of imprisonment with three years of supervised release. Final judgment was entered on June 19, 2014 and Morales’s case before the district court was concluded. *Id.* The other three defendants in this consolidated appeal—Mark Ring, Moises Patricio-Guzman, and Rene Sanchez-Gomez—have similar stories. *See* Pet. App. 35a n.2.

Sitting in review of the district court’s denial of Respondents’ appeal, a three-judge panel of the Ninth Circuit initially vacated the denial and remanded for further proceedings that might produce a more “adequate justification” for the district court’s policy. Pet. App. 73a. That decision was later reviewed en banc. This time, the appellate court relied upon its authority to issue supervisory mandamus writs in order to reach the merits of Respondents’ claims. Ultimately, the Ninth Circuit ruled for Respondents, declaring that “if a government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant.” Pet App. 30a. Petitioners now seek review of that decision in this Court.

Respondents challenge only the Marshals Service’s prospective use of restraints in their cases. They do not seek “review of the individual decisions to permit the use of restraints in their cases, \* \* \* damages for any injury they incurred due to this policy,” or for their “convictions or sentences [to be] set aside as a result of any prejudicial effect of the restraint policy.” Pet. App. 36a. The Federal Defenders of San Diego represent the four defendants, but seek prospective relief

for all future pretrial detainees who might have pretrial proceedings in the Southern District of California. *Id.*

## SUMMARY OF ARGUMENT

This case threatens to reduce Article III’s case-or-controversy requirement to words without force. The Ninth Circuit reached well beyond the scope of its authority and weighed upon claims that, under well-established mootness rules, are no longer justiciable. This case should not have been heard at all, much less used to rewrite the Fifth Amendment in a way that undermines the authority of state and federal courts to adopt policies that ensure their courtrooms remain safe for the orderly dispensation of justice. This error runs afoul of the Constitution and this Court’s jurisprudence. As such, it merits vacatur and dismissal, or reversal in the alternative.

\*\*\*\*\*

I. As an initial matter, Respondents’ claims are moot. The Ninth Circuit erred in proceeding to the merits. Accordingly, this Court ought to vacate and dismiss on this issue without plodding on.

*First*, under ordinary mootness rules, Respondents fail to present a live claim or any possible remedy for their harm. Today, as when the Ninth Circuit sat in review, Respondents’ criminal cases have ended and none of the individuals remain subject to the complained-of policy. In fact, the district court has since suspended its policy altogether. As such, “even a favorable decision” from this Court would not relieve Respondents from anything. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Barring some accommodating exception to these principles, Respondents’ claims must be dismissed.

*Second*, Respondents’ claims do not fall within the “capable of repetition, yet evading review” exception to ordinary mootness rules. This Court’s holding in *Spencer v. Kemna* is

controlling. 523 U.S. 1 (1998). Outside of the class-action context, parties challenging a government policy must plausibly show that *they*—not others—are likely to face the same harm in the future. Here, both Respondents and the lower court majority readily admit such a showing cannot be made. Moreover, contrary to the Ninth Circuit’s holding, this Court has never allowed the live interests of other similarly situated individuals not formally joined to a case to excuse the mootness of a party’s claims. As such, Respondents’ claims do not garner the capable-of-repetition exception and are still moot.

*Finally*, further exceptions to Article III’s case-or-controversy requirement that would reach Respondents’ claims are neither permitted, advisable, nor necessary. A new doctrinal accommodation would transgress Article III’s bounds on the proper sphere of judicial authority and permit courts to issue unconstitutional advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). It would also allow federal public defenders to bring civil class actions via individual criminal cases, which Congress has explicitly barred them from doing. *See* 18 U.S.C. § 3006A(a) (limiting the scope of representation). Lastly, changing the law would permit evasion of the statutory requirements for collective actions in Rule 23 and create new problems of claim preclusion for those parties not before the court. Such constitutional and statutory breaches are unnecessary. Other remedial avenues exist for Respondents’ claims and this Court need not breach Article III’s limits to hear them.

II. Additionally, the Ninth Circuit erred in concluding it had jurisdiction to hear Respondents’ claims as they were raised. Neither the collateral order doctrine nor an appellate court’s supervisory mandamus authority allowed it to sit in review.

*First*, the collateral order doctrine does not permit an appellate court to hear Respondents’ claims on immediate appeal. The conditions for collateral order review “are stringent,” and this

Court has been clear that the doctrine is “narrow” and “should stay that way.” *Will v. Hallock*, 546 U.S. 345, 350 (2006). Collateral orders are not meant to supplant the normal appeal process. In the criminal context, this Court has allowed immediate appeal of only four types of pre-judgment orders—none of which extend to the type of order Respondents challenge or the type of interest they seek to protect. Moreover, since Respondents primarily challenge the district-wide policy prospectively as it will be applied to *all* defendants, their claims do not provide an appropriate basis for collateral order review, which is typically reserved for individualized determinations. As such, the collateral order doctrine does not provide jurisdiction to the Ninth Circuit.

*Second*, the Ninth Circuit’s supervisory mandamus authority does not permit review either. Under the three-prong test for supervisory mandamus writs outlined in *Cheney*, mandamus authority was not “appropriate under the circumstances.” *Cheney v. U.S. Dist. Court of the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004). In *Will v. United States*, this Court recognized that the writ is “appropriate under the circumstances” only when a district court has engaged in “willful disobedience of the rules laid down by” the Supreme Court, or “adopted a deliberate policy in open defiance of the federal rules.” 389 U.S. 90, 101-02 (1967) (internal citations omitted). Here, the district court has not violated any federal rule of procedure or defied a higher court to the degree that *Will* requires for supervisory mandamus authority to be appropriate. Instead, as in *Will*, “the most that can be claimed on this record is that [the district court] may have erred in ruling on matters within [its] jurisdiction.” *Id.* at 103-04. Thus, supervisory mandamus authority does not provide a basis for appellate court review of Respondents’ case.

III. Even if this Court reaches the merits, the district court’s policy did not violate the Due Process Clause of the Fifth Amendment. The Government, in its administration of criminal justice, has clear authority to detain criminal defendants pending trial. This includes the attendant authority

to secure criminal defendants in the courtroom itself. Violence in the court—and the harm that it poses to other parties, defendants, and judicial staff—undermines the orderly process in which parties are given fair hearing before a court of law. Thus, the Ninth Circuit erred in claiming that the Fifth Amendment forbids the Southern District of California from adopting a policy allowing the U.S. Marshals Service to produce criminal defendants in physical restraints during non-jury proceedings, subject to the discretionary oversight of district and magistrate judges.

*First*, the district court’s policy did not violate substantive due process rights. Because the Government has “a substantial interest in ensuring that persons accused of crimes are available for trials,” *Bell v. Wolfish*, 441 U.S. 520, 534 (1979), the appropriate test is whether the district court’s policy was “rationally related to a legitimate nonpunitive governmental purpose” and was not “excessive in relation to that purpose.” *Id.* at 561. Under this standard, the district court’s policy was well within its authority, since the use of physical restraints with criminal defendants was reasonably related to the government’s legitimate interest in ensuring safe courtroom proceedings for the orderly dispensation of justice.

*Second*, the district court’s policy did not violate procedural due process rights. In *Deck v. Missouri*, this Court already addressed the scope of the government’s authority in restraining defendants in court, and drew the outer limits of that authority where the restraint unfairly prejudices the defendant in the eyes of a jury. 544 U.S. 622, 629 (2005). Because the district court’s policy was only applied in non-jury proceedings, it was well within the bounds of the government’s constitutional authority and comports with the three general principles *Deck* asserts as necessary to ensure defendants’ right to a fair trial is protected.

*Third*, the common law underlying the due process rights at issue affirms the district court’s policy. Because the Government’s authority to administer criminal justice is clear and



unquestioned, Respondents' countervailing claim can only prevail if it draws upon "deep roots" in the common law tradition underlying the Fifth Amendment. *Deck*, 544 U.S. at 626. But the common law rule applied in English and American courts reinforces the district court's policy, since courts have consistently permitted the use of physical restraints on criminal defendants when they are not before a jury. These common law rules clearly defer to courts' authority to implement physical restraints to preserve the safety and security of court proceedings, demonstrating why it was permissible for the district court to do so here.

## **ARGUMENT**

### **I. THE COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF THE DISTRICT COURT'S POLICY BECAUSE RESPONDENTS' CLAIMS ARE MOOT.**

In its determination to reach the merits of this case, the Ninth Circuit attempted to simply bend ordinary mootness rules. Instead, it broke them. Neither the Constitution nor this Court's jurisprudence permits this Court to hear Respondents' claims. Ordinary mootness rules require a live claim redressable at every stage of litigation—something Respondents readily admit they lack. Additionally, contrary to the Ninth Circuit's reasoning, the "capable of repetition, yet evading review" exception does not apply because Respondents are not a formal class and they are unlikely to suffer the same injury again. As such, current doctrine requires this Court to vacate the Ninth Circuit's ruling and dismiss Respondents' claims as moot.

Facing this reality, Respondents may urge this Court to depart from its doctrine and create a further exception to mootness principles that would reach their claims. This Court should reject that invitation. The exception that Respondents seek would threaten to entirely swallow the case-or-controversy principle. It would also permit federal defenders to evade federal law by bringing civil actions on the back of individual criminal cases and frustrate the statutory requirements for

class actions that Congress enshrined in Fed. R. Civ. P. 23. Departure from current doctrine is also unnecessary. Respondents have numerous alternative avenues of redress at their disposal—avenues that comport with, rather than violate the constitutional requirements of Article III and preserve the integrity of criminal actions. For these reasons, this Court should reaffirm its position that, outside the class-action context, Article III bars moot claims.

**A. Respondents do not present a live, redressable claim under ordinary mootness rules.**

Respondents' claims are nonjusticiable according to ordinary principles of mootness. Under Article III of the Constitution, federal "judicial Power" is constrained to nine classes of "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. In order to satisfy the case-or-controversy requirement, ordinary mootness principles require that relief must be affordable to the parties before the Court. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The requirement "subsists through all stages of federal judicial proceedings." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461 (2007) (internal quotation marks omitted). Thus, if a party seeking a remedy loses a "cognizable interest in the outcome" at any stage of the litigation, *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted), then the case becomes moot and is "no longer a 'Case' or 'Controversy' for purposes of Article III, . . . [n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013).

Moreover, the requirement is categorical and does not vary with the appellate court's method of review. Even in its supervisory mandamus role, an appellate court still requires a live case or controversy to hear claims. Indeed, each case the Ninth Circuit cited in support of its view that mootness principles are somehow more flexible in the context of supervisory mandamus review involved a clearly live Article III case or controversy. *Will v. United States*, 389 U.S. 90,

91 (1967) (ongoing criminal prosecution for tax evasion); *Schlagenhauf v. Holder*, 379 U.S. 104, 106-09 (1964) (ongoing diversity personal injury suit); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251-54 (1957) (ongoing antitrust suit).

The case-or-controversy requirement plays an important role in our constitutional scheme. It is a critical feature of the judicial process and our system of limited government. As this Court has said, justiciability is a dual limitation designed to confine “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process” and to “define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In other words, Article III’s requirement ensures that the cases judges decide are vigorously litigated by interested parties and that judges themselves do not stray from their judicial role.

Here, Respondents fail to clear Article III’s bar against non-live claims. They no longer suffer any form of pre-trial constraint because their cases have long since ended. Moreover, the district court has suspended the complained-of policy. As such, “even a favorable decision” would not relieve Respondents from anything. *Murphy*, 455 U.S. at 481. Accordingly, ordinary principles of mootness, absent some accommodating exception, require dismissal of Respondents’ claims.

**B. The “capable of repetition, yet evading review” exception to ordinary mootness rules does not apply to Respondents’ claims.**

In avoiding the mootness of Respondents’ claims, the Ninth Circuit mistakenly applied the “capable of repetition, yet evading review” exception to the ordinary rules of justiciability. It argued that a line of cases confined exclusively to the class-action context is controlling, even though Respondents do not bring a class action, because “the case serve[s] the same functional purpose—it [is] a functional class action.” Pet. App. 13a. But, this Court has never applied the

capable-of-repetition exception to such claims and, instead, has routinely refused to do so in situations more “class-like” than this one. *See, e.g., Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Spencer v. Kemna*, 523 U.S. 1 (1998); *Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128 (1975). Put simply, the Ninth Circuit’s novel theory, while creative, directly contradicts this Court’s precedent.

This Court has only applied the “capable of repetition, yet evading review” exception [to ordinary mootness rules] in two situations: (1) outside of the class-action context, where the complained-of injury is too fleeting in nature to be reviewable and is likely to be sustained by the *same* complaining party, *see, e.g., Spencer*; and (2) inside the class-action context, where the injury’s fleeting nature makes it difficult for named plaintiffs to preserve their claims through class certification, *see, e.g., Gerstein v. Pugh*, 420 U.S. 103 (1975). Contrary to the Ninth Circuit’s reasoning, Respondents’ claims belong to the first category—not the second—and, in any case, do not garner the exception. As such, Respondents’ claims remain moot and merit dismissal.

*i. Outside of the class-action context, Spencer limits the exception’s availability to complaining parties likely to suffer the same injury again*

Because Respondents do not bring their claims in the class-action context, *Spencer v. Kemna* is controlling and Respondents’ claims are moot. 523 U.S. 1 (1998). *Spencer* applied a two-prong test to determine whether, in the absence of a formal statutory vehicle for joinder, a plaintiff’s moot claims could nonetheless be heard. This Court said the capable-of-repetition exception applies “only in exceptional situations where the following two circumstances [are] simultaneously present: “(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Id.* at 17 (internal citations omitted). Respondents fail to meet the second prong of this test.

*Spencer*'s second prong "requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the *same complaining party*.'" *Wis. Right to Life*, 551 U.S. at 463 (emphasis added) (quoting *Murphy*, 455 U.S. at 482). A similar controversy is deemed likely to recur "when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality.'" *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). This is a high bar, failed even by claims more likely to recur than Respondents'. *See, e.g., Spencer*, 523 U.S. at 18 (finding a former inmate's challenge of parole revocation procedures moot because his sentence had already expired and he had not "demonstrated a reasonable likelihood that he [would] once again be paroled and have that parole revoked"); *Murphy*, 455 U.S. at 482 (finding a convicted inmate's challenge of a pretrial bail determination moot because he was unlikely to be charged again or have his convictions overturned on appeal); *Sosna v. Iowa*, 419 U.S. 393, 400 (1975) (finding a wife's challenge of state residency would have been moot outside of a formal class action because she was unlikely to "return [to Iowa] and later seek a divorce within one year from her return").

Notably, the petitioner in *Spencer* unsuccessfully urged the Court to do precisely what the Respondents ask of it today: "be[] flexible about mootness." Pet.'s Reply Br. at 8, *Spencer v. Kemna*, 523 U.S. 1 (1998) (No. 96-7171). Like Respondents here, *Spencer*'s counsel argued that, though the capable-of-repetition exception "once applied *only* to cases where the *same* plaintiff or petitioner would be burdened by the defendant's or respondent's conduct, the *principle* of this limitation has not survived." *Id.* at 5. He then invited this Court to extend the exception to parole revocations, despite the unlikelihood that *Spencer* himself would be convicted and subjected to parole proceedings again. *Id.* This Court directly rejected that invitation and, for the same reasons, ought to reject Respondents' as well.

Here, like the parolee's sentence, Respondents' cases have all ended and the district court's policy is no longer in effect. As in *Spencer* and *Murphy*, there is no reason for this Court to presume that Respondents will be charged with crimes in the future and be placed in pretrial constraints again. Whether *other* criminal defendants are likely to be subjected to similar constraints in the future is irrelevant. In the absence of a statutory vehicle for joinder, this Court has clearly stated that there must be a likelihood of repetition with respect to the *same* plaintiffs currently before the court. As such, Respondents' claims fail the second prong of *Spencer's* test and do not enjoy the capable-of-repetition exception.

ii. *In the class-action context, this Court has never applied Gerstein or its progeny to cases lacking a formal statutory vehicle for aggregating claims*

*Gerstein* and its progeny cannot control this case in the absence of a formal statutory mechanism for joining interested parties. Sensing this doctrinal requirement, the Ninth Circuit went to great lengths to fashion Respondents' individual claims as "functional" class actions. It argued that "the rule in *Gerstein* doesn't turn on the presence of a procedural device like Rule 23," but instead is a free-floating means of "resolv[ing] the problem of inherently transitory claims while ensuring there is a live controversy to which the court can provide relief." Pet. App. 46a. But, merely sharing class characteristics with others who are not parties to an action has never been a substitute for pursuing formal joinder. *See, e.g., Jacobs*, 420 U.S. 128 (requiring full class certification even where an injury was widely shared among similarly situated individuals); *Sosna*, 419 U.S. at 398 ("If appellant had sued only on her own behalf, \* \* \* this case [would be] moot and require dismissal. But appellant brought this suit as a class action."). Because the Ninth Circuit relies upon the prospective live interests of parties not formally before the court to excuse the mootness of Respondents' claims, its functional class action theory falls well beyond the reach of *Gerstein's* rule and violates Article III.

In the class-action context, this Court has overlooked a named plaintiff’s moot claims only in certain situations, recognizing that “[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 399 (1980). In *Gerstein*, this Court laid down the test for the justiciability of such transitory claims. It identified three factors that cut in favor of overlooking the mootness issue: (1) the transitory nature of the injury, (2) the existence of “a class of persons suffering the deprivation,” and (3) the class’ representation by counsel with similarly-situated clients. *Gerstein*, 420 U.S. at 110 n.11.

Seizing non-exhaustive language in a footnote, the Ninth Circuit argued that *Gerstein*’s second factor is not expressly limited to classes of persons with an independent collective legal status—even though the class at issue in the case was, in fact, a Rule 23 class. The Ninth Circuit relied heavily on this ambiguity, suggesting it created room for “functional class actions” that lack any statutory hook whatsoever. But, *Gerstein*’s eleventh footnote was not the only word on this issue. Other cases have clarified that the exception *does* require the existence of a formal statutory vehicle for joinder—something Respondents conspicuously lack.

The same day the Court decided *Gerstein* it decided another case treating the exact same issue. *Jacobs*, 420 U.S. 128 (1975). There, the Court ultimately declared high school students’ claims moot, not because their claims weren’t “class-like,” but because “there was inadequate compliance with the requirements of Rule 23(c).” *Id.* at 134. Thus, even in a case where plaintiffs actively pursued formal class status, this Court did not look to the claims of similarly situated individuals to excuse the named plaintiffs’ moot claims.

Today, this Court still requires a “putative class [that] acquires an independent legal status once it is certified” for *Gerstein*’s rule to apply. *Genesis Healthcare*, at 1530 (2013). In *Genesis*

*Healthcare*, this Court dismissed an employee’s FLSA claim that had fallen moot after the claim was filed, but prior to “conditional certification”<sup>1</sup>—just like in *Gerstein*. *Id.* The Ninth Circuit misinterpreted that decision and, by extension, the entire line of cases in the class-action context. It made much hay of the fact that, after rejecting the independent legal status of the claimed FLSA class, the Court “nonetheless considered whether, under *Gerstein*, the plaintiff’s injury might be capable of repetition, yet evading review.” Pet. App. 15a. The Ninth Circuit concludes this must mean that Respondents’ claims need only be “class-like” for *Gerstein* to apply. But, that conclusion is flawed for several reasons.

First, the Court traditionally separates its *Gerstein* analysis from discussion of *Sosna* and *Geraghty* because the mechanics of the “relation-back principle”<sup>2</sup> differ between the cases. While *Sosna* and *Geraghty* dealt with claims that fell moot *after* a decision on class certification, *Gerstein* dealt with claims that fell moot *before* class certification. In the former instance, independent legal status of a class is decisive because the court relates a named plaintiff’s moot claims back to when the class was certified. *Id.* at 1530. In the *Gerstein* setting, the Court relates a moot class claim back to the moment it was filed in order to preserve it through class certification. *Id.* By discussing *Sosna* and *Geraghty* first, the Court merely makes this distinction clear and underscores why the mechanics in *Gerstein* are more apposite—not that class action status is unnecessary. Incidentally, the Court’s focus on the mechanics of the class certification process highlights precisely why formal class status is important: it ensures that a properly joined live claim of some class member

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<sup>1</sup> Under FLSA, the employee sought to establish an opt-in class as permitted under 29 U.S.C. § 216(b). As noted above, the employee’s own claim fell moot prior to conditional certification of the class that would have permitted others to begin to opt-in. This timing is important and helps explain why this Court segmented its analysis in the way that it did.

<sup>2</sup> The “relation-back principle” refers to the legal concept whereby the Court treats something done today as if it were done earlier. In this context, the line of cases beginning with *Sosna* and including *Geraghty* determine when a named plaintiff—whose claims are presently moot—can relate their claims back to when they were live in order to continue litigating on behalf of a class.



will be before the Court when it renders a final decision and that, given the preclusive effect of the decision on that member's claim, the position will be vigorously advocated.

Moreover, each time the Court has discussed the capable-of-review exception, it has done so only where it was sure to include a class-action qualifier. *See, e.g., id.* at 1530-31 (characterizing the "line of cases" of which *Gerstein* is a part as applying to "class-action claim[s]"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (applying *Gerstein* and holding "that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review" (emphasis added)); *cf. Murphy*, 455 U.S. at 481-84 (implicitly rejecting the view expressed by the dissenting justice that, under *Gerstein*, "the formalities of class certification are unnecessary," *id.* at 486 n.3).

Finally, the Ninth Circuit's holding is hard to square with this Court's consistent treatment of cases *outside* of the class-action context. Many claims that looked even more class-like under the Ninth Circuit's test were still assessed under *Spencer*—not *Gerstein*. *See, e.g., Spencer; Jacobs; Weinstein v. Bradford*, 423 U.S. 147 (1975) (applying the *Spencer* test to a single prisoner's challenge to parole procedures). Thus, the Ninth Circuit must explain not only why the *Gerstein* rule has never been extended to merely functional class actions—but also why the Court has always applied the *Spencer* rule to analogous cases. Ultimately, this proves too much.

Because *Spencer*'s test applies and Respondents admit they cannot show that they will likely suffer the complained-of injury again, Respondents' claims are still moot.

**C. Further exceptions to Article III's case-or-controversy requirement that might reach Respondents' claims would be impermissible, imprudent, and unnecessary.**

As noted above, current doctrine requires this Court to dismiss Respondents' claims as moot. Facing this reality, Respondents may attempt to argue that their situation merits departure

from the doctrine. This Court should not take that bait. Creating a further exception to Article III's case-or-controversy requirement to reach Respondents' claims would entirely swallow the constitutional rule and create many more problems than it might solve. It is also unnecessary. Respondents' claims are readily justiciable via a number of other more appropriate avenues. This Court should reaffirm its own case law, continue to protect the constitutional principles those cases support, and permit Respondents to take advantage of alternative litigation strategies.

- i. Eroding Article III's justiciability rules would permit courts to step beyond their proper sphere of authority and diminish the adversarial nature of the judicial process*

The Ninth Circuit lost sight of the importance of Article III's case-or-controversy requirement in constraining courts to their proper role. If courts were not required to first locate a live controversy or remediable injury before hearing claims, they would be permitted to issue advisory opinions on issues presented outside of an adversarial context. Such an outcome would be patently unconstitutional and, in any case, would not comport with "Article III values" or the "dispute resolution model" that undergirds the judicial process. *See Zwickler*, 394 U.S. at 108; Paul M. Bator et al., *Hart and Wechsler's the Federal Courts and the Federal System*, 82 (7th ed. 2015) (noting the Court's adherence to a dispute resolution model). It could also subject "[a]n already overcrowded federal docket \* \* \* to a flood of clearly moot cases in which litigants urge public interest exceptions." David H. Donaldson, Jr., *A Search for Principles of Mootness in the Federal Courts*, 54 Tex. L. Rev. 1289, 1299 (1976). Indeed, if any moot claim can be brought before a court simply by virtue of its being transitory and widely-shared, Article III's justiciability limits will be reduced to words without force. This Court should not permit such a result.

- ii. *Permitting federal public defenders to bring civil class actions would contravene statutory limitations on their work and evade Rule 23's requirements for class certification*

Creating space for Respondents' claims would also directly contradict Congress and federal law. This Court, following Congress' lead, has long protected statutory vehicles for collective action in order to, among other things, ensure that members' claims are properly litigated. *See Geraghty*, 445 U.S. at 406 (noting the importance of Rule 23(a)'s requirement that a named representative "fairly and adequately protect the interests of the class"). This protection is particularly critical because *every* class member is ultimately bound by the judgment in a suit and precluded from bringing their own claims separately in the future. This is why Congress has laid out extensive requirements in Rule 23 for class action lawsuits. *See* Fed. R. Civ. P. 23(a) (requiring numerosity, commonality, typicality, and adequacy of representation).

Respondents in this case did not seek any such class or collective status, or ever purport to address Rule 23's requirements. Indeed, the most that could be said is that the Federal Defenders of San Diego join the parties together through common counsel. Pet. App. 16a. But, not only does this barely scratch the surface of Rule 23, it directly contradicts the statutory limitations that Congress has placed on federal public defenders. *See* 18 U.S.C. § 3006A(a) (limiting the scope of representation); *id.* § 3006A(g)(2)(A) (barring federal public defenders from "engag[ing] in the private practice of law").

Thus, the Ninth Circuit's opinion permits federal public defenders to evade Congress' statutory limitation on the scope of their work by bringing civil class actions on the back of individual criminal appeals without ever having to satisfy the class certification requirements of Rule 23. Accordingly, any extension of the mootness exception to Respondents' claims would

disturb existing statutory requirements for formal class actions and put courts in the business of making precisely the type of legislative determinations that Article III was meant to bar.

*iii. Respondents' claims enjoy other avenues for redress that do not trigger the same concerns*

Finally, the Ninth Circuit's opinion is animated by the concern that, without some type of exception, Respondents' individual claims and the district court's broader policy would escape appellate review altogether. This isn't so. Respondents would still possess a number of avenues for redress—none of which violate Article III or breach statutory requirements.

First, as the Ninth Circuit dissent pointed out, nothing prevented Respondents or similarly situated pretrial detainees “from filing a class action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to recover damages from the individuals implementing the restraint policy, or to seek to enjoin the United States Marshal for the district from carrying out the policy.” Pet. App. 51a (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (noting that federal courts have long had the equitable power to enjoin unlawful conduct by federal officers); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183 (1938) (similar); 5 U.S.C. § 702 (waiving sovereign immunity for such claims). Additionally, the judicial council of the circuit retains supervisory authority to issue guidance to lower courts.

Respondents could also have simply attempted to file a regular class action lawsuit. Had they done so, the questions of how “class-like” Respondents' claims really are would have properly been before the Court and, under *Gerstein*, may very well have qualified for the capable-of-repetition exception.

Importantly, none of these alternative avenues would pose the problems that the posture of Respondents' case presents today. As a result, the urgent air of necessity that sounds throughout

the Ninth Circuit's opinion is overstated. This Court should vacate the error and dismiss Respondents' claims as moot without reaching any other questions in this case.

**II. EVEN IF RESPONDENTS' CLAIMS AREN'T MOOT, THE NINTH CIRCUIT IMPROPERLY EXERCISED ITS APPELLATE JURISDICTION.**

The Ninth Circuit also erred in concluding it had jurisdiction to hear Respondents' claims. Neither the collateral order doctrine nor an appellate court's supervisory mandamus authority permitted it to sit in review. Thus, lack of jurisdiction provides an independent ground for not proceeding to the merits. Again, this Court should vacate the Ninth Circuit's decision and dismiss Respondents' claims.

**A. Respondents' claims do not meet the requirements for immediately appealable collateral orders.**

By statute, appellate courts "have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. A "final decisio[n]" is ordinarily one "by which a district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). This Court, however, has "long given" § 1291 a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

As this Court held in *Cohen*, § 1291 reaches not only judgments that "terminate an action," but also a "small class" of collateral rulings that, although they do not end the litigation, are appropriately deemed "final." *Id.* "That small category includes only decisions that are (1) conclusive, (2) that resolve important questions separate from the merits, and (3) that are effectively unreviewable on appeal from the final judgment in the underlying action." *Sell v. United States*, 539 U.S. 166, 176 (2003). These "conditions are stringent," and this Court has been clear that the doctrine is "narrow" and "should stay that way." *Will v. Hallock*, 546 U.S. 345, 350

(2006). Though this Court has “been asked many times to expand the ‘small class’ of collaterally appealable orders,” it has “instead kept it narrow and selective in its membership.” *Id.*

Moreover, the collateral order doctrine remains most strict and selective in criminal cases. *See Flanagan v. United States*, 465 U.S. 259, 265 (1984). In the criminal context, this Court has allowed immediate appeal of only four types of pre-judgment orders: denials of motions to dismiss under the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979), denials of motions to reduce bail, *Stack v. Boyle*, 342 U.S. 1 (1951), denials of motions to dismiss on double-jeopardy grounds, *Abney v. United States*, 431 U.S. 651, 657 (1977), and orders to forcibly medicate, *Sell v. United States*, 539 U.S. 166 (2003).

*Sell*’s holding does not extend by analogy to the type of injury Respondents assert. First, the interests are categorically different. In *Sell*, the Court asked whether forcible medication deprived the defendant of “liberty \* \* \* without due process of law” in violation of the Fifth Amendment.” *Id.* at 178. Here, under the standard in *Bell v. Wolfish*, 441 U.S. at 535 (1979), that interest is not violated. *See, infra*, Part III.A. Second, *Sell* relied heavily on the “severity of the intrusion” and noted that many similarly irreversible liberty deprivations would not be severe enough to trigger collateral order review. The district court’s policy is much less severe than forced medication and fails to trigger the doctrine.

Finally, the Court utilizes Respondents’ appeal to, primarily, review the district court’s policy as it relates to *all* defendants. This strays from the collateral order’s intended purpose: to remedy particularly severe *individual* deprivations of liberty. The Ninth Circuit admitted as much. “Because we do not review the individual defendants’ shackling decisions, we see no reason to revisit” the applicability of the collateral order doctrine. Pet. App. 6a.

For these reasons, the collateral order doctrine does not provide appellate jurisdiction over Respondents' claims.

**B. Respondents' claims do not meet the requirements for a writ of supervisory mandamus.**

“The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): ‘The Supreme Court and all courts established by Act of Congress may issue all writs necessary and agreeable to the usages and principles of law.’ *Cheney v. U.S. Dist. Court of the Dist. of Columbia*, 542 U.S. 367, 380 (2004). The “supervisory” or “advisory” writ is one such category of usages that this Court has permitted. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957) (“We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system.”).

In order for an advisory writ to issue, three conditions must be met: (1) there must be “no other adequate means to attain the relief”; (2) the petitioner must have a “clear and indisputable” right to the writ; and, (3) the court must be “satisfied that the writ is appropriate under the circumstances.” *Cheney, supra*, at 380-81. Because the third condition is not satisfied here, the Ninth Circuit’s use of its supervisory mandamus authority was improper.

This Court has long recognized the importance of cabining access to an appellate court’s supervisory mandamus authority. In every context, appellate review is, where possible, to “be postponed, except in certain narrowly defined circumstances, until after judgment has been rendered by the trial court.” *Will v. United States*, 389 U.S. 90, 96 (1967) (internal citations omitted). In criminal and civil cases alike, the writ is “appropriate under the circumstances” according to *Cheney*’s third condition only when a district court has engaged in “willful disobedience of the rules laid down by” the Supreme Court, or “adopted a deliberate policy in open

defiance of the federal rules.” *Id.*, at 101-102. Only “exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” *Id.* at 95.

Here, the district court has not violated any federal rule of procedure or defied a higher court to the degree that *Will* requires for a supervisory writ to be appropriate. Rather, the district court appears to have done its best to comply with the Ninth Circuit’s last word on similar policies. In *United States v. Howard*, the Ninth Circuit approved a similar policy of the Central District of California involving leg restraints. 480 F.3d 1005, 1008 (9th Cir. 2007). While it is true that five-point restraints are relatively more intrusive than mere leg restraints, such “wrinkle[s]” between this case and that one do not amount to the type of “open defiance” that *Will* requires. Pet. App. 7a. Instead, as in *Will*, “the most that can be claimed on this record is that [the district court] may have erred in ruling on matters within [its] jurisdiction.” *Will*, 389 U.S. at 103-04.

Thus, the district court’s policy does not amount to the type of exceptional violation of a higher court’s rule that permits supervisory mandamus jurisdiction. As such, the Ninth Circuit’s opinion should still be vacated and defendants’ claims dismissed even if this Court deems Respondents’ claims live.

### **III. THE DISTRICT COURT’S POLICY DID NOT VIOLATE THE FIFTH AMENDMENT.**

Even if this Court reaches the merits, the district court’s policy of placing criminal defendants in physical restraints during non-jury proceedings was well within the court’s prerogative to ensure safe proceedings for the administration of law. As such, the district court’s policy was consistent with the Fifth Amendment. The Fifth Amendment prohibits individuals from being “deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.<sup>3</sup>

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<sup>3</sup> The Due Process Clauses under the Fifth and Fourteenth Amendment apply the same constitutional requirements. See *Bowles v. Willingham*, 321 U.S. 503, 518 (1944).



Though this may include “freedom from bodily restraint,” such freedom is “not absolute.” *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). In the context of pretrial detention, “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Price v. Johnston*, 334 U.S. 266, 285 (1948).

These restrictions are especially important when ensuring safety. “[T]here are occasions in which it is necessary for the State to restrain the movement” of persons “to protect them as well as others from violence.” *Youngberg*, 457 U.S. at 316. This was one such occasion. The district court’s policy applied physical restraints to criminal defendants in a high-volume district, where incidents of violence spurred the U.S. Marshals to recommend this policy to ensure safety during pretrial proceedings. *See* Pet. App. 33a-34a. Violence in the courtroom—and the harm that it poses to other parties, defendants, and judicial staff—undermines the orderly process in which parties are given fair hearing before a court of law.

Thus, the district court’s policy did not violate the Fifth Amendment because (1) the Government is entitled to enact policies necessary to secure criminal defendants prior to trial, (2) the district court’s policy did not intrude upon defendants’ procedural rights, and (3) the common law tradition supports the district court’s policy in placing restraints on criminal defendants in non-jury proceedings.

**A. The district court’s policy did not violate substantive Fifth Amendment rights because the policy falls well within the district court’s prerogative to ensure safe and orderly court proceedings.**

When administering criminal justice, the Government has broad authority to implement policies securing criminal defendants and the institutions where they are located. In *Bell v. Wolfish*, the Court recognized that the Government “has a substantial interest in ensuring that persons

accused of crimes are available for trials,” and “confinement of persons pending trial is a legitimate means of furthering that interest.” 441 U.S. 520, 534 (1979). Thus, “[o]nce the Government has exercised its conceded authority to detain a person pending trial,” it “obviously is entitled” to employ “devices that are calculated to effectuate this detention.” *Id.* at 537. *Wolfish* does not qualify the Government’s detention authority on the location of the criminal defendant. So long as the method of detention is “calculated to effectuate” the criminal defendant’s appearance before court, *id.*, the Government retains its authority to employ those methods of securing criminal defendants. This need to secure the defendant does not change the moment the person enters the courtroom, just as the need to secure the defendant does not change the moment the person leaves the holding facility on the way to court. In the courtroom, the Government has the same substantial authority and interest in ensuring that individuals do not escape the proceedings of law.

The Government’s power to detain criminal defendants pending trial also includes measures it may take to ensure security and safety. “[M]aintaining institutional security and preserving internal order and discipline” are “essential goals” that “may require limitation or retraction of the retained constitutional rights of \* \* \* pretrial detainees.” *Id.* at 546. Here, the district court’s policy of using full restraints was also a device for “maintaining institutional security” and “preserving internal order and discipline” in the courtrooms of the Southern District of California. The policy was adopted after a report by the United States Marshals Service “highlighting security problems within the district.” Pet. App. 74a. Thus, the district court’s policy served the court’s essential goal of ensuring institutional security in its courtrooms during their proceedings.

When evaluating the constitutionality of such security policies, this Court upholds the policy if it is “rationally related to a legitimate nonpunitive governmental purpose” and is not

“excessive in relation to that purpose.” *Wolfish*, 441 U.S. at 561. Put another way, if a policy is “arbitrary or purposeless,” it violates the Fifth Amendment. *Id.* The district court’s policy was neither arbitrary nor purposeless. It ensured that criminal defendants were unable to threaten physical violence in a way that would disrupt judicial proceedings or threaten other parties present in the courtroom. Thus, the use of physical restraints reasonably relates to the prevention of physical violence.

There are two additional reasons why the district court’s policy was rationally related to the Government’s security interest, and was not excessive relative to that goal. First, the policy was adopted upon recommendation of those with expertise in the institutional security concerns of the court. As this Court stated in *Wolfish*, when reviewing “whether restrictions or conditions are reasonably related to the Government’s interest in maintaining security and order” in an institution, courts “should ordinarily defer” to judgments made “within the province and professional expertise” of officials charged with operating these institutions. *Wolfish*, 441 U.S. at 540 n.23; *see also Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326 (2012) (“Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.”). Here, the district court’s policy was adopted upon recommendation by the U.S. Marshals, *see* Pet. App. 3a, whom Congress statutorily authorized to “provide for the security \* \* \* of the United States District Courts.” Pet. App. 32a (citing 28 U.S.C. § 566(a)). Absent evidence that these officials with expertise “exaggerated” their judgments in bad faith, *Wolfish* 441 U.S. at 540 n.23, the district court’s policy reasonably related to the Government’s legitimate interest in ensuring the security of courtroom proceedings.

Second, the district court's policy was narrow in temporal scope, further evidence that it was not in excess of the Government's security interest. In *Schall v. Martin*, the Court upheld the pretrial detention of juveniles against a due process challenge because such restraint was "strictly limited in time." *Schall v. Martin*, 467 U.S. 253, 269 (1984). Although juvenile defendants could be fully detained for up to 17 days, the Court declared such detention not excessive since these limited time frames were "suited to the limited purpose" of pretrial detention. *Id.* at 270. In *Wolfish*, the Court similarly states that a number of pretrial detention restrictions were within the Government's constitutional powers since they "were of only limited duration," lasting only until the defendant had their trial. 441 U.S. at 562. Like the policies in *Schall* and *Wolfish*, the district court's policy was limited in temporal duration; full restraints were applied only during court proceedings, and were entirely suited to the goal of ensuring security for the duration of those very proceedings. *Cf. Deck v. Missouri*, 544 U.S. 622, 640 (2005) (Thomas, J., dissenting) (observing that full restraint policies are applied in a limited fashion, since a "modern-day defendant does not spend his pretrial confinement wearing restraints").

Further, the Ninth Circuit erred in distinguishing *Bell v. Wolfish* on the grounds that it applied to a detention center, and not a courtroom; because the institutional concern for safety and security continues into the courtroom, *Wolfish* is still controlling. The Ninth Circuit writes, "[t]he courtroom is not a pretrial detention facility," and argues that this matters because pretrial detention facilities "are meant to restrain and keep order, not dispense justice." *United States v. Sanchez-Gomez*, 859 F.3d 649, 665 (9th Cir. 2017) (en banc).

However, the Ninth Circuit's reasoning is flawed in two ways. First, the elements of safety and order are indispensable to the administration of justice, and not contrary to it. In *Sheppard v. Maxwell*, this Court explained that "the very purpose of a court system [is] to adjudicate

controversies \* \* \* in the calmness and solemnity of the courtroom according to legal procedures.” 384 U.S. 333, 350–51 (1966) (internal citations and quotation marks omitted). This is why this Court recognizes the vital need for security to preserve the process of law. *See Holbrook v. Flynn*, 475 U.S. 560, 563 (1986) (approving of the presence of guards by criminal defendants in court “in view of the need for adequate security” and “to ensure that tense courtroom exchanges do not erupt into violence”). Security policies, such as the district court’s, serve not only to preserve the physical safety of participants in courtroom proceedings, but to preserve the integrity of those proceedings which operate under the orderly rule of law. Thus, *Bell v. Wolfish* applies in the context of courtrooms.

Second, the Ninth Circuit’s misreads the *Wolfish* rule when claiming that applying *Wolfish* to courtrooms would transform them into “places of restraint and punishment.” *Sanchez-Gomez*, 859 F.3d at 665. *Wolfish* ruled the exact opposite: that pretrial detention was *not* to be treated as punishment, since doing so would violate the Fifth Amendment. *Wolfish*, 441 U.S. at 535. Its standard provides a test for the Court to decide “whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.” *Id.* at 538. Accordingly, the application of *Wolfish* does not transform courtrooms into sites devoted to punishment, but provides the very rule protecting against policies that produce such an effect. And to the extent that *Wolfish* does justify “restraint,” it does so in a manner complementary to the orderly dispensation of justice, as described above.

Thus, under *Wolfish*, this Court need only determine whether the policy at issue is reasonably related to the Government’s interest in ensuring safety and security during its proceedings. The district court’s policy of applying restraints to criminal defendants during court

proceedings was clearly related to the aim of ensuring safety and security for all parties in those courtroom proceedings. Accordingly, the policy was constitutional under the Fifth Amendment.

**B. The district court’s policy did not violate procedural due process under *Deck v. Missouri*.**

The district court’s policy did not contravene the Fifth Amendment’s right to a fair trial because the use of full restraints is not inherently prejudicial in proceedings without a jury. The Ninth Circuit erred in relying on *Deck v. Missouri*, since *Deck* affirms the Government’s authority to implement restraints on criminal defendants, and draws the outer boundary of that authority only at the point where the defendant is brought before a jury of peers. Since the district court’s policy applied restraints only in proceedings before the bench, it reflected a constitutional exercise of the Government’s authority.

*Deck v. Missouri* held that the “the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury*.” 544 U.S. 622, 629 (2005) (emphasis added). This prohibition has two bases. First, *Deck* states that the rule against the physical restraint of criminal defendants before a jury “has deep roots in common law.” *Id.* at 626. Second, *Deck* derives this prohibition from three general principles: (1) the presumption of innocence, (2) the right to counsel, and (3) the dignity and decorum of court proceedings. *Id.* at 630-32.

Under common law, *Deck* expressly states that its prohibition of physical restraints does not apply in proceedings where a jury is not present. As the Court wrote, the common law “rule [against physical restraint] did not apply at ‘the time of arraignment,’ or like proceedings before the judge.” *Id.* at 626 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 317 (1769) and citing *Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K.B. 1722)). Because the Fifth Amendment prohibits restraints only when the criminal defendant is before a jury, *Deck* expressly

recognizes that the district court's policy, applied only to non-jury proceedings, was not subject to the same prohibition.

Moreover, the Ninth Circuit erred by dismissing as "dictum" *Deck's* declaration that the rule against restraints does not apply at non-jury proceedings. *United States v. Sanchez-Gomez*, 859 F.3d 649, 663 (9th Cir. 2017). *Deck's* unambiguous statement cannot be dismissed as dictum, since it responds to the objections in dissent and draws the limits for the right against restraint that the majority articulated. Justice Thomas' dissent raised a key historical argument about the common law right underlying the Fifth Amendment right against restraints presented in *Deck*. See *id.* at 678 (Ikuta, J., dissenting). The majority in *Deck* consequently "conceded the dissent's historical point regarding shackling at arraignments," and *Deck's* responsive historical analysis presented "part of its holding, as it bears on *Deck's* delineation of the scope of the common law rule that constitutes due process under the Constitution." *Id.* And in that responsive historical analysis, *Deck* holds that the rule against restraints does not apply at "the time of arraignment" or "like proceedings before the judge." *Deck*, 544 U.S. at 626.

The three general principles invoked in *Deck* also support the district court's policy. First, the district court's policy did not interfere with the criminal defendant's presumption of innocence because the application of restraints in non-jury proceedings is not "so inherently prejudicial" that it would brand defendants with "an unmistakable mark of guilt." *Holbrook*, 475 U.S. at 571-72. As *Deck* explains, placing defendants in restraints before a jury is problematic because it "almost inevitably implies to a jury \* \* \* that court authorities consider the offender a danger to the community." *Deck*, 544 U.S. at 633. In *Estelle v. Williams*, the Court similarly struck down a court policy under the Fifth Amendment on grounds that it "might have a significant effect on the jury's

feelings about the defendant.” 425 U.S. 501, 505 (1976) (quoting *Illinois v. Allen*, 397 U.S. 337 (1970) (emphasis added)).

But no such danger exists when the proceeding is before the bench. The court cannot mistakenly infer that “court authorities consider the offender a danger,” *id.*, because the court is the one making that discretionary determination. *See* Pet. App. 3a. And judges are not prejudiced by elements ordinarily thought to prejudice juries. For example, in pretrial suppression hearings, judges must routinely review and “screen out unreliable or illegally obtained evidence” that would ordinarily be prejudicial before a jury. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979); *see also Anderson v. Smith*, 751 F.2d 96, 106 (2d Cir. 1984) (“[A] judge conducting a bench trial can hear evidence that he ultimately determines to be inadmissible without prejudice to his verdict.”); *United States v. Graham*, 72 F.3d 352, 359 (3d Cir. 1995) (“We are confident that experienced district judges are able to avoid the influence of inappropriate, irrelevant, or extraneous information.”), *cert. denied*, 516 U.S. 1183 (1996). As the Second Circuit explained in *United States v. Zuber*, courts “will not permit the presence of the restraints to affect its sentencing decision.” 118 F.3d 101, 104 (2d Cir. 1997).

In fact, courts consistently apply the harmless error doctrine in instances where defendants’ restraints are not visible to juries, indicating that courtroom restraints only raise a cognizable effect on the presumption of innocence in cases where it might prejudice a jury. In *Chapman v. California*, this Court established the harmless error doctrine, which discerns whether or not a practice violated the right to a “fair trial” by determining whether or not the defendant suffered actual injury. 386 U.S. 18, 23 (1967). The circuit courts, applying this doctrine to the use of restraints in court, have consistently recognized that there is no injury when the restraints are not visible to a jury. *See, e.g., United States v. Tagliamonte*, 340 F. App’x 73, 81 (3d Cir. 2009)



(holding harmless error when “the restraints were concealed from the jury’s view”); *United States v. Cooper*, 591 F.3d 582, 588–89 (7th Cir. 2010) (because restraints “were not visible,” to the jury, “the jury would have had no reason to draw any adverse inference”); *United States v. Chung*, 329 F. App’x 862, 867–68 (11th Cir. 2009) (harmless error because “the district court found no evidence that any jurors had seen the shackles”). This consistent line of cases shows that the only cognizable constitutional interest against courtroom constraints is the interest against an unfairly prejudiced jury. Because the district court’s policy was performed solely in non-jury proceedings, it raised no constitutional problem.

Second, the district court’s policy did not interfere with “the right to counsel,” *Deck*, 544 U.S. at 631, since the physical restraints did not prevent criminal defendants from communicating with their counsel in court. In *Illinois v. Allen*, this Court noted that one primary concern was whether or not a security measure would interfere with defendants’ “ability to communicate with [their] counsel,” one of the “primary advantages of being present at the trial.” *Illinois v. Allen*, 397 U.S. 337, 344 (1970). *Allen* contemplated the possibility of employing both physical restraints and “gags” on a disruptive defendant. There, the Court recognized that gagging a defendant would be an extreme measure since it would entirely remove the defendant’s ability to communicate with counsel or the court. *Id.*; see also *Deck*, 544 U.S. at 631 (expressing concern over restraints that would “interfere with a defendant’s ability to participate in his own defense”).

Here, however, the district court’s policy preserved the defendants’ full range of communications with counsel and the court. The district court’s policy imposed no muzzle on criminal defendants. Defendants retained their ability to speak to counsel or to the court on their own behalf. Even in matters where the defendant might seek to take the stand on his or her behalf, the record shows that the district court’s policy applied restraints that are sufficiently flexible

enough to allow criminal defendants “to walk and move their feet around.” Pet. App. 85a. Further, these restraints “can be loosened if they are too tight,” and Respondents concede that “judges have ordered them loosened” in a number of instances. *Id.* Finally, Respondents raised no right to counsel claim under the Sixth Amendment, and even then, the record reflects no evidence that the district court’s policy had diminished defendants’ capacity to communicate with their lawyers. Since defendants retained full capacity to speak with counsels or the court, the district court’s policy did not infringe upon their right to counsel, and reflected a constitutional exercise of the court’s authority.

Third, the district court’s policy preserved the “dignified process” of law by ensuring the safety and security necessary to conduct the orderly process of law. In *Deck*, this Court explained that “judges must seek to maintain \* \* \* [t]he courtroom’s formal dignity.” 544 U.S. at 631. But the Court acknowledged that “[t]here will be cases, of course, where these perils of shackling are unavoidable,” given “the need to restrain dangerous defendants to prevent courtroom attacks.” *Id.* at 632. For the reasons articulated *supra*, p. 28, the district court’s policy preserved the dignity of court by preserving “the calmness and solemnity of the courtroom” and its “legal procedures,” *Sheppard*, 384 U.S. at 350-51, while ensuring the secure and orderly process of law. *Cf. Holbrook*, 475 U.S. at 563. Ultimately, given the balance between security and decorum necessary for the courtroom, this Court concluded in *Deck* that only the presence of “prejudicial effect” would limit the use of “visible restraints” before a jury. 544 U.S. at 631. Because the district court’s policy was only applied in non-jury proceedings, its restraints had no prejudicial effect and served only to prevent the threat of violence that would otherwise undermine the dignity of courtroom proceedings.

Accordingly, the three general principles laid out in *Deck*—(1) the presumption of innocence, (2) the right to counsel, and (3) the dignity and decorum of courtrooms—affirm the district court’s policy as a permissible exercise of its constitutional authority to ensure the safety of all parties and proceedings within its courtrooms.

*Deck*, in drawing an exception to the Government’s power to impose physical restraints before a jury, is the exception that proves the rule. It proves that the Government may implement security restraints in a courtroom so long as those restraints are not inherently prejudicial in the eyes of a jury. Because the district court’s policy applied in purely non-jury proceedings, it had no prejudicial effect on criminal defendants, and was a constitutional extension of the Government’s authority.

**C. The common law tradition supports the district court’s policy in using restraints in proceedings that are not before a jury.**

This Court need not look further than *Deck*’s express statement that the common law rule against physical restraints only applies to cases before a jury. But even if this Court decides to re-read the historical record, the common law tradition affirms the district court’s policy of using restraints with criminal defendants in non-jury proceedings.

Blackstone states the common law rule for the use of restraints on a criminal defendant when they are not before a jury. He describes the tradition at arraignment, writing that there was a difference “between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.” 4 Blackstone, *Commentaries on the Laws of England* 317. The Ninth Circuit erred by claiming that Blackstone was citing a specific exception applied in the *Trial of Christopher Layer*. This claim misreads the record laid out in Layer’s case, which affirmed the use of restraints as a general rule and denied Layer’s request to have restraints removed.

The *Trial of Christopher Layer* approved restraints upon a criminal defendant during an arraignment in line with the common law’s general rule. First, when Layer entered his arraignment, he came “brought here in Chains,” *Trial of Christopher Layer*, 16 How. St. Tr. 94, 96 (K.B. 1722) (“*Layer*”). This alone demonstrates the use of restraints as the default practice that was only modified where defendants were presented before a jury. Second, the court approved of the restraints on the defendant *prior* to the court being informed of the fact that the defendant had attempted an escape. In response to the defendant’s request to remove his restraints, the court declared, “[a]s to the chains you complain of, it must be left to those to whom the custody of you is committed by law, to take care that you may not make your escape; when you come to your trial, then your chains may be taken off.” *Id.* at 97. Thus, the common law rule mirrors the district court’s policy, which deferred to the U.S. Marshals on the use of restraints—“those to whom the Custody of [defendants] is committed by law.” *Id.* The Ninth Circuit claims that *Layer* was the exception, not the rule, because the defendant was a special flight risk. *Sanchez-Gomez*, 859 F.3d at 664. *Layer* does not support such a reading. Though Sir Robert Raymond did inform the court of the defendant’s attempted escape, he did so only after the court had already concluded with its general order that the defendant was to be kept in restraints. *Layer*, 16 How. St. Tr. at 97. Thus, *Layer* proves that the use of restraints in non-jury proceedings was standard in the common law tradition.

Third, *Layer* explains that the common law rule on courtroom restraints is primarily concerned with preserving defendants’ ability to represent themselves in court—because the district court’s policy did not interfere with criminal defendants’ self-representation, it is consistent with the common law tradition. Historically, the rule against restraints was meant to prevent restraints from inflicting pain upon defendants, which would interfere with their ability to represent

themselves in front of the court. *See, e.g.,* J. Kelyng, A Report of Divers Cases in Pleas of the Crown 10 (1708). As the court in *Layer* explains, the prohibition was meant to allow a defendant to “have the use of his reason, and all advantages to clear his innocence.” *Layer*, 16 How. St. Tr. at 100. But the court in *Layer* simultaneously concluded that this did not apply in pretrial proceedings since “[h]ere he is only called upon to plead by advice of his counsel; he is not to be tried now,” and “when he comes to be tried, if he makes that complaint, the Court will take care he shall be in condition proper to make his defense.” *Id.* at 100-101. Under the common law tradition, then, the dispositive factor for the appropriate use of restraints was whether or not they would interfere with a defendant’s ability to represent themselves in court. Because the district court’s policy here did not interfere with defendants’ capacity to defend themselves, the district court’s policy is consistent with the core principle behind the common law rule against restraints.

Another case, *King v. Waite*, affirms that the English common law adopted restraints as a default until defendants began trial before a jury. In *King v. Waite*, “[t]he prisoner, at the time of his arraignment, desired that his irons might be taken off.” 1 Leach 28, 36 (K.B. 1743). But the court informed him that it “had no authority for that purpose until the Jury were charged to try him.” *Id.* Only after pleading before the bench, “and being put upon his trial, the Court immediately ordered his fetters to be knocked off.” *Id.* Thus *Waite* reinforces the common law rule that defendants were placed in restraints during arraignment or other proceedings before the bench. The Ninth Circuit’s majority in *Sanchez-Gomez* fails to make even a passing reference to *Waite*, principally because *Waite* contradicts the outcome that the majority wished to reach. *Waite*, as in *Layer*, proves that the common law tradition permitted the use restraints to criminal defendants unless they stood before a jury.

While the Ninth Circuit cites William Hawkin’s treatise to argue otherwise, the Ninth Circuit places too much weight in those writings, which proffer Hawkin’s personal view, and not the binding tradition of the day. Hawkin’s treatise claims that

[E]very person at the time of his arraignment, *ought to* be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore *ought not to* be brought to the bar in a contumelious manner; as with his hands tied together.

2 William Hawkins, *A Treatise of the Pleas of the Crown* 434 (John Curwood, 8th ed. 1824) (emphasis added). However, Hawkin’s commentary only reflects what he believes “ought to be” the case, and not the common law tradition as practiced. He concludes that very paragraph with this comment: “It seems indeed to have been beheld by some, that this is a particular privilege of persons in holy orders; but it seems the better *opinion*, that law makes no distinction in this respect between them and laymen.” *Id.* (emphasis added). Here, it is evident that Hawkins’s comment acknowledges disagreement in the views of other scholars, and admits that his writing reflects his opinion, in contrast to the opinions of others. But the subjective opinion of a commentator does not reflect the “deep roots” of traditional common law. *Deck*, 544 U.S. at 626. Rather, the appropriate metric to observe the common law tradition is in its actual practice. And the cases of *Layer* and *Waite* show that the practice of using restraints on a criminal defendant is permissible when they are not before a jury.

Additionally, American courts have applied the common law rule for courtroom restraints in a manner consistent with the district court’s policy. The Mississippi Supreme Court, in *Lee v. State*, wrote that restraints on criminal defendants “may be safely committed to courts and sheriffs,” 51 Miss. 566, 574 (1875), *overruled on other grounds*, *Wingo v. State*, 62 Miss. 311 (1884). And “[o]ther state courts similarly recognized the distinction between arraignment and

trial,” recognizing that there was only a specific rule against restraint when it was in the latter, before a jury. *Sanchez-Gomez*, 859 F.3d at 679-80 (9th Cir. 2017) (Ikuta, J., dissenting) (citing *State v. Temple*, 92 S.W. 869, 872 (Mo. 1906), *Rainey v. State*, 20 Tex. App. 455, 472 (1886), *People v. Harrington*, 42 Cal. 165, 167 (1871), and *Parker v. Territory*, 52 P. 361 (Ariz. 1898)). State cases therefore reflect the common law rule that restraints are within the constitutional authority of the Government when they are not done before a jury.

The state cases cited by the Ninth Circuit do not hold the contrary. Those cases only held restraints impermissible when defendants were placed before *juries*, and are consequently consistent with *Deck* and Petitioner’s position that defendants may be put in restraints unless doing so would prejudice them in the eyes of a jury. *Rainey v. State*, for example, dealt with the removal of restraints before a jury. 20 Tex. App. 455, 472 (1886) (citing *State v. Kring*, 64 Mo. 591, 592-93 (1877), which affirmed the rule against restraints only applied “when brought before the jury for trial” because “the jury must necessarily conceive a prejudice”). *Parker v. Territory* similarly stated that “if it were a fact that [the defendant] was in shackles at the time of arraignment, but not at the time of trial,” such restraint would be permissible since it would not have “deprived [defendant] of his right to manage and control in person his own defense untrammelled.” 52 P. 361, 363 (Ariz. 1898). Only one case, *Blair v. Commonwealth*, discouraged the use of restraints in pretrial proceedings, but even *Blair* admits that the reason for the rule is the underlying principle of avoiding the unfair prejudice of a criminal defendant “in the eyes of a jury.” 171 Ky. 319, 188 S.W. 390, 393 (Ky. Ct. App. 1916). Because that the district court’s policy raised no fear of prejudicing the defendant before a jury, this case, like the others cited by the Ninth Circuit, does not counsel against the policy enacted by the district court.

The common law tradition reiterates what this Court already understood in its rulings in *Wolfish* and *Deck*. It reiterates the Government's broad authority to implement policies securing criminal defendants pending judgment, an authority that ends only at the point where it would prejudice the defendant's defense. The district court's policy had no such detriment to criminal defendants, since it applied only in non-jury proceedings. This policy was thereby a constitutional exercise of the Government's authority to protect all parties in the courtroom and ensure that all may safely have their day in court.

## CONCLUSION

For the foregoing reasons, this Court should decline to reach the constitutionality of the district court's policy, vacate the Ninth Circuit's judgment on that issue, and dismiss Respondents' claims.

If this Court chooses to reach the question of the policy's constitutionality, then the judgment of the court of appeals should be reversed.

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NOVEMBER 5, 2017



## PETITIONER'S APPENDIX

**Article III, Section 2, Clause 1 of the United States Constitution** outlines the scope of judicial authority is presented in full below:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, sec. 2, cl. 1

**The Fifth Amendment to the United States Constitution** is presented in full below:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

**28 U.S.C. § 566** outlines the powers and duties of the United States Marshals Service and is presented in full below:

(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.

(b) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in that district, and of the Court of International Trade holding sessions in that district, and may, in the discretion of the respective courts, be required to attend any session of court.

(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.

(d) Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

(e)(1) The United States Marshals Service is authorized to--

(A) provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding;

(B) investigate such fugitive matters, both within and outside the United States, as directed by the Attorney General;

(C) issue administrative subpoenas in accordance with section 3486 of title 18, solely for the purpose of investigating unregistered sex offenders (as defined in such section 3486); and

(D) assist State, local, and other Federal law enforcement agencies, upon the request of such an agency, in locating and recovering missing children.

(2) Nothing in paragraph (1)(B) shall be construed to interfere with or supersede the authority of other Federal agencies or bureaus.

(f) In accordance with procedures established by the Director, and except for public money deposited under section 2041 of this title, each United States marshal shall deposit public moneys that the marshal collects into the Treasury, subject to disbursement by the marshal. At the end of each accounting period, the earned part of public moneys accruing to the United States shall be deposited in the Treasury to the credit of the appropriate receipt accounts.

(g) Prior to resignation, retirement, or removal from office--

(1) a United States marshal shall deliver to the marshal's successor all prisoners in his custody and all unserved process; and

(2) a deputy marshal shall deliver to the marshal all process in the custody of the deputy marshal.

(h) The United States marshals shall pay such office expenses of United States Attorneys as may be directed by the Attorney General.

(i) The Director of the United States Marshals Service shall consult with the Judicial Conference of the United States on a continuing basis regarding the security requirements for the judicial branch of the United States Government, to ensure that the views of the Judicial Conference regarding the security requirements for the judicial branch of the Federal Government are taken into account when determining staffing levels, setting priorities for programs regarding judicial security, and allocating judicial security resources. In this paragraph, the term “judicial security” includes the security of buildings housing the judiciary, the personal security of judicial officers, the assessment of threats made to judicial officers, and the protection of all other judicial personnel. The United States Marshals Service retains final authority regarding security requirements for the judicial branch of the Federal Government.

28 U.S.C. § 566.

**Federal Rule of Civil Procedure 23** outlines the requirements for class action lawsuits and is presented in full below:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 23.

**18 U.S.C. Section 3006A(a)** outlines the scope of representation by counsel provided to defendants by district courts. It is presented in full below:

(a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

(1) Representation shall be provided for any financially eligible person who—

(A) is charged with a felony or a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;



(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under section 4109 of this title.

(2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

(A) Attorneys furnished by a bar association or a legal aid agency,

(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

18 U.S.C. § 3006A(a).

**18 U.S.C. § 3006A(g)(2)(A)** outlines the proper scope of professional authority of federal public defenders and is presented in full below:

(g) Defender organization.—

(2) Types of defender organizations.—

(A) Federal Public Defender Organization.--A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

18 U.S.C. § 3006A(g)(2)(A).

**28 U.S.C. Section 1291** gives appellate courts jurisdiction over all final decisions of district courts and is presented in full below:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291.

**28 U.S.C. Section 1651(a)** outlines the authority of appellate courts to issue writs of supervisory mandamus and is presented below in full:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651.