No. 17-312

IN THE

Morris Tyler Moot Court of Appeals at Yale

UNITED STATES OF AMERICA

Petitioner,

v.

RENE SANCHEZ-GOMEZ, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The Southern District of California adopted a policy of routinely shackling all pretrial defendants with no individualized determination of necessity. Four defendants, the respondents here, collectively challenged their individual shackling and the district-wide policy. Although the appeals were interlocutory and the defendants' criminal cases had ended, the en banc Ninth Circuit held that it had jurisdiction under its mandamus power and that the challenge fell into the "capable of repetition, yet evading review" mootness exception. On the merits, the court held that that shackling policy violated the Due Process Clause.

The questions presented are:

1. Whether the Ninth Circuit correctly held that it had appellate jurisdiction and that the respondents' claims were "capable of repetition, yet evading review."
2. Whether indiscriminate shackling of the accused violates the Fifth Amendment right to due process of law.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

TABLE OF AUTHORITIES—continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page

OPINIONS BELOW

The decision of the en banc Ninth Circuit is reported at 859 F.3d 649 and appears at Pet. App. 1a-70a. The decision of the Ninth Circuit panel is reported at 798 F.3d 1204 and appears at Pet. App. 71a-82a. The decision of the Southern District of California denying the motion in the consolidated cases of Ms. Morales, Mr. Patricio-Guzman, and Mr. Sanchez-Gomez is unreported, but is available at 2013 WL 6145601 and at Pet. App. 83a-99a. The oral order of the Southern District of California in the fourth case is unreported, but is available at Pet. App. 100a-104a.

JURISDICTION

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

CONSTITUTIONAL AND STATURY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> 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.

STATEMENT

A. The Southern District's shackling policy

In the Southern District of California, all pretrial detainees, including the sick, the elderly, and the disabled, appeared in court cuffed, chained, and fettered, with no individualized finding

that this treatment was necessary. This policy began in July 2013, when the U.S. Marshals Service, citing security concerns based on resource constraints and a "change in inmate demographics,"[1] recommended a districtwide policy of producing all in-custody defendants in "full restraints" for non-jury proceedings. Pet. App. 32a, 80a. A person in "full restraints" has her hands cuffed together, with the cuffs connected by a fifteen-inch chain to a waist-level "belly chain." Pet. App. 3a, 74a, 85a. Her feet are shackled and bound together with a chain between twelve and eighteen inches long. Pet. App. 3a, 85a. The district "decided to defer" to the Marshals' proposal with a few minor exceptions. Pet. App. 34a, 74a. Judges reserved the authority to ask the Marshals to unshackle particular defendants. Pet. App. 3a. And district judges, but not magistrates, directed the Marshals to unshackle defendants' arms and hands (but not their feet) during most guilty pleas and sentencing hearings. Pet. App. 3a-4a. The shackling began in October 2013. Pet. App. 34a.

While the policy was in effect, "the Marshals shackled all in-custody defendants at pretrial proceedings." Pet. App. 4a. Aside from the courtroom of the single judge who opted out of the policy, full shackling was uniform and indiscriminate, and judges summarily dismissed defendants' requests to be freed from the chains. Pet. App. 4a. After ruling on a few defendants' objections, the judges abandoned all pretense of individualized consideration. Pet. App. 4a. They incorporated general security justifications made in previous hearings and refused to allow defendants to make complete evidentiary records. Pet App. 20a. They declined to conduct individualized determinations because they did not "want to go through it a bunch of times." Pet. App. 4a.

[1] The Marshals' recommendation relied in part on the fact that out of the approximately 40,000 annual in-custody appearances in the Southern District, two assaults occurred in 2013. Pet. App. 32a-33a.

Defendants who posed no reasonable risk of flight or violence endured "the degradation of human beings who stand before a court in chains without having been convicted." Pet. App. 31a. A visually-impaired defendant was produced with one free hand to use his cane, but the other hand was shackled and linked to a belly chain, and his feet were chained. Pet. App. 5a. Another defendant appeared in shackles, despite having a fractured wrist. Pet. App. 5a. The judges denied their motions to be unshackled "for all of the reasons previously stated." Pet. App. 5a. One wheelchair-bound defendant, whose "dire and deteriorating" health likely obviated any security concerns, appeared in shackles. The judge "noted" her objection, but "appreciate[d] [counsel] not taking any more time" with it. Pet. App. 5a (alterations in original).

B. Procedural background

The four defendants here were all shackled at pretrial proceedings and collectively challenged their individual shackling and the district-wide policy. Ms. Morales's, Mr. Patricio-Guzman's, and Mr. Sanchez-Gomez's cases were consolidated before a district court judge who upheld the shackling policy in November 2013. Pet. App. 99a. The same week, a district court judge upheld a magistrate's decision to shackle Mr. Ring. Pet. App. 104a. The appeals were consolidated in the Ninth Circuit, where a panel unanimously held that it had jurisdiction under the collateral order doctrine and that the blanket shackling policy lacked adequate justification. Pet. App. 75a, 81a.

By the time the Ninth Circuit heard the case, three of the defendants had pleaded guilty and the fourth's charges had been dismissed with prejudice. Pet. App. 35a & n.2. The Southern District also stopped shackling pretrial detainees in light of litigation, although the Government has avowed that it will seek to resume shackling if given the opportunity. Pet. App. 16a-17a. The en

banc court noted these jurisdictional issues, but held that the case was not moot because the "capable-of-repetition-yet-evading-review mootness exception" applied and the policy could be reinstated at any time. Pet. App. 14a, 16a. It also construed the appeal as a petition for a writ of mandamus, giving it jurisdiction over the shackling policy. Pet. App. 7a. The court held that the Southern District's policy of shackling all in-custody defendants without an individualized justification was an unconstitutional deprivation of the "fundamental right to be free of unwarranted restraints," but exercised its discretion not to issue the writ given that the policy had been temporarily abated. Pet. App. 30a.

SUMMARY OF ARGUMENT

1. Respondents, like all other pretrial detainees in the Southern District of California, have suffered an unconstitutional deprivation of their liberty. Provided that jurisdictional requirements are met, respondents deserve a remedy. The three jurisdictional doctrines at issue in this case have been characterized as "practical," "discretionary," and "flexible." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)) (collateral order doctrine); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (mootness exception for claims capable of repetition, yet evading review); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 260 (1957) (mandamus). And it is a foundational principle of American law that "every right, when withheld, must have a remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). Respondents meet the jurisdictional requirements and have suffered a grievous constitutional harm. A remedy must lie.

As a category, pretrial shackling decisions fall into the collateral order exception to 28 U.S.C. § 1291's final judgment rule. Under this doctrine, some interlocutory orders are immediately appealable so long as they "[1] conclusively determine the disputed question, [2] resolve an

important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Pretrial shackling decisions fulfill all of these criteria. There was no indication that the district court would revisit its shackling decisions, shackling implicates important constitutional rights and is conceptually distinct from a defendant's guilt or innocence, and shackling violates defendants' dignity in a way that cannot be cured after the fact.

If the collateral order exception does not apply, then respondents are eligible for a writ of mandamus. This Court has long recognized that mandamus is a tool for the courts of appeal to exercise "supervisory control" over their districts, in part to avoid the "abdication of the judicial function." *La Buy*, 352 U.S. at 256, 259-60. When all but one of a district's judges completely abdicate their responsibility for the rights of their litigants to the Marshals Service, mandamus is appropriate. Respondents have also satisfied the factors for mandamus laid out in *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). Without a collateral appeal, respondents have "no other adequate means" to challenge pretrial shackling, their right to the writ is "clear and indisputable," and in light of the Ninth Circuit's discretion, mandamus would be "appropriate under the circumstances" were the Government to reinstate the shackling policy. *Cheney*, 542 U.S. at 380-81. This discretion warrants special deference given the Ninth Circuit's judicious use of its mandamus authority over the last several decades.

The constitutional harm defendants suffer from pretrial shackling is reasonably likely to reoccur, but will not last long enough to receive judicial review. The mootness exception for cases that are "capable of repetition, yet evading review" therefore applies. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna* 523 U.S. 1, 17 (1998)).

The less-than-six months that all of these defendants spent in pretrial custody is insufficient for full judicial review. And the revolving door of justice means that these defendants may well be shackled again. Indeed, two of them have already been rearrested in the Southern District where they appeared before judges who participated in the shackling policy. Because the constitutional harm caused by shackling is one that is "*capable* of repetition," yet does not last long enough for judicial review, this exception to the mootness doctrine applies.

Nor is this case mooted by the Government's voluntary cessation of the policy. Voluntary cessation only moots a case if the "allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 157, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Here, the Government has confirmed that it will seek to reinstate the policy if given the opportunity, making recurrence nearly certain. Pet. App. 16a-17a.

2. With these jurisdictional barriers resolved, this Court must address the constitutional harm of pretrial shackling without an individualized finding of necessity. A practice is proscribed under the Due Process Clause if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445-46 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). Courts applying this standard ask (1) whether the rule has "deep roots in our common-law heritage," and (2) whether the practice "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 444, 448 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). The rule against pretrial shackling without demonstrated need has deep roots in the common law, and in

practice indiscriminate shackling transgresses the presumption of innocence, the rights to counsel and participation in one's own defense, and the dignity of the accused.

The rule prohibiting shackling at pretrial proceedings is deeply embedded in the common law and is therefore fundamental to our system of ordered liberty. Early English jurists agreed that shackling at arraignment was not permitted absent a showing of special need, like risk of violence or escape. This common-law rule was adopted by early American courts and carried forward by the states. Thus, since "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental," *Medina*, 505 U.S. at 446, the right to be free from unwarranted restraints is protected by the Due Process Clause.

Moreover, as *Deck v. Missouri* recognized, shackling without an individualized determination of necessity violates "three fundamental legal principles." 544 U.S. 622, 630 (2005). First, shackling compromises the presumption that the accused is innocent until proven guilty by suggesting that "the justice system itself sees a 'need to separate a defendant from the community at large.'" *Id.* at 630 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)). Given that *Deck* considered post-conviction shackling, the presumption of innocence is more seriously implicated here than in that case. Second, unwarranted restraint may unduly hinder, encumber, and humiliate the accused, jeopardizing the fundamental rights to counsel and to participate in one's own defense. *See id.* at 631. Since these rights are fundamental at all critical stages of the criminal process, this reasoning applies with like force in non-jury settings. Finally, routine shackling undermines the dignity and decorum of the courtroom, which includes "the respectful treatment of defendants." *Id.* A defendant who appears in chains in front of friends, family, and the public suffers as serious

a dignitary harm as a defendant who is shackled in the presence of a jury. Thus, unjustified shackling of the accused transgresses these fundamental principles at non-jury proceedings, and the Southern District of California's indiscriminate shackling of all pretrial detainees violates the Fifth Amendment's guarantee that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

ARGUMENT

I. The Ninth Circuit had jurisdiction.

A. Pretrial shackling determinations are appealable as collateral orders.

Pretrial shackling decisions are appealable as collateral orders under 28 U.S.C. § 1291. The U.S. Courts of Appeals have jurisdiction over appeals from "all final decisions" of the district courts. 28 U.S.C. § 1291. While this provision generally refers to decisions entering judgment, this Court "has long given" it a "practical rather than a technical construction." *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 546). This Court has taken an expansive view of finality "in the interest of 'achieving a healthy legal system.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cobbledick v. United States*, 309 U.S. 323, 326 (1940)). Therefore, certain prejudgment orders that "are 'collateral to' the merits of an action and 'too important' to be denied immediate review" are treated as final decisions. *Mohawk*, 558 U.S. at 103 (quoting *Cohen*, 337 U.S. at 546). Orders are treated as appealable under § 1291 for the "entire category to which a claim belongs" and not on a case-by-case basis. *Digital Equip.*, 511 U.S. at 868.

The collateral order doctrine is "equally applicable in both civil and criminal proceedings." *Abney v. United States*, 431 U.S. 651, 659 n.4 (1977). Concerns about delaying criminal trials have sometimes led this Court to remark that the need to avoid "piecemeal appellate review" is "at its

strongest in the field of criminal law." *Flanagan v. United States*, 465 U.S. 259, 264 (1984) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). However, shackling orders, like the bail orders in *Stack v. Boyle*, 342 U.S. 1 (1951), can be appealed without delaying other proceedings and therefore do not raise special finality concerns.

In order for a collateral order to be appealable, it "[1] must conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

1. The district court "conclusively determine[d]" that respondents would be shackled at pretrial appearances. *Coopers & Lybrand*, 437 U.S. at 468. After the district court's decisions, there were "simply no further steps" that the respondents could take in the district court to avoid continued shackling. *Abney*, 431 U.S. at 659. In the consolidated case, the district court emphatically denied the challenge to the shackling policy. Pet. App. 99a. While the judge in Mr. Ring's case stated that his ruling was "tentative," he denied the motion without any indication that he would be revisiting the decision. Pet. App. 104a. Other judges in the Southern District were even clearer, telling defense counsel that their objection was noted, but that "[counsel doesn't] have to repeat that every time." Pet. App. 4a (alteration in original). These orders are a "complete, formal, and in the trial court, final rejection" of the respondents' request not to be shackled. *Abney*, 431 U.S. at 659.

2. Pretrial shackling is "an important issue completely separate from the merits" of each defendant's guilt or innocence. *Coopers & Lybrand*, 437 U.S. at 468. Like the claim in *Sell* that forced medication violated the defendant's due process rights, the claim here "raises questions of

clear constitutional importance." *Sell v. United States*, 539 U.S. 166, 176 (2003). Respondents have been denied their due process right to be free of unwarranted restraints. The individual dignity they are being denied is not just important, it is the "lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834 (1975) (quoting *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Brennan, J., concurring)).

For an issue to be collateral, it must be "conceptually distinct from the merits." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). However, some "factual overlap between a collateral issue and the merits" is permitted. *Id* at 529 n.10. As discussed below, pretrial shackling can prejudice the outcome, but it also works a separate harm to individual dignity and courtroom decorum. Moreover, shackling, like forced medication or double jeopardy, is completely separate from whether the defendant "is guilty or innocent of the crimes charged." *Sell*, 539 U.S. at 176; *accord Abney*, 431 U.S. at 659. Even if shackling can affect the outcome of a case, it has no bearing on actual guilt and is "conceptually distinct from the merits." *Mitchell*, 472 U.S. at 527.

3. Pretrial shackling as a category is "effectively unreviewable on final judgment." *Coopers & Lybrand*, 437 U.S. at 468. In *Stack*, this Court held that bail orders fall within the collateral order exception. 342 U.S. at 6 (citing *Cohen*, 337 U.S. at 545-47). As Justice Jackson, the author of *Cohen*, explained in his concurrence, if bail is not "reviewed before sentence, it can never be reviewed at all." *Id.* at 12 (Jackson, J., concurring). Similarly, pretrial shackling cannot effectively be reviewed after sentencing. The Government readily concedes this point by arguing that these shackling claims become moot after conviction. While *this* case is not moot because the respondents are challenging a general policy which could apply to them in the future, this Court determines

collateral order exceptions on a categorical level. *Digital Equip.*, 511 U.S. at 868. If shackling claims are to be reviewed at all, they must be collaterally reviewable like the bail orders in *Shack*.

Shackling also causes harm that cannot be cured after judgment. Shackling "'[a]ffronts' the 'dignity and decorum of judicial proceedings.'" *Deck*, 544 U.S. at 631 (alteration in original) (quoting *Allen*, 397 U.S. at 344). In *Sell*, this Court held that forced medication before trial was immediately appealable because by the time a judgment was entered, Sell would have already suffered "the very harm that he seeks to avoid"—the forced medication itself. 539 U.S. at 177. Respondents here are in the same situation. They are facing a dignitary harm that cannot be remedied after the fact.

Post-deprivation review is especially inadequate for defendants who win dismissal or acquittal. For them, there is no possibility for post-conviction appeal. As the Court observed in *Sell*, the defendant "cannot undo [the] harm [of forced medication] even if he is acquitted." 539 U.S. at 177. Here, Mr. Ring had the charges against him dismissed with prejudice. Pet App. 36a. Yet were he only challenging his own shackling, he would have no remedy without a collateral appeal.

Defendants who plead guilty like Mr. Sanchez-Gomez, Mr. Patricio-Guzman, and Ms. Morales, *see* Pet. App. 35a, also lack an effective way to challenge their shackling after conviction. In addition to the dignitary harm of pretrial shackling, convicted defendants are prejudiced by their hampered ability to communicate with their lawyers and participate in their own defense. *See Deck*, 544 U.S. at 631. For example, shackling can make it difficult for a defendant to fully engage with the plea colloquy.[2] This can cause constitutional harm without rising to the extremely high bar

[2] While district judges in the Southern District directed the Marshals to remove arm shackles during plea colloquies and sentencing hearings, they did not require the removal of fetters, and magistrate judges conducted plea colloquies and sentencing hearings with fully shackled defend-

needed to reverse a guilty plea. If "voluntary and intelligent," a guilty plea "renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). A hampered ability to communicate with counsel may not make a plea involuntary or unintelligent, but in a system where plea bargaining "*is* the criminal justice system," *Missouri v. Frye*, 566 U.S. 134, 144 (2012), this impediment can still lead defendants to take pleas they might not have otherwise taken, a harm that cannot be appealed after conviction.

B. In the alternative, the Ninth Circuit had supervisory mandamus jurisdiction.

If the respondents are not permitted to appeal their shackling determinations as final orders, then they have "no other adequate means to attain the relief" they desire and are eligible for a writ of mandamus if the Government reinstates the shackling policy.[3] *Cheney*, 542 U.S. at 380. The All Writs Act gives "all courts established by Act of Congress" the power to "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. Mandamus is a "drastic and extraordinary remedy," but is used when "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947). If this

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ants. Pet. App. 3a. All of the respondents who pleaded guilty did so before a magistrate. *See* Criminal Docket, *United States v. Morales*, No. 13-cr-04126 (S.D. Cal. Mar. 11, 2014); Criminal Docket, *United States v. Sanchez-Gomez*, No. 13-cr-04209 (S.D. Cal. Nov. 21, 2013); Criminal Docket, *United States v. Patricio-Guzman*, No. 13-mj-03882 (S.D. Cal. Oct. 31, 2013).

[3] The Southern District has suspended its shackling policy in response to other litigation. Pet. App. 16a. However, the Government has made clear that if it prevails here, it will seek to resume shackling. Pet. App. 16a-17a. As described below, this voluntary cessation does not render the case moot. However, it led the Ninth Circuit to exercise its discretion not to issue the writ at this time, instead indicating that it will do so if the Government resumes this unconstitutional policy. Pet. App. 30a. Respondents do not challenge the Ninth Circuit's decision to decline to issue the writ, but argue that because the Ninth Circuit could have issued the writ, it had jurisdiction to decide the case.

Court rejects respondents' right to appeal under the collateral order doctrine, then mandamus is the appropriate response to the Southern District of California's total abdication of pretrial detainees' right to be free from shackling.

1. As a preliminary matter, the Ninth Circuit had the power to construe respondent's appeal as a petition for a writ of mandamus. While this Court has expressly taken no view on this practice, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 n.14 (1988), the writ of mandamus "may be granted or withheld in the sound discretion of the Court," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). This flexible approach to mandamus weighs in favor of allowing circuits to construe appeals as petitions for mandamus. Other circuits routinely do so. *See In re Grand Jury Subpoenas*, 573 F.2d 936, 940 (6th Cir. 1978) (collecting cases). Given the "new and important problems" manifest in a district-wide policy denying defendants their constitutional right not to be shackled without cause, forcing respondents to refile their case as a mandamus petition would only create needless delay. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964).

2. Mandamus's "corrective and didactic function" supports its use here. *Will v. United States*, 389 U.S. 90, 107 (1967). The mandamus power includes the "supervisory control of the District Courts by the Courts of Appeals" because such supervision "is necessary to proper judicial administration in the federal system." *La Buy*, 352 U.S. at 259-60. Supervisory mandamus can work both "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will*, 389 U.S. at 95 (quoting *Roche*, 319 U.S. at 216). Its use is appropriate both when there is judicial "usurpation" and "abdication." *Id.*; *La Buy*, 352 U.S. at 256.

Supervisory mandamus is appropriate because the Southern District of California has committed "an abdication of the judicial function" by giving the Marshals Service complete discretion in shackling defendants. *Id*. In *La Buy*, this Court held that mandamus was appropriate where a district judge delegated a burdensome antitrust trial to a special master. 352 U.S. at 250-51, 258, 260. Because the district court judge had abdicated his responsibilities by refusing to hear the case, the Court of Appeals could compel him to act via mandamus. *Id.* at 256. In contrast, in *Will*, this Court held that mandamus was not an appropriate way to block a discovery order, because the judge carefully considered the "legitimate needs of the defendant in the case before him" and there was "no indication that he considered the case to be governed by a uniform and inflexible rule." 389 U.S. at 103. The delegation of nearly all shackling decisions to the Marshals Service reflects the total abdication of *La Buy* and not the individualized consideration of *Will*. Judges in the Southern District of California shackled defendants without regard to their "individual characteristics." Pet. App. 5a. While one district judge opted out of the policy, every other judge in the Southern District shackled *every* pretrial detainee with only a general reference to security concerns and "changing demographics." Pet. App. 4a. They shackled a woman in a wheelchair, a vision-impaired man with a cane, and a woman with a broken wrist. Pet. App. 5a. This is not the kind of individualized decision-making that we require from the district courts.

3. Against this backdrop, respondents fulfilled the mandamus requirements laid out in *Cheney*. They have "no other adequate means" to challenge the shackling policy, their right to the writ is "clear and indisputable," and the Ninth Circuit properly exercised its discretion to find that the writ would be "appropriate under the circumstances" were the policy in effect. *Cheney*, 542

U.S. at 380-81 (quoting *Kerr v. U.S. Dist. Court*, 425 U.S. 394, 403 (1976); and then quoting *Fahey*, 332 U.S. at 260).

a. Respondents have "no other adequate means to attain the relief" they desire. *Id.* at 380. The purpose of this requirement is "to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-81. As this Court has recognized, mandamus can serve as a fallback when an appeal is not available under the collateral order doctrine. *See Mohawk*, 558 U.S. at 111. If the Court rejects respondents' collateral order doctrine argument, it will implicitly be holding that they cannot challenge the shackling determinations through the regular appeals process. As outlined above, post-conviction review is an inadequate means to challenge the general policy, particularly for defendants like these who plead guilty or have the charges against them dismissed.

Other alternatives are also inadequate. The Federal Rules of Criminal Procedure have no class action procedure analogous to the Civil Rules. The Ninth Circuit dissent suggests that defendants bring a civil class action for damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), or for injunctive relief. Pet. App. 51a. The Ninth Circuit issued its opinion before this Court's decision in *Ziglar v. Abbasi*, which reaffirmed that expanding *Bivens* is a "'disfavored' judicial activity," requiring a "special factors analysis" before its extension to new contexts. 137 S. Ct. 1843, 1857, 1860 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Given this high bar, it seems unlikely that a *Bivens* action would lie here, especially when this Court has noted that *Bivens* is not a "proper vehicle for altering an entity's policy." *Id.* at 1860 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Even if it did, judges in the Southern District could plead absolute immunity, *see Mireles v. Waco*, 502 U.S. 9, 9 (1991), and the marshals could plead

qualified immunity, an extremely high bar that protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Given these hurdles, a *Bivens* action is an inadequate alternative.

As for injunctive relief, the indigent defendants here are represented by the Federal Defenders, who are subject to statutory limits on the scope of their representation and are forbidden from engaging in the private practice of law. 18 U.S.C. §§ 3006A(a), 3006A(g)(2)(A). Given that they have no Sixth Amendment right to counsel in civil cases, *Turner v. Rogers*, 564 U.S. 431, 441 (2011), respondents have no other realistic way to gain representation. Mandamus "provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders." *Sampson v. United States*, 724 F.3d 150, 159 (1st Cir. 2013) (quoting Charles A. Wright et al., 16 *Federal Practice and Procedure* § 3934.1 (2d ed. 2013)). Given this flexible goal, this Court should acknowledge the practical reality that indigent pretrial detainees do not have the means to bring a civil class action for injunctive relief, even if a federal court might have the power to issue equitable relief. *See Armstrong v. Exceptional Childcare Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Asking a transient group of detainees to retain a private lawyer willing to litigate a massive civil class action with no prospect for a contingent fee is simply not an adequate alternative.

The Ninth Circuit Judicial Council is also not an adequate means for respondents to obtain relief. Pet. App. 52a. There is no mechanism for criminal defendants to petition the Judicial Council for action. *See* 28 U.S.C. § 332. And even if there was, asking indigent defendants to lobby a policymaking body is hardly an adequate alternative. In many of this Court's mandamus cases, petitioners could have sought relief from the Judicial Council or even Congress. In *La Buy*, for

example, the circuit Judicial Council had the power, as it still does today, to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, § 332, 62 Stat. 869, 902. The litigants in that case could have lobbied the circuit to make a rule or Congress to make a law forbidding the delegation of antitrust cases to masters. Yet, this Court did not even entertain the notion that mandamus would be unavailable if the petitioners could attain the desired result through a policy change. This Court should reject the same suggestion here. Pretrial detainees should not have to lobby policymakers for the rights the Constitution affords them.

b. The respondents' right to a writ of mandamus is "clear and indisputable." *Cheney*, 542 U.S. at 381. As detailed below, pretrial detainees throughout the Southern District of California are being subjected to an unconstitutional deprivation of their liberty. Indiscriminate pretrial shackling was forbidden at common law and is inconsistent with fundamental fairness. Pretrial shackling also infringes on three fundamental legal principles articulated by this Court in *Deck*: the presumption of innocence, the right to counsel, and the dignity of the courtroom. 544 U.S. at 630-31. Judges cannot merely abdicate decisions about these due process rights to the Marshals Service. If the policy is unconstitutional, then mandamus is appropriate.

c. With the first two prongs of *Cheney* established, the Ninth Circuit had discretion to issue the writ. While it chose not to do so given the temporary cessation of the policy, this does not deprive it of jurisdiction. This Court has repeatedly emphasized that "the issuance of the writ is a matter vested in the discretion of the court to which the petition is made." *Cheney*, 542 U.S. at 391; *see also Schlagenhauf*, 379 U.S. at 111 n.8. The Ninth Circuit therefore had the discretion to

declare the policy unconstitutional, but declined to issue the writ. This sort of "commendable self-restraint" is a judgment that should be respected by this Court. *La Buy*, 352 U.S. at 257.

4. The Ninth Circuit's exercise of its discretion should also be viewed in light of its general mandamus practices, which are in accord with the other circuits and this Court's precedents. This is not a case of "the Ninth Circuit in particular" ignoring established law. *See Lopez v. Smith*, 135 S. Ct. 1, 4 (2013). The mandamus factors that the Ninth Circuit articulated in *Bauman v. U.S. District Court*, 557 F.2d 650, 655 (9th Cir. 1977), are if anything more restrictive than the *Cheney* factors, effectively limiting the "important question" prong to cases where the error is "oft-repeated" or involves "new and important problems." In fact, the factors the Ninth Circuit adopted in *Bauman* have been explicitly adopted by four other circuits. *See In re Powerhouse Licensing, LLC*, 441 F.3d 467, 471 (6th Cir. 2006); *Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice*, 182 F.3d 981, 986-87 (D.C. Cir. 1999); *In re Bieter Co.*, 16 F.3d 929, 932 (8th Cir. 1994); *In re Dalton*, 733 F.2d 710, 716-17 (10th Cir. 1984). And the Ninth Circuit has shown caution in granting mandamus, expressing "concern over the unprincipled use of the writ as a means of wresting control of litigation from the district courts." *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1301 (9th Cir. 1982). Given this careful development and respect for precedent, this Court should defer to the Ninth's Circuit's invocation of this discretionary remedy. *Cf.* Wright et al., *supra*, § 3934.1 ("It is better that writ practice be left to this flexible process of development in the courts of appeals than that the Supreme Court seek to intervene with guidelines designed to protect the courts of appeals against their own possible folly but calculated to stifle the truest source of wise development.").

C. The case is not moot.

Respondents' claims are not moot because they fall into the long-recognized exception for claims that are "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The jurisdiction of the federal courts is limited to actual "cases" and "controversies." U.S. Const. art. III, § 2. This requirement means that there must be a live dispute throughout the litigation. If the complaining party loses a "personal stake in the outcome of the lawsuit," the case must be dismissed as moot. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)). However, so "long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 1017, 1023 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

Article III mootness has a "flexible character." *Geraghty*, 445 U.S. at 404. It is "not a legal concept with a fixed content or susceptible of scientific verification." *Id.* at 401 (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion)). As part of this flexibility, this Court recognizes an exception to its mootness doctrine for cases that are "capable of repetition, yet evading review." *Kingdomware*, 136 S. Ct. at 1976 (quoting *Spencer*, 523 U.S. at 17). This test has also been formulated as asking (1) whether the challenged action is "in its duration too short to be fully litigated prior to its cessation or expiration," and (2) whether "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

1. Pretrial shackling is too short in duration for full litigation. This Court has previously held that periods up to two years are sufficiently brief to qualify for this mootness exception. *Kingdomware*, 136 S. Ct. at 1976. Pretrial shackling is even shorter. All of the respondents here spent less than six months in custody before plea or dismissal. *See* Criminal Docket, *United States v. Morales*, No. 13-cr-04126 (S.D. Cal. Apr. 9, 2014); Criminal Docket, *United States v. Patricio-Guzman*, No. 13-mj-03882 (S.D. Cal. Nov. 6, 2013); Criminal Docket, *United States v. Ring*, No. 13-cr-03876 (S.D. Cal. Oct. 24, 2013); Criminal Docket, *United States v. Sanchez-Gomez*, No. 13-cr-04209 (S.D. Cal. Oct. 23, 2013). This Court has already recognized that pretrial detention is too short for class certification to occur, much less the litigation of an entire case. *Gerstein v. Pugh*, 420 U.S.103, 110 n.11 (1975). Thus, pretrial shackling will ordinarily cease before defendants can seek full judicial review.

2. The key question then is whether there is a "reasonable expectation" that these respondents will be subjected to pretrial shackling in the future. This standard asks "whether the controversy [is] *capable* of repetition and not . . . whether the claimant ha[s] demonstrated that a recurrence [is] more probable than not." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). Claimants need only show that the expectation is "reasonable," not "demonstrably probable." *Id.* Given the revolving door of the criminal justice system, it is reasonable to expect that these respondents might be shackled again. Indeed, two of them presumably already have been. Mr. Patricio-Guzman and Mr. Sanchez-Gomez have both been rearrested on federal charges in the Southern District of California and appeared before judges that participated in the shackling policy. *See* Criminal Docket, *United States v. Patricio-Guzman*, No. 16-mj-00407 (S.D. Cal. Feb. 9, 2016); Criminal Docket, *United States v. Sanchez-Gomez*, No. 15-cr-01999 (S.D. Cal. July 3, 2015).

The "capable of repetition, yet evading review" mootness exception received one of its clearest modern explications in *Roe v. Wade*, 410 U.S. 113 (1973). The Court held that Roe's claim was not moot after her pregnancy because pregnancy fits the "classic justification" for a mootness exception. *Id.* at 125. It "often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us." *Id.* at 125. Likewise, pretrial detention often comes multiple times to the same individual, and while we can imagine a world without it, a judicial system with arrests and in-custody appearances will be with us for the foreseeable future. A recent study found that 49.3% of federal offenders were rearrested within an eight-year period. Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. Sentencing Comm'n 5 (Mar. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf. The numbers are even more dramatic at the state level where 76.6% of prisoners are rearrested within five years. Matthew R. Dunrose et al., Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. Dep't of Just. 1 (Apr. 2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf. Given these high recidivism rates, pretrial shackling is a harm that is certainly "*capable* of repetition." *Honig*, 484 U.S. at 318 n.6.

In contrast, this Court has declined to invoke the exception when specific facts made recurrent injury unlikely or impossible. For example, in *United States v. Juvenile Male*, this Court held that an offender could not challenge a juvenile supervision order where he had since turned twenty-one and would never be subject to such an order again. 564 U.S. 932, 938 (2011). Or in *Murphy v. Hunt*, a defendant was not permitted to challenge the denial of bail when he had already been convicted and sentenced to up to fifteen years each on three charges and stipulated to the

"evident" proof against him, making it unlikely that he would ever be eligible for bail again. 455 U.S. 478, 480, 483, 484 (1982).

In some older cases, the Court also required a "demonstrated probability" of recurrence, but the argument that such a showing was required was specifically rejected in *Honig*. 484 U.S. at 318 n.6. *Murphy* is further distinguishable for this reason. *Id.* at 482-83. And so is *Weinstein*, where the Court found that a released prisoner could not challenge a state parole scheme because there was no "demonstrated probability" that he would be eligible for parole again. 423 U.S. at 149. *Weinstein* is also distinguishable because the probability that one former prisoner would subsequently be rearrested, convicted, imprisoned, and eligible for parole is far lower than the probability that one of four defendants will be rearrested.

Though the Court has sometimes assumed that claimants will avoid future contact with law enforcement, those cases are inapposite. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court suggested that individuals lacked standing to challenge law enforcement practices where there was no evidence that they would be subject to the challenged behavior. In *O'Shea*, plaintiffs alleged racial discrimination in a county's bond setting, sentencing, and jury fee practices. 414 U.S. at 492. This Court dismissed the complaint. *Id.* at 504. It assumed that the challengers would "conduct their activities within the law" and therefore not face discrimination, but it also noted that there was no evidence that the named plaintiffs were especially likely to experience discrimination and no allegation that any of them had "suffered any injury in the matter specified." *Id.* at 497. This case was therefore a typical application of Article III standing's "injury in fact" requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Without any past harm or articulated risk of future harm, the *O'Shea* plaintiffs lacked

standing. In contrast, the respondents here have personally experienced unconstitutional shackling and have an increased likelihood of being shackled in the future.

In *Lyons*, the plaintiff challenged illegal choking by the Los Angeles Police Department. 461 U.S. at 98. While he had been choked in the past, the Court held that plaintiff lacked standing to seek injunctive relief because he would not only need to claim that he would have another encounter with the LAPD, but also make the "incredible assertion" either that "*all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter" or that the policy was specifically ordered by the City. *Id.* at 105-06. Here though, we know that, subject to narrow exceptions for certain proceedings, all judges but one in the Southern District of California *always* shackle *all* pretrial detainees in their courtrooms and that this shackling is specifically authorized by a district-wide policy. Pet. App. 4a. While the *Lyons* Court was rightfully dubious of whether the plaintiff would really be choked again, a ruling for the Government here would result in the resumption of the shackling policy and make it nearly certain that the respondents will be shackled if they face rearrest in the Southern District, as two of them already have.

3. The respondents' claims are made stronger by their class-like nature. While the "capable of repetition, yet evading review" exception "was developed outside the class-action context," *Geraghty*, 445 U.S. at 398, it has often been applied in class actions, *e.g.*, *Gerstein*, 420 U.S. 103; *Dunn v. Blumstein*, 405 U.S. 330 (1972). Although this case was not filed as a class action, it still raises class-like claims that favor a flexible interpretation of mootness. *Roe* provides a helpful analogy here. While Jane Roe purported to sue on behalf of similarly situated women, there is no indication from the district court's opinion that the class was ever certified under Rule 23. 410 U.S. at 120; *see Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). Nevertheless, the Court still

considered the broader class of pregnant women in finding that the case was not moot. *Roe*, 410 U.S. at 125. While Roe herself needed to have standing, her class-like claims helped show the typicality of her situation. *Id.* Likewise, the commonality of the respondents' situation helps demonstrate why this situation is "capable of repetition."

Similarly in *Gerstein*, which was a class action, the Court considered the likelihood of repeated pretrial confinement for both the individual and his class. 420 U.S. at 110 n.11. *Gerstein* also observed that the respondents there were represented by the public defender, noting that "we can safely assume that he has other clients with a continuing live interest in the case." *Id.* While Rule 23 gives other class members a unique legal status, *see Genesis Healthcare*, 569 U.S. at 74, *Gerstein*'s emphasis on individual deprivation and the ability of the public defender to serve multiple clients applies with equal force to this case. Thus, *Gerstein*, like *Roe*, demonstrates how the likelihood of repetition for individual litigants and the broader class to which they belong are mutually reinforcing for purposes of the mootness analysis.

In order to maintain an Article III case or controversy, the individual respondents need to show that there is a "reasonable expectation" that they will be shackled again. Given the high rates of recidivism in the federal system and the fact that two of the named respondents have already been rearrested in the Southern District, this expectation is certainly reasonable. The class-like nature of their claims strengthens respondents' case in light of the "flexible character of the Article III mootness doctrine." *Geraghty*, 445 U.S. at 400.

4. The Government's voluntary cessation of the shackling policy does not render the case moot. A case may become moot based on "voluntary cessation of a challenged practice" only if

"subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); and then quoting *Concentrated Phosphate*, 393 U.S. at 203). Here, the Government's statements that it will seek to reinstate the policy make absolutely clear that the unconstitutional shackling *will* reoccur absent judicial intervention. Pet. App. 16a-17a. The case is not moot.

II. Unwarranted courtroom shackling of pretrial detainees violates due process.

The Southern District of California's routine courtroom shackling of all pretrial detainees violates the Fifth Amendment's guarantee that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In order to assess whether procedural rules that are "part of the criminal process" comport with due process, this Court uses the *Medina* framework. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). Under that inquiry, a practice is proscribed under the Due Process Clause if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445-46 (quoting *Patterson*, 432 U.S. at 201-02). Courts applying this standard ask (1) whether the rule has "deep roots in our common-law heritage," and (2) whether the practice "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 444, 448 (quoting *Dowling*, 493 U.S. at 352); *see also Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996) (applying *Medina*).

This Court has held that courtroom shackling without demonstrated need betrays the common-law tradition and undermines fundamental principles of American justice, thereby violating the Constitution. In *Allen*, this Court considered what measures a court may take to subdue an unusually disruptive defendant. The Court held that the Constitution sometimes permits special

measures, including restraints, but added that "even to contemplate such a technique . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort." 397 U.S. at 344. In *Holbrook*, this Court first articulated the rule against unwarranted shackling. 475 U.S. at 562. Considering a special security measure where the usual courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the gallery, the Court concluded that the use of additional security personnel is not "the sort of inherently prejudicial practice that, like shackling, should be permitted *only where justified by an essential state interest specific to each trial*." *Id*. at 568-69 (emphasis added).

Deck, this Court's only decision on a shackling policy, controls this case. *Deck* concerned routine shackling during the penalty phase of a capital proceeding. 544 U.S. at 624. Reviewing English common law and its adoption by the American colonies, the Court found that the rule against unjustified shackling "has deep roots in the common law." *Id.* at 626. Shackling without demonstrated need also contravenes "three fundamental legal principles"—the presumption of innocence, the rights to counsel and to participate in one's own defense, and the dignity of the judicial proceedings. *Id.* at 630-31. Due process thus requires a showing of "special need" even before shackling a convicted murderer. *Id.* at 626, 630. The fundamental principles recognized in these cases, together with the common-law rule against unjustified shackling, make clear that the right to be free from unwarranted restraints applies with like force to pretrial proceedings.

A. The prohibition on unwarranted pretrial shackling is deeply rooted in the common law.

The common law prohibited courtroom shackling without an individual justification, and this rule applied in non-jury proceedings as well as in the trial setting. "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina*, 505 U.S. at 446. The right to be free from unwarranted shackling at arraignment is deeply embedded in the common law and is therefore fundamental for purposes of the Due Process Clause.

1. At English common law, shackling at arraignment was only permitted upon a showing of special need, such as dangerousness or risk of escape. Early English jurists agreed that pretrial shackling was only permitted in exceptional circumstances. Writing in the eighteenth century, Hawkins captures this rule:

> [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 contumacious manner, as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescue or escape.[4]

2 William Hawkins, *A Treatise of Pleas of the Crown* 436-37 (1788); *see also* 3 Edward Coke, *Institutes of the Lawes of England* 34 (1644) ("It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted."). Blackstone, too, documents the common-law rule against unwarranted shackling at arraignment. In the chapter "Of Arraignments, And Its Incidents," Blackstone wrote, "it is laid down in our antient books, that, though under an indictment

[4] Accounts like Hawkins' make clear that the purpose of this rule was not only to minimize distraction due to physical pain, *see Deck*, 544 U.S. at 638 (Thomas, J., dissenting), but also to protect the dignity of the accused and the decorum of the judicial proceeding.

of the highest nature, [the accused] must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 William Blackstone, *Commentaries on the Laws of England* 317 (1768) (footnote omitted).

This common-law rule applied at arraignment as well as trial. Immediately after observing the ancient rule against unjustified irons at arraignment, Blackstone observed that "in Layer's case . . . a difference was taken 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." Although Blackstone's reading of *Layer's Case* may be ambiguous, *Layer's Case* itself clearly supports the principle that shackles at arraignment had to be justified by individual need. Both Layer's lawyer and the Lord Chief Justice acknowledged that the law normally forbade restraints at arraignment. Citing Coke, Layer's lawyer argued that "by law he ought not to be called upon, even to plead, till his fetters are off." *The Trial of Christopher Layer* (1722), *in* 16 *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* 94, 99 (London, T.S. Hansard 1816). The Lord Chief Justice conceded that shackling at arraignment was normally unlawful, but found that the seriousness of the charge and Layer's previous escape attempt justified the exception: "I do not think a man charged with high treason of this nature, can be said justly to be too well guarded, especially if it be true what hath been suggested, that he hath endeavoured to make his escape; *that will justify more than what the law allows in other cases*." *Id.* at 101 (emphasis added). Thus, Layer was afforded precisely the procedural protection the Ninth Circuit demands from the Southern District: an individualized determination that the risk of flight or violence justifies pretrial shackling.

The "antient books" Blackstone cites support this interpretation. In his thirteenth-century commentary on "how an arrested man ought to be brought before the justices," Bracton summarized the rule: "[w]hen the person thus arrested is to be brought before the justices he ought not to be brought with his hands tied (though sometimes in leg-irons because of the danger of escape)." 2 Henry de Bracton, *De Legibus et Consuetudinibus Anglilae* [*On the Laws and Customs of England*] 385 (Samuel E. Thorne trans., 1968) (c.1235). Another thirteenth-century jurist made clear that "when any felons appear in judgment to answer of their felony, our will is, that they come . . . without irons or any kinds of bonds." John le Breton, *Britton* 29-30 (Francis Morgan Nichols trans., 1901) (c.1275). These texts reveal that the exact rule the Ninth Circuit recognized—that pretrial shackling is only permitted upon a showing of special need—has been central to our scheme of justice for at least eight-hundred years.

Insofar as *Deck* reads Blackstone to make a distinction between shackling at arraignment and trial, *see* 544 U.S. at 626, that interpretation is rebutted by this history. While Blackstone's language may be ambiguous, the history Blackstone relied upon is not. Pretrial shackling was not permitted without a finding of special cause. Moreover, *Deck*'s interpretation was "undoubtedly dictum in a case about shackling at capital sentencing," Pet. App. 24a, and ought to be corrected.

2. Early American courts applied the common-law rule that pretrial shackling was only permitted when justified by special circumstances. In determining whether a practice has the endorsement of history, courts look to how the English common law was adopted by the colonies and carried forward by the states. *See Deck*, 544 U.S. at 626 (discussing how "American courts have traditionally followed Blackstone's 'ancient' English rule").

The tradition against unwarranted pretrial shackling is borne out in early American treatises and cases. Mack's 1904 legal encyclopedia summarized the rule: "At common law [a] defendant, although indicted for the highest crime, must be free from all manner of shackles or bonds, whether on his hands or feet, when he is arraigned, unless there is evident danger of escape. In the United States the common-law rule is followed . . . ." 12 William Mack, *Cyclopedia of Law and Procedure* 529 (1904). The Kentucky high court explained that "[a]t early common law . . . upon his plea of not guilty to an indictment for a criminal offense, [the accused] was entitled to make his appearance free from all shackles or bonds. This is his right to-day in the United States." *Blair v. Commonwealth*, 188 S.W. 390, 393 (Ky. 1916) (quoting William M. McKinney & Burdett A. Rich, 8 *Ruling Case Law* 68 (1915)). In *Parker v. Territory*, the court acknowledged that a "person charged with a public offense shall not before conviction be subjected to any more restraint than is necessary for his detention to answer the charge, which is but the common-law and constitutional right." 5 Ariz. 283, 287 (1898) (internal quotation marks omitted). These sources confirm that the common-law rule that has existed since at least the thirteenth century has continued into American practice.

Some early American sources suggest that shackling at arraignment was easier to justify than shackling at trial. In 1886, the Texas Court of Appeals quoted Bishop's treatise for the principle that "[t]hough the rule at arraignment where only a plea is required is less strict, a prisoner at trial should have the unrestrained use of his reason and all advantages to clear his innocence." *Rainey v. State*, 20 Tex. App. 455, 472 (1886) (quoting 1 Joel Prentiss Bishop, *Criminal Procedure* § 955 (3d ed. 1880)); *cf. State v. Temple*, 92 S.W. 869, 871-73 (Mo. 1906) (interpreting the common-law rule against shackling as applying with less force at arraignment). This principle is consistent with the Ninth Circuit rule. As courts make individualized determinations of necessity, they

may—as early American courts appear to have done—consider all appropriate factors, including the special harm of appearing in chains before a jury.[5] These American courts and their English predecessors make clear that the rule against unwarranted shackling is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445-46.

B. Unwarranted pretrial shackling violates all three principles of fundamental fairness recognized in *Deck*.

Indiscriminate shackling undermines the fundamental fairness of judicial proceedings. When determining whether a practice violates due process, courts ask not only whether it was prohibited at common law, but also whether it transgresses "recognized principles of 'fundamental fairness' in operation." *Medina*, 505 U.S. at 448. In *Deck*, this Court recognized that the right to be free from unwarranted shackling safeguards three fundamental legal principles: (1) the presumption that the accused is innocent until proven guilty; (2) the fundamental rights to counsel and to participate in one's own defense; and (3) the dignity and decorum of the judicial process, including "the respectful treatment of defendants." 544 U.S. at 630-31. Although *Deck* considered the penalty phase of capital proceedings, its reasoning applies with like force "whether the proceeding is pretrial, trial, or sentencing, with a jury or without." Pet. App. 19a.

1. Unwarranted shackling undermines the presumption that the accused is innocent until proven guilty. The presumption of innocence is "unquestionably" a "principle of justice so rooted

[5] The fact that a court making a shackling decision can consider all relevant factors, including the concerns that led the Marshals to propose routine shackling, undermines the accusation that enforcing the constitutional prohibition on unwarranted shackling "puts trial courts throughout this circuit at risk." Pet. App. 54a. These are the kinds of inquiries trial courts undertake every day in the bail context, and "there is nothing inherently unattainable about a prediction of future criminal conduct." *Schall v. Martin*, 467 U.S. 253, 254 (1984).

in the traditions and conscience of our people as to be ranked as fundamental." *Nelson*, 137 S. Ct. at 1256 n.9 (quoting *Medina*, 505 U.S. at 445). And its existence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895) (tracing the presumption of innocence from Deuteronomy, through Roman law, to English and American common law). Shackling compromises the presumption of innocence by suggesting that "the justice system itself sees a 'need to separate a defendant from the community at large.'" *Deck*, 544 U.S. at 630 (quoting *Holbrook,* 475 U.S. at 569). The presumption of innocence is more seriously implicated here than in *Deck*; while Deck was shackled in post-conviction proceedings, respondents appeared in chains while innocent in the eyes of the law.

Unwarranted shackling offends the presumption of innocence even when there is no jury present. The presumption of innocence ensures more than accuracy in fact-finding. No doubt, the presumption of innocence guarantees that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). But this Court has recognized that the presumption of innocence is more than an evidentiary rule. In *Betterman v. Montana*, this Court considered whether the Sixth Amendment's speedy trial guarantee applies to the sentencing phase of a criminal prosecution. 136 S. Ct. 1609, 1612 (2016). Concluding that it does not, the Court reasoned that the speedy trial right loses force upon conviction because it is a "measure protecting the presumptively innocent." *Id.* at 1614. The Speedy Trial Clause "implements that presumption [of innocence] by preventing undue and oppressive incarceration prior to trial [and] minimizing anxiety and concern accompanying public accusation." *Id.* (internal quotation marks and alterations omitted). Like an inordinately

delayed trial, indiscriminate courtroom shackling threatens the presumption of innocence by creating undue oppression and enhancing the anxiety of public accusation. These harms do not depend on the presence of a jury. Indiscriminate shackling therefore undermines this fundamental principle in all proceedings involving presumptively innocent defendants.

2. Unwarranted shackling erodes the rights to counsel and to participate in one's own defense. These rights are essential to the fundamental fairness of judicial proceedings and are guaranteed by the Constitution. *See Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf."); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

Chains may distract, embarrass, and encumber the accused, unduly hindering his ability to communicate with counsel or otherwise participate in his defense. The Constitution "provides [the accused] with a right to counsel" but "the use of physical restraints diminishes that right." *Deck*, 544 U.S. at 631. This Court has recognized that "one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." *Allen*, 397 U.S. at 344. Likewise, "[s]hackling can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf." *Deck*, 544 U.S. at 631; *see also People v. Harrington*, 42 Cal. 165, 167 (1871) ("[To,] without evident necessity, impose physical burdens, pains, and restraints upon a prisoner . . . inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense.").

Neither the right to counsel nor the right to participate in one's own defense depends upon the presence of the jury. The constitutional guarantee of counsel applies not only to the trial setting, but also "to pretrial critical stages that are part of the whole course of a criminal proceeding." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). So too with the right to participate in one's own defense. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). Whether during arraignment, bond hearing, preliminary hearing, or plea colloquy, the defendant's reduced ability to participate undermines the fundamental fairness of the proceeding. Thus, these constitutional concerns are as strong in non-jury settings as they were in the circumstances addressed by *Deck* and *Allen*.

3. Unwarranted shackling erodes the dignity of the accused and the decency of the judicial process. Indiscriminately chaining people accused of crimes violates "that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (quoting *Allen*, 397 U.S. at 350-51). Like appearing in prison garb, answering charges in chains "robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence." *Estelle v. Williams*, 425 U.S. 501, 518 (1976) (Brennan, J., dissenting) (agreeing with the Court's holding that the defendant's appearance in prison garb violated due process, but dissenting from the decision that the failure to object negates the constitutional violation).

The injury to the dignity of the accused does not depend upon the presence of the jury. The federal government forced the respondents to appear in chains, not only before judges and court personnel, but also before the strangers, friends, and family members in the courtroom. "The

fact that the proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles." *United States v. Zuber*, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring).

The degradation of the accused effaces the decorum of the judicial system. The use of shackles is itself "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen*, 397 U.S. at 344. When an observer sees a wheelchair-bound woman with "dire and deteriorating" health appear in court in chains, Pet. App. 5a, she perceives no "majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life." Pet. App. 22a. Routine shackling eviscerates the appearance of justice.

The appearance of justice matters. "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion). It is for this reason that the public trial right is designed in part to protect the "perception of fairness." *Id.* at 570. Similarly, this Court has held that the appearance of judicial partiality violates due process even if the judge may have had no actual bias: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases . . . . But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *see also Lankford v. Idaho*, 500 U.S. 110, 121 (1991) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached." (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring))). By eroding the decorum of the judicial process, the

degradation of the accused compromises not only the fairness of the individual's case, but the public legitimacy of the justice system as a whole.

The legitimacy of the court system depends on the perception that judicial decisions are made by fair procedures. When people view the process as unfair, they are less likely to accept courts' decisions as just and less likely to perceive the courts as legitimate. *See, e.g.*, Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 Law & Soc'y Rev. 483, 483 (1988) (finding that people's satisfaction with the outcomes of their felony cases was linked to their perception of procedural justice); Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 Yale L.J.F. 525, 526-27 (2014) (noting empirical evidence that "the primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure"). Popular legitimacy is important because it shapes people's willingness to comply with the law and cooperate with courts. *See, e.g.*, Tom R. Tyler, *Why People Obey the Law* 8, 105 (2006) (suggesting that people obey the law because they see it as legitimate, not because they fear punishment). This empirical work supports *Deck*'s observation that the dignity of the courtroom "reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve." 544 U.S. at 631. Not only for the sake of the accused, but also for the continued vitality of the judicial system, courts "must take seriously how [they] treat individuals who come into contact with our criminal justice system." Pet. App. 29a.

These concerns about the dignity of the accused and the legitimacy of the court system are even more pressing now that "the negotiation of a plea bargain, rather than the unfolding of a trial,

is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144. The dignitary harm of indiscriminate shackling is more acute for the defendants whose cases end in guilty pleas. Those defendants who go to trial have at least some interaction with the justice system "as free men with their heads held high." Pet. App. 28a. Indeed, a fair trial can sometimes wipe clean constitutional errors occurring before the trial itself. *See Lafler*, 566 U.S. at 165. But the defendants who plead guilty— ninety-seven percent of those convicted in the federal system — may never make a court appearance free of chains. *Id.* at 170. Those who feel degraded and treated unfairly during the entire course of their criminal processes will undoubtedly question the dignity of the judicial process and the legitimacy of the court system. Given "the reality that criminal justice today is for the most part a system of pleas, not a system of trials," *id.*, indiscriminate shackling threatens the dignity of the judicial process now more than ever.

4. *Bell v. Wolfish*, 441 U.S. 520 (1979), does not confine these fundamental principles to jury proceedings. In *Bell*, pretrial detainees challenged "double-bunking" and other conditions of confinement in a custodial facility. *Id.* at 530, 544. The Court's ruling that these practices did not violate due process rested on two grounds: (1) that the presumption of innocence does not guarantee a "detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity," and (2) that in "evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law . . . the proper inquiry is whether those conditions amount to punishment of the detainee." *Id.* at 532, 535. Both principles are expressly limited to the jail setting, and neither applies to shackling in the courtroom.

First, *Bell*'s conclusions about the presumption of innocence in the custodial setting have no application to court proceedings. In *Bell*, the presumption of innocence was not a source of defendant's right to be free from uncomfortable conditions of confinement because although "the presumption of innocence plays an important role in our criminal justice system . . . it has no application to a determination of the rights of a pretrial detainee *during confinement* before his trial has even begun." *Id.* at 533 (emphasis added). On its face, *Bell*'s holding is limited to the jail, not the courtroom. The Court has never suggested that *Bell* framework governs in a courtroom setting, and this position would be incompatible with the central holding of *Deck*.

This Court's recent decision in *Nelson* demonstrates that *Bell* did not render the presumption of innocence irrelevant in non-jury courtroom proceedings. In *Nelson*, the Court invalidated Colorado statutes that required defendants whose convictions had been reversed or vacated to prove actual innocence before being refunded costs, fees, and restitution. 137 S. Ct. at 1252. The State of Colorado cited *Bell* for the principle that the "presumption of innocence applies only at criminal trials" and argued that the presumption therefore had no application after convictions had been erased. *Id*. at 1256 n.8. This Court clarified that *Bell* "held only that the presumption does not prevent the government from 'detain[ing a defendant] to ensure his presence at trial . . . so long as [the] conditions and restrictions [of his detention] do not amount to punishment, or otherwise violate the Constitution.'" *Id.* (alterations in original) (quoting *Bell*, 441 U.S. at 536-37). In other words, *Bell* concludes only that pretrial detention for purposes of ensuring the defendant's presence at trial does not violate the presumption of innocence; *Bell does* not confine the presumption to the trial context.

Second, in the courtroom setting, shackling implicates not only the defendant's right to be free from punishment prior to conviction, but also several other due process rights. *Bell* held that when a person is lawfully committed to pretrial detention, the government "may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Bell*, 441 U.S. at 536-37. In the courtroom setting, unjustified shackling "otherwise violate[s] the Constitution." *Id.* Although the "government's interest in securing [detainees'] presence at trial and maintaining order and security" may "remain[] the same regardless of the location," Pet. App. 66a, the rights of the accused are fundamentally different while appearing in court. A detainee challenges a condition of confinement based on his "right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement." *Bell*, 441 U.S. at 534 (internal citation omitted). In contrast, an in-custody defendant challenging courtroom shackling seeks to safeguard her rights to a fair tribunal, to be presumed innocent, to participate in her defense, and to be treated with dignity and respect.

The additional due process rights that make *Bell* inapplicable to the courtroom setting do not only adhere within in the presence of the jury, but any time the accused appears before the court. As discussed above, the presumption of innocence, the right to participate in one's own defense, and the dignity of the accused all apply with like force in non-jury proceedings. Lower court decisions on the courtroom use of electronic stun belts illustrate how due process violations do not depend on the risk of jury bias. A stun belt is an electronic device that, when activated remotely, delivers an electrical current throughout the defendant's body. *See Gonzalez v. Pliler*,

341 F.3d 897, 899 (9th Cir. 2003). Because a stun belt is ordinarily worn beneath the defendant's clothing, and is not visible to the jury, it makes an apt comparison to restraints at non-jury hearings.

Although this Court has not addressed the constitutionality of electronic stun belts, the lower courts agree that stun belts must be justified in the same way as physical restraints visible to a jury. *See, e.g.*, *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) ("[S]tun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways . . . ."); *People v. Mar*, 52 P.3d 95, 106 (Cal. 2002) ("Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor . . . ."); *People v. Allen*, 856 N.E.2d 349, 353 (Ill. 2006) ("[E]ven when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings."). Beyond the risk of bias to the factfinder, unwarranted courtroom shackling violates the Due Process Clause by eroding the presumption of innocence, interfering with the defendant's ability to participate in his own defense, and undermining the dignity of the accused.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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NOVEMBER 2017