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Proceedings at an Impasse: Appealing Fugitive Disentitlement Orders of International Defendants Under the Collateral Order Doctrine

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PROCEEDINGS AT AN IMPASSE: APPEALING FUGITIVE DISENTITLEMENT ORDERS OF INTERNATIONAL DEFENDANTS UNDER THE COLLATERAL ORDER DOCTRINE

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The doctrine of fugitive disentitlement allows federal courts to decline to entertain a defendant's claims when that defendant is deemed a fugitive from justice. Once disentitled, defendants cannot seek relief from the judicial system until they submit to the court's jurisdiction. But complications emerge when federal district courts disentitle non–U.S. citizens who reside outside of the United States, who are indicted for alleged misconduct committed abroad, and who attempt to dismiss charges while remaining in their home countries. Federal circuit courts of appeals are split on whether such defendants can appeal from a fugitive disentitlement ruling without submitting to the court's jurisdiction and before a final judgment in the case.

This circuit split results from disagreement over whether this category of fugitive disentitlement orders falls within the collateral order exception to the final judgment rule. This Note argues that these orders meet the collateral order doctrine's requirements and overcome the doctrine's heightened strictness in criminal cases. Foreign defendants face unique risks in deciding whether to enter the United States, and their indictments raise questions about the reach of federal criminal law. Accordingly, this Note advocates that courts adopt the U.S. Court of Appeals for the Second Circuit's jurisdictional holding in United States v. Bescond *to permit immediate appeal and proposes additional boundaries for the category of appealable disentitlement orders.*

INTRODUCTION 325

I. OVERVIEW OF THE DOCTRINES AT ISSUE: FUGITIVE DISENTITLEMENT AND THE COLLATERAL ORDER DOCTRINE 328

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A. Fugitive Disentitlement 328
1. Development of Fugitive Disentitlement 328
2. Fugitive Disentitlement as Applied to International Defendants 330
B. The Final Judgment Rule and the Collateral Order Doctrine 333
1. Overview of the Collateral Order Doctrine 333
2. The Criminal Collateral Order Doctrine 337
3. Writ of Mandamus as an Alternative to Appeal Under the Collateral Order Doctrine 340
II. ARGUMENTS AGAINST AND FOR PERMITTING APPEALS FROM FUGITIVE DISENTITLEMENT ORDERS UNDER THE COLLATERAL ORDER DOCTRINE 341
A. Arguments Against Immediate Appeal 341
1. Fugitive Disentitlement Orders Do Not Resemble the Types of Orders Collaterally Appealable in Criminal Cases 343
2. Disentitlement Orders Do Not Satisfy the *Cohen* Requirements 345
3. Practical Consequences Put Forth Against Immediate Appeal 346
B. Arguments in Favor of Immediate Appeal 347
1. Disentitlement Orders Resemble the Established Types of Collateral Orders in Criminal Cases 348
2. These Orders Satisfy the *Cohen* Requirements 349
3. Practical Consequences of Appeal and the Aftermath of *United States v. Bescond* 350
III. FUGITIVE DISENTITLEMENT ORDERS OF INTERNATIONAL DEFENDANTS SHOULD FALL UNDER THE COLLATERAL ORDER DOCTRINE 352
A. The Second Circuit Should Limit Appealability to Only Indictments That Implicate Concerns of Extraterritoriality and in Which the Conduct Occurred Entirely Abroad 352
B. Other Circuits and the Supreme Court Should Permit Interlocutory Appeals Regardless of Whether They Maintain the Same Definition of "Fugitive" 357
CONCLUSION 359

INTRODUCTION

In August 2017, federal prosecutors charged Muriel Bescond with criminal violations of the Commodity Exchange Act[1] (CEA) in the U.S. District Court for the Eastern District of New York.[2] Bescond worked as the head of the Paris treasury desk at Société Générale ("SocGen"), a global bank headquartered in France.[3] The indictment charged that between May 2010 and October 2011, Bescond, a resident French citizen, participated in a scheme to manipulate the United States Dollar London Interbank Offered Rate ("USD LIBOR").[4] The indictment did not state that Bescond was in the United States when she engaged in the charged criminal activity.[5]

A judge issued a warrant for her arrest, but Bescond declined to enter the United States and submit to the court's jurisdiction.[6] Moreover, the French government would not extradite Bescond or prosecute her or any other persons associated with SocGen.[7] Through American counsel, however, Bescond moved to dismiss the charges on multiple grounds.[8] But because she refused to enter the United States, the government urged the district court to declare Bescond a fugitive from justice and exercise its discretion to apply the doctrine of fugitive disentitlement, under which a district court may decline to entertain the claims of a defendant who is declared a fugitive.[9] The district court subsequently concluded that Bescond was a fugitive, applied the fugitive disentitlement doctrine, and refused to decide the merits of her motions for dismissal.[10]

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1. 7 U.S.C. §§ 1–27f.

2. *See* United States v. Bescond, 24 F.4th 759, 763–64 (2d Cir. 2021); 7 U.S.C. § 13(a)(2).

3. *See id.* at 764.

4. *See id.* LIBOR is "a benchmark interest rate at which major global banks lent to one another in the international interbank market for short-term loans." Julie Kagan, *LIBOR: What the London Interbank Offered Rate Is and How It's Used*, INVESTOPEDIA, https://www.investopedia.com/terms/l/libor.asp [https://perma.cc/D5UN-DQTB] (June 30, 2023). Because of repeated scandals and manipulation, LIBOR has been completely replaced by new pricing benchmarks as of 2022. Lananh Nguyen & Jeanna Smialek, *Libor, Long the Most Important Number in Finance, Dies at 52*, N.Y. TIMES (Jan. 12, 2022), https://www.nytimes.com/2022/01/12/business/libor-finance.html [https://perma.cc/6LNX-Q723].

5. *See* United States v. Sindzingre, No. 17-CR-0464, 2019 WL 2290494, at *3 (E.D.N.Y. May 29, 2019), *rev'd in part, appeal dismissed in part sub nom.* United States v. Bescond, 24 F.4th 759 (2d Cir. 2021).

6. *See id.*

7. *See* Opening Brief of Def.-Appellant Muriel Bescond at 28–29, *Bescond*, 24 F.4th 759 (No. 19-1698-CR). France is not obligated to extradite its citizens. *See* Extradition Treaty, Fr.-U.S., Apr. 23, 1996, T.I.A.S. No. 02-201, at 5; William Julié & Juliette Fauvarque, *The Rule Against the Extradition of Nationals: Overview and Perspectives*, INT'L BAR ASS'N, https://www.ibanet.org/article/22AF1681-37A0-487A-A660-3ACA32938540 [https://perma.cc/FFR6-89B7] (last visited Sept. 3, 2023).

8. The motions included due process, statute of limitations, gender-based selective prosecution, and extraterritoriality challenges. *See Bescond*, 24 F.4th at 764.

9. *See id.* (citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)).

10. *See id.* The district court provided alternative rulings rejecting Bescond's extraterritoriality and due process grounds for dismissal in anticipation of appeal. *Sindzingre*, 2019 WL 2290494, at *9.

Consequently, if Bescond wanted to challenge the charges against her, she would have had to enter the United States and risk pretrial detention.[11] Alternatively, if she remained in France, unable to challenge the charges, she would have had to "live indefinitely with the imputation of being a fugitive" and risk detention if she tried to leave her home country.[12] Instead, Bescond appealed the disentitlement ruling, arguing that a foreign citizen who remains abroad without hiding and challenges the indictment in good faith does not qualify as a fugitive and should not be disentitled.[13] Because Bescond appealed from a pretrial order, however, the U.S. Court of Appeals for the Second Circuit first had to ascertain whether it had appellate jurisdiction over the matter before reaching the merits of the appeal.[14]

Bescond contended that the collateral order doctrine afforded jurisdiction over the appeal.[15] The collateral order doctrine provides appellate jurisdiction over a small class of "collateral" rulings that do not terminate litigation but are nonetheless sufficiently "final" and distinct from the merits to be appealable before a final judgment is entered.[16] This doctrine is applied "with the utmost strictness in criminal cases."[17] The Supreme Court has recognized only four types of orders in criminal cases that satisfy the doctrine's requirements: (1) motions to reduce bail, (2) motions to dismiss on double jeopardy grounds, (3) motions to dismiss under the Speech or Debate Clause, and (4) orders permitting the forced administration of antipsychotic drugs to render a defendant competent for trial.[18]

Despite the doctrine's strictness, the Second Circuit, in *United States v. Bescond*,[19] granted appellate review of the disentitlement order.[20] The court held that "order[s] disentitling a foreign citizen who has remained at home abroad . . . without evasion, stealth, or concealment" are appealable under the collateral order doctrine.[21] On the merits, the court stated that Bescond was not a fugitive under any definition of the word and, even assuming she was, disentitlement would be unwarranted.[22] As a result, she did not have to enter

11. *See* Chloe S. Booth, Note, *Doctrine on the Run: The Deepening Circuit Split Concerning Application of the Fugitive Disentitlement Doctrine to Foreign Nationals*, 59 B.C. L. REV. 1153, 1168–70 (2018) (describing the consequences of entering the United States for foreign defendants).

12. *Bescond*, 24 F.4th at 767; *see* Booth, *supra* note 11, at 1168–70 (describing the consequences of declining to enter the United States for foreign defendants).

13. *See* Opening Brief for Def.-Appellant Muriel Bescond, *supra* note 7, at 39–48; *Bescond*, 24 F.4th at 773 (describing Muriel Bescond as a defendant "who stay[ed] at home abroad, without concealment or evasion").

14. *See id.* at 764.

15. *See id.*

16. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (establishing the collateral order doctrine).

17. Flanagan v. United States, 465 U.S. 259, 265 (1984).

18. *See infra* Part I.B.2; *Bescond*, 24 F.4th at 776 (Livingston, C.J., dissenting) (listing the four types of orders).

19. 24 F.4th 759 (2d Cir. 2021).

20. *See id.* at 770.

21. *Id.* at 767.

22. *See id.* at 773.

the United States, leave her family for an unknown duration, and risk pretrial detention while challenging her indictment.[23] In March 2023, almost six years after the indictment and two years after the Second Circuit permitted her to challenge the charges from France, federal prosecutors dropped the charges against Bescond and her codefendant.[24]

If she had been charged in the U.S. Court of Appeals for the Sixth or Eleventh Circuits, however, she would have been forced to enter the United States to challenge the indictment. Both circuits previously rejected appeals from a fugitive disentitlement ruling under the collateral order doctrine in similar circumstances.[25] Likewise, in her dissent in *Bescond*, Chief Judge Debra Ann Livingston agreed with these other circuits, writing that "[t]he Court's decision today is a victory for Muriel Bescond. But our Circuit's law is a silent loser."[26]

The scope of the collateral order doctrine implicates core tenets of the federal court system: appellate courts should not interfere with district judges' administration of trials before a final judgment; nor should appellate judges be forced to resolve questions of fact or law better decided through trial procedure; and litigants should not be able to clog the courts through a succession of appeals.[27] In this way, whether the disentitlement of a foreign citizen who declines to enter the United States is an appealable collateral order implicates more than an inconsistent administration of justice between circuits. Analyzing this circuit split also clarifies how courts balance the benefits of immediate appeal with the principles embedded in federal appellate procedure.

This Note examines this circuit split and recommends that courts permit appeals from fugitive disentitlement orders by foreign citizens who remain abroad under the collateral order doctrine.[28] Part I provides an overview of the two doctrines at issue: fugitive disentitlement and the collateral order doctrine. Part II reviews the arguments against and in favor of granting appellate jurisdiction over interlocutory appeals by foreign defendants from disentitlement orders. Part III argues that, with additional limitations on the Second Circuit's category of appealable disentitlement rulings, these orders should be appealable under the collateral order doctrine. Part III further

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23. *See id.* at 767–78.

24. *See* Jody Godoy, *U.S. Prosecutors Move to Drop Libor Case Against Ex-SocGen Bankers*, REUTERS (Mar. 30, 2023, 1:53 PM), https://www.reuters.com/legal/us-prosecutors-move-drop-libor-case-against-ex-socgen-bankers-2023-03-29/ [https://perma.cc/U4V4-QRAH]. This Note was principally written before the charges were dropped.

25. *See generally* United States v. Martirossian, 917 F.3d 883 (6th Cir. 2019); United States v. Shalhoub, 855 F.3d 1255 (11th Cir. 2017).

26. *Bescond*, 24 F.4th at 775 (Livingston, C.J., dissenting).

27. *See id.* at 766 (majority opinion); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–74 (1981).

28. For other perspectives on this circuit split, see generally Zachary Z. Schroeder, Comment, *Fugitive Pull: Applying the Fugitive Disentitlement Doctrine to Foreign Defendants*, 98 WASH. L. REV. 287 (2023), and Olivia Lu, Comment, *In Flight from U.S. Law by Remaining at Home Abroad?:* United States v. Bescond*'s Impact on Interlocutory Appeal of Fugitive Disentitlement Under the Collateral Order Doctrine*, 123 COLUM. L. REV. F. 37 (2023).

encourages other federal circuit courts and the Supreme Court to permit such appeals.

I. OVERVIEW OF THE DOCTRINES AT ISSUE: FUGITIVE DISENTITLEMENT AND THE COLLATERAL ORDER DOCTRINE

This part examines the judicially created fugitive disentitlement and collateral order doctrines. Part I.A describes the development and scope of fugitive disentitlement. Part I.B provides an overview of the collateral order doctrine—especially in the criminal context—and ends with a discussion of criticisms of the doctrine and alternative mechanisms for immediate appellate review.

A. Fugitive Disentitlement

The fugitive disentitlement doctrine allows a court to "decline to entertain the claims of a defendant who is a fugitive from justice."[29] This power emerged from the inherent authority invested in federal courts to protect their proceedings and judgments.[30] As the doctrine stands today, disentitling a fugitive-defendant is a two-step process.[31] First, the court must determine whether the defendant qualifies as a fugitive.[32] Second, "the court may then exercise discretion to disentitle the fugitive—but only if doing so would serve the doctrine's objectives."[33] Neither step of the process is straightforward.[34] Part I.A.1 describes the doctrine's development, and Part I.A.2 analyzes the issues surrounding the application of fugitive disentitlement to defendants living outside of the United States.

1. Development of Fugitive Disentitlement

Fugitive disentitlement originated in the late nineteenth century.[35] In its early formulation, the doctrine was invoked to dismiss pending appeals of

29. *Bescond*, 24 F.4th at 764 (citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)).

30. *See* Degen v. United States, 517 U.S. 820, 823–24 (1996), *superseded by statute*, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of the U.S.C.); Martha B. Stolley, Note, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 752–53 (1997) (describing how a court's dismissal of a fugitive's claims in criminal proceedings falls within the inherent powers of federal courts).

31. *See Bescond*, 24 F.4th at 771.

32. *See id.*

33. *Id.*

34. *See* United States v. Martirossian, 917 F.3d 883, 885 (6th Cir. 2019) (describing a federal court's discretion to insist on a defendant's presence in the jurisdiction to be "known loosely" as the fugitive disentitlement doctrine); United States v. Bokhari, 757 F.3d 664, 672 (7th Cir. 2014) ("Identifying fugitives for purposes of the disentitlement doctrine can present complicated legal and factual questions. . . . [T]he term 'fugitive' may take on subtly different meanings as it is used in a variety of legal contexts.").

35. *See* Smith v. United States, 94 U.S. 97, 97–98 (1876).

convicted prison escapees.[36] Over time, the Supreme Court broadened the scope of the doctrine and its policy rationales.[37]

In 1876, in *Smith v. United States*,[38] the Court removed a criminal defendant's post-conviction appeal from its docket because the defendant fled the Court's jurisdiction while the appeal was pending.[39] Absent physical control over the defendant, the Court expressed concern that there could be no assurance that any judgment it issued would be enforceable.[40] In subsequent cases, the Court reiterated this enforceability rationale to dismiss pending appeals based on the fugitive status of defendants.[41]

After *Smith*, the Court added further justifications for disentitlement. Although the Court does not consider jurisdictional escape to change a pending appeal's status as an "adjudicable case or controversy," the Court has held that flight "disentitles the defendant to call upon [courts'] resources."[42] The escapee "flout[s] the judicial process" by fleeing and therefore should be penalized, not rewarded.[43] The Court has also noted that disentitlement serves to discourage escape, encourage voluntary surrender, and promote the efficient operation of courts.[44]

With these new justifications came contention over the bounds of the doctrine. Until *Ortega-Rodriguez v. United States*,[45] the Court expanded the rationales behind disentitlement "while [also] ruling against every fugitive who came before the Court."[46] In *Ortega-Rodriguez*, however, the Court took a first step in curtailing the doctrine's reach.[47] In that case, the Court held that disentitlement is unjustified when a fugitive flees and is recaptured *before* invoking the appellate process.[48] Because the defendant is back under the court's control, the concerns over enforceability, flouting the judicial

36. *See* Booth, *supra* note 11, at 1158; *see, e.g.*, Allen v. Georgia, 166 U.S. 138, 138 (1897); Bonahan v. Nebraska, 125 U.S. 692, 692 (1887); *Smith*, 94 U.S. at 97.

37. *See* Booth, *supra* note 11, at 1157–60.

38. 94 U.S. 97 (1876).

39. *Id.* at 97–98 (concluding that "[i]t is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party . . . is where he can be made to respond to any judgment we may render").

40. *Id.*; *see also* Stolley, *supra* note 30, at 753–54 (describing the enforceability rationale for fugitive disentitlement).

41. *See* Ortega-Rodriguez v. United States, 507 U.S. 234, 239–40 (1993); Stolley, *supra* note 30, at 753–55 (summarizing the cases invoking the enforceability rationale); Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEO. IMMIGR. L.J. 749, 752–56 (2013) (same).

42. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). *But see* Eisler v. United States, 338 U.S. 189, 192 (1949) (Frankfurter, J., dissenting) (arguing that courts lack jurisdiction when the litigant withdraws from the power of the presiding court).

43. Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 280 (2d Cir. 1997). The Court has considered fleeing to be "tantamount to waiver or abandonment" of appeal. *Ortega-Rodriguez*, 507 U.S. at 240.

44. Estelle v. Dorrough, 420 U.S. 534, 537 (1975); *see also* Glen, *supra* note 41, at 758–59.

45. 507 U.S. 234 (1993).

46. Glen, *supra* note 41, at 759.

47. *See id.*

48. *Ortega-Rodriguez*, 507 U.S. at 244–45.

system, and efficient proceedings are attenuated.[49] Meanwhile, although disentitlement would have served to deter escape, the majority considered this justification insufficient to support such a harsh rule.[50]

Most recently, in *Degen v. United States*,[51] the Court held that the rationales supporting disentitlement in a criminal case were generally absent in parallel civil forfeiture proceedings.[52] Because courts in civil forfeiture cases retain jurisdiction over the property, there is less risk of unenforceability or delay in proceedings due to the defendant's absence.[53] Even assuming that permitting disentitlement in a forfeiture case would deter flight, the Court found disentitlement "too blunt an instrument" to advance this goal.[54] Ultimately, the Court cautioned that "the sanction of disentitlement is most severe," and the respect afforded to a court's judgments "is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."[55]

Instead, the opinion encouraged Congress to define the disentitlement power of courts in civil forfeiture proceedings.[56] Congress obliged, and *Degen* was superseded by statute shortly after it was decided.[57] Through the Civil Asset Forfeiture Reform Act of 2000,[58] Congress extended fugitive status in forfeiture proceedings to international defendants who were not in the United States to begin with and granted courts statutory authority to disentitle those deemed fugitives.[59]

This section surveyed disentitlement's expansion from prison escapees seeking appeal to defendants who never fled but rather declined to enter a court's jurisdiction. The following section describes the open questions concerning the doctrine's application to international criminal defendants.

2. Fugitive Disentitlement as Applied to International Defendants

Although the Civil Asset Forfeiture Reform Act extended fugitive disentitlement to international parties in a specific context,[60] challenges to

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49. *See id.* at 244–47.

50. *See id.* at 246–48.

51. 517 U.S. 820 (1996), *superseded by statute*, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of the U.S.C.).

52. *Id.* at 829.

53. *See id.* at 825.

54. *Id.* at 828.

55. *Id.*

56. *See id.* at 823.

57. *See* 28 U.S.C. § 2466(a)(1)(B)–(C).

58. Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of the U.S.C.).

59. 28 U.S.C. § 2466(a)(1)(B)–(C) ("A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action . . . [who] to avoid criminal prosecution . . . declines *to enter* or reenter the United States . . . ." (emphasis added)); *see* Collazos v. United States, 368 F.3d 190, 197–98 (2d Cir. 2004) (describing the factors that courts must consider under the statute to disentitle a defendant).

60. *See supra* notes 56–59 and accompanying text.

jurisdiction and international law complicate the doctrine's application in transnational *criminal* proceedings.[61] For example, foreign defendants often contest the reach of U.S. criminal law abroad.[62] Further, defendants who live in countries that lack extradition treaties with the United States have no legal obligation to submit themselves to the jurisdiction of U.S. courts.[63] These complications raise difficult questions regarding the fugitive status of a defendant who declines to enter a court's jurisdiction to face charges for conduct done wholly outside of the territories of the United States.

A prominent jurisdictional challenge brought by international litigants is that charges against them constitute an unlawful extraterritorial application of U.S. law.[64] To avoid international discord, U.S. courts have created a rebuttable presumption against the extraterritoriality of federal law absent clear congressional intent otherwise.[65] This presumption, although it had seemingly been "given up for dead" for some time, has more recently been expanded to "foreclose[] a large amount of transnational litigation."[66] Lower courts have taken the revitalization of the presumption against extraterritoriality seriously.[67] Federal criminal statutes were long thought to defeat the presumption, but federal courts have become more open to dismissing indictments against international litigants on the grounds that the charges constitute an unlawful extraterritorial application of federal law.[68]

Relevant to this analysis are two recent cases in which the Second Circuit limited the extraterritorial reach of the CEA—the statute that Muriel Bescond allegedly violated.[69] First, between the district court's disentitlement ruling against Bescond and her appeal, the Second Circuit decided *Prime International Trading, Ltd. v. BP P.L.C.*[70] In *Prime*, the court held that the plaintiffs failed to plead a domestic application of the same section of the

61. *See* Booth, *supra* note 11, at 1166; *In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009) ("The complexities inherent in transnational criminal law enforcement can be vexing . . . .").

62. *See, e.g.*, United States v. Martirossian, 917 F.3d 883, 886 (6th Cir. 2019) (weighing the reach of money laundering charges abroad); United States v. Shalhoub, 855 F.3d 1255, 1258 (11th Cir. 2017) (considering whether the indictment of a Saudi citizen living in Saudi Arabia should be dismissed); *Hijazi*, 589 F.3d at 403 (considering whether federal fraud charges reach a Lebanese citizen in Kuwait).

63. *See Hijazi*, 589 F.3d at 403.

64. *See, e.g.*, *id.*; *Martirossian*, 917 F.3d at 885–86; *Shalhoub*, 855 F.3d at 1258–59.

65. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) (noting that the presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries"); *see* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 255 (2010) ("It is a 'longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within . . . the United States."'" (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

66. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1098–99 (2015); *see RJR Nabisco*, 579 U.S. at 346 (holding that section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) did not overcome the presumption against extraterritoriality); *Morrison*, 561 U.S. at 267 (holding that the application of section 10(b) of the Securities Exchange Act in the case was prohibited as impermissibly extraterritorial).

67. Bookman, *supra* note 66, at 1099.

68. *See id.* at 1098–99.

69. *See supra* notes 1–4 and accompanying text.

70. 937 F.3d 94 (2d Cir. 2019); *see* United States v. Bescond, 24 F.4th 759, 772 n.8 (2d Cir. 2021).

CEA that Bescond was charged under, as "all of the relevant [manipulation] . . . occurred abroad."[71] Second, after *Bescond*, in October 2022, the Second Circuit again found a plaintiff's CEA claims "impermissibly extraterritorial" because the alleged misconduct was "predominantly foreign."[72]

Because of concerns that such charges are impermissibly extraterritorial, many international defendants face a difficult choice in deciding whether to enter the United States to challenge their indictments. If defendants travel to the United States, they risk pretrial detention and a strong likelihood of being denied bail because they are perceived as a legitimate flight risk.[73] And even if a court grants bail, criminal proceedings take a substantial and uncertain amount of time, to the detriment of a defendant who resides outside the United States.[74] Defendants may be required to remain in the United States until resolution of the case, thus removing them from family, employment, and the familiarity of their home nation.[75]

Yet declining to travel to the United States does not free international defendants from the harms of indictment. Unless the court grants the defendant permission to challenge the indictment through counsel—that is, the court declines to exercise fugitive disentitlement—the defendant will not be able to raise defenses against the charges.[76] And even if the court permits counsel to appear for the defendant, it may deny the defendant's motion to dismiss.[77] Either way, INTERPOL may publish a "red notice" with law enforcement worldwide "so that if the defendant leaves [their] home country, [they] can be provisionally arrested, effectively confining" them to where they reside.[78] Altogether, prosecutors "impos[e] financial, reputational, and family hardship" on the defendant through the pending indictment, "regardless of [the defendant's] guilt or innocence" or "whether the indictment charges violations of a statute that applies extraterritorially."[79]

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71. *Prime*, 937 F.3d at 108.

72. Laydon v. Coöperatieve Rabobank U.A., 55 F.4th 86, 96 (2d Cir. 2022). SocGen, the same bank at issue in *Bescond*, was one of several defendants in *Laydon* that were sued under the CEA for manipulating financial benchmarks similar to USD LIBOR. *See id.* at 93 n.3.

73. *See* Booth, *supra* note 11, at 1169; Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 708 & n.168 (2018) ("Defendants with significant ties outside the jurisdiction are traditionally viewed as more likely, or at least more able, to flee.").

74. *See* Booth, *supra* note 11, at 1169 & n.102.

75. *Id.*; Michael P. Kelly, *The "Fugitive Disentitlement" Doctrine Warrants a Close Look by the United States Supreme Court*, LEXOLOGY (Nov. 5, 2014), https://www.lexology.com/library/detail.aspx?g=03f2a359-0cde-4af5-a2ea-70a3dcc2fbab [https://perma.cc/B8JQ-WYCQ].

76. *See supra* notes 8–10 and accompanying text.

77. *See, e.g.*, United States v. Cornelson (*Cornelson II*), 609 F. Supp. 3d 258, 261 (S.D.N.Y. 2022) (denying the defendant's motion to dismiss even though the court previously declined to disentitle the foreign defendant).

78. Booth, *supra* note 11, at 1168–69; *see Red Notices*, INTERPOL, https://www.interpol.int/en/How-we-work/Notices/Red-Notices [https://perma.cc/56YM-DWSK] (last visited Sept. 3, 2023).

79. United States v. Bescond, 24 F.4th 759, 775 (2d Cir. 2021); *see also* Booth, *supra* note 11, at 1168–69 ("[T]he charges and pending indictment will continue to follow the defendant, likely affecting his ability to get work and his personal reputation.").

In part because of these difficulties, courts inconsistently apply fugitive disentitlement to foreign citizens who, although never fleeing from the United States, remain in their home country.[80] The main point of contention is whether the definition of "fugitive" includes those who decline to *enter* the United States or only those who flee or decline to *reenter*.[81] Regardless of a court's stance on when to impose fugitive disentitlement on a foreign defendant, challenging a disentitlement once ordered presents significant difficulties. The circuit split described in Part II demonstrates how defendants have struggled to challenge their disentitlement because of procedural appellate barriers.

B. The Final Judgment Rule and the Collateral Order Doctrine

Appellate jurisdiction is the main procedural barrier for international defendants trying to appeal their disentitlement. 28 U.S.C. § 1291 generally prohibits immediate appeal of a disentitlement order.[82] But the collateral order doctrine permits immediate appeal of a small class of district court orders in both civil and criminal cases under § 1291.[83] Part I.B.1 describes the development of the collateral order doctrine. Part I.B.2 surveys the doctrine's heightened strictness in criminal cases. Part I.B.3 briefly examines the writ of mandamus, which defendants raise as an alternative mechanism for appellate review in these cases.

1. Overview of the Collateral Order Doctrine

Known as the "final judgment rule," 28 U.S.C. § 1291 is the "key jurisdictional statute for the federal courts of appeals."[84] Section 1291 empowers courts of appeals to review only "final decisions of the district

80. For a thorough discussion of how courts apply fugitive disentitlement to such defendants, see generally Booth, *supra* note 11 (advocating against applying fugitive disentitlement to defendants who decline to enter the United States).

81. *See id.* at 1169–70. *Compare* Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 281 (2d Cir. 1997) ("A fugitive from justice has been defined as '[a] person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual place of abode and conceals himself within the district.'" (alterations in original) (quoting BLACK'S LAW DICTIONARY (5th ed. 1979))), *with* United States v. Martirossian, 917 F.3d 883, 890 (6th Cir. 2019) ("[A] defendant need not be present in and leave a jurisdiction to become a fugitive; the mere refusal to report for prosecution can constitute constructive flight."), *and* United States v. Shalhoub, 855 F.3d 1255, 1263 (11th Cir. 2017) (concluding that a "fugitive" includes those that constructively flee by deciding not to return to the United States).

82. *See infra* Part I.B.1.

83. *See infra* Part I.B.1.

84. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1814 (2018); *see* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (3d ed. 2023) ("For more than two centuries, the final judgment rule has been the heart of appellate jurisdiction in the federal system.").

courts."[85] In most circumstances, a district court decision is final when it marks the end of proceedings.[86] Thus, the final judgment rule generally requires a party to "raise all claims of error in a single appeal" after the district court has entered a final judgment on the merits.[87] Although other statutes permit appeals of nonfinal decisions,[88] § 1291 is the source of appellate jurisdiction for most appeals from district court decisions.[89]

Strict adherence to the final judgment rule serves several important functions.[90] First, it "preserves the proper balance between trial and appellate courts."[91] Appellate courts should not interfere "with the numerous decisions [district courts] must make in the pre-judgment stages of litigation."[92] Second, the finality requirement reduces litigants' ability to clog the legal system with a "succession of costly and time-consuming [interlocutory] appeals."[93] Ultimately, a strict final judgment rule is intended to promote the efficient administration of justice, whereas piecemeal interlocutory review may undermine it.[94]

Even so, federal courts have interpreted the term "final decisions" in § 1291 to cover more than only appeals at the end of district court proceedings.[95] Under the collateral order doctrine, appellate courts have jurisdiction under § 1291 over a small class of "collateral" rulings that do not terminate the litigation but are nonetheless sufficiently "final" to be appealable before a final judgment is entered.[96] The collateral order doctrine provides appellate jurisdiction over orders that (1) are "conclusive" on the

85. 28 U.S.C. § 1291. The statute applies to all federal circuit courts of appeals except for the U.S. Court of Appeals for the Federal Circuit. *Id.* It also does not apply "where a direct review may be had in the Supreme Court." *Id.*

86. *See* Lammon, *supra* note 84, at 1811.

87. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); *see* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007); Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017) ("'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.'" (alteration in original) (quoting McLish v. Roff, 141 U.S. 661, 665–66 (1891))).

88. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (allowing appeal of certain orders granting injunctive relief); 28 U.S.C. § 1292(b) (permitting district courts to certify interlocutory orders in civil actions for discretionary appellate review); 18 U.S.C. § 3731 (allowing the prosecution in a criminal case to appeal certain district court orders or decisions before a final judgment).

89. Lammon, *supra* note 84, at 1814 & n.18.

90. Flanagan v. United States, 465 U.S. 259, 263–64 (1984).

91. *Microsoft Corp.*, 137 S. Ct. at 1712.

92. *Flanagan*, 465 U.S. at 263–64; *see also* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 436 (1985) ("Implicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and . . . can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.").

93. *Flanagan*, 465 U.S. at 263–64.

94. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106–07 (2009); *see Flanagan*, 465 U.S. at 264 (finding the purpose behind § 1291 "inimical" to piecemeal appellate review (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982))).

95. *Mohawk Indus.*, 558 U.S. at 106.

96. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (establishing the collateral order doctrine).

issue, (2) "resolve important questions separate from the merits," and (3) "are effectively unreviewable on appeal from the final judgment in the underlying action."[97] In practice, courts consider these conditions—conclusiveness, importance, separateness, and "effective unreviewability"—to determine whether a prejudgment decision is an appealable collateral order.[98]

These conditions are labeled the "*Cohen* requirements" after *Cohen v. Beneficial Industrial Loan Corp.*,[99] the case in which the Supreme Court established the doctrine.[100] In *Cohen*, the Court ruled that the defendants could appeal from a pretrial denial of their motion for the plaintiffs to provide a security to pay defense costs.[101] Crucially, *Cohen* did not create an exception to the final judgment rule; instead, the Court relied on a practical rather than technical construction of § 1291 to hold that some pretrial orders are final decisions.[102]

The nuances of the *Cohen* requirements developed over decades of cases.[103] On conclusiveness, if a district court might reexamine an issue later in the litigation, there is minimal justification for immediate appeal because the district court could reverse its position on the issue.[104] On importance, an issue is important if it is "weightier than the societal interests advanced by the ordinary operation of final judgment principles."[105] The key question is "whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal."[106] Separateness from the merits ties the collateral order doctrine to the efficiency purpose underlying the final judgment rule—appeals can take years and may require a stay of proceedings if the appeal is close to the merits of the action; sufficient separateness could allow proceedings to continue while the appeal is pending.[107] Finally, effective unreviewability not only requires that the order would be rendered moot post judgment but also, decisively, that delaying

97. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995).

98. *Mohawk Indus.*, 558 U.S. at 107–08. Although the collateral order doctrine is conceptualized as a three-part test, the second requirement—resolving important questions separate from the merits—covers both the importance and separateness conditions. Steinman, *supra* note 87, at 1248.

99. 337 U.S. 541 (1949).

100. *Mohawk Indus.*, 558 U.S. at 106.

101. *Cohen*, 337 U.S. at 546–47.

102. *Id.* at 546 ("The Court has long given this provision of the statute this practical rather than a technical construction."); *see* Lammon, *supra* note 84, at 1815–16, 1842 ("Collateral orders are final decisions.").

103. For a thorough history of the early development of the collateral order doctrine, see generally Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998).

104. *See* Lammon, *supra* note 84, at 1841.

105. Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994).

106. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108–09 (2009) (rejecting collateral appeal of disclosure orders adverse to attorney-client privilege in part because post-judgment appeals suffice to protect litigants and the "vitality of the attorney-client privilege").

107. *See* Lammon, *supra* note 84, at 1841.

review "'would imperil a substantial public interest' or 'some particular value of a high order.'"[108]

The Supreme Court has stated that the collateral order doctrine should be applied narrowly and these conditions construed stringently.[109] Moreover, the doctrine is a blunt instrument.[110] Whether an order is appealable is "determined for the entire category to which a claim belongs."[111] Thus, the Second Circuit in *Bescond* did not settle the appealability of only the disentitlement order at issue. Rather, it determined that fugitive disentitlement orders of foreign citizens who decline to enter U.S. jurisdiction—as a category of orders—are immediately appealable within the Second Circuit.[112]

The Supreme Court has rejected collateral order appeals on numerous issues important to litigants,[113] but the Court is noticeably more divided in cases that apply rather than reject the doctrine.[114] The Court recently accepted an appeal under the collateral order doctrine for the first time in roughly twenty years—and it did so in a footnote.[115] In *Shoop v. Twyford*,[116] a 5–4 majority held that a district court's grant of a prisoner transportation order under the All Writs Act[117] was an appealable collateral order, and therefore the Court could reach the case's merits.[118] Although its analysis was confined to a footnote, the majority found that these transportation orders

108. *Mohawk Indus.*, 558 U.S. at 107 (quoting Will v. Hallock, 546 U.S. 345, 352–53 (2006)).

109. *See Digit. Equip.*, 511 U.S. at 868 (emphasizing that the doctrine should "never be allowed to swallow the general rule that a party is entitled to a single appeal" after a final judgment).

110. *Id.* at 883.

111. *Id.* at 868. *But see* Steinman, *supra* note 87, at 1273 (explaining that some courts of appeals have exercised "discretionary review through the collateral order doctrine" without providing categorical appealability).

112. United States v. Bescond, 24 F.4th 759, 775 (2d Cir. 2021) (Livingston, C.J., dissenting) (noting that "the majority create[d] a new class of interlocutory appeals"). Although collateral order appeal is categorical, courts can narrow the category for a type of order. *See, e.g.*, Johnson v. Jones, 515 U.S. 304, 319–20 (1995) (limiting the appealability of denials of qualified immunity to orders that turn on questions of law, not fact); *see also* Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1035 (10th Cir. 2022), *cert. denied*, No. 22-741, 2023 WL 3937608 (June 12, 2023) (limiting its collateral order analysis to appeals from denials of the ministerial exception because there was a genuine issue of fact whether the plaintiff was a minister).

113. *See, e.g.*, *Digit. Equip.*, 511 U.S. at 884 (prior settlement); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 496 (1989) (forum selection clauses); Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) (forum non conveniens); United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982) (per curiam) (vindictive prosecution).

114. *See* Colin Starger, *Consensus and the Collateral Order Exception*, IN PROGRESS (Nov. 16, 2015), https://blogs.ubalt.edu/cstarger/2015/11/16/consensus-and-the-collateral-order-exception/ [https://perma.cc/9Q4P-PSN5] (mapping most of the collateral order cases heard by the Supreme Court prior to 2015 by vote breakdown).

115. Shoop v. Twyford, 142 S. Ct. 2037, 2043 n.1 (2022); *see infra* note 148 (noting that, before *Shoop*, the Supreme Court most recently granted appeal under the collateral order doctrine in 2003).

116. 142 S. Ct. 2037 (2022).

117. 28 U.S.C. § 1651.

118. *Shoop*, 142 S. Ct. at 2043 n.1.

satisfied the *Cohen* requirements.[119] The Court also found persuasive that all lower courts that had considered the issue permitted appeal.[120]

Justice Stephen G. Breyer, joined by Justices Sotomayor and Kagan, and Justice Gorsuch wrote dissents based on this jurisdictional issue.[121] Justice Breyer did not find the majority's analysis of the *Cohen* requirements persuasive.[122] Moreover, he considered "the harms of interlocutory appeal [to be] significant" and "the countervailing benefits [to be] minimal."[123] Justice Gorsuch's brief dissent emphasized that the class of collaterally appealable orders must be kept narrow.[124] And because the Court did not grant certiorari to extend the collateral order doctrine, he would have dismissed the case as improvidently granted.[125]

The conflict in *Shoop* is significant to the circuit split over collateral order appeal of fugitive disentitlement orders for two reasons. First, the Court's application of the doctrine for the first time in twenty years may indicate that a majority of the current justices are more open to permitting appeal under the doctrine going forward. Second, the case reveals the concerns of some of the current justices about extending the doctrine. *Shoop*'s usefulness here, however, is moderated by the fact that the case did not involve an order in a criminal proceeding.

2. The Criminal Collateral Order Doctrine

The Supreme Court has long held that the policy behind the final judgment rule "is at its strongest in the field of criminal law."[126] Accordingly, it is applied with "the utmost strictness in criminal cases."[127] The Court has reasoned that this strictness serves to protect the interests of all parties.[128] Because of the added scrutiny in the context of criminal collateral orders, the

119. *Id.*
120. *Id.*
121. *Id.* at 2047 (Breyer, J., dissenting); *id.* at 2050 (Gorsuch, J., dissenting).
122. *See id.* at 2046–50 (Breyer, J., dissenting).
123. *Id.* at 2048. His dissent stated that collateral appeal as of right "would impair the ability of district courts to manage their own dockets and supervise trial proceedings." *Id.* By contrast, the benefits would be small because district courts have "comparative expertise" relative to appellate courts in deciding when transportation orders are necessary, and therefore "interlocutory appeal is unlikely 'to bring important error-correcting benefits.'" *Id.* at 2049 (quoting Johnson v. Jones, 515 U.S. 304, 316–17 (1995)).
124. *Id.* at 2050–51 (Gorsuch, J., dissenting).
125. *Id.*
126. Flanagan v. United States, 465 U.S. 259, 264 (1984) (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)); *see also* Cobbledick v. United States, 309 U.S. 323, 325 (1940) (concluding that the tenets of the final judgment rule are "especially compelling in the administration of criminal justice").
127. *Flanagan*, 465 U.S. at 265.
128. Bringing cases to trial promptly alleviates swelling court dockets and the overcrowding of detention facilities; defendants have a strong interest in the speedy resolution of the charges against them; the prosecution's case may falter as each delay diminishes viable evidence and witness testimony; and the public has a safety interest in the swift administration of justice. *See id.* at 264–65 (describing these interests and others).

Court has held thus far that only four types of pretrial orders in criminal prosecutions meet the *Cohen* requirements.[129]

First, in *Stack v. Boyle*,[130] the Court held that an order denying a motion to reduce bail may be reviewed before trial.[131] Although the majority opinion permitted appeal without explanation, Justice Robert H. Jackson, who authored *Cohen*, offered some reasoning in a separate opinion.[132] He emphasized that the finality requirement serves to avoid piecemeal review when appeal would stifle trial proceedings, but review of an order fixing bail can be accomplished without halting proceedings on the merits because "[bail] issues are entirely independent of the issues to be tried."[133] Additionally, these types of orders can never be reviewed unless they are appealed before sentencing.[134] For these reasons, Justice Jackson found that orders fixing bail in criminal cases are final decisions under § 1291 in the same way as orders determining the right to security in civil cases, as in *Cohen*, and are therefore immediately appealable.[135]

Second, in *Abney v. United States*,[136] twenty-six years after *Stack*, the Court held that a pretrial order denying a defendant's motion to dismiss on double jeopardy grounds satisfies the *Cohen* requirements.[137] It held that these orders are conclusive on the issue of a criminal defendant's double jeopardy claim.[138] Once rejected, there are "no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment[]."[139] Additionally, as with bail review, a double jeopardy challenge is separate from the merits because it does not require the court to evaluate whether the defendant is guilty of the offense charged.[140] Rather, the defendant contests the "authority of the Government to hale [the defendant] into court to face trial" on specific charges.[141] Finally, the order would be effectively unreviewable on post-conviction appeal because the accused's Fifth Amendment right to be free from double jeopardy would

129. *See* United States v. Bescond, 24 F.4th 759, 776 (2d Cir. 2021) (Livingston, C.J., dissenting) (listing the four types of orders).

130. 342 U.S. 1 (1951).

131. *Id.* at 7. The Eighth Amendment protects against excessive bail. U.S. CONST. amend. VIII (stating that "excessive bail shall not be required").

132. *See Stack*, 342 U.S. at 12 (Jackson, J., concurring); *see also* Anderson, *supra* note 103, at 549.

133. *See Stack*, 342 U.S. at 12 (Jackson, J., concurring).

134. *Id.*

135. *Id.*

136. 431 U.S. 651 (1977).

137. *Id.* at 662–65 (granting appeal but denying the motion to dismiss on double jeopardy grounds when defendants faced retrial on conspiracy charges). The Double Jeopardy Clause of the Fifth Amendment protects against being twice put to trial for the same offense. U.S. CONST. amend. V.

138. *Abney*, 431 U.S. at 659.

139. *Id.*

140. *Id.* at 659–60. The Court found that these motions also do not affect the evidence that the Government would use to obtain a conviction. *Id.*

141. *Id.*

already have been violated by having had to endure the trial.[142] Consequently, the Court held that denials of double jeopardy challenges constitute appealable collateral orders.[143]

Third, in *Helstoski v. Meanor*,[144] the Court held that an order denying a motion to dismiss an indictment of a member of Congress on Speech or Debate Clause grounds is immediately appealable.[145] Relying heavily on *Abney*, the Court reasoned that if a member of Congress is to avoid questioning for acts done in either House, denial of a challenge to the indictment must be reviewable before trial.[146]

Finally, in *Sell v. United States*,[147] the Court granted appeal from an order that a pretrial detainee be involuntarily medicated to be able to stand trial.[148] Ordering a defendant to take medication conclusively determines the issue of whether a defendant "has a legal right to avoid forced medication."[149] And the order resolves an issue of "clear constitutional importance"—one's expectations of bodily privacy and security.[150] Whether a defendant must undergo forced medication is also wholly separate from that defendant's guilt or innocence, the court reasoned.[151] Finally, on the last condition, effective unreviewability, the Court found that, by the time of postjudgment appeal, a defendant will have undergone forced medication—"the very harm [the defendant] seeks to avoid."[152] Thus, the order cannot be reviewed after trial, even if the defendant is acquitted.[153]

Even though the Supreme Court has limited its application of the collateral order doctrine to these four types of orders in criminal cases, the federal courts of appeals have exercised their discretion to apply it more expansively. For instance, the Second Circuit has permitted collateral appeal of several

142. *See id.* at 660–62 (explaining that the Double Jeopardy Clause of the Fifth Amendment pertains to the right not to be *tried* twice for the same offense, not against being *punished* twice).

143. The Court acknowledged that this holding could result in "dilatory appeals" but explained that this problem could be averted by rules or policies for expedited review. *Id.* at 662 n.8 ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.").

144. 442 U.S. 500 (1979).

145. *Id.* at 508. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

146. *See Helstoski*, 539 U.S. at 506–08.

147. 539 U.S. 166 (2003).

148. *Id.* at 177. *Sell* is also the most recent case before *Shoop* in which the Court applied the collateral order doctrine. *See* Starger, *supra* note 114 (mapping *Sell* as the last case in which the Court permitted appeal under the doctrine).

149. *Sell*, 539 U.S. at 176.

150. *See id.* In dissent, Justice Antonin Scalia questioned the relevance of whether the disputed question is "*an important constitutional issue*." *Id.* at 192–93 (Scalia, J., dissenting).

151. *Id.* at 176 (majority opinion).

152. *Id.* at 176–77.

153. *Id.* The dissent largely agreed with the majority on the first two *Cohen* requirements but disagreed on the effectively unreviewable condition. *See id.* at 189–90 (Scalia, J., dissenting).

other types of criminal orders.[154] In fact, most circuit courts have expanded the categories of criminal orders collaterally reviewable on a range of issues.[155] This expansion is not without criticism.[156] Some scholars have criticized courts for not consistently following the original reasoning behind the doctrine—chiefly, that "collateral order appeal should be permitted only if postponing an appeal of an issue until after the termination of the case would bar any review at all."[157] This inconsistency and lack of clear guidance likely contributes to the stark circuit split central to this Note and analyzed in Part II.

3. Writ of Mandamus as an Alternative to Appeal Under the Collateral Order Doctrine

The collateral order doctrine is not the only possible mechanism for immediate appellate review of a fugitive disentitlement order. The All Writs Act permits appellate courts to issue a writ of mandamus to compel a district court to perform a particular duty within its jurisdiction.[158] The writ is a "'drastic and extraordinary' remedy" reserved for "only exceptional circumstances."[159] Because of its high standards, mandamus relief is extraordinarily rare and highly specific to the facts of each case.[160]

Even so, foreign defendants often seek mandamus relief from a fugitive disentitlement order as an alternative to appeal under the collateral order

154. *See* United States v. Pons, 607 F. App'x 64, 65 (2d Cir. 2015) (order of commitment to determine competency to stand trial); United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995) (order transferring a juvenile to adult status); United States v. Myers, 635 F.2d 932, 935 (2d Cir. 1980) (order denying a member of Congress's challenge to an indictment on separation of powers grounds).

155. *See, e.g.*, United States v. Bokhari, 757 F.3d 664, 670–71 (7th Cir. 2014) (order denying claim that comity with Pakistani courts required dismissal of indictment); United States v. Kashamu, 656 F.3d 679, 680–83 (7th Cir. 2011) (denial of a motion to dismiss indictment on the grounds that a foreign extradition proceeding had a collateral estoppel effect on prosecution in the United States); United States v. Romero, 511 F.3d 1281, 1283–84 (10th Cir. 2008) (order denying a request for concurrent sentences upon revocation of supervised release); United States v. Griffin, 440 F.3d 1138, 1141 (9th Cir. 2006) (order permitting a special master to turn over letters to the government despite claim of marital privilege); United States v. Brown, 218 F.3d 415, 420–22 (5th Cir. 2000) (gag orders); United States v. Caggiano, 660 F.2d 184, 190 (6th Cir. 1981) (orders disqualifying prosecutors from a criminal case); United States v. Cianfrani, 573 F.2d 835, 845 (3d Cir. 1978) (orders closing a pretrial proceeding to the public).

156. It has been referred to as "hopelessly complicated"; "legal gymnastics"; "dazzling in its complexity"; "unconscionable intricacy" with "overlapping exceptions, each less lucid than the next"; "an unacceptable morass"; "dizzying"; "tortured"; "a jurisprudence of unbelievable impenetrability"; "helter-skelter"; "a crazy quilt"; "a near-chaotic state of affairs"; a "Serbonian Bog"; and "sorely in need of limiting principles." Steinman, *supra* note 87, at 1238–39 (citations omitted) (collecting scholarly criticisms of the doctrine).

157. Anderson, *supra* note 103, at 561; *see* Lammon, *supra* note 84, at 1842.

158. 28 U.S.C. § 1651(a) ("[A]ll 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."); *see* Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004).

159. *Cheney*, 542 U.S. at 380 (first quoting *Ex Parte* Fahey, 332 U.S. 258, 259–60 (1947); and then quoting Will v. United States, 389 U.S. 90, 95 (1967)).

160. *See In re* Hijazi, 589 F.3d 401, 406–07 (7th Cir. 2009).

doctrine.[161] In *In re Hijazi*,[162] the U.S. Court of Appeals for the Seventh Circuit granted mandamus relief from a disentitlement order and ordered a district court to rule on an absent foreign defendant's motion to dismiss his indictment.[163] Moreover, even though Chief Judge Livingston forcefully dissented on appeal under the collateral order doctrine in *Bescond*, she nevertheless admitted that "there may be circumstances in which such [disentitlement] orders may properly be the subject of mandamus relief."[164]

But mandamus relief lacks the consequential categorical application of the collateral order doctrine and therefore would not resolve the current circuit split.[165] At minimum, however, the reasoning of the court in *Hijazi* bolsters the arguments in favor of collateral order appeal discussed in the following parts of this Note.[166]

II. ARGUMENTS AGAINST AND FOR PERMITTING APPEALS FROM FUGITIVE DISENTITLEMENT ORDERS UNDER THE COLLATERAL ORDER DOCTRINE

This part describes the arguments on each side of the circuit split. Part II.A examines the arguments against appeal under the collateral order doctrine in *Shalhoub*, *Martirossian*, and the *Bescond* dissent. Part II.B details the Second Circuit's arguments in favor of appeal and briefly discusses the decision's aftermath.

A. Arguments Against Immediate Appeal

The Eleventh and Sixth Circuits have held that fugitive disentitlement orders of foreign citizens who decline to enter the United States are not appealable under the collateral order doctrine.[167] In *United States v. Shalhoub*,[168] the Eleventh Circuit rejected defendant Khalid Shalhoub's interlocutory appeal from a fugitive disentitlement order.[169] Shalhoub, a citizen and resident of Saudi Arabia, was married in Miami in 1985.[170] He divorced his partner four years later, and a Florida court granted the two "full shared parental responsibility" over their child.[171]

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161. *Compare id.* at 414 (permitting mandamus relief of a fugitive disentitlement order), *with* United States v. Martirossian, 917 F.3d 883, 889–91 (6th Cir. 2019) (denying mandamus relief in a strikingly similar case), *and* United States v. Shalhoub, 855 F.3d 1255, 1262–65 (11th Cir. 2017) (same).

162. 589 F.3d 401 (7th Cir. 2009).

163. *Id.* at 407–12 (reversing disentitlement because the defendant's actions were committed entirely from abroad, there were concerns about the reach of the statute at issue, and the defendant was under no obligation to enter the United States).

164. United States v. Bescond, 24 F.4th 759, 780 (2d Cir. 2021) (Livingston, C.J., dissenting).

165. *See supra* notes 109–12 and accompanying text.

166. *See* Opening Brief for Defendant-Appellant Muriel Bescond, *supra* note 7, at 35–36.

167. *See* United States v. Martirossian, 917 F.3d 883, 890 (6th Cir. 2019); United States v. Shalhoub, 855 F.3d 1255, 1255 (11th Cir. 2017).

168. 855 F.3d 1255 (11th Cir. 2017).

169. *Id.* at 1258–59.

170. *See id.*

171. *Id.* at 1258.

In 1997, a grand jury in the U.S. District Court for the Southern District of Florida indicted Shalhoub on one count of parental kidnapping under the International Parental Kidnapping Crime Act of 1993.[172] The indictment alleged that Shalhoub removed his child from the United States to Saudi Arabia "with [the] intent to obstruct the lawful exercise of the parental rights" of the other parent.[173] A magistrate judge issued a warrant for Shalhoub's arrest the day he was indicted, but he was not successfully arrested, and the district court labeled him a fugitive from justice.[174]

Eighteen years after his indictment, in 2015, Shalhoub filed a motion to allow his counsel to appear in Florida and seek dismissal of the charges.[175] He asserted that he was not a fugitive because he was living in Saudi Arabia when he was indicted and therefore at no point fled the United States.[176] Despite this, the district court denied his motion without prejudice, explaining that the fugitive disentitlement doctrine barred Shalhoub's motion.[177] Even though Shalhoub was living abroad when indicted, he "constructively fle[d] by not deciding to return."[178] Shalhoub appealed, arguing that the collateral order doctrine permitted review of his disentitlement.[179] In a unanimous panel opinion, the court dismissed the appeal for lack of appellate jurisdiction.[180] To reach its conclusion, the court did not analyze the *Cohen* requirements; rather, the court found it sufficient that, in the panel's view, these disentitlement orders are not analogous to the types of criminal orders already accepted as collaterally appealable.[181]

In 2019, in *United States v. Martirossian*,[182] the Sixth Circuit mirrored the Eleventh Circuit but, in doing so, considered whether fugitive disentitlement orders satisfy the *Cohen* requirements.[183] The facts in this case again involved a foreign defendant who declined to enter the court's jurisdiction. Azat Martirossian, an Armenian citizen living in China, declined to travel to the United States to answer money laundering and conspiracy charges in the U.S. District Court for the Southern District of Ohio.[184] The indictment alleged that Martirossian participated in a scheme to funnel money through U.S. banks to bribe a Kazakh official on behalf of Rolls-Royce Energy

172. 18 U.S.C. § 1204; *Shalhoub*, 855 F.3d at 1258–59.
173. *Id.*
174. *Id.* at 1258.
175. *Id.*
176. *Id.* at 1259.
177. *Id.*
178. *Id.* (alteration in original) (quoting United States v. Barnette, 129 F.3d 1179, 1184 (11th Cir. 1997)); *see supra* notes 80–81.
179. *Id.*
180. *Id.* (denying collateral-order-based appeal and mandamus relief).
181. *Id.*; *see supra* Part I.B.2 (describing the four types of criminal orders to which the Supreme Court has applied the collateral order doctrine).
182. 917 F.3d 883 (6th Cir. 2019).
183. *Id.* at 886; *see supra* Part I.A.1 (describing the conditions of the collateral order doctrine).
184. *Martirossian*, 917 F.3d at 886.

Systems, Inc., an Ohio subsidiary of a British firm, in violation of 18 U.S.C. § 1956.[185]

Through counsel, Martirossian filed a motion to dismiss the indictment on the grounds that § 1956 did not reach his conduct outside of the United States.[186] But the district court declared him a fugitive and declined to rule on the motion until he submitted himself to the court's jurisdiction.[187] On appeal from that disentitlement order, a unanimous panel held that the court lacked appellate jurisdiction over Martirossian's appeal.[188] In her dissent in *Bescond*, Chief Judge Livingston agreed with the reasoning of the Eleventh and Sixth Circuits in these cases,[189] emphasizing the practical consequences of permitting Bescond's appeal.[190]

Part II.A.1 examines the findings from these opinions that fugitive disentitlement orders do not resemble the four established criminal collateral orders. Part II.A.2 surveys these opinions' analyses of the *Cohen* requirements. Finally, Part II.A.3 describes Chief Judge Livingston's dissent's criticisms of the potential consequences of *Bescond*'s jurisdictional holding.

1. Fugitive Disentitlement Orders Do Not Resemble the Types of Orders Collaterally Appealable in Criminal Cases

Much like other cases considering collateral-order-based jurisdiction,[191] *Shalhoub*, *Martirossian*, and *Bescond* weighed how much disentitlement orders resemble established collateral orders.[192] As mentioned, in criminal cases, the Supreme Court has recognized only four types of orders appealable under the collateral order doctrine: motions to reduce bail, motions to dismiss on double jeopardy grounds, motions to dismiss under the Speech or Debate Clause, and orders permitting the forced administration of antipsychotic drugs to render a defendant competent for trial.[193] The Sixth and Eleventh Circuits and the *Bescond* dissent found that disentitlement orders do not infringe upon the same rights at stake in the accepted criminal

185. *Id.*
186. *Id.*
187. *See id.*
188. *Id.*
189. United States v. Bescond, 24 F.4th 759, 778 (2d Cir. 2021) (Livingston, C.J., dissenting) ("[O]ur sister circuits have the better of this argument.").
190. *See id.* at 782–85 ("I fear that our decision today will prove yet again the wisdom . . . that the collateral order exception to the finality rule is to be narrowly construed, and most especially in criminal cases.").
191. *See, e.g.*, Abney v. United States, 431 U.S. 651, 660 (1977) (holding that district court orders denying motions to dismiss on double jeopardy grounds are collaterally appealable in part because they resemble a previously established collateral order of denial of double jeopardy motions); Belya v. Kapral, 45 F.4th 621, 633 (2d Cir. 2022) ("Defendants argue that the parallels between qualified immunity and church autonomy mean church autonomy is also . . . within the collateral order doctrine."), *cert. denied,* No. 22-824, 2023 U.S. LEXIS 2441 (June 12, 2023).
192. *See Bescond*, 24 F.4th at 782–84 (Livingston, C.J., dissenting); *Martirossian*, 917 F.3d at 888–89; United States v. Shalhoub, 855 F.3d 1255, 1260–61 (11th Cir. 2017).
193. *See supra* Part I.B.2.

collateral orders—namely, a right not to be tried and a right against excessive bail.[194] Therefore, permitting appeal here would broaden the collateral order doctrine beyond the narrow bounds set by the Supreme Court.[195]

On the right not to be tried, the Sixth and Eleventh Circuits and the *Bescond* dissent rejected attempts to analogize disentitlement orders with denials of motions to dismiss for double jeopardy. Although challenges to fugitive disentitlement implicate a "panoply of rights"—including the presumption against extraterritoriality and due process—none of these rest upon a statutory or constitutional guarantee that trial will not occur as the Double Jeopardy Clause does.[196]

Moreover, *Martirossian* held that courts should not conflate "a right not to be tried" with "a right whose remedy requires the dismissal of charges."[197] The court accepted that, if a criminal statute does not apply extraterritorially, a defendant "would in a sense have a right not to be tried under the statute."[198] But the Sixth Circuit emphasized that this is true of "*all*" challenges to an indictment that would defeat the charges.[199] Absent a statutory or constitutional guarantee not to be tried, the value in triumphing before trial cannot overcome the finality requirement.[200]

These judges found comparisons to denials of motions to fix bail similarly unpersuasive.[201] For one, like the right against double jeopardy, the right against excessive bail derives directly from a constitutional guarantee.[202] In addition, an order fixing bail is entirely separate from the merits of the charges to be tried, whereas in their view a fugitive disentitlement order is not.[203] Taken together, there is a through line in these opinions that, at least in criminal cases where the collateral order doctrine is at its most stringent, applying the doctrine requires the order that a criminal defendant appeals from to directly implicate a constitutional or statutory right.[204]

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194. *See supra* note 192. Orders denying motions to dismiss on double jeopardy grounds and orders denying motions to reduce bail satisfy the collateral order doctrine in part because they directly implicate these constitutional rights. *See* Flanagan v. United States, 465 U.S. 259, 265–66 (1984).

195. *See Bescond*, 24 F.4th at 782–84 (Livingston, C.J., dissenting).

196. *Shalhoub*, 855 F.3d at 1261.

197. *Martirossian*, 917 F.3d at 888–89 (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982)); *see id.* at 889 ("[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" (quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994))).

198. *Id.* at 889.

199. *Id.*

200. *See id.* at 888–89; *Bescond*, 24 F.4th at 784 (Livingston, C.J., dissenting).

201. *See supra* notes 130–35 and accompanying text.

202. *See Bescond*, 24 F.4th at 782 (Livingston, C.J., dissenting); *Martirossian*, 917 F.3d at 889 (finding that "the right against excessive bail arises from the U.S. Constitution, and Martirossian has no constitutional right not to be labeled a fugitive"); United States v. Shalhoub, 855 F.3d 1255, 1261 (11th Cir. 2017).

203. *See Martirossian*, 917 F.3d at 889; *Shalhoub*, 855 F.3d at 1261.

204. *See Bescond*, 24 F.4th at 781 & n.5 (Livingston, C.J., dissenting) (emphasizing that "the four appealable collateral orders the Supreme Court has recognized all protect constitutional rights").

2. Disentitlement Orders Do Not Satisfy the *Cohen* Requirements

Turning to the *Cohen* requirements,[205] the Sixth Circuit and the *Bescond* dissent rejected arguments that disentitlement orders (1) conclusively decide the issue, (2) resolve important questions separate from the merits, and (3) would be unreviewable on appeal.[206]

First, they found that disentitlement orders are inconclusive on the issue because the ruling only has effect unless or until a defendant submits to the court's jurisdiction.[207] Importantly, however, the conclusiveness analysis depends on how a court frames the issue. In *Martirossian*, the Sixth Circuit framed the issue as a motion to dismiss the indictment, not the disentitlement order itself.[208] Thus, Chief Judge Jeffrey S. Sutton reasoned that because the district court held the defendant's motion in abeyance only until the defendant submitted to the court's jurisdiction, the disentitlement could not be conclusive on the motion to dismiss.[209] Consequently, there is no finality because there is no ruling on the motion, and the defendant is "neither better nor worse" than before disentitlement.[210] Meanwhile, in *Bescond*, the Government conceded that the question of whether Muriel Bescond was a fugitive was conclusively decided.[211] The dissent, however, suggested that conclusiveness may not be satisfied even if the issue is framed as the defendant's fugitive status.[212]

Second, these opinions found that disentitlement orders do not resolve important questions separate from the merits. A question is considered important only when it is "weightier than the societal interests advanced by the ordinary operation of final judgment principles."[213] The Sixth and Eleventh Circuits considered there to be no important question at issue in fugitive disentitlement,[214] emphasizing that defendants do not have a "freestanding right not to be labeled a defendant."[215] The *Bescond* dissent went further, explaining that even if labeling Bescond a fugitive implicated a constitutionally protected interest, that interest was not distinct from the

205. *See supra* Part I.B.1.

206. *See Bescond*, 24 F.4th at 780–84 (Livingston, C.J., dissenting); *Martirossian*, 917 F.3d at 887–88. Although *Shalhoub* did not explicitly analyze the factors, the court nonetheless listed them and rejected the doctrine's applicability. 855 F.3d at 1260.

207. *See Bescond*, 24 F.4th at 780 (Livingston, C.J., dissenting); *Martirossian*, 917 F.3d at 887.

208. *See Bescond*, 24 F.4th at 780 n.4 (Livingston, C.J., dissenting) (describing the Sixth Circuit's analysis); *Martirossian*, 917 F.3d at 887.

209. *Martirossian*, 917 F.3d at 886–88.

210. *Id.* at 887.

211. *See Bescond*, 24 F.4th at 767.

212. *See id.* at 780 n.4 (Livingston, C.J., dissenting) (concluding that Bescond's fugitive status and disentitlement "would no doubt be revisited if Bescond were to appear").

213. Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994); *see supra* notes 105–06 (describing the importance condition).

214. *See* United States v. Shalhoub, 855 F.3d 1255, 1261–62 (11th Cir. 2017); *Martirossian*, 917 F.3d at 887–88. This ties back to these courts' stance that the collateral order doctrine applies only when an explicit constitutional or statutory right is at stake. *See supra* note 204 and accompanying text.

215. *Martirossian*, 917 F.3d at 887 (quoting *Shalhoub*, 855 F.3d at 1261–62).

interest of any defendant who would need to travel to a court's jurisdiction to face trial.[216] As a result, the dissent found that Bescond's interest did not overcome the societal interest in the final judgment rule.[217]

On separateness, *Martirossian* and the *Bescond* dissent emphasized that challenging fugitive disentitlement and the merits of the case are not "completely separate."[218] They found that many of the arguments regarding the applicability of criminal statutes to foreign citizens for actions abroad overlap with the question of whether a foreign defendant who declines to enter the United States is a fugitive.[219] Even though a decision on disentitlement does not entail a certain resolution of the merits, the facts and arguments underlying the two overlap considerably.[220]

Finally, the Sixth Circuit concluded that the key issue presented—whether the federal statute reached the defendant's conduct—was capable of review after a final judgment.[221] Interestingly, Chief Judge Sutton conceded that one's fugitive status would become moot if a defendant submits to a court's jurisdiction to appeal a final judgment.[222] But he emphasized that this is true of many trial court decisions, and the collateral order doctrine—especially in criminal cases—is a narrow doctrine.[223] Therefore, one's right to appeal should not increase because a defendant is labeled a fugitive.[224]

3. Practical Consequences Put Forth Against Immediate Appeal

In addition to agreeing with the Sixth and Eleventh Circuits, the *Bescond* dissent criticized the practical consequences that the Second Circuit's conflicting decision would have on litigation within the circuit. The dissent stated that the district court, on remand, will have no ability to enforce a judgment adverse to Bescond if she continues to litigate the case from abroad.[225] Chief Judge Livingston also questioned the boundaries of the court's holding on appellate jurisdiction.[226]

Positing hypotheticals, Judge Livingston asked whether the court's holding would apply to a foreign citizen charged with committing a cybercrime or an alleged terrorist who plots or commits actions from abroad.[227] The dissent criticized the majority for leaving these questions

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216. *Bescond*, 24 F.4th at 781 (Livingston, C.J., dissenting).
217. *See id.* at 780–81.
218. *Id.* at 780; *see Martirossian*, 917 F.3d at 887–88.
219. *Bescond*, 24 F.4th at 783; *Martirossian*, 917 F.3d at 888.
220. *See Martirossian*, 917 F.3d at 887–88.
221. *Id.* at 888.
222. *Id.* at 888–89.
223. *See id.* at 887–88.
224. *Id.* at 888.
225. *See* United States v. Bescond, 24 F.4th 759, 782 (2d Cir. 2021) (Livingston, C.J., dissenting) (contrasting *Bescond* with *Degen*, in which the government still controlled the property at issue—if not the defendant litigating from abroad—as a means to enforce an adverse judgment).
226. *Id.*
227. *Id.* at 779 (finding that each can be said to have "'remained at home' as Bescond has done").

open "for resolution in future cases that likely will come . . . through dilatory interlocutory appeals."[228] Further, it expressed concern that the majority did not extend "this privilege" of immediate appeal to American citizens residing abroad who commit the same offenses.[229] In effect, the dissent argued, the court "interpret[ed] the Due Process Clause to afford *greater* protection to foreign citizens located abroad than to similarly situated Americans."[230] Taken together with each opinions' consideration of the Supreme Court's jurisprudence on criminal collateral orders[231] and the *Cohen* requirements,[232] these concerns underscore the strong reservations about permitting appeal and emphasize the striking contrast of the Second Circuit's decision in *Bescond* as described in Part II.B below.

B. Arguments in Favor of Immediate Appeal

In *Bescond*, the Second Circuit explicitly parted ways with the Sixth and Eleventh Circuits.[233] The court held that the collateral order doctrine applies to fugitive disentitlement orders of foreign citizens who decline to travel to the United States.[234] Because the collateral order doctrine applies to categories of orders, the Second Circuit defined the category of appealable fugitive disentitlement rulings as "order[s] disentitling a foreign citizen who has remained at home abroad . . . without evasion, stealth, or concealment."[235] But despite granting Bescond the ability to challenge the charges from abroad, the Second Circuit declined to exercise pendent jurisdiction over her motions to dismiss.[236] Instead, the court instructed the district court to decide the motions on remand.[237]

Part II.B.1 examines the majority's arguments that fugitive disentitlement orders resemble the established criminal collateral orders. Part II.B.2 relays the court's arguments—contrary to those in Part II.A.2—that these orders satisfy the *Cohen* requirements. Finally, Part II.B.3 describes the majority's response to the dissent's concerns about the decision's consequences[238] and briefly assesses the aftermath of *Bescond*.

228. *Id.*
229. *Id.* at 777.
230. *Id.*
231. *See supra* Part II.A.1.
232. *See supra* Part II.A.2.
233. *Bescond*, 24 F.4th at 769 ("The Sixth and Eleventh Circuits have ruled that they lacked jurisdiction to hear interlocutory appeals from rulings that disentitled fugitives. . . . Respectfully, we disagree.").
234. *See id.* at 767–70.
235. *Id.* at 767.
236. *Id.* at 770–71.
237. *Id.* at 771, 775.
238. *See supra* Part II.A.2.

1. Disentitlement Orders Resemble the Established Types of Collateral Orders in Criminal Cases

Contrary to the *Martirossian* and *Shalhoub* courts' holdings, the majority in *Bescond* found that fugitive disentitlement orders resemble criminal orders already appealable under the collateral order doctrine.[239] The majority, however, criticized overreliance on these precedents at the expense of analyzing whether disentitlement orders satisfy the *Cohen* requirements.[240] Neither the Supreme Court nor the Second Circuit has "categorically limited" the doctrine to specific rights, such as the right not to be tried or be subject to excessive bail.[241] Therefore, the lack of complete overlap of the rights at stake should not decide whether fugitive disentitlement qualifies as a collateral order.[242] Still, the majority considered "Bescond's right to defend against criminal charges . . . no less important than the interests implicated in other kinds of cases in which interlocutory review is available."[243]

The court found that the penalty that disentitlement imposes before conviction resembles the interest at stake in a motion to reduce bail.[244] The right against excessive bail "serves to prevent the infliction of punishment prior to conviction."[245] Likewise, disentitlement restricts the ability of defendants to defend themselves in court, and the majority considered this sanction especially harsh given Bescond's extraterritoriality challenge that the CEA does not reach her conduct in the first place, regardless of her guilt or innocence.[246]

Similarly, the majority disagreed with the other circuits about whether challenging disentitlement implicates a constitutional right. The court stated that "Bescond does assert a constitutional right: the right to defend herself in court,"[247] and deemed it irrelevant that this right is distinct from a right not to be tried (as in a double jeopardy challenge) or a right against excessive bail.[248] For instance, in *Sell*,[249] the most recent criminal case in which the Supreme Court expanded the collateral order doctrine, the Court held that an order requiring the involuntary medication of a defendant is immediately

239. *See supra* Part II.A.1.

240. *See Bescond*, 24 F.4th at 768 n.4 (criticizing the dissent for treating the collateral order doctrine as a "series of watertight 'exception[s]' on a 'list.'" (alterations in original) (quoting *id.* at 776–77 (Livingston, C.J., dissenting))).

241. *Id.* at 769.

242. *See id.* at 769–70 (describing other rights invoked to permit immediate appeal under the collateral order doctrine, such as a defendant's privacy and security interests).

243. *Id.* at 768.

244. *See id.*; *see also supra* notes 130–35 and accompanying text (discussing *Stack v. Boyle*, 342 U.S. 1 (1951), in which the Supreme Court granted immediate appeal of motions to reduce bail).

245. *Bescond*, 24 F.4th at 768 (quoting *Stack*, 342 U.S. at 3–4, 6).

246. *See id.*

247. *Id.* at 769.

248. *See supra* notes 240–43 and accompanying text.

249. *See supra* notes 147–53 and accompanying text.

appealable because of the "privacy and security" interests at stake.[250] Ultimately, the court in *Bescond* found that the doctrine's "utmost strictness in criminal cases" should not be conflated with limiting the doctrine only to the rights to which it already applies.[251]

2. These Orders Satisfy the *Cohen* Requirements

As to the *Cohen* requirements, the majority in *Bescond* held that fugitive disentitlement orders like Bescond's satisfy each condition—conclusiveness, importance, separateness, and effective unreviewability.[252]

On conclusiveness, the Government did not dispute that the disentitlement ruling conclusively decided the issue—that is, Bescond's ability to challenge the charges from France.[253] Thus, the court considered the condition satisfied without further analysis.[254] Unlike the Sixth Circuit, it did not consider the conditional nature of disentitlement to weigh on the conclusiveness requirement.[255]

As to the second requirement, the court found that the disentitlement order determined important questions separate from the merits.[256] On importance, fugitive disentitlement is important because it heavily burdened Bescond's exercise of her due process right to defend herself in court.[257] This burden was sharpened because the indictment touched on international affairs and extraterritoriality: France declined to extradite or prosecute Bescond, and there are serious questions about the CEA's extraterritorial reach.[258] Quoting *Degen*,[259] the majority emphasized that "the Court cautioned against 'the harsh sanction of absolute disentitlement,'" and it is an important question whether this sanction should be applied to someone with no obligation to enter the court's jurisdiction.[260] Moreover, the majority considered these orders separate from the merits because one's fugitive status is distinct from whether one is innocent or guilty of criminal charges.[261] Whereas the Sixth Circuit found considerable overlap between whether the defendant is a fugitive and whether a statute applies to a foreign citizen abroad, the Second

250. *Bescond*, 24 F.4th at 769–70 (quoting Sell v. United States, 539 U.S. 166, 176–77 (2003)).

251. Flanagan v. United States, 465 U.S. 259, 265 (1984); *see supra* note 240 and accompanying text.

252. *See Bescond*, 24 F.4th at 767–70.

253. *Id.* at 767.

254. Although the dissent also accepted that this factor was undisputed for the purposes of Bescond's appeal, Chief Judge Livingston raised the possibility that one's fugitive status could be revisited. *See supra* notes 211–12 and accompanying text.

255. *See supra* notes 207–10 and accompanying text.

256. *Bescond*, 24 F.4th at 769.

257. *See id.* at 768–69.

258. *See id.*; *supra* notes 70–72 and accompanying text (discussing the Second Circuit's recent decisions restricting the CEA's extraterritorial reach).

259. *See supra* notes 51–59 and accompanying text.

260. *Bescond*, 24 F.4th at 767–68 (quoting Degen v. United States, 517 U.S. 820, 822 (1996)).

261. *Id.* at 768.

Circuit determined that it "c[ould]—and d[id]—decide one issue without deciding the other."[262]

Finally, the majority held that disentitlement is effectively unreviewable post judgment because the defendant's right to mount a defense is "now or never."[263] Either the defendant remains outside the court's jurisdiction and loses the opportunity for appeal, or the defendant submits to the court's jurisdiction—the very harm the defendant sought to remedy through immediate appeal.[264] In this case, if Bescond remained in France—"as France entitle[d] her to do"—she would have never stood trial so long as disentitled.[265] In turn, she would have no opportunity to appeal nor to "alleviate the damage to her life and reputation."[266] Alternatively, if Bescond gave in "to the pressure of disentitlement" and appeared in the district court, an appeal could not remedy the harm she faced because she already entered the court's jurisdiction.[267] Similarly, as in *Sell*,[268] the court emphasized that even acquittal would not "undo th[e] harm."[269] Further, acknowledging the circuit split, the majority considered Chief Judge Sutton's concession on the mootness of one's fugitive status on an appeal from a conviction to be "fatal[]" to the Sixth Circuit's analysis of this requirement.[270]

3. Practical Consequences of Appeal and the Aftermath of *United States v. Bescond*

The Second Circuit's decision, although clear in its application to Bescond, left much open to future cases to define the reach of its holding on the collateral order doctrine.[271] Even so, the majority responded to the dissent's hypotheticals about "cybercriminals and villains in caves" by laying out a framework through which defendants may invoke immediate appellate review of their disentitlement.[272] In addition, the early consequences of the decision can be seen through developments in Bescond's case on remand, along with the one case thus far to apply the decision.

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262. *Id.* at 770 ("In reviewing extraterritoriality, we consider the CEA's text. In reviewing disentitlement, we ask whether Bescond meets the definition of a 'fugitive' and consider whether disentitling her would serve the purposes of the doctrine." (citation omitted) (quoting Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 280–81 (2d Cir. 1997))).

263. *See id.* at 769 (emphasizing that effective unreviewability is "satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989))).

264. *See id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *See supra* note 153 and accompanying text.

269. *Bescond*, 24 F.4th at 769 (quoting Sell v. United States, 539 U.S. 166, 177 (2003)).

270. *See id.* at 769–70.

271. *See id.* at 770 n.6 ("[E]very disposition leaves unresolved questions that may arise in cases that follow in its wake. That is why we turn on the lights.").

272. *Bescond*, 24 F.4th at 769–70, 770 n.6; *see supra* notes 227–30 and accompanying text (describing the dissent's hypotheticals).

Regarding cybercriminals and terrorists specifically, the majority noted that "such bad actors have concealed themselves and are thus easily distinguishable from Bescond."[273] The court also distinguished the circumstances in *Bescond* from an American citizen—or an individual who renounced citizenship—who had "recently been in [the United States], had been briefly abroad, and could defend himself here without the same weighty burdens."[274] Together, these responses to criticism present some of the potential considerations in determining whether a defendant's disentitlement is appealable under *Bescond*. For example, has the defendant engaged in concealment, stealth, or evasion? Is or was the person a U.S. citizen? How recently, if at all, has the defendant lived in the United States?[275]

The aftermath of *Bescond* can also be seen through the developments in the case on remand. The Second Circuit, in reversing Bescond's disentitlement, ordered the district court to permit her to challenge the case through counsel and to rule on her motions to dismiss.[276] But before the district court could rule on her renewed motions, the prosecution moved to drop the charges against her.[277] Notably, however, before the charges were dropped, Bescond filed a notice of supplemental authority concerning the Second Circuit's recent decision in *Laydon v. Coöperatieve Rabobank U.A.*,[278] in which the court further limited the extraterritorial reach of the CEA.[279] Bescond argued that *Laydon*—in which SocGen, Bescond's employer, faced similar allegations to those Bescond faced—"confirms that the Indictment must be dismissed as violative of the presumption against extraterritoriality."[280]

Thus far, only one case has applied *Bescond*'s holding on fugitive disentitlement. In *United States v. Cornelson*[281] (*Cornelson I*), the district court declined to issue a fugitive disentitlement order considering the holding of *Bescond*.[282] The facts of that case had significant overlap with those in *Bescond*.[283] One difference, however, was that the defendant owned property in the United States and, until three years before the indictment, frequently traveled to the United States.[284] Even so, the court held that the defendant did not qualify as a fugitive for the same reasons Bescond did

273. *Bescond*, 24 F.4th at 770 n.6.

274. *Id.* at 769 n.5. This example came from *United States v. Golden*. *See* 239 F.2d 877, 878–79 (2d Cir. 1956) (finding no jurisdiction to review an order that denied a motion to dismiss brought by a defendant who lived abroad and failed to appear in court).

275. *See supra* notes 235, 273–74 and accompanying text.

276. *See Bescond*, 24 F.4th at 770–71, 775.

277. *See supra* note 24 and accompanying text.

278. 55 F.4th 86 (2d Cir. 2022).

279. Notice of Supplemental Auth. at 1, United States v. Sindzingre, No. 17-CR-00464 (E.D.N.Y. Oct. 20, 2022), ECF No. 40; *see supra* note 72 and accompanying text.

280. Notice of Supplemental Auth., *supra* note 279, at 1.

281. 595 F. Supp. 3d 265 (S.D.N.Y. 2022).

282. *Id.* at 270, 274 (declining to disentitle a Brazilian defendant residing in Brazil who was indicted for securities and wire fraud offenses).

283. *Id.* at 271–73.

284. *Id.* at 271.

not.[285] And, even if he were a fugitive, disentitlement would have been improper because it would not serve the purposes of the doctrine.[286] Yet after full briefing and oral argument, the district court denied the defendant's motion to dismiss, holding that the indictment did not allege an improperly extraterritorial application of the criminal statute.[287]

Although only a short time has passed since *Bescond*, neither the developments in that case nor *Cornelson* demonstrate significant concerns about the Second Circuit's decision.[288] But as the circuit split and forceful dissent reveal, the decision was controversial, and courts and scholars should weigh in on the bounds of *Bescond*'s application in future cases.

III. FUGITIVE DISENTITLEMENT ORDERS OF INTERNATIONAL DEFENDANTS SHOULD FALL UNDER THE COLLATERAL ORDER DOCTRINE

Part III advocates for permitting the immediate appeal of foreign-defendant fugitive disentitlement orders. The unique risks that these defendants face in deciding whether to enter the United States and their legitimate concerns about the reach of federal criminal law are too important to be foreclosed without appellate review.[289] Accordingly, Part III.A supports the Second Circuit's decision in *Bescond* and proposes limitations on the category of appealable orders in consideration of the concerns from *Shalhoub*, *Martirossian*, and the *Bescond* dissent. Part III.B encourages other circuits to permit appeal and advocates for the Supreme Court to weigh in on the issue.

A. The Second Circuit Should Limit Appealability to Only Indictments That Implicate Concerns of Extraterritoriality and in Which the Conduct Occurred Entirely Abroad

The Second Circuit displayed better reasoning on whether foreign citizens should be able to appeal fugitive disentitlement rulings under the collateral order doctrine.[290] First, permitting appeal does not undermine the tenets behind the final judgment rule and its collateral order exception. Second, the developments since *Bescond* demonstrate the decision's benefits.[291] But, as the majority admitted, the decision left "unresolved questions" on the bounds of its holding,[292] and the reasoning of *Shalhoub*, *Martirossian*, and the *Bescond* dissent should help define the category of appealable disentitlement

285. *Id.* at 271–72.
286. *Id.* at 272.
287. *Cornelson II*, 609 F. Supp. 3d 258, 267 (S.D.N.Y. 2022).
288. *See infra* notes 314–19 and accompanying text.
289. *See supra* Part I.A.2; *see also supra* notes 256–62 and accompanying text (describing why *Bescond* found these orders to satisfy the importance requirement).
290. The court's precise holding was that "order[s] disentitling a foreign citizen who has remained at home abroad . . . without evasion, stealth, or concealment" are appealable under the collateral order doctrine. United States v. Bescond, 24 F.4th 759, 767 (2d Cir. 2021).
291. *See supra* Part II.B.3.
292. *Bescond*, 24 F.4th at 770 n.6.

orders going forward.[293] To that end, the Second Circuit should further limit collateral order appeal to cases with serious concerns of extraterritoriality and only to those cases in which the alleged misconduct occurred entirely abroad.

Although the cases in Part II comprehensively address the *Cohen* requirements, they spent little time considering whether appeals from disentitlement orders conflict with the tenets behind the final judgment rule. Ultimately, the rule is intended to promote the efficient administration of justice, whereas piecemeal review may undermine it.[294] In all these cases, proceedings halted at an indictment[295]—in some of them for years.[296] With defendants under no obligation to enter the United States and the government unable to proceed to trial without the defendants present, appealing disentitlement presents the only administration of justice foreseeable.[297]

Nor does appellate review create excessive interference with the numerous decisions district courts must make in the prejudgment stages of litigation.[298] In *Bescond*, the court denied pendent appellate jurisdiction over Bescond's motions to dismiss, leaving it to the district court to rule on the motions.[299] This approach should be followed in future appeals.[300] Deciding motions to dismiss on grounds such as extraterritoriality may require a robust factual record and briefing.[301] A district court is better situated to make these fact-intensive determinations.[302] This restriction would mitigate the potential disruption in the balance between trial and appellate courts.

Similar issues arise in considering disentitlement against the purposes of the collateral order doctrine. One modern criticism of the doctrine is that courts do not follow the reasoning originally set forth in *Cohen*—that is, collateral order appeal should be permitted only if postponing an appeal until the termination of the case would bar any review at all.[303] Fugitive disentitlement orders meet that standard. In *Martirossian*, the Sixth Circuit conceded that one's fugitive status would be moot in a post-conviction

293. *See supra* Part II.A.

294. *See supra* notes 90–94 and accompanying text.

295. *See supra* Part II.

296. *See, e.g.*, *Cornelson I*, 595 F. Supp. 3d 265, 269 (S.D.N.Y. 2022) ("[N]early eight years after the complaint was unsealed, and over six years after the [i]ndictment was filed . . . Cornelson's attorneys made their first appearances in this action."); United States v. Shalhoub, 855 F.3d 1255, 1263 (11th Cir. 2017) (considering an indictment idling for twenty years).

297. *See In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009) ("[M]atters have reached an impasse in this case.").

298. *See supra* notes 90–92 and accompanying text. The final judgment rule also serves to "preserve[] the proper balance between trial and appellate courts." Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017).

299. United States v. Bescond, 24 F.4th 759, 770–71 (2d Cir. 2021); *see also Hijazi*, 589 F.3d at 403 (declining to decide the defendants' motions after reversing the disentitlement ruling).

300. The appellate court may also affirm the disentitlement ruling, which creates no risk of future interference in district court decision-making.

301. *See Bescond*, 24 F.4th at 783 n.8 (Livingston, C.J., dissenting) (emphasizing that the extraterritoriality inquiry requires courts to consider facts "that may not be apparent on the face of [an] indictment").

302. *See supra* note 27 and accompanying text.

303. Anderson, *supra* note 103, at 561.

appeal.[304] The Second Circuit was correct to declare that admission fatal to the court's effective unreviewability analysis.[305] Fugitive disentitlement is a two-step process, and defendants appeal both their fugitive status and resulting disentitlement.[306] Together, these determinations cannot be reviewed post conviction.[307]

Relatedly, the doctrine's "utmost strictness in criminal cases" should not be conflated with limiting the doctrine's scope only to the rights to which it already applies.[308] The final judgment rule is at its strongest in criminal law to protect the interests of all parties.[309] Accordingly, whether fugitive disentitlement orders prevail over this extra scrutiny should depend on if their appeal would harm those interests. It should not, as the Second Circuit noted, depend on whether these orders invoke the same rights as those in the four criminal collateral orders established by the Supreme Court.[310]

Framed this way, permitting interlocutory appeal of disentitlement orders seems to advance—or at minimum hardly implicate—the protected interests more than denying appeal would. For instance, not only does appeal advance a defendant's interest in the speedy resolution of charges, but it also diminishes the prosecution's potential fear that delay will reduce viable evidence and witness testimony.[311] Meanwhile, no proceedings will occur absent appeal. Yes, the Supreme Court's precedent is important to this inquiry.[312] But unless the Court holds otherwise, the circuit courts should not allow the four types of orders to define the confines of the doctrine in criminal cases—nor have they in a number of instances.[313]

Recent decisions within the Second Circuit since *Bescond* also demonstrate the benefits of its holding.[314] If Bescond had not been able to immediately appeal her disentitlement and have it reversed, she could not have invoked *Laydon*, which further limited the extraterritorial reach of the CEA after *Bescond* was decided, in her motion to dismiss on remand.[315] Yet because the prosecutors dropped the charges against Bescond before the

304. *See supra* notes 263–70 and accompanying text (describing the Sixth Circuit's analysis of the effective unreviewability *Cohen* requirement).

305. *Bescond*, 24 F.4th at 770.

306. *Id.*

307. *See supra* 263–269 and accompanying text.

308. Flanagan v. United States, 465 U.S. 259, 265 (1984).

309. *See supra* note 128 and accompanying text.

310. *See Bescond*, 24 F.4th at 768 n.4, 768–69 (criticizing the dissent for treating the collateral order doctrine as a "series of watertight 'exception[s]' on a 'list.'" (alterations in original) (quoting *id.* at 776–77 (Livingston, C.J., dissenting))).

311. *Flanagan*, 465 U.S. at 264–65 (listing these interests); *see In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009) (finding that "ordinary tasks like . . . collecting evidence" become "hurdles that are difficult, or impossible, to pass" in transnational prosecution).

312. *See supra* Part I.B.2.

313. *See supra* notes 154–55 (listing many of the types of orders in criminal cases that the federal circuit courts have granted collateral order status).

314. *See supra* notes 276–87 and accompanying text (discussing the Second Circuit's decision in *Laydon* and the U.S. District Court for the Southern District of New York's decision in *Cornelson I*).

315. *See* Laydon v. Coöperatieve Rabobank U.A., 55 F.4th 86, 96–98 (2d Cir. 2022).

district court ruled on her motion to dismiss, it is unclear whether *Laydon*'s holding, or the earlier *Prime* decision,[316] would have persuaded the district court to dismiss the case. But given the expansion of the presumption against extraterritoriality,[317] courts should be skeptical of rulings—such as fugitive disentitlement—that impede reaching the merits of extraterritoriality.[318] Even if a district court ultimately denies a motion to dismiss, as the court did in *Cornelson II* after it previously declined to disentitle the defendant,[319] opting against disentitlement advances case law on extraterritoriality and provides defendants an opportunity to bolster their challenges with new, relevant decisions.

Still, the criticisms of permitting appeal under the collateral order doctrine should influence future applications of the Second Circuit's holding. The majority held that appeal is limited to foreign citizens who remain in their home country "without evasion, stealth, or concealment."[320] In its view, cybercriminals and terrorists like those conjured by the dissent would be denied appeal because they have "concealed themselves."[321] Admittedly, this response is not satisfying; one could imagine instances in which these types of actors do not conceal themselves. But these individuals could also be distinguished based on extraterritoriality because neither of these examples raises the same extraterritoriality concerns.[322]

Looking forward, the Second Circuit should exclude cases that do not raise legitimate extraterritoriality concerns from its category of appealable disentitlement rulings. Yes, too much inquiry into extraterritoriality would weigh against the separateness from the merits requirement of the collateral order doctrine.[323] But when questions about whether the statute reaches the defendant's alleged conduct are minimal or nonexistent on the face of the indictment, appeal should be denied. In *Bescond*, the court considered the importance requirement of the collateral order doctrine satisfied in large part because the extraterritoriality concerns evident in the indictment sharpened the burdens Bescond faced in trying to defend herself in court.[324] Absent questions of sovereignty and related prosecutorial overreach, immediate

316. *Prime* was decided between Bescond's disentitlement and her appeal, so the district court judge did not analyze it in the original proceeding. United States v. Bescond, 24 F.4th 759, 772 n.8 (2d Cir. 2021).

317. *See supra* notes 64–72 and accompanying text.

318. *Cf.* Degen v. United States, 517 U.S. 820, 828 (1996) (finding that the respect afforded to a court's judgments "is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits").

319. *Cornelson II*, 609 F. Supp. 3d 258, 261 (S.D.N.Y. 2022).

320. *Bescond*, 24 F.4th at 767.

321. *Id.* at 770 n.6.

322. *See* Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN'S L. REV. 1483, 1493–94 (2011) (describing how accused terrorists who committed acts against Americans abroad have been prosecuted under federal law).

323. *See supra* notes 218–20 and accompanying text.

324. *See supra* notes 257–60 and accompanying text.

appeal likely does not outweigh a district court's inherent powers over its courtroom.[325]

Similarly, the Second Circuit should limit appeal to cases involving alleged conduct that occurred entirely abroad but also not exclude defendants because they visited the United States before indictment. Applying both this standard and the proposed extraterritoriality requirement, the disentitlement order in *Shalhoub* plausibly would not be appealable.[326] In *Shalhoub*, the alleged misconduct took place partially in the United States, which was not true of *Bescond* or *Martirossian*.[327] Moreover, the Eleventh Circuit noted that the criminal statute Shalhoub was charged under contained the word "*[i]nternational*" in the name, which reduced the court's extraterritoriality concerns about the statute.[328] At minimum, this is a closer case than the examples from the *Bescond* dissent.[329] In turn, it demonstrates how transnational criminal litigation would not be consumed by disentitlement appeals with further restrictions on the category of appealable orders.[330]

The proposed requirement that the alleged conduct occurred entirely abroad does not mean that the defendant must never have visited the United States before being indicted. This scenario occurred in *Cornelson I*, in which the defendant owned property in the United States and visited frequently in the years before his indictment.[331] Otherwise, the facts overlapped considerably with *Bescond*, and the district court declined to disentitle the defendant.[332] Suppose the district court had disentitled Cornelson. His visits to the United States were unrelated to his alleged misconduct and thus would not weigh on the extraterritoriality concerns.[333] Therefore, appeal in this counterfactual scenario should have been granted and the disentitlement likely reversed.

Taken together, the Second Circuit should add certain requirements for an order to fall within the category of fugitive disentitlement orders appealable under the collateral order doctrine. First, a disentitlement order must involve

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325. *Cf.* Degen v. United States, 517 U.S. 820, 823–24 (1996) ("Principles of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it." (citations omitted)). Because disentitlement in these cases implicates international affairs, Congress may be better suited to determine when courts should disentitle foreign defendants by statute, as Congress did with certain civil forfeiture cases after *Degen*. *See supra* notes 51–59 and accompanying text.

326. *See* United States v. Shalhoub, 883 F.3d 1255, 1258–59 (11th Cir. 2017) (denying appeal of a defendant indicted under the International Parental Kidnapping Crime Act of 1993).

327. *See supra* notes 172–79 and accompanying text.

328. *See Shalhoub*, 883 F.3d at 1264.

329. *See supra* Part II.A.3.

330. As the Supreme Court recognized when it permitted appeal from denials of double jeopardy challenges, courts could create "rules and procedures" to mitigate dilatory, frivolous appeals. *Cf.* Abney v. United States, 431 U.S. 651, 662 n.8 (1977) ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.").

331. *See Cornelson I*, 595 F. Supp. 3d 265, 271 (S.D.N.Y. 2022).

332. *See id.* (comparing Cornelson's circumstances to those of the defendant in *Bescond*).

333. *See id.* at 271–72.

legitimate extraterritoriality concerns. Second and relatedly, the alleged misconduct must have occurred entirely abroad. Finally, the Second Circuit should deny pendent jurisdiction over the motions to dismiss (as it did in *Bescond*).[334] These proposed conditions would bolster the requirements the Second Circuit put forth in *Bescond*, including that defendants are foreign citizens, remain in their home country without concealing themselves, and are under no obligation to enter the court's jurisdiction.[335]

B. Other Circuits and the Supreme Court Should Permit Interlocutory Appeals Regardless of Whether They Maintain the Same Definition of "Fugitive"

It is untenable to leave the circuit split on appellate review in place. If the Second Circuit remains the only circuit that permits categorical appeal of these orders, the remedy for disentitlement would not differ between circuits; rather, the Second Circuit would be the only jurisdiction with a reliable opportunity to appeal one's disentitlement.[336] Accordingly, the other circuits should also permit appeal from a fugitive disentitlement order under the collateral order doctrine, regardless of whether they maintain the same definition of a fugitive. In addition, given this untenable circuit split, the Supreme Court should weigh in on the issue.

After holding that the court had jurisdiction over the disentitlement order in *Bescond*, the majority held that courts also should not impose fugitive status on defendants who remain in their home country without evasion or concealment.[337] Although the Seventh Circuit reached a similar result in *Hijazi*,[338] other circuits have held otherwise.[339] One may argue that immediate appeal from a disentitlement order would have a reduced likelihood of success in a circuit in which the defendant is more likely to qualify as a fugitive. Recall, however, that fugitive disentitlement is a two-step process.[340] In opinions such as *Bescond*, *Cornelson I*, and *Hijazi*, the courts held that even if the respective defendants were fugitives, disentitlement would be improper.[341] Accordingly, a jurisdiction with a

334. *See supra* notes 299–303 and accompanying text.

335. *See supra* notes 270–75.

336. *Compare* United States v. Bescond, 24 F.4th 759, 770 (2d Cir. 2021) (granting categorical collateral order appeal to a type of fugitive disentitlement order), *with In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009) (granting mandamus relief limited to the disentitlement order at issue).

337. *Bescond*, 24 F.4th at 773.

338. *See supra* Part I.B.3. The Seventh Circuit is likely best situated to adopt the Second Circuit's jurisdictional holding because of its decision in *In re Hijazi*. *See supra* notes 162–63 and accompanying text. Many of the reasons the court gave for granting mandamus relief, which has a stricter standard than the collateral order doctrine, overlap with the reasons the Second Circuit found disentitlement orders to satisfy the *Cohen* requirements. *See* Opening Brief for Defendant-Appellant Muriel Bescond, *supra* note 7, at 35–36.

339. *See supra* notes 80–81 and accompanying text.

340. *See Bescond*, 24 F.4th at 770.

341. *Id.* at 773; *Cornelson I*, 595 F. Supp. 3d 265, 272 (S.D.N.Y. 2022); *Hijazi*, 589 F.3d at 411.

broader definition of "fugitive" may still reverse a fugitive-defendant's disentitlement.

The Supreme Court should also weigh in on the circuit split and grant collateral order status to fugitive disentitlement orders. If the Court were to decide that defendants like Bescond are not fugitives or should not be disentitled outright, it would likely need to initially address the jurisdictional question. First, the issue would likely advance through the appellate process on an interlocutory basis because—with the defendants declining to enter the jurisdiction—these cases do not reach a final judgment on the merits.[342] Second, in Justice Gorsuch's dissent in *Shoop*, the most recent case in which the Supreme Court granted collateral order appeal,[343] he stated that he would have dismissed the appeal as improvidently granted because the Court did not grant certiorari to extend the collateral order doctrine.[344] Thus, for at least one justice, the jurisdictional question likely must be presented to rule on the confines of fugitive disentitlement.

Appeal from a fugitive disentitlement order under the collateral order doctrine also does not implicate the concerns from Justice Breyer's dissent in *Shoop*.[345] The dissent considered the harms of interlocutory appeal of prisoner transportation orders "significant" and the countervailing benefits to be "minimal."[346] The same concerns do not apply to a foreign citizen's disentitlement.

On the one hand, there is little risk that immediate appeal would impair a district court's management of its docket and supervision of trial proceedings because the cases are at an impasse.[347] So long as the defendant declines to enter the United States and the court declines to permit the defendant to challenge the charges through counsel, there are no proceedings.[348] On the other hand, here, interlocutory appeal would bring "important error-correcting benefits."[349] The longer these cases go on, the clearer it becomes that resolution on the merits will not be forthcoming through usual criminal proceedings.[350] Further, unlike in deciding prisoner transportation orders, district courts do not have "comparative expertise" in deciding disentitlement when the case implicates issues of extraterritoriality and sovereignty.[351]

Bescond presents strong arguments for granting collateral order appeal to fugitive disentitlement orders.[352] The developments in the case on remand, including its dismissal, and the case's application so far demonstrate the

342. *See supra* Part I.A.2.
343. *See supra* notes 114–20 and accompanying text.
344. Shoop v. Twyford, 142 S. Ct. 2037, 2050–51 (2022) (Gorsuch, J., dissenting).
345. *See supra* notes 121–23 and accompanying text.
346. *Shoop*, 142 S. Ct. at 2048 (Breyer, J., dissenting).
347. *See supra* Part I.A.2.
348. *See In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009).
349. *Shoop*, 142 S. Ct. at 2049 (Breyer, J., dissenting) (quoting Johnson v. Jones, 515 U.S. 304, 316 (1995)).
350. *See, e.g.*, *Hijazi*, 589 F.3d at 407.
351. *Shoop*, 142 S. Ct. at 2049 (Breyer, J., dissenting) (quoting *Johnson*, 515 U.S. at 317).
352. *See supra* Part II.B.

decision's benefits.[353] Other circuits should follow the Second Circuit's approach, with consideration of the further limitations proposed in Part III.A of this Note. Moreover, the Supreme Court should take the next available opportunity to decide whether fugitive disentitlement orders should fall under the collateral order doctrine. Doing so would provide clarity on this consequential issue and better define the bounds of the heightened strictness of the collateral order doctrine in criminal cases.

CONCLUSION

The Supreme Court created the collateral order doctrine recognizing that some important questions are unreviewable on appeal from a final judgment.[354] Today, several federal circuit courts disagree as to whether fugitive disentitlement orders of foreign citizens who decline to enter the United States meet this doctrine's requirements.[355] These defendants face unique risks in deciding whether to travel to the United States, and their indictments raise concerns over the reach of federal criminal law.[356] Yet declining the opportunity for immediate appeal forecloses any consideration of these questions important to both individual defendants and the boundaries of transnational criminal litigation.

Accordingly, this Note advocates that the federal courts of appeals and the Supreme Court follow the Second Circuit and permit immediate appeal from these defendants' disentitlement orders.[357] In deciding the bounds of the category of appealable disentitlement orders, this Note recommends additional requirements for immediate appeal—including that there should be legitimate extraterritoriality concerns regarding the indictment and that the alleged misconduct occurred entirely abroad.[358] Moreover, courts of appeals should deny pendent appellate jurisdiction to decide the merits of a defendant's motions to dismiss.[359] These requirements would ensure that disentitlements of foreign citizens are capable of review while also minimizing the risk of significant dilatory appeals.

353. *See supra* notes 314–19 and accompanying text.
354. *See supra* Part I.B.1.
355. *See supra* Part II.
356. *See supra* Part I.A.2.
357. *See supra* Part III.B.
358. *See supra* Part III.A.
359. *See supra* notes 298–302 and accompanying text.