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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

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This Comment examines the collateral order doctrine, a narrow exception to the otherwise general rule that appeals from interlocutory orders are generally disallowed in the federal court system. It does so in the context of fugitive disentitlement orders. This Comment focuses on a recent Second Circuit decision, United States v. Bescond*, analyzing its consequences for interlocutory challenges by foreign defendants who live and conducted their violative conduct abroad and have not stepped foot into the United States to surrender to jurisdiction.* Bescond *created a new circuit split with the Sixth and Eleventh Circuits.*

The Comment proceeds in three parts. It begins by describing the origins of the collateral order doctrine and traces its uneven application throughout the history of Supreme Court jurisprudence. It next discusses the main points of contention arising from the circuit split created by the Sixth and Eleventh Circuits' analyses of the collateral order doctrine, and the Second Circuit's recent decision in Bescond. *Finally, it proposes that the Supreme Court should resolve the circuit split by exercising its rulemaking powers. It should do so by granting interlocutory appeal to fugitive disentitlement orders involving extraterritorial applications of U.S. law to foreign defendants remaining at home abroad.*†

INTRODUCTION

In 2012, an international investigation revealed that global banks, including Barclays, Deutsche Bank, Rabobank, the Royal Bank of Scotland, and UBS rigged the London Interbank Offered Rate (LIBOR)

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† In a previous version of this Piece, one sentence mistakenly referred to a split as existing between the Second Circuit and the Ninth and Eleventh Circuits. The split is actually between the Second Circuit and the Sixth and Eleventh Circuits. This error was corrected on February 1, 2023.

underpinning hundreds of trillions of dollars in securities and loans to increase traders' profits.[1] As part of a greater effort to combat financial crime after the 2008 financial crisis, U.S. prosecutors have pursued numerous criminal cases against foreign banks and individuals for LIBOR manipulation.[2] But increasing numbers of cases against foreign individuals who remain at home abroad have raised concerns of prosecutorial overreach, especially in light of the Supreme Court's long-standing presumption against extraterritoriality.[3]

On August 24, 2017,[4] U.S. prosecutors charged Muriel Bescond, the then-head of Société Générale's Paris treasury desk, for LIBOR manipulation in violation of the Commodity Exchange Act (CEA).[5] Bescond is a French citizen living in France who has never resided in the United States.[6] During the time period covered by the indictment, Bescond did not travel to the United States.[7] France refused to extradite her to the United States pursuant to its nonextradition policy.[8] Bescond filed motions to dismiss, alleging that the indictment violated her due process rights, selectively prosecuted women, and was based on an invalid extraterritorial application of the CEA.[9] The Eastern District of New York denied Bescond's motions to dismiss, concluding that Bescond was a fugitive subject to disentitlement—thus foreclosing her ability to challenge criminal charges without submitting to U.S. jurisdiction.[10] Left standing, this decision would have subjected Bescond to two equally harsh choices: submit to U.S. jurisdiction and risk prolonged pretrial detention in a foreign country or remain in France under the stigma of fugitive status.[11] Bescond subsequently appealed to the Second Circuit.[12]

In *United States v. Bescond*, the Second Circuit reversed the Eastern District of New York and created a new circuit split with the Sixth and Eleventh Circuits by holding that fugitive disentitlement orders are

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1. James McBride, Understanding the Libor Scandal, Council on Foreign Rels. (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal [https://perma.cc/AS3S-BCBC].

2. See Pierre-Hugues Verdier, The New Financial Extraterritoriality, 87 Geo. Wash. L. Rev. 239, 241, 249 & n.42 (2019).

3. See, e.g., Kayla Foley, Comment, Worldwide Reliance: Is It Enough? The Importance of Personal Jurisdiction and a Push for "Minimum Contacts" in Prosecuting Foreign Defendants for Financial Crimes, 67 DePaul L. Rev. 139, 140, 154, 167 (2017).

4. Opening Brief of Defendant-Appellant Muriel Bescond at 11, United States v. Bescond, 24 F.4th 759 (2d Cir. 2021) (No. 19-1698-cr), 2019 WL 4597403.

5. *Bescond*, 24 F.4th at 764–65.

6. Opening Brief of Defendant-Appellant Muriel Bescond at 11, *Bescond*, 2019 WL 4597403.

7. Id.

8. Id.

9. *Bescond*, 24 F.4th at 765.

10. See id.

11. Id. at 767.

12. Id. at 765–66.

immediately appealable under the collateral order doctrine.[13] This case Comment examines *Bescond*'s implications for interlocutory challenges by foreign defendants who live abroad, conducted their violative conduct abroad, and have not come to the United States to surrender to jurisdiction. Part I describes the origins of the collateral order doctrine and traces its uneven application throughout the history of Supreme Court jurisprudence. Part II explains the Sixth and Eleventh Circuits' analyses of the collateral order doctrine's nonapplicability to fugitive disentitlement orders. It then discusses the main points of contention arising from *Bescond*'s split from the Sixth and Eleventh Circuits, as well as the response from *Bescond*'s dissenting opinion. Part III argues that in light of the confusion arising from the collateral order doctrine, the Supreme Court should exercise its rulemaking powers to grant interlocutory appeal to fugitive disentitlement orders involving extraterritorial applications of U.S. law to foreign defendants who remain at home abroad.

I. THE DEVELOPMENT OF THE COLLATERAL ORDER DOCTRINE

This Part provides background on the collateral order doctrine. Section I.A describes *Cohen v. Beneficial Industrial Loan Corp.*'s invention of the collateral order doctrine, albeit under an unsatisfying legal justification, as an exception to the rule of finality.[14] Section I.B traces how *Cohen* has spawned inconsistency and confusion based on a chronological selection of Supreme Court cases on the collateral order doctrine that have been cited by *Bescond*'s majority and dissenting opinions.

A. *The Collateral Order Doctrine's Weak Legal Footing in* Cohen

Congress, through codifying 28 U.S.C § 1291 in 1948, limited the jurisdiction of courts of appeal to final decisions from district courts[15] to limit piecemeal appellate intervention, avoid opening the floodgates of innumerable pretrial orders for appellate review, and prevent adversaries from harassing litigants with the time and expense of multiple appeals before final judgment.[16] But Congress also created exceptions to § 1291 in cases where potential harm from an erroneous decision outweighs the costs of piecemeal appeals.[17] *Cohen* went further, construing § 1291 to also allow pre-final judgment appeal for a "small class" of claims that were "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

13. See id. at 769–70.

14. 337 U.S. 541 (1949).

15. 28 U.S.C. § 1291 (1948).

16. Lloyd C. Anderson, The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform, 46 Drake L. Rev. 539, 542 (1998).

17. See id. at 543.

require that appellate consideration be deferred until the whole case is adjudicated."[18]

Cohen justified its vague collateral order standard with minimal and remote caselaw.[19] The first cited case, *Bank of Columbia v. Sweeny*, only supports the nonapplication of exceptions to the final judgment rule.[20] The second cited case, *United States v. River Rouge Improvement Co.*, only applies the principle that an appeal can arise from a partial final judgment involving multiple parties.[21] The final cited case, *Cobbledick v. United States*, only recognized in dictum that immediate appeal is allowed only if the issue would be moot post-final judgment.[22] While *Cobbledick* may provide some support for *Cohen*'s mootness rationale, there is relatively little support for the finality and separateness prongs of *Cohen*'s analysis.[23]

B. *Inconsistencies Within Post-*Cohen *Supreme Court Jurisprudence on the Collateral Order Doctrine*

Although *Cohen* purported to delineate a narrow scope for the collateral order doctrine, its unclear reasoning has resulted in both expansion and contraction of the doctrine throughout later Supreme Court jurisprudence.[24]

In *Abney v. United States*,[25] the Supreme Court adopted a liberal construction of the collateral order doctrine by relaxing *Cohen*'s separability and mootness requirements.[26] The *Abney* Court distinguished the

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18. *Cohen*, 337 U.S. at 546.

19. Anderson, supra note 16, at 545–46.

20. 26 U.S. (1 Pet.) 567, 569 (1828); see also Anderson, supra note 16, at 545 (concluding that *Sweeny* "provides no support whatsoever for the collateral order doctrine").

21. 269 U.S. 411, 413–14 (1926); Anderson, supra note 16, at 545–46.

22. 309 U.S. 323, 324–25 (1940) ("Finality as a condition of review is [a] historic characteristic of federal appellate procedure . . . and has been departed from only when observance of it would practically defeat the right to any review at all."); Anderson, supra note 16, at 546.

23. See Anderson, supra note 16, at 546 ("[A]t most, *Cobbledick* provides support for a narrow collateral order doctrine in which immediate appeal is allowed only if the issue would be moot after final judgment so that appeal would not be available at all at that time.").

24. For a more extensive discussion of the collateral order doctrine's evolution throughout Supreme Court jurisprudence, see Anderson, supra note 16, at 548–68; Michael E. Harriss, Note, Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision Making, 91 Wash. U. L.J. 721, 728–34 (2014).

25. 431 U.S. 651 (1977). *Abney* involved defendants convicted for conspiracy and obstruction of interstate commerce via extortion in violation of the Hobbs Act. Id. at 653–54. The court of appeals ordered a new trial, which proceeded on a single conspiracy charge. Id. at 655. The defendants then moved to dismiss the indictment by claiming that the retrial constituted double jeopardy. Id. *Abney* held that a pretrial order denying defendants' motion to dismiss an indictment on double-jeopardy grounds is eligible for interlocutory appeal. Id. at 659.

26. Anderson, supra note 16, at 556. *Abney* is one representative example out of a line of expansionist cases. See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 527–28 (1985) (expanding *Cohen*'s separateness requirement to cover conceptually distinct, even if intertwined, issues);

defendants' double-jeopardy challenge to being haled into court from the merits of the charge,[27] even though assessing double-jeopardy claims can require a trial on the merits.[28] For instance, in a double-jeopardy challenge alleging that multiple prosecutions are based on the same conduct, evidence presented at trial would be necessary to parse out the defendant's precise conduct.[29] Additionally, a trial's sentencing phase is required to determine whether a defendant would be subject to multiple punishments.[30] *Abney* therefore departed from a stricter *Cohen* standard, which demands complete analytical nonoverlap. Moreover, while *Cohen* predicated unreviewability on the mootness of claims due to the lengthy time required to reach final judgment,[31] the *Abney* Court was willing to find unreviewability when the defendant's rights would be "significantly undermined" were the appellate review to be postponed until after conviction and sentencing.[32] Even if a defendant's conviction were to be reversed post-final judgment on double-jeopardy grounds, it is the risk of conviction—namely, being forced to "endure the personal strain, public embarrassment, and expense of a criminal trial more than once"—that sufficiently constitutes a loss of rights satisfying *Abney*'s unreviewability standard.[33]

The Supreme Court's effort to contract the collateral order doctrine without overruling contradictory expansionist jurisprudence has resulted in a contortionistic legal analysis. *Coopers & Lybrand v. Livesay* proposed a narrower reformulation of *Cohen*'s vague collateral order doctrine: Decisions eligible for interlocutory appeals "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final judgment."[34] But this reformulation failed to reconcile conflicting interpretations of unreviewability. Contractionist cases

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Loc. No. 438 Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542, 550 (1963) (finding *Cohen*'s mootness requirement satisfied when postponing review of a temporary injunction against picketing would erode national labor policy).

27. *Abney*, 431 U.S. at 659–60 ("[T]he defendant makes no challenge . . . to the merits of the charge against him . . . . Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. The elements of that claim are completely independent of his guilt or innocence." (citations omitted)).

28. Anderson, supra note 16, at 557.

29. Id.

30. Id.

31. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) ("When [final judgment] comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.").

32. *Abney*, 431 U.S. at 660.

33. Id. at 661.

34. 437 U.S. 463, 468 (1978).

rejecting additional collateral orders such as *United States v. MacDonald*[35] and *United States v. Hollywood Motor Car Co.*[36] fabricated coherence with *Abney* by construing *Abney*'s unreviewability standard as a more limited right not to be tried (which could only be enjoyed if vindicated before trial) as opposed to a right whose remedy requires the dismissal of charges[37]—a distinction that was not part of the original *Cohen* factors. Furthermore, if *Abney*'s application of the collateral order doctrine only protects the right not to be tried, then *Abney* also contradicts that proposition in protecting personal interests threatened by double jeopardy that exist both before and during trial.[38]

The Supreme Court's struggle with applying the collateral order doctrine has therefore resulted in its disputed applications, which persist in lower courts tasked with evaluating new categories for interlocutory appeal.[39]

II. THE CIRCUIT SPLIT

This Part explains the circuit split arising from *Bescond*'s holding that fugitive disentitlement orders are immediately appealable under the collateral order doctrine. Section II.A describes the Sixth and Eleventh Circuits' rulings that disentitlement orders are ineligible for interlocutory appeal. Section II.B then describes *Bescond*'s majority opinion along with

35. 435 U.S. 850 (1978). In *MacDonald*, the defendant attempted to appeal his failed motion to dismiss a murder indictment on the grounds that the five-year gap between the crime and indictment denied his Sixth Amendment right to a speedy trial. See id. at 850–52. The *MacDonald* Court denied interlocutory appeal, arguing that denying a motion to dismiss on speedy trial grounds did not constitute a sufficiently final, separable, or unreviewable judgment under *Cohen*. Id. at 857–61.

36. 458 U.S. 263 (1982). In *Hollywood Motor*, the Supreme Court held that denial of a motion to dismiss on the ground of vindictive prosecution did not qualify for interlocutory appeal. Id. at 264, 270.

37. Through interpreting *Abney*'s unreviewability standard as the "right not to be tried," *MacDonald* distinguished the right to a speedy trial: "It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *MacDonald*, 435 U.S. at 861. The *Hollywood Motor* Court followed *MacDonald*'s "distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Hollywood Motor*, 458 U.S. at 269 (citing *MacDonald*, 435 U.S. at 860 n.7). *MacDonald* and *Hollywood Motor* are two representative examples within a line of Supreme Court cases narrowing the collateral order doctrine at the expense of coherence with *Abney* and *Cohen*. See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370, 376–77 (1981) (holding that an order refusing to disqualify opposing counsel for a conflict of interest in a civil case was not eligible for immediate appeal because the unreviewability condition is only satisfied when the involved right would be destroyed if not vindicated before trial).

38. Anderson, supra note 16, at 560–61.

39. Apart from the circuit split arising from *Bescond*, circuits are currently split on collateral order eligibility for denials of appointed counsel in civil rights cases, denials of *Parker* immunity claims, temporary reinstatement orders for minors suing their employers, and resolutions of motions to strike under anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes. See Matthew R. Pikor, The Collateral Order Doctrine in Disorder: Redefining Finality, 92 Chi.-Kent L. Rev. 619, 638–46 (2017).

its responses to the Sixth and Eleventh Circuits. Section II.C describes *Bescond*'s dissenting opinion.

A. *The Sixth and Eleventh Circuits' Opinions*

Apart from the Second Circuit, only the Sixth and Eleventh Circuits have dealt with the eligibility of fugitive disentitlement orders for the collateral order doctrine.

United States v. Shalhoub is an Eleventh Circuit case involving a Saudi Arabian resident citizen charged with parental kidnapping for taking his child from the United States to Saudi Arabia.[40] Having been labeled as a fugitive by the district court, the defendant sought interlocutory appeal after the district court denied his motion to dismiss, without prejudice to his right to appear and seek dismissal of his indictment in person.[41] *Shalhoub* held that fugitive disentitlement orders are not subject to the collateral order doctrine because they do not satisfy the unreviewability and separateness factors.[42]

Shalhoub first cited *Abney* as an example of a right that would be destroyed if not vindicated before trial. Noting that *Abney* specifically concerned "the very authority of the Government to hale [the defendant] into court,"[43] *Shalhoub* then ironically ignored *Abney*'s liberal application of the *Cohen* factors in further limiting unreviewable rights to the right not to be tried or the right against excessive bail.[44] Despite conceding that the defendant's fugitive status is "likely unreviewable" after final judgment, *Shalhoub* found fugitive disentitlement challenges to be distinguishable in that they do not rest on an explicit statutory or constitutional right.[45]

Without constitutional regulations on fugitive disentitlement, *Shalhoub* then found no separable due process rights. Declaring that "[a] fugitive has no more of a freestanding right not to be labelled a fugitive, than a criminal defendant has a freestanding right not to be labelled a defendant," *Shalhoub* narrowly defined due process as merely notice and the opportunity to be heard, both of which are satisfied at trial.[46]

The Sixth Circuit followed *Shalhoub* in *United States v. Martirossian*, also holding that fugitive disentitlement orders are not subject to the collateral order doctrine because they do not satisfy the three *Cohen* factors, that is, "the order must (1) finally resolve the question at hand, (2) involve a significant issue separate from the merits of the action, and (3) be

40. 855 F.3d 1255, 1258 (11th Cir. 2017).

41. Id. at 1258–59.

42. Id. at 1260–62.

43. Id. at 1260 (internal quotation marks omitted) (quoting Abney v. United States, 431 U.S. 651, 659 (1977)).

44. Id. at 1261.

45. Id. at 1261–62.

46. Id.

unreviewable on appeal from final judgment."[47] In *Martirossian*, an Armenian citizen living in China who conducted his violative conduct abroad refused to answer criminal money laundering and bribery charges in the Southern District of Ohio, resulting in the district court labeling him a fugitive.[48] The defendant moved to dismiss his indictment, but the district court temporarily held the motion in abeyance until the defendant submitted to jurisdiction.[49] The defendant then appealed the ruling.[50]

First, *Martirossian* held that there was no final resolution under *Cohen* because the motion to dismiss was in abeyance and the defendant refused to "accept the potential benefit or burden of any ruling."[51] Second, the Sixth Circuit found insufficient separability and importance.[52] Citing *Shalhoub*, it argued that there are no freestanding due process rights against fugitive disentitlement.[53] Additionally, the court held that the defendant's goal of removing his fugitive status to contest the money laundering statute's extraterritorial validity functioned as a concession that the court's evaluation of fugitivity is interrelated to the merits of the case.[54] Third, although the defendant's fugitive status would be moot after submitting to the court's jurisdiction, the *Martirossian* court declared that this issue is not particularly unique.[55] Post trial, contestations of all defendants who do not want to answer to an indictment or arrest would be moot.[56] Furthermore, many trial court decisions are uncorrectable on appeal and are not immediately appealable.[57] *Martirossian* also dismissed the defendant's argument that he would have a right not to be tried if the money laundering statute did not apply extraterritorially.[58] Invoking *Hollywood Motor*'s distinction between a right not to be tried and a right whose remedy requires the dismissal of charges, *Martirossian* warned that collapsing the distinction would result in all rights that could be enforced by pretrial dismissal becoming rights not to be tried.[59]

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47. 917 F.3d 883, 886–87 (6th Cir. 2019) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

48. Id. at 886.

49. Id.

50. Id.

51. Id. at 887.

52. Id. at 887–88.

53. Id. at 887 ("Martirossian has 'no more of a freestanding right not to be labeled [sic] a fugitive, than a criminal defendant has a freestanding right not to be labeled [sic] a defendant.'" (quoting United States v. Shalhoub, 855 F.3d 1255, 1261–62 (11th Cir. 2017)) (misquotation)).

54. Id. at 888.

55. Id.

56. Id.

57. Id.

58. Id. at 889.

59. Id. The *Martirossian* court explained:

> [I]f 18 U.S.C. § 1956 does not apply extraterritorially, [defendant] would in a sense have a right not to be tried under the statute. But the point

B. *The* Bescond *Majority Opinion*

Bescond deviated from the Sixth and Eleventh Circuits in holding that fugitive disentitlement orders do indeed fulfill the *Cohen* requirements for collateral orders.[60] Finding no dispute that fugitive disentitlement satisfies *Cohen*'s finality requirement, *Bescond* focused on the separability and unreviewability factors.[61]

In response to *Shalhoub*'s holding that there is no cognizable constitutional right against fugitivity,[62] the *Bescond* court argued that Bescond's challenge to fugitive disentitlement actually asserts the distinct constitutional right to defend herself in court.[63] The *Bescond* court highlighted disentitlement's uniquely weighty policy implications for foreign defendants' liberty interest.[64] As a disentitled fugitive, Bescond could not defend herself without risking lengthy pretrial detention and trial in a foreign country—all of which would have resulted in an extended absence jeopardizing her banking career and cutting off her income as the sole earner of her family.[65] But if Bescond were to remain in France, whose nonextradition policy imposes no obligation for her to submit to U.S. jurisdiction, her indefinitely looming fugitive status would ruin her career as well—a "penalty for staying home" whether or not her disentitlement is actually merited.[66] The court explained that Bescond is entitled to due process even as a foreigner because if she were only to gain due process rights after coming to the United States, she would have already irrevocably lost her due process right to contest U.S. jurisdiction.[67] Recognizing that Bescond raises a "nonfrivolous extraterritoriality claim," the *Bescond* court further noted that coercing submission to U.S. jurisdiction contradicts the presumption against extraterritoriality: "[I]f our law does not reach Bescond or her conduct, can it be said that she is

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> proves too much. The same could be said of *all* challenges to an indictment that would prohibit the charges and thus conflates "a right not to be tried" with "a right whose remedy requires the dismissal of charges." Truth be told, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'"

Id. (first quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982); then quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994)).

60. See United States v. Bescond, 24 F.4th 759, 767 (2d Cir. 2021).

61. Id. at 767–69.

62. United States v. Shalhoub, 855 F.3d 1255, 1261 (11th Cir. 2017) ("The right against excessive bail is a constitutional right . . . . By contrast, so long as he refuses to appear in court, Shalhoub has no right to avoid being labelled a fugitive." (citations omitted)).

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

64. Id. at 767–68.

65. Id. at 767.

66. Id.

67. Id. at 767–68.

in flight from it?"[68] Yet, without interlocutory review, courts are precluded from evaluating extraterritoriality.[69]

Moreover, the *Bescond* court rendered disentitlement separable from the merits of the case because disentitlement only bears on Bescond's ability to defend herself, not whether she violated the CEA.[70] Although *Martirossian* considered fugitivity and the extraterritoriality of a criminal statute to be interrelated,[71] the *Bescond* court countered that extraterritoriality analysis is limited to the statutory text.[72] On the other hand, fugitivity analysis distinctly inquires into whether a defendant qualifies as a fugitive and whether disentitlement furthers the doctrine's broader policy aims.[73]

The *Bescond* court also deemed *Martirossian*'s concession that a defendant's fugitive status becomes moot after submitting to U.S. jurisdiction to be a fatal one.[74] Disentitlement thus satisfies the unreviewability requirement because post-trial appeal and acquittal will not undo its harm.[75] Contesting *Shalhoub*'s holding that only the right not to be tried and the right against excessive bail can be subject to the collateral order doctrine, the *Bescond* court identified other rights protected by interlocutory appeal that fall outside that ambit.[76] For instance, the Supreme Court allowed immediate appealability for the involuntary administration of antipsychotic drugs because of privacy and security interests.[77] The Second Circuit allowed interlocutory appeal of an order designating a juvenile as an adult in criminal cases since it deprives the defendant of legal benefits such as record sealing and pretrial detention.[78]

C. *The* Bescond *Dissenting Opinion*

In her dissent, Chief Judge Debra Livingston argued that Bescond's disentitlement failed to satisfy *Cohen*'s separability and unreviewability requirements. Echoing *Martirossian* and *Shalhoub*, Chief Judge Livingston declared that "Bescond has no 'more a freestanding right not to be labeled a fugitive, than a criminal defendant has a freestanding right not to be labeled a defendant'"[79] because, like the defendant in *Shalhoub*, Bescond

68. Id. at 772–73.

69. Id. at 773.

70. Id. at 768.

71. United States v. Martirossian, 917 F.3d 883, 888 (6th Cir. 2019).

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

73. Id.

74. Id.

75. Id. at 769.

76. Id. at 769–70.

77. Id. (citing Sell v. United States, 539 U.S. 166, 176–77 (2003)).

78. Id. at 770 (citing United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995)).

79. Id. at 781 (Livingston, C.J., dissenting) (quoting United States v. Martirossian, 917 F.3d 883, 887 (6th Cir. 2019)).

was afforded due process by receiving notice and being granted the opportunity to be heard at trial.[80]

In addition, Chief Judge Livingston disputed disentitlement's separability from the merits of Bescond's case.[81] Analogizing Bescond to the defendant in *Martirossian*, who similarly challenged U.S. money laundering charges since he had never traveled to the United States and the entirety of his charged conduct occurred abroad, Chief Judge Livingston reiterated *Martirossian*'s holding that a disentitlement decision considerably overlaps with the relevant facts and arguments involved in determining the permissibility of a statute's extraterritorial application.[82] As a result, declining to appear should not increase the interlocutory appealability of issues that would otherwise be resolved at trial.[83]

While the majority opinion determined *Cohen*'s unreviewability requirement to be satisfied upon a finding of mootness, Chief Judge Livingston argued that mootness alone is insufficient.[84] Despite *Martirossian*'s concession that fugitive status becomes moot after submitting to federal court jurisdiction, Chief Judge Livingston deemed it nonfatal because *Martirossian* also recognized that moot fugitive status alone has never warranted interlocutory appeal.[85] Moreover, Bescond lacked a constitutional right cognizable under the collateral order doctrine that could be deemed unreviewable post final judgment.[86] Characterizing Bescond's challenge to disentitlement as merely a desire to litigate from a convenient location of her choice,[87] Chief Judge Livingston chose *Hollywood Motor*'s narrow reading of *Abney* to distinguish Bescond's claims to due process.[88] In contrast to *Abney*, which found unreviewability when rights would be significantly undermined, *Hollywood Motor* read *Abney* to limit collateral orders to rights that "must be upheld prior to trial if it is to be enjoyed at all"[89]—and there is no right to convenient litigation.

Chief Judge Livingston also warned that predicating a grant of interlocutory appeal on Bescond's status as a foreign citizen remaining "at home abroad" risked creating a slippery slope where foreign defendants

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80. Id. ("Bescond, like the defendant in *Shalhoub*, 'enjoys a right to appear in court, to defend [herself] against the indictment, and to clear [her] name if she prevails.'" (alterations in original) (quoting *Shalhoub*, 855 F.3d at 1261–62)).

81. Id. at 783.

82. Id.

83. Id.

84. Id. at 783–84.

85. Id. at 784.

86. Id. ("[T]here is no due process right to challenge a fugitivity ruling without appearing in court. . . . Bescond's supposed due process right is . . . very far from the character of those rights that the Supreme Court has recognized to merit review pursuant to the collateral order doctrine, lest they be lost forever.").

87. Id.

88. See id.

89. Id. (internal quotation marks omitted) (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 266 (1982)).

are given better protections than American citizens.[90] For instance, under the majority's analysis, an American citizen at home in Paris who is charged with the same crime as Bescond would not be able to claim interlocutory appeal for a disentitlement order.[91] Additionally, Chief Judge Livingston argued that the majority opinion's lack of a clear definition for remaining at home abroad potentially grants interlocutory appeal of disentitlement to overseas criminals who commit cybercrimes and direct terrorist attacks on the United States.[92] Although the majority opinion distinguished Bescond from conventional fugitives in that she had not concealed herself, Chief Judge Livingston found this argument unconvincing when applied to foreign terrorists and cybercriminals who can live openly with state support.[93]

III. SUPREME COURT RULEMAKING AS A SOLUTION

In 1988, as a response to concerns about overburdened federal courts, Chief Justice William Rehnquist appointed a Federal Courts Study Committee with Congress's authorization.[94] Motivated by concerns that the collateral order doctrine "strikes many observers as unsatisfactory" and "may in some instances restrict too sharply the opportunity for interlocutory review," the Committee recommended that Congress should delegate rulemaking authority to the Supreme Court to clarify the scope of final decisions and grant immediate appeal to nonfinal orders.[95] As a result, Congress amended 28 U.S.C. § 2072 and 28 U.S.C. § 1292 to respectively grant the Supreme Court the power to define finality and "expand the appealability of interlocutory determinations by the courts of appeals."[96]

The Supreme Court has favorably recognized Congress's delegation of rulemaking authority. In *Swint v. Chambers County Commission*, the Court declined to expand the collateral order doctrine by court decision because Congress made rulemaking available.[97] Similarly, in *Mohawk Industries, Inc. v. Carpenter*, the Court declared that "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking," especially since the rulemaking process "draws on the collective experience of the bench and bar" in addition to "facilitat[ing] the adoption of measured, practical solutions."[98] In a concurring opinion,

90. Id. at 777.

91. Id.

92. Id. at 779.

93. Id.

94. Harriss, supra note 24, at 734.

95. Jud. Conf. of the U.S., Report of the Federal Courts Study Committee 95 (1990), https://www.ojp.gov/pdffiles1/Digitization/124270NCJRS.pdf [https://perma.cc/2RFE-3DWJ].

96. H.R. Rep. No. 102-1006, at 18 (1992).

97. 514 U.S. 35, 48 (1995) ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect.").

98. 558 U.S. 100, 114 (2009).

Justice Clarence Thomas even suggested that rulemaking renders *Cohen*'s analysis unnecessary.[99]

Yet, despite its stated enthusiasm for rulemaking as a replacement for the collateral order doctrine, the Supreme Court has only exercised its rulemaking authority once to allow interlocutory appeal of class action certification orders.[100] Whether fugitive disentitlement orders qualify for interlocutory appeal is thus an issue ripe for Supreme Court rulemaking, especially in light of conflicting judicial applications of the collateral order doctrine as embodied throughout Supreme Court jurisprudence and in *Bescond*'s majority and dissenting opinions.

The Supreme Court should exercise its rulemaking power to grant interlocutory appeal to fugitive disentitlement orders involving extraterritorial applications of U.S. law to foreign defendants who remain at home abroad. Because fugitive status becomes moot once a foreign defendant submits to U.S. jurisdiction, disentitlement is an overly blunt tool compelling foreign defendants to undergo the large personal costs of trial even in cases of questionable extraterritorial authority. While domestic defendants can live at home while awaiting trial, foreign defendants who submit to U.S. jurisdiction must uproot their lives until final adjudication.[101] Foreign defendants who cannot afford to live in the United States while awaiting trial often plead guilty for lessened jail time or remain a fugitive under the risk of detention and extradition during international travel.[102]

Although Chief Judge Livingston warned that expanding the collateral order doctrine to include disentitlement orders would lead to a slippery slope where even terrorists can dispute their fugitive status,[103] her concern actually highlights the need for courts to have an opportunity to determine statutory extraterritoriality—which, in Bescond's case, would be

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99. Id. at 115 (Thomas, J., concurring in part and concurring in the judgment) ("We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine, which prompted the rulemaking amendments in the first place. In taking this path, the Court needlessly perpetuates a judicial policy that we for many years have criticized and struggled to limit.").

100. See Carey M. Erhard, Note, A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f), 51 Drake L. Rev. 151, 157 (2002) ("Rule 23(f) is the only Federal Rule of Civil Procedure created under § 1292(e).").

101. See Robert E. Connolly & Masayuki Atsumi, Defending the Foreign "Fugitive" Against the Fugitive Disentitlement Doctrine (Part 1), Wolters Kluwer: AntitrustConnect Blog (Mar. 21, 2017), http://antitrustconnect.com/2017/03/21/defending-the-foreign-fugitive-against-the-fugitive-disentitlement-doctrine/ [https://perma.cc/4FEZ-KKDK] ("The cost of access to the courtroom . . . is quite high for the foreign defendant—potentially years away from a job, home, family health care providers and many other hardships of an indefinite stay in a foreign land.").

102. Id.

103. See United States v. Bescond, 24 F.4th 759, 777 (2d Cir. 2021) (Livingston, C.J., dissenting) ("The logic of the majority's new rule would appear to apply equally to an overseas foreign terrorist who kills Americans abroad, and an overseas foreign terrorist who directs an attack on U.S. soil, each of whom can be said to have 'remained at home' as Bescond has done.").

extinguished by fugitive disentitlement without interlocutory appeal. The presumption against extraterritoriality, which demands that courts avoid construing statutes to apply on foreign soil, imposes varying degrees of limitations on statutes depending on whether there is congressional intent for extraterritorial application.[104] Foreign terrorists targeting the United States would likely violate the Antiterrorism Act of 1990, which explicitly provides for extraterritorial reach.[105] But in *Prime International Trading, Ltd. v. BP P.L.C.,* the Second Circuit held that private plaintiffs cannot bring suit based on a "ripple effects" theory of predominately foreign conduct because the CEA is silent on extraterritorial effect[106]—which, according to the *Bescond* majority, indicated that Bescond brought a nonfrivolous extraterritoriality claim.[107] Especially in cases where prosecutorial overreach has resulted in potentially invalid extraterritorial applications of U.S. law, interlocutory appeal of disentitlement orders is a necessary defensive tool for foreign defendants at home abroad because it empowers courts to answer the threshold question of whether the defendant violated any laws in the first place.

CONCLUSION

Bescond's triumph in the Second Circuit may only be a pyrrhic victory as the Second Circuit only decided that it had jurisdiction over deciding the applicability rather than the merits of her motions to dismiss.[108] Although Bescond's case was reversed, it was remanded back to the district court,[109] which had already stated that it would reject Bescond's claims of extraterritoriality and due process.[110] Nevertheless, *Bescond* recognized the need for interlocutory appeal of overly harsh fugitive disentitlement orders in the context of foreign, modern-day financial crimes that

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104. 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, 1184 (2018) (noting that "courts have found implied congressional intent for certain federal criminal statutes to operate overseas" and that "Congress has explicitly stated that certain statutes apply outside of the United States").

105. See 18 U.S.C. § 2332b(e) (2018).

106. 937 F.3d 94, 102–03, 108 (2d Cir. 2019) (noting that a "ripple effect" theory "fail[s] to plead a proper domestic application of Section 9(a)(2)").

107. *Bescond*, 24 F.4th at 772 ("[W]e express no view as to its merits, [but] it is telling that Bescond raises a nonfrivolous extraterritoriality claim . . . ."). Although not explicitly referenced in the *Bescond* majority opinion, *United States v. Vilar* further supports the Second Circuit's position that Bescond brings a nonfrivolous extraterritoriality claim. See 729 F.3d 62, 72 (2d Cir. 2013) (holding that the presumption against extraterritoriality does apply to criminal statutes, except when the law at issue protects the government's right to defend itself).

108. *Bescond*, 24 F.4th at 764 (citing the district court's conclusion that "Bescond was a fugitive, [and thus] exercised discretion to apply the fugitive disentitlement doctrine").

109. Id.

110. United States v. Sindzingre, No. 17-CR-0464 (JS), 2019 WL 2290494, at *9–10 (E.D.N.Y. May 29, 2019), rev'd sub nom. *Bescond*, 24 F.4th at 764.

inevitably touch the U.S. financial market in some remote way. *Cohen*'s unclear guidance on the collateral order doctrine has produced inconsistent Supreme Court jurisprudence and confusion among lower courts. The time is ripe for the Supreme Court to exercise its woefully underused rulemaking powers to grant interlocutory appeal to fugitive disentitlement orders involving extraterritorial applications of U.S. law to foreign defendants who remain at home abroad.