No. 17-135

In the Supreme Court of the United States

KHALID A. SHALHOUB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal of the district court's interlocutory order denying his motion to appear by counsel to seek dismissal of the indictment against him.

2. Whether the court of appeals abused its discretion by denying petitioner's request for a writ of mandamus directing the district court to rule on his motion while he remains outside of the United States and refuses to submit to the district court's authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 855 F.3d 1255. The opinion of the district court (Pet. App. 18-23) is not published in the Federal Supplement but is available at 2016 WL 8943847.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2017. The petition for a writ of certiorari was filed on July 25, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 17, 1998, a federal grand jury in the Southern District of Florida charged petitioner, a citizen of Saudi Arabia, with international parental kidnapping, in violation of 18 U.S.C. 1204. Pet. App. 18-19, 61. Petitioner did not make himself available for arrest in the United States or appear before the district court. *Id.* at

27. In 2015, petitioner moved the court to allow his counsel "to specially appear to seek a dismissal of the indictment." *Ibid.* (capitalization altered; emphasis omitted). The court denied the motion. *Id.* at 18-23. Petitioner appealed and, in the alternative, sought a writ of mandamus. The court of appeals dismissed petitioner's appeal for lack of jurisdiction and denied mandamus relief. *Id.* at 1-17.

1. In 1985, petitioner married Miriam Hernandez in Miami, Florida. Pet. App. 2. The couple divorced four years later. *Ibid.* Following the divorce, a Florida court designated Hernandez the "primary residential parent" of the couple's daughter. *Ibid.* (citation omitted). Petitioner was allowed significant visitation rights, including the right to travel with his daughter, provided that he give Hernandez advance notice of their itinerary. *Id.* at 51 n.10.

On or about June 22, 1997, petitioner took his then-11-year-old daughter to Saudi Arabia, where he "retain[ed]" her. Pet. App. 61 (Indictment); *Investigation into Abductions of American Children to Saudi Arabia: Hearings Before the House Comm. on Government Reform*, 107th Cong., 2d Sess. 109-114 (2002) (2002 Hearings) (statement of Alexandria Davis, formerly Yasmeen Alexandria Shalhoub), available at 2002 WL 1292857. According to petitioner, once his daughter was in Saudi Arabia, the country's laws allowed him to keep her there indefinitely. Pet. 2-3 n.1; see also C.A. App. 67 (State Department advisory) ("Women must have permission from their husband or father to exit Saudi Arabia.").[1]

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[1] Petitioner states that his daughter "travelled to Saudi Arabia to visit" him "as permitted by the relevant custody order." Pet. 2. As

In 1998, a grand jury returned an indictment charging petitioner with one count of international parental kidnapping, in violation of 18 U.S.C. 1204, by "remov[ing] from the United States a child who had not attained the age of sixteen years and had been living in the United States" and "retain[ing] said child outside the United States," with the "intent to obstruct the lawful exercise of the parental rights of Miriam Hernandez." Pet. App. 61. A warrant was issued for petitioner's arrest, but he remained in Saudi Arabia, "a non-extradition country." *Id.* at 19.

In 2015, petitioner moved the district court to allow his "counsel to specially appear to seek a dismissal of the indictment." Pet. App. 27 (capitalization altered). The motion contended, *inter alia*, that venue did not lie in the Southern District of Florida; the International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 U.S.C. 1204, could not apply to petitioner's actions abroad; and application of the fugitive-disentitlement doctrine to bar petitioner's motion while he remained abroad would violate his right to due process. Pet. App. 3, 38-56. The government responded that petitioner's motion should be denied based on the fugitive-disentitlement doctrine, which "limits access to courts by a fugitive" as a matter of equity. *Id.* at 19-20 (quoting *Magluta* v. *Samples*, 162 F.3d 662, 664 (11th Cir. 1998) (per curiam)). The court agreed, exercising its discretion to refuse to entertain petitioner's challenges to the indictment until petitioner "submit[s] to the Court's

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the government noted in the district court (C.A. App. 81), this characterization is incorrect: petitioner "took his daughter to Saudi Arabia * * * without informing Miriam Hernandez of his travel itinerary in advance, in violation of [her] parental rights" under the Florida court's order. See also 2002 Hearings 109-114.

authority." *Id.* at 22; see *id.* at 23 & n.3 (denying motion without prejudice and stating that "[t]he Court will consider a challenge to the indictment once [petitioner] surrenders himself to the authorities").

2. Petitioner appealed the district court's denial of his motion and, in the alternative, sought a writ of mandamus directing the court to "remove the 'fugitive' label from" him and "consider [his] motion to dismiss the Indictment on the merits." Pet. C.A. Br. 1. The court of appeals dismissed the appeal for lack of jurisdiction and denied mandamus relief. Pet. App. 1-17.

a. The court of appeals first held that it lacked jurisdiction over the appeal under the final-judgment rule. As the court explained, "[c]ourts of appeals have jurisdiction over 'final decisions of the district courts of the United States,'" and thus lack jurisdiction to review "a pretrial order" until the defendant is convicted and sentenced. Pet. App. 6 (quoting 28 U.S.C. 1291). The court emphasized that the final-judgment rule is applied with "utmost strictness in criminal cases." *Ibid.* (quoting *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984)).

The court of appeals acknowledged that the collateral-order doctrine provides a "'narrow' exception" to the final-judgment rule, which "permits appellate review of an interlocutory order that (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." Pet. App. 6 (brackets and internal quotation marks omitted). But the court held that the exception did not apply in this case. *Ibid.* It explained that this Court has applied the exception in criminal cases only when the defendant's claim concerns the "right not to be tried," as

in a motion to dismiss an indictment on double jeopardy grounds or under the Speech or Debate Clause, or where "[t]he issue is finally resolved and is independent of the issues to be tried, and the order becomes moot if review awaits conviction and sentence," as in a motion to reduce excessive bail. *Id.* at 7 (quoting *Flanagan*, 465 U.S. at 266, 267). Because petitioner's claim did not have those characteristics, the court concluded that it lacked jurisdiction and dismissed the appeal. *Id.* at 8, 17.[2]

b. The court of appeals also denied petitioner's request for the "drastic and extraordinary remedy" of a writ of mandamus. Pet. App. 12 (citation and internal quotation marks omitted). The court explained that mandamus is warranted only where the party seeking it has "no other adequate means to attain * * * relief"; where he "satisf[ies] the burden of showing that his right to issuance of the writ is clear and indisputable"; and where "the issuing court, in the exercise of its discretion, [is] satisfied that the writ is appropriate under the circumstances." *Id.* at 12-13 (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)). It determined that petitioner had not met any of those requirements.

First, the court of appeals observed that petitioner had an "adequate means to challenge the indictment"—he could appear before the district court. Pet. App. 13. Second, the court determined that petitioner had failed to "establish[] a clear and indisputable right" that was violated by the district court. *Id.* at 14. In particular, the court declined to find it "clear and indisputable"

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[2] The court of appeals also rejected petitioner's argument that it had jurisdiction under the doctrine of "marginal finality." Pet. App. 11-12. Petitioner does not renew that argument in this Court.

that labelling petitioner a "fugitive" by applying the fugitive-disentitlement doctrine violated due process, or that "the *International* Parental Kidnapping Crime Act" could not apply "to conduct that occurs in another country." *Id.* at 14-15. Finally, the court was not satisfied that mandamus relief would be appropriate in this case because petitioner did not "raise the kinds of significant questions necessary for issuance of the writ." *Id.* at 16.

ARGUMENT

The court of appeals correctly concluded that it lacked jurisdiction over petitioner's appeal of the district court's interlocutory order, and it did not abuse its discretion in determining that mandamus relief was not appropriate. The court's decision does not conflict with any decision of this Court or of another court of appeals. This Court recently denied a petition for certiorari presenting similar issues. *Darin* v. *United States*, 137 S. Ct. 1223 (2017) (No. 16-564). The Court should reach the same result here.

1. Petitioner's contention (Pet. 7-16) that the court of appeals erred in dismissing his appeal for lack of jurisdiction does not warrant this Court's review.

a. Section 1291 of Title 28 of the United States Code limits the jurisdiction of the courts of appeals to "final decisions of the district courts." "Final decisions" generally means "final judgments," and the statute accordingly "requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (citations and internal quotation marks omitted). "In a criminal case the rule prohibits appellate review until conviction and imposition of sentence." *Ibid.*

The collateral-order doctrine is a limited exception to the final-judgment rule. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). As the court of appeals here recognized, to fall within the "small class" of decisions that constitute immediately appealable collateral orders, a decision must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 522 (1988) (citations and internal quotation marks omitted); see Pet. App. 6.

The collateral-order exception is "interpreted * * * 'with the utmost strictness' in criminal cases." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989) (quoting *Flanagan*, 465 U.S. at 265). This Court has permitted a collateral-order appeal of the denial of a motion to dismiss an indictment only where the motion was based on the Double Jeopardy Clause or the Speech or Debate Clause, because those claims involve the right not to be tried at all. See *Abney* v. *United States*, 431 U.S. 651, 660-662 (1977); see also *Helstoski* v. *Meanor*, 442 U.S. 500, 506-507 (1979).[3] By contrast, orders denying motions to dismiss on other grounds—including other constitutional grounds—have been held not to be immediately appealable collateral orders. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam) (denial of motion to dismiss

[3] This Court also has applied the collateral-order doctrine to an order denying a reduction in bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951), and an order permitting involuntary medication to restore competence to stand trial, *Sell* v. *United States*, 539 U.S. 166 (2003).

based on alleged prosecutorial vindictiveness not immediately appealable); *United States* v. *MacDonald*, 435 U.S. 850, 863 (1978) (denial of motion to dismiss based on Sixth Amendment speedy trial issue not immediately appealable); cf. *Abney*, 431 U.S. at 662-663 ("In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well.").

Applying that legal framework, the court of appeals correctly concluded that the collateral-order exception is inapplicable here. The district court's order does not conclusively determine whether the indictment against petitioner should be dismissed, because petitioner could renew his fact-intensive argument about where his crime took place (Pet. 2; Pet. App. 51) in the district court after discovery has been produced and any other relevant pretrial motions have been decided. Petitioner also could raise any preserved argument that the charged offense did not involve a sufficient nexus to the United States in an appeal after conviction and sentencing. See generally *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) (explaining that the fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed" to bring a case within the scope of the collateral-order exception) (ellipsis in original; citation omitted). While petitioner apparently plans to "stay in his home country" of Saudi Arabia (Pet. 11), thus stymying further proceedings in his case, a defendant cannot manufacture appellate jurisdiction by refusing to face charges.

Petitioner claims that the district court's order should have been deemed appealable because "principles of [international] comity preclude[] proceeding with the case against him," making his argument analogous to an assertion of "a right not to be tried." Pet. 13 (citation omitted). But this Court has construed the "right not to be tried" restrictively, explaining:

> A right not to be tried in the sense relevant to the [collateral-order] exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), or the Speech or Debate Clause ("([F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place").

Midland Asphalt Corp., 489 U.S. at 801 (internal citation omitted; second and third brackets in original); see, *e.g.*, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (noting that under a less stringent approach "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'"); *Hollywood Motor Car Co.*, 458 U.S. at 269 ("Even when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied.").

Petitioner has not satisfied that demanding standard. Petitioner's challenge to the "extraterritorial application of a statute," Pet. 7, does not assert a "violation of an 'explicit statutory or constitutional guarantee that trial will not occur,' as that phrase is used in *Midland Asphalt* [*Corp.*]," *United States* v. *Macchia*, 41 F.3d 35, 38 (2d Cir. 1994); see *United States* v. *Wampler*, 624 F.3d

1330, 1335 (10th Cir. 2010), cert. denied, 564 U.S. 1021 (2011); cf. *United States* v. *Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991) (explaining that "courts have rejected interlocutory appeals of orders in criminal cases denying dismissal on grounds of subject matter jurisdiction" and "personal jurisdiction," including when a foreign defendant claims that a United States court cannot try him, and collecting authority).[4] Accordingly, the court of appeals correctly rejected petitioner's attempt to justify appellate jurisdiction under the collateral-order doctrine.[5]

b. Contrary to petitioner's contention (Pet. 9-13), the decision below does not conflict with the decision of any other court of appeals.

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[4] None of the cases petitioner cites (Pet. 14-15) for the proposition that the IPKCA cannot apply extraterritorially involved review pursuant to the collateral-order exception. See *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090 (2016) (review of final judgment); *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247 (2010) (same); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (same); see also *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (review following certification pursuant to 28 U.S.C. 1292(b)).

[5] Petitioner suggests in passing (Pet. 11; see Pet. 19-20) that the court of appeals should have exercised jurisdiction over his claim that labeling him a fugitive violates his right to due process. But that claim also does not satisfy the collateral-order doctrine. Among other things, it does not conclusively determine the fugitive label, which would be removed if petitioner appeared in court. Nor does petitioner's due process claim implicate a right not to be tried. In any event, review of that issue is unwarranted because the claim is meritless: "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." Pet. App. 9-10 (citing *Allen* v. *Georgia*, 166 U.S. 138, 141 (1897) (rejecting a due process challenge to the dismissal of an escaped prisoner's appeal based on the fugitive-disentitlement doctrine)).

Neither Seventh Circuit decision identified by petitioner is inconsistent with the decision below. In *United States* v. *Kashamu*, 656 F.3d 679 (2011), cert. denied, 565 U.S. 1115 (2012), the defendant argued that he should not stand trial as a matter of collateral estoppel because a judge in England already had determined that he had not committed the crime in question. See *id.* at 681-682. The court of appeals observed that "there is an exception [to the finality requirement] when the ground is double jeopardy * * * because the double jeopardy clause protects a defendant against being retried, and not just against being convicted—and the double jeopardy clause has been held to incorporate the doctrine of collateral estoppel." *Id.* at 682. The court therefore concluded that the defendant's case fit within an existing exception to the finality rule. See *ibid.*; cf. *United States* v. *Guevara*, 443 Fed. Appx. 641, 644 (2d Cir. 2011) (court of appeals lacked jurisdiction over appeal from denial of motion to dismiss indictment to review defendant's claim that opinion ordering his extradition required that charges alleged in indictment be narrowed).

In *United States* v. *Bokhari*, 757 F.3d 664 (7th Cir. 2014), the defendant likewise argued that the findings of a foreign court during extradition proceedings precluded his trial on the underlying charges in the United States. *Id.* at 669-670. Applying "[t]he same analysis" as in *Kashamu*, the court found that Bokhari's claim was closely akin to the claim of "a defendant invoking his right against double jeopardy." *Ibid.*

Unlike *Kashamu* and *Bokhari*, this case does not involve a motion to dismiss that rests on the decision of a foreign court allegedly exonerating the defendant. Accordingly, the Seventh Circuit's analogy to claims under

the Double Jeopardy Clause has no relevance here. *Kashamu* and *Bokhari* do not address the proper treatment of an interlocutory appeal by a defendant who, like petitioner, simply refuses to stand trial, despite the fact that no court has determined or even suggested that his trial should not take place.

c. Review of the court of appeals' application of the collateral-order doctrine in this case is unwarranted for an additional reason: as discussed p. 14, *infra*, the district court correctly exercised its discretion under the fugitive-disentitlement doctrine not to hear petitioner's motion. Thus, even if this Court were to take up the collateral-order question and rule in petitioner's favor, petitioner would derive no benefit from that ruling because the ultimate result in this case would not change. The court of appeals would continue to leave in place the district court's decision to deny petitioner's motion based on the fugitive-disentitlement doctrine.

2. The petition purports to raise the question "[w]hether the fugitive disentitlement doctrine precludes review of the extraterritorial application of a criminal statute." Pet. i. Given the procedural posture of this case before this Court, that question is not properly presented here. The court of appeals held only that it lacked jurisdiction over petitioner's appeal from the denial of his motion to dismiss the criminal complaint and that mandamus relief was not warranted. The court did not rule on the merits of the district court's decision to apply the fugitive-disentitlement doctrine. Because the court of appeals has not passed on this issue—and, indeed, lacked jurisdiction to consider it on an interlocutory appeal—it is not properly presented for this Court's review at this stage of the proceedings. See *United States* v. *Williams*, 504 U.S.

36, 41 (1992); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (explaining that an interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the petition). And to the extent petitioner's second question presented may be construed to "fairly include" (Sup. Ct. R. 14) the question whether the court of appeals abused its discretion in denying mandamus relief because the fugitive-disentitlement doctrine cannot preclude review of the extraterritorial application of a criminal statute (Pet. 16-18), this Court's consideration of the issue is not warranted.

a. The court of appeals permissibly exercised its discretion to deny mandamus relief because petitioner established no error by the district court, much less an error that was "clear and indisputable." *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 381 (2004) (citation omitted).

As this Court has explained, the fugitive-disentitlement doctrine rests in part on enforceability concerns: when an individual remains at large, there can be "no assurance that any judgment [the court] issue[s] would prove enforceable." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-240 (1993); see *id.* at 239-242; see also *Degen* v. *United States*, 517 U.S. 820, 824-825 (1996). The doctrine also "encourages voluntary surrenders," deters unlawful conduct, and "promotes the efficient, dignified operation" of the courts. *Ortega-Rodriguez*, 507 U.S. at 241 (citation omitted); *id.* at 240 (explaining that a defendant's failure to appear before the authorities is "tantamount to waiver or abandonment").

The district court correctly found those justifications applicable in this case and exercised its equitable authority to disentitle petitioner from obtaining dismissal of the indictment against him. Any order adverse to petitioner is unenforceable in his absence. *Ortega-Rodriguez*, 507 U.S. at 239-240; see Pet. 12 (noting that the United States has no extradition treaty with Saudi Arabia). Petitioner's efforts to obtain a favorable ruling while precluding the enforcement of an unfavorable one thus flouts the judicial process. And ruling on the merits of petitioner's motion would eliminate any incentive a defendant in his position would have to appear before the court and answer to the criminal charges.

Petitioner asserts (Pet. 20), relying on *Barker* v. *Wingo*, 407 U.S. 514, 527 (1972), that he has not flouted the judicial process because he "has no duty to appear in the United States." See also Pet. 7, 9 n.2. But *Barker* held that the government has a duty "to provide a prompt trial" even if the defendant does not request one, 407 U.S. at 527 n.26, not that a defendant has a "constitutional right to stay in his home country" (Pet. 11) rather than comply with judicial process and face trial. At bottom, petitioner seeks a favorable ruling from a U.S. court while declining to submit to the authority of the court or bear the consequences of an unfavorable ruling. That is precisely the behavior that the fugitive-disentitlement doctrine is designed to discourage. See *Degen*, 517 U.S. at 824-825; *Ortega-Rodriguez*, 507 U.S. at 239-242; see also, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047, 1050 (11th Cir. 1985); *Bokhari*, 757 F.3d at 672-673. At a minimum, petitioner's asserted right to avoid application of that doctrine is not "clear and indisputable," as required to

justify a writ of mandamus. *Cheney*, 542 U.S. at 381 (citation omitted).

b. Petitioner errs in asserting that the Seventh Circuit's decision in *In re Hijazi*, 589 F.3d 401 (2009), conflicts with the decision here. That decision does not support the broad rule petitioner seeks (Pet. 16)—that the fugitive-disentitlement doctrine cannot "be used to bar review of an indictment that implicates principles of international comity"—or suggest that the court of appeals abused its discretion in denying mandamus relief here. The court there deemed the defendant—a Lebanese national living in Kuwait who had made only "one brief visit to the United States"—a non-fugitive because, on learning that he had been indicted in the United States, he "surrendered himself to the Kuwaiti authorities." *Hijazi*, 589 F.3d at 409, 412; see *id.* at 405-406. Here, however, petitioner has significant ties to the United States, having married in Florida and fathered a child who resided in this country, Pet. App. 2, and he is actively seeking to avoid surrendering himself to any authorities, see Gov't C.A. Br. 4. Furthermore, *Hijazi* raised "delicate foreign relations issues" not present in this case, because the Kuwaiti government had "formally protested [the prosecution] on three occasions." 589 F.3d at 411.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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