

19-1698

United States v. Sindzingre

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

No. 19-1698

UNITED STATES OF AMERICA,
Appellee

v.

MURIEL BESCOND,
Defendant-Appellant

DANIELLE SINDZINGRE,
Defendant.

ARGUED: SEPTEMBER 3, 2020

DECIDED: AUGUST 5, 2021

Before: LIVINGSTON, Chief Judge, WALKER, JACOBS, Circuit Judges.

Muriel Bescond, a citizen and resident of France, is charged with violating the Commodity Exchange Act (“CEA”). She appeals from the memorandum and order of the United States District Court for the Eastern District of New York (Seybert, L), which applied the fugitive disentitlement doctrine and denied her motions to dismiss the indictment on grounds of (inter alia) extraterritoriality

and due process. On appeal, Bescond argues that the collateral order doctrine confers appellate jurisdiction to review the application of the fugitive disentitlement doctrine, and that there is pendent appellate jurisdiction to review the merits of her challenges based on extraterritoriality and due process. As to merits, she argues that the district court misapplied the fugitive disentitlement doctrine, that the indictment impermissibly charges her with extraterritorial violations of the CEA, and that her prosecution is inconsistent with due process. We conclude that we have jurisdiction to review the disentitlement ruling, but none to review the merits of extraterritoriality or due process. We conclude that Bescond is not a fugitive and, even if she were a fugitive, the district court abused its discretion in disentitling her. Accordingly, we **REVERSE** the order disentitling Bescond and **REMAND** for further proceedings to consider or reconsider the merits of her motions to dismiss, and we **DISMISS** this appeal insofar as it seeks review of the (alternative) rulings on extraterritoriality and due process.

Chief Judge Livingston concurs in part and dissents in part in a separate opinion.

JEREMY R. SANDERS, Appellate Counsel (David C. James, Alixandra Smith, Andrey Spektor, Assistant United States Attorneys, for JACQUELYN M. KASULIS, Acting United States Attorney for the Eastern District of New York; Carol L. Sipperly, Senior Litigation Counsel; Timothy A. Duree, Trial Attorney; Brian A. Benczkowski, Assistant Attorney General; John P. Cronan, Deputy Assistant Attorney General; on the brief), Washington, DC and Brooklyn, NY, for Appellee United States of America.

LAURENCE S. SHTASEL, Blank Rome LLP, New York, NY, for Defendant-Appellant Muriel Bescond.

DENNIS JACOBS, Circuit Judge:

Muriel Bescond, a French banker, is charged with transmitting false, misleading, and knowingly inaccurate commodities reports, and with conspiracy to do the same, in violation of the Commodity Exchange Act (“CEA”). A citizen and resident of France, she allegedly participated in the LIBOR benchmark interest rate calculation process from her office in Paris. It is alleged that, by causing an artificial reduction in LIBOR rates, she affected the pricing of futures contracts traded on the Chicago Mercantile Exchange. Bescond remains in France today and has not submitted to the district court’s jurisdiction.

Through counsel, Bescond moved to dismiss the indictment on the grounds that (1) it impermissibly charged her with extraterritorial violations of the CEA, (2) the prosecution violated her Fifth Amendment due process rights, (3) the government selectively prosecuted her because she is a woman, and (4) the statute of limitations had run. The United States District Court for the Eastern District of New York (Seybert, L) concluded that Bescond was a fugitive, exercised discretion to apply the fugitive disentitlement doctrine, and declined to decide the merits of her motions. Under the doctrine of fugitive disentitlement, a court may decline to entertain the claims of a defendant who is a fugitive from justice. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam); Nen Di Wu v. Holder, 646 F.3d 133, 135 & n.2 (2d Cir. 2011).

In the alternative, the district court rejected the extraterritoriality and due process challenges on the merits. Since additional briefing would have been needed to decide the claims of selective prosecution and statute of limitations, the court did not reach them, even hypothetically.

Because Bescond appeals from a memorandum and order issued pre-trial, we must first ascertain appellate jurisdiction. Bescond contends (i) that the collateral order doctrine affords jurisdiction to entertain the challenge to her

designation as a fugitive and the exercise of discretion to disentitle her, and (ii) that there is pendent appellate jurisdiction to decide whether the indictment impermissibly charges extraterritorial violations of the CEA and whether the prosecution violates her due process rights. We conclude that we have jurisdiction to review the order disentitling Bescond, which we reverse, and we remand for further proceedings to consider or reconsider the merits of her motions to dismiss. However, we conclude that we lack jurisdiction to review the merits of the extraterritoriality and due process challenges and dismiss the appeal to that extent.

BACKGROUND

Muriel Bescond is a French citizen living in France who worked as the head of the Paris treasury desk at Société Générale (“SocGen”), a global bank headquartered in France. The indictment charges that, between May 2010 and October 2011, she participated in a scheme to manipulate the United States Dollar London Interbank Offered Rate (“USD LIBOR”).

LIBOR is a benchmark interest rate, calculated for various currencies and borrowing periods, that averages the rates at which certain banks borrow

unsecured funds. At the time of the alleged scheme, the USD LIBOR calculation process began with sixteen “Contributor Panel” banks submitting estimates of the rates at which they could borrow funds. SocGen, one of the sixteen, employed “submitters” or “setters” to prepare these estimates and transmit them to Thomson Reuters in London. Thomson Reuters set aside the four highest estimates and the four lowest, and averaged the eight estimates in the middle to arrive at the final USD LIBOR, or the “fix.” The final rate was transmitted to three data centers for worldwide publication, including one center in Hauppauge, New York.

The prices of certain financial instruments depend on USD LIBOR. One such instrument is the Eurodollar futures contract, the price of which reflects the predicted USD LIBOR at the end of a fixed period. Investors trade Eurodollar futures contracts as a commodity on the Chicago Mercantile Exchange.¹

In Paris, Bescond supervised SocGen’s setters. At the direction of the bank’s Global Head of Treasury Danielle Sindzingre, Bescond instructed the

¹ Eurodollars are interest-yielding U.S. dollars deposited in foreign banks for fixed amounts of time. Eurodollar futures contracts are derivatives whose prices reflect the predicted USD LIBOR at the end of the three-month term of a \$1 million deposit. Investors trade Eurodollar futures contracts based on their predictions of USD LIBOR increases and decreases.

setters to prepare false USD LIBOR submissions that were lower than SocGen's actual borrowing rates. The object was to protect SocGen's reputation as a sound financial institution by understating the rates at which SocGen could borrow money. The setters transmitted the false USD LIBOR submissions to a SocGen manager in London, who transmitted them in turn to Thomson Reuters. SocGen's false submissions artificially lowered the USD LIBOR fix, affecting financial transactions that referenced USD LIBOR.

The indictment filed in the Eastern District of New York charged Bescond with four substantive counts of transmitting false, misleading, and knowingly inaccurate commodities reports in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(a)(2), and one count of conspiracy to do the same. Bescond remains in France and has not submitted to the district court's jurisdiction. France will not extradite her.

Through counsel, Bescond moved to dismiss the indictment. Her first motion argued that the indictment violated the Fifth Amendment right to due process because it failed to allege a sufficient nexus with the United States, and that the statute of limitations had run. Her second motion argued that the government was selectively prosecuting women participants in the alleged

scheme, while declining to prosecute men who were similarly situated. At the district court's request, Bescond filed an additional brief arguing that the indictment charged an impermissible extraterritorial application of the CEA. Bescond also argued that, as an alternative to dismissal on grounds of selective prosecution and statute of limitations, the court should order discovery and additional briefing from the government on those issues.

The district court concluded that Bescond was a fugitive and made the discretionary ruling that disentitlement was warranted. Accordingly, the court declined to reach the merits of Bescond's motions. The court then issued an alternative ruling on the merits, in order "to provide the Second Circuit with a complete record on review." United States v. Sindzingre, No. 17-CR-0464(JS), 2019 WL 2290494, at *9 (E.D.N.Y. May 29, 2019). It concluded that the indictment properly charged domestic violations of the CEA and that the prosecution did not violate Bescond's due process rights. The court declined to make an alternative ruling on selective prosecution and the statute of limitations because "additional briefing and information" would be needed to resolve those issues. Id. Bescond's motions to dismiss were denied in a memorandum and order.

Bescond has appealed. The government moved to dismiss the appeal on the ground that we lack jurisdiction for want of a final judgment. A motions panel of this Court denied the motion, citing the collateral order doctrine.

On appeal, Bescond argues that, as the motions panel concluded, there is appellate jurisdiction to review the disentitlement ruling under the collateral order doctrine; and that we should exercise pendent appellate jurisdiction to review the alternative rulings on the merits of extraterritoriality and due process (Point I below). She argues that the district court erred in designating her a fugitive and in exercising discretion to disentitle her (Point II). Finally, she argues that the indictment charges an impermissible extraterritorial application of the CEA and violates her due process rights (which we cannot decide for lack of jurisdiction).

DISCUSSION

I

Courts of appeals “have jurisdiction of appeals from all final decisions of the district courts of the United States.” 28 U.S.C. § 1291. Known as the “final judgment rule,” section 1291 “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) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)). In a criminal case, the final judgment rule “prohibits appellate review until conviction and imposition of sentence.” Id. (citing Berman v. United States, 302 U.S. 211, 212 (1937)). The rule “minimiz[es] appellate-court interference with the numerous decisions [trial judges] must make in the pre-judgment stages of litigation[,] . . . reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals[, and] is crucial to the efficient administration of justice.” Id. at 263–64 (citing Firestone Tire, 449 U.S. at 374). Because these interests “are ‘especially compelling in the administration of criminal justice,’” the policy underlying the final judgment rule “is at its strongest in the field of criminal law.” Id. at 264 (first quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940), and then quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)).

Nevertheless, in limited circumstances, a court of appeals may exercise jurisdiction absent a final judgment on the merits. Under the collateral order doctrine, a court of appeals has jurisdiction to review an order that (1)

“conclusively determine[s] the disputed question”; (2) “resolve[s] an important issue completely separate from the merits of the action”; and (3) is “effectively unreviewable on appeal from a final judgment.” *Id.* at 265 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), superseded on other grounds by Fed. R. Civ. P. 23(f)); see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).² We apply the collateral order doctrine “with the utmost strictness in criminal cases.” Flanagan, 465 U.S. at 265.

Relatedly, we may exercise pendent appellate jurisdiction in certain interlocutory appeals. When we have jurisdiction to review “an interlocutory appeal of one ruling,” we may also “exercise jurisdiction over other, otherwise unappealable interlocutory decisions, where such rulings are ‘inextricably intertwined’ with the order over which we properly have appellate jurisdiction, or where review of such rulings is ‘necessary to ensure meaningful review’ of the appealable order.” Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 116–17 (2d Cir. 2016) (quoting Myers v. Hertz Corp., 624 F.3d 537, 552 (2d Cir. 2010)).

² This case does not implicate the various statutory exceptions to the final judgment rule. See, e.g., 28 U.S.C. § 1292 (permitting appellate review of certain interlocutory decisions).

We agree with Bescond that we have jurisdiction to review the fugitive disentitlement ruling pursuant to the collateral order doctrine; we disagree that we have pendent jurisdiction to review the alternative rulings concerning extraterritoriality and due process.

A. The collateral order doctrine

A motions panel has already decided that the collateral order doctrine affords appellate jurisdiction to review the disentitlement order in this case. Upon our own independent review, we hold that we have jurisdiction under the collateral order doctrine to review an order disentitling a foreign citizen who has remained at home abroad—in this case, without evasion, stealth, or concealment.

1. Conclusive determination

It is undisputed (including by the dissent for purposes of this appeal) that the disentitlement ruling satisfies the first requirement of the collateral order doctrine: it “conclusively determine[s] the disputed question.” Flanagan, 465 U.S. at 265 (quoting Coopers & Lybrand, 437 U.S. at 468).

2. An important issue separate from the merits

Disentitlement is “important” — that is, it is “weightier than the societal interests advanced by the ordinary operation of final judgment principles.”

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

Disentitlement heavily burdens Bescond’s exercise of the due process right to defend herself in court. See In re Oliver, 333 U.S. 257, 273 (1948); Holden v. Hardy, 169 U.S. 366, 390 (1898); Hovey v. Elliott, 167 U.S. 409, 417 (1897). As long as she is disentitled, she cannot mount a defense unless she travels to the United States, thereby risking pre-trial detention and trial in a foreign country and causing an extended absence that could jeopardize her career and would cut off her income (which, incidentally, is the sole support of her family). These burdens are especially weighty in view of France’s non-extradition policy; as far as her home country is concerned, Bescond has no obligation to appear in the United States. Cf. In re Hijazi, 589 F.3d 401, 407–08 (7th Cir. 2009) (reasoning that because a foreign defendant was “under no obligation to travel to the United States,” mandamus was justified to compel a ruling on motions to dismiss). On the other hand, if she remains in France, she has no opportunity to contest the charges against her and will live indefinitely with the imputation of being a

fugitive (bad enough for anyone, and ruinous for a banking executive). In this case, disentitlement thus imposes a penalty for staying home.

Disentitlement is a sanction “most severe.” Degen v. United States, 517 U.S. 820, 828 (1996). In Degen, the Supreme Court considered a district court’s inherent power to disentitle a claimant in a civil forfeiture suit. See id. at 821. At stake was the “right to a hearing to contest the forfeiture of . . . property, a right secured by the Due Process Clause.” Id. at 822. The Court cautioned against “the harsh sanction of absolute disentanglement.” Id. at 827.³ A fortiori the sanction is harsh when the due process right at stake is to defend liberty; so the issue is important. The severity of disentanglement is sharpened here because disentanglement has been applied to bar Bescond’s challenge to the CEA’s extraterritoriality, that is, whether the law she is alleged to have violated can reach her and her conduct in the first place. Cf. In re Hijazi, 589 F.3d at 411 (concluding that a writ of mandamus ordering the district court to rule on the merits of a motion to dismiss an indictment was appropriate when the foreign defendant “raise[d] serious questions about the reach of U.S. law,” and “there [was] reason to believe that [the] case raise[d] delicate foreign relations issues”).

³ Congress subsequently permitted disentanglement in forfeiture cases by statute. See 28 U.S.C. § 2466.

Bescond's right to defend against criminal charges is no less important than the interests implicated in other kinds of cases in which interlocutory review is available. A collateral order denying a motion to reduce bail is immediately appealable: the "traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction." Stack v. Boyle, 342 U.S. 1, 3–4, 6 (1951). And the "liberty interest" jeopardized by an order of commitment also supports interlocutory review. United States v. Gold, 790 F.2d 235, 239 (2d Cir. 1986). The penalty that disentitlement imposes prior to conviction, and the threat that it poses to the right to defend liberty, are just as important.⁴

The dissent posits that a foreign citizen such as Bescond enjoys the right to due process only on U.S. soil. It cites Agency for International Development v. Alliance for Open Society International, Inc., 140 S. Ct. 2082 (2020), which held that "foreign organizations operating abroad . . . possess no rights under the First Amendment," id. at 2087. But Bescond is not a free-floating foreigner invoking

⁴ The dissent says that we "have more often [than not] declined invitations to create ever more appealable collateral orders," Dissent at 4—an assertion supported by a paucity of citations. That says nothing about whether we should entertain *this* appeal. The dissent treats the collateral order doctrine as a series of watertight "exception[s]" on a "list." Id. at 5. In fact, the only category is the set of cases that satisfy the doctrine's three requirements.

the jurisdiction of our federal courts to vindicate a Constitutional right. It is the *government* that invoked such jurisdiction when it pursued indictment; Bescond is a defendant in a U.S. criminal court. As such, she is not without rights. If the right to due process does not attach until Bescond travels to the United States, it will have been infringed beyond remedy as soon as the right attaches.

Disentitlement also satisfies the requirement that issues for interlocutory review be completely separate from the merits of the underlying criminal action. The question is whether disentitlement is “collateral” to Bescond’s “guilt or innocence of the charges against [her].” Gold, 790 F.2d at 238. In Bescond’s case, disentitlement has nothing to do with her guilt or innocence: it bears not on whether she violated the CEA, but rather on her ability to defend herself. See id. (concluding that a defendant’s competence to stand trial was “entirely separate” from the issue of whether he committed the alleged crime, and therefore suitable for immediate appellate review).

Accordingly, the disentitlement ruling “resolve[s] an important issue completely separate from the merits of the action.” Flanagan, 465 U.S. at 265 (quoting Coopers & Lybrand, 437 U.S. at 468).

3. Effectively unreviewable post-judgment

Disentitlement is effectively unreviewable on appeal from a final judgment. Id. (quoting Coopers & Lybrand, 437 U.S. at 468). This “third prong of the [collateral order] test 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.’” Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)). Bescond’s right to mount a defense can be vindicated now or never. If she remains in France—as France entitles her to do—she will never stand trial; naturally, she will have no opportunity to appeal and alleviate the damage to her life and reputation. See Gold, 790 F.2d at 239 (“[T]here may never be a criminal trial if the defendant is never found competent to stand trial; in this instance, there would be no appellate review.”). Alternatively, if she succumbs to the pressure of disentitlement and appears in the United States, an appeal could not remedy “the very harm that [s]he seeks to avoid.” Sell v. United States, 539 U.S. 166, 177 (2003); see Gold, 790 F.2d at 239. Even acquittal would not “undo th[e] harm.” Sell, 539 U.S. at 177; see Gold, 790 F.2d at 239.

4. Out-of-circuit views

The Sixth and Eleventh Circuits have ruled that they lacked jurisdiction to hear interlocutory appeals from rulings that disentitled fugitives. (The government erroneously contends that we, too, have so held.⁵) Respectfully, we disagree.

In United States v. Shalhoub, the Eleventh Circuit reasoned that “absent the assertion of a right not to be tried or the assertion of a right akin to the right against excessive bail, a defendant must accept the burdens of trial and sentencing before he obtains appellate review of an adverse ruling.” 855 F.3d 1255, 1261 (11th Cir. 2017). While “[t]he right against excessive bail is a

⁵ The dissent invokes United States v. Golden—decided in 1956—which disclaimed jurisdiction to review an order that denied a motion to dismiss when the defendant lived abroad and failed to appear. 239 F.2d 877, 878–79 (2d Cir. 1956). That challenge to disentanglement, raised in a reply brief, was rejected in four words and without explanation: “[t]his position i[s] untenable.” Id. at 879. We do not regard Golden as foreclosing today’s decision, which follows the reasoned analysis of subsequent cases.

The dissent posits that four words “may be all it takes” to set a precedent that forecloses interlocutory review here. Dissent at 5. But the four words contain no analysis, and there were other sufficient grounds for decision. See Norton v. Sam’s Club, 145 F.3d 114, 117 (2d Cir. 1998) (explaining that an issue raised for the first time in a reply brief is not properly presented for appellate review). Less is more; but nothing is still nothing.

constitutional right,” it continued, “[a defendant] has no right to avoid being labelled a fugitive.” Id.

However, Bescond does assert a constitutional right: the right to defend herself in court. And neither the Supreme Court nor this Court has categorically limited the collateral order doctrine to the right not to be tried and the right against excessive bail. For example, an order requiring the involuntary administration of antipsychotic drugs is immediately appealable because of the “privacy and security” interests at stake. Sell, 539 U.S. at 176–77 (quoting Winston v. Lee, 470 U.S. 753, 759 (1985)). So, too, is “an order transferring a juvenile to adult status” in a criminal proceeding, as it deprives the defendant of such “legal and practical benefits” as the sealing of records and pre-trial detention in settings favorable to adult prison. United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995).

In United States v. Martirosian, the Sixth Circuit reasoned that the “[c]onsiderable overlap” between the issues of whether the defendant was a fugitive, and whether the relevant criminal statute applied to foreigners, counseled against interlocutory review. 917 F.3d 883, 888 (6th Cir. 2019). True, Bescond challenges the CEA’s assertedly extraterritorial application—a concept

that, broadly speaking, overlaps with fugitivity. But the issues are distinct. In reviewing extraterritoriality, we consider the CEA’s text. See RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016). 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. Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 280–81 (2d Cir. 1997). Although Bescond’s location abroad is relevant to both analyses, see RJR Nabisco, 136 S. Ct. at 2101; Finkelstein, 111 F.3d at 280, we can—and do—decide one issue without deciding the other.

The Sixth Circuit rejected Martirossian’s argument that fugitivity would be unreviewable on appeal from a final judgment, but conceded (fatally) that a defendant’s fugitive status “become[s] moot” once “he submits to the jurisdiction of the federal courts.” Martirossian, 917 F.3d at 888.

We are persuaded that we may properly review the disentitlement ruling as a collateral order.⁶

⁶ The dissent casts our holding in broad terms, so that it is the dissent rather than this opinion that would provoke the abuses that the dissent foreshadows. Concerned about how we will deal with future foreign defendants abroad, the dissent conjures up cybercriminals and villains in caves. But whether in a cave or behind a screen, such bad actors have concealed themselves and are thus easily distinguishable from Bescond. In any event, every disposition leaves

B. Pendent appellate jurisdiction

Does jurisdiction to review the disentitlement ruling empower us to review the alternative rulings on the merits of extraterritoriality and due process? It does not.

Under the doctrine of pendent appellate jurisdiction, an interlocutory appeal of one ruling permits us “to exercise jurisdiction over other, otherwise unappealable interlocutory decisions, where such rulings are ‘inextricably intertwined’ with” or “‘necessary to ensure meaningful review’ of the appealable order.” Atlantica Holdings, Inc., 813 F.3d at 116–17 (quoting Myers, 624 F.3d at 552). Pendent appellate jurisdiction is available only in “narrowly circumscribed” circumstances, “in order to avoid ‘encourag[ing] parties to parlay [reviewable] collateral orders into multi-issue interlocutory appeal tickets,’ thereby undermining the general rule that an appeal may not be taken until a final judgment has been entered.” Id. at 117 (first alteration in original) (quoting Swint v. Chambers Cnty. Comm’n, 514 U.S. 35, 49–50 (1995)). “[T]he exercise of pendent appellate jurisdiction is discretionary,” and “we will only exercise [such jurisdiction] in exceptional circumstances.” Id. (quoting Myers, 624 F.3d at 553);

unresolved questions that may arise in cases that follow in its wake. That is why we turn on the lights.

see Bolmer v. Oliveira, 594 F.3d 134, 141 (2d Cir. 2010) (“[P]endent appellate jurisdiction should be exercised sparingly, if ever.” (quoting Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 292 (2d Cir. 1996))).

These circumstances are insufficiently exceptional. Bescond asserts that review of the merits of extraterritoriality and due process is necessary to ensure meaningful review of her disenfranchisement. But her argument at best is that the concepts of extraterritoriality and due process would be enlightening because they illustrate why she is justified in remaining abroad. This is not enough. See Myers, 624 F.3d at 553–54 (explaining that, even when two independent issues are factually or legally similar, pendent appellate jurisdiction does not lie when “resolution of the non-appealable order would require us to conduct an inquiry that is distinct from and ‘broader’ than the inquiry required to resolve solely the issue over which we properly have appellate jurisdiction” (quoting Britt v. Garcia, 457 F.3d 264, 273 (2d Cir. 2006))). Not incidentally, jurisdiction under the collateral order doctrine to review the disenfranchisement ruling depends, in part, on its separateness from the merits of extraterritoriality and due process.

Accordingly, we decline to exercise pendent appellate jurisdiction to review the alternative rulings on the merits.⁷

II

The sole issue that we have jurisdiction to review is the application of the fugitive disentitlement doctrine. The doctrine “applies only to fugitives from justice.” Finkelstein, 111 F.3d at 281. So in order to disentitle a litigant, a court must first determine that the litigant is a fugitive. The court may then exercise discretion to disentitle the fugitive—but only if doing so would serve the doctrine’s objectives. See id. at 280. We hold that Bescond is not a fugitive, and that, even if she were, the district court abused its discretion in concluding that disentitlement was justified.

A. Fugitivity

The issue of whether Bescond meets the definition of a “fugitive” is reviewed de novo. Collazos v. United States, 368 F.3d 190, 195 (2d Cir. 2004).

The ordinary meaning of the term “fugitive” does not describe Bescond. A

⁷ We have no need to decide the correctness of the government’s assertion that we can never exercise pendent jurisdiction in a criminal case.

fugitive is “[s]omeone who flees or escapes; a refugee,” or “[a] criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp[ecially] by fleeing the jurisdiction or by hiding.” BLACK’S LAW DICTIONARY (11th ed. 2019).

Fugitivity implies some action by Bescond to distance herself from the United States or frustrate arrest. Bescond took no such action.

As the district court recognized, Bescond is not a fugitive under either of the two categories at common law: (1) traditional fugitives and (2) constructive-flight fugitives. A traditional fugitive is “[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.” Finkelstein, 111 F.3d at 281 (alterations in original) (quoting BLACK’S LAW DICTIONARY (5th ed. 1979)). Bescond has neither fled nor concealed herself.

Nor is Bescond a constructive-flight fugitive: a person “who allegedly committed crimes while in the United States but who w[as] outside the country—for whatever reason—when [she] learned that [her] arrest[] w[as] sought and who then refused to return to the United States in order to avoid prosecution.” Collazos, 368 F.3d at 199. Bescond was not in the United States

while allegedly committing the charged conduct. See In re Hijazi, 589 F.3d at 412 (The fugitive disentitlement doctrine “does not apply . . . [to a defendant who] has never been in the country, . . . has never set foot in Illinois, and . . . owns no property in the United States.”). Nor is she refusing to return to the United States to avoid prosecution; she simply remains at home, as her home country permits her to do. So she does not qualify as a constructive-flight fugitive.

In forfeiture cases, Congress has extended fugitive status to persons who were not in the United States to begin with—those who “decline[] to enter . . . the United States to submit to its jurisdiction” or “otherwise evade[] the jurisdiction of the court in which a criminal case is pending against [them.]” 28 U.S.C. § 2466(a)(1)(B)–(C); Collazos, 368 F.3d at 199–200. This extension is justified for a reason that fits the forfeiture context specifically:

the unseemly spectacle . . . of a criminal defendant who, facing both incarceration and forfeiture for his misdeeds, attempts to invoke from a safe distance only so much of a United States court’s jurisdiction as might secure him the return of alleged criminal proceeds while carefully shielding himself from the possibility of a penal sanction.

Collazos, 368 F.3d at 200. But, as this is not a forfeiture case, the forfeiture statute does not apply.

In short, Bescond is not a fugitive under existing law. Cf. Gao v. Gonzales, 481 F.3d 173, 176–77 (2d Cir. 2007) (“[T]he ‘paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending.’” (quoting Antonio-Martinez v. I.N.S., 317 F.3d 1089, 1092 (9th Cir. 2003))); United States v. Awadalla, 357 F.3d 243, 246 (2d Cir. 2004) (“Because Awadalla absconded after challenging his judgment of conviction in this Court, there is no doubt that we have the authority to dismiss his appeal.”); United States v. Morgan, 254 F.3d 424, 426–27 (2d Cir. 2001) (holding that the district court properly disentitled a criminal defendant who fled the United States after pleading guilty and before sentencing); Finkelstein, 111 F.3d at 281–82 (concluding that litigants who failed to comply with bench warrants and appear for depositions, whose whereabouts were unknown, and who faced “an immense judgment” were fugitives); Bar-Levy v. U.S. Dep’t of Just., 990 F.2d 33, 35 (2d Cir. 1993) (“[T]he alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims.”).

Although we express no view as to its merits, it is telling that Bescond raises a nonfrivolous extraterritoriality claim—especially in view of our decision in Prime International Trading, Ltd. v. BP P.L.C., 937 F.3d 94 (2d Cir. 2019), cert.

denied, No. 19-1141, 2020 WL 3146710 (June 5, 2020).⁸ Labeling a foreign defendant a fugitive can be enough to coerce submission to U.S. jurisdiction wholly regardless of whether the charged statute reaches individuals outside our territory. That result is in tension with principles that underlie the presumption against extraterritoriality. See RJR Nabisco, 136 S. Ct. at 2100 (providing that the presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries” and “reflects the more prosaic ‘commonsense notion that Congress generally legislates with domestic concerns in mind’” (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993))). And if our law does not reach Bescond or her conduct, can it be said that she is in flight from it?

The district court acknowledged the tension, but reasoned that it could be alleviated in the discretionary ruling on whether to apply the doctrine: “[w]ere a court to identify any abuse or prosecutorial overreaching, it could decline to apply disentitlement and reach the merits of a defendant’s motion even if the defendant could be classified as a fugitive.” Sindzingre, 2019 WL 2290494, at *7 n.5. But if the assertion of prosecutorial overreach is premised on

⁸ We decided Prime International after the district court issued its order in this case.

extraterritoriality, there may be no opportunity to detect that overreach precisely because the fugitive disentitlement doctrine preempts consideration of the merits.

Bescond's presence abroad is unrelated to the American prosecution. She is a French citizen, living in France, where she supports a family, and is employed in a legitimate line of work. A different result may obtain if a person's presence abroad is in any part covert or suspect: a hideout, sanctuary, or escape from the reach of law. Arguably to the contrary are the Sixth Circuit's decision in Martirossian, 917 F.3d at 890, and In re Kashamu, 769 F.3d 490, 493 (7th Cir. 2014). But see In re Hijazi, 589 F.3d at 412–13. But if the doctrine were to be expanded to reach someone such as Bescond, who stays at home abroad, without concealment or evasion, Congress, not the courts, should weigh the competing issues and values and determine whether such an expansion is warranted. As observed in Degen: "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities," including disentitling fugitive defendants, but "[t]he extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government,

without benefit of cooperation or correction from the others, undertakes to define its own authority.” 517 U.S. at 823.

B. Disentitlement

We go on to review the discretionary ruling of disentitlement because (1) it is closely related, a ruling on disentitlement being the business end of a fugitivity finding; and (2) courts faced with close questions of fugitivity may prefer to decide on a question confided to discretion. In this case, even if Bescond were a fugitive, disentitlement was improper.

We review disentitlement for abuse of discretion. Morgan, 254 F.3d at 426.

A court abuses its discretion when it:

(1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions.

Klipsch Grp., Inc. v. ePRO E-Com. Ltd., 880 F.3d 620, 627 (2d Cir. 2018) (citation omitted).

Disentitlement serves four purposes: “1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for

flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by the defendant's escape." Finkelstein, 111 F.3d at 280. Courts exercise their discretion to apply the doctrine "[b]earing these objectives in mind."⁹ Id. Here, the conclusion that disentitlement furthered these four objectives was an abuse of discretion.

As to the enforceability of decisions, disentitlement is a disproportionately severe response to Bescond's absence and therefore too harsh a means of ensuring mutuality in the litigation. See Degen, 517 U.S. at 823–24 ("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)). It cannot be said that Bescond fled the district court's jurisdiction, let alone that she did so to seize an unfair advantage or game the system. Cf. Gao, 481 F.3d at 177 ("The gravamen of [the] petition is the posture of 'heads I win, tails you'll never find me.'" (quoting Antonio-Martinez, 317 F.3d at 1093)). Other than to avoid a ruinous designation as a fugitive, Bescond has no reason to travel here: it is not shown that she has residence, immigration status, job, or family in

⁹ Other factors may be considered. See Nen Di Wu, 646 F.3d at 136.

this country, and she allegedly committed the charged offense entirely from abroad. “[D]isentitlement is too blunt an instrument for” a foreign defendant in Bescond’s circumstances. Degen, 517 U.S. at 828.

As to whether Bescond is “flouting the judicial process,” as the district court found she is, Sindzingre, 2019 WL 2290494, at *8, there is no basis for a finding that Bescond is exhibiting disrespect for U.S. law. See Gao, 481 F.3d at 176 (“[The] reasons why the inherent power of the court to manage its own affairs should be used to dismiss an appeal of a party who is a fugitive . . . include . . . the need for a sanction to redress the fugitive’s affront to the dignity of the judicial process.”). All Bescond has done is stay home, where she remained during the allegedly criminal scheme, and where her government permits her to live freely. Her reasons for litigating from home are legitimate and fair.

As to the discouragement of flight: given Bescond’s circumstances, there exists no cohort of fugitives who would perceive an adjudication of her motions as inducement or inspiration to flee the jurisdiction of our courts. Bescond was never here; her charged offense is financial, diffuse, and novel, and it affected the United States—allegedly—only through a chain of other actors in other

countries; she did not act for a criminal organization; she was in a legitimate line of work, as a banking executive; and her home country protects her from extradition. It cannot be said that an adjudication of Bescond's motions on the merits "would eradicate any incentive for [others] to comply with an arrest warrant, submit to a court's jurisdiction, and respond to the Government's allegations." Sindzingre, 2019 WL 2290494, at *8. "[W]e question whether a slight general deterrence effect can outweigh the countervailing harm to the judicial process, which seeks to resolve cases on the merits whenever possible." Nen Di Wu, 646 F.3d at 137.

Finally, as to prejudice, the district court was over-solicitous of the government's claim. The court concluded that "Bescond's failure to appear prejudices the Government's ability to locate witnesses and present evidence at trial." Sindzingre, 2019 WL 2290494, at *9. However, the prejudice to consider is that "caused by the defendant's escape" — of which none is identified.

Finkelstein, 111 F.3d at 280. The government has no apparent need to acquire new evidence related to Bescond's period of absence. See Nen Di Wu, 646 F.3d at 138 (concluding that the prejudice factor did not support disentitlement when the petitioner did not "premise[] his claim to relief entirely on events that

occurred during the period of his fugitivity, thereby making the government rebut new facts in order to defeat his petition on the merits”). Concern that existing evidence would grow stale may arise in some cases; but here, it is odd, given that by the time the indictment was filed, about six to seven years had already elapsed since the charged conduct.

The district court did not consider the countervailing prejudice to Bescond. Disentitlement enables the government to coerce Bescond’s presence in court by imposing financial, reputational, and family hardship regardless of her guilt or innocence, and regardless of whether the indictment charges violations of a statute that applies extraterritorially. So long as the government surmounts the low threshold of securing an indictment, any soul on the planet may be deemed a fugitive, and disentitlement would then bar a challenge to extraterritoriality from abroad, requiring the foreigner to leave home and face arrest and detention to have any hope of securing dismissal. Such a result contravenes the rationales that underly disentitlement and assigns no weight to the sovereignty of other nations.

Discretion depends on circumstances. See Nen Di Wu, 646 F.3d at 138 (“Where the law calls for the exercise of discretion, facts matter, and cases cannot

be lumped together on account of formal similarities.”). In Bescond’s case, given her innocent residence as a foreign citizen abroad, given the nature of the charged offense and her remoteness from the alleged harm that it caused, given her line of work, and given her nonfrivolous challenge to the extraterritoriality of the criminal statute, the exercise of discretion to disentitle her was an abuse.

CONCLUSION

For the foregoing reasons, the order disentitling Bescond is reversed; the case is remanded for further proceedings to consider or reconsider the merits of her motions to dismiss; and the appeal is dismissed insofar as it seeks review of the alternative rulings on extraterritoriality and due process.