NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

CAMILLO LANDAZURI VARGAS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE PROSECUTION OF MR. VARGAS – AN ECUADORIAN NATIONAL WITH NO TIES TO THE UNITED STATES – FOR TRAFFICKING CONTROLLED SUBSTANCES IN INTERNATIONAL WATERS, EXCEEDS CONGRESS' ENUMERATED POWERS.

WHETHER THE MARITIME DRUG LAW ENFORCEMENT ACT IS UNCONSTITUTIONAL BECAUSE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES EVIDENCE THAT A NEXUS EXISTS BETWEEN THE ACTIONS OF A DEFENDANT AND THE UNITED STATES IN ORDER TO PROCEED WITH A PROSECUTION UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT.

WHETHER THE DUE PROCESS CLAUSE REQUIRES THAT JURISDICTION BE INCLUDED AS AN ELEMENT UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT AND THAT IT BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT IN ORDER TO COMPLY WITH THE PROTECTIONS OF THE FIFTH AND SIXTH AMENDMENTS.

INTERESTED PARTIES

There are no parties to the proceedings other than those named in the caption of the case.

Related Proceedings

Proceedings directly related to this case are as follows:

- *Desmond Alexander v. United States,* S.Ct. No. 17-7879

(Judgement issued June 18, 2018)

There are no additional proceedings in any court that are directly relates to this case.

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PETITION FOR WRIT OF CERTIORARI

Camillo Landazuri Vargas respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number No. 18-13175 in that court on June 24, 2019, *United States v. Vargas,* --- F. App'x ---,2019 WL 2577420 (11th Cir. June 24, 2019), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on June 24, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction of all final decisions and sentences of United States district courts.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. CONST. art. I, § 8, cl. 10

The Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

46 U.S.C. § 70501 - 46 U.S.C. § 70507

reprinted in the Appendix (A-14-25)

STATEMENT OF THE CASE

On November 9, 2017, an indictment was returned in the Southern District of Florida against Mr. Vargas and two co-defendants alleging in count one that on October 13, 2017, Vargas and his co-defendants conspired to possess with intent to distribute more than five kilos of cocaine; count two charged that on the same date that Vargas and his co-defendants possessed with intent to distribute more than five kilos of cocaine; count three charged that he failed to heave to in violation of 18 U.S.C. § 2237 (a) (1). The indictment alleged that counts one and two violated Title 46 U.S.C. § 70506(a) and Title 21 U.S.C. §960(b)(1)(B).

On February 23, 2018, Vargas filed Omnibus Motion to Dismiss Indictment alleging among other things that the Court was without subject matter jurisdiction because Title 46 U.S.C. 70501-70505, The Maritime Drug Enforcement Act (MDLEA), was unconstitutional in that Congress exceeded its power in enacting the statute and that the statute was also unconstitutional because it deprived Vargas of safety valve relief to which he otherwise would have been entitled. On February 26, 2018 the district court denied the motion. The motion also contested the fact that no nexus is required under the MDLEA which Vargas contended violated Due Process of Law under the Fifth Amendment. In the motion he also maintained that the Due Process Clause required that jurisdiction be included as an element under the MDLEA and that it be proven to a jury beyond a reasonable doubt in order to comply with the protections of the Fifth and Sixth Amendments.

On March 13, 2018, Vargas pled guilty to count one of the indictment. Thereafter, a pre-sentence investigation report (PSI) was compiled and on July 12, 2108, Vargas filed objections to the PSI contending that the PSI was incorrect to impose a two level enhancement for creating a substantial risk of death or serious bodily injury to another person in the course of fleeing from law enforcement and that the PSI was incorrect to apply a two level enhancement for Vargas being the captain of the vessel and that it was also incorrect to find that Vargas did not qualify for a minor role. The PSI was revised for the final time on July 16, 2018 agreeing that the two level enhancement for creating a risk of death or serious bodily harm *did not* apply. Vargas also filed a written objection to the failure of the PSI to grant safety valve relief because the PSI concluded that safety valve relief is not available in Title 46 cases. At the sentencing hearing conducted on July 17, 2018, Vargas argued that the failure of the PSI to apply safety valve relief violated Vargas' rights to equal protection of the law as guaranteed by the Fifth Amendment to the United States Constitution. Vargas acknowledged Eleventh Circuit's contrary ruling in *United States v. Pertuz-Pertuz,* 679 F.3d 1327 (11th Cir. 2012). In addition, Vargas renewed the arguments outlined in his objections to the PSI that the failure to award safety valve relief violated the due process clause of the Fifth Amendment and also violated the Sixth Amendment as outlined in *Crawford v. Washington,* 541 U.S. 39, 124 S.Ct. 1354 (2004). The district court overruled these objections. However, the district court sustained Vargas' objections to the PSI finding that Vargas did not qualify for an enhancement for being the captain and

that he *did* qualify for a minor role reduction. The court then concluded that the base offense level for Vargas was 26 and, with a criminal history category of I, the court found that Vargas' sentencing guideline range was 63-78 months. However, because of the requirements of Title 46 the district court imposed a mandatory minimum sentence of 120 months. Thereafter, Vargas renewed his objections that Title 46 was unconstitutional and that the court did not have subject matter jurisdiction over the case. In addition, Vargas renewed his objection that Title 46 was also unconstitutional because it deprived him of safety valve relief that he otherwise would have been entitled to in violation of the equal protection clause, the due process clause and the Sixth Amendment to the Constitution. The district court noted and overruled the renewed objections.

Mr. Vargas appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit, arguing, *inter alia*, that the statute exceeds Congress' enumerated powers as applied to conduct lacking any nexus to the United States. He also maintained that the MDLEA is unconstitutional because the Due Process Clause of the Fifth Amendment requires that a nexus exists between the actions of a defendant and the United States in order to proceed with a prosecution under the MDLEA. Further, he claimed that the Due Process Clause required that jurisdiction be included as an element of the offense and that it be proven to a jury beyond a reasonable doubt in order to comply with the protections of the Fifth and Sixth Amendments. Relying on binding circuit precedent, the United States Court of Appeals for the Eleventh Circuit issued an unpublished opinion affirming Mr.

Vargas' conviction and sentence on June 24, 2019. *United States v. Vargas,* --- F. App'x ---, 2019 WL 2577420 (11th Cir. June 24, 2019). This petition follows.

On October 13, 2017, Camilo Vargas, a Columbian and Ecuadorian national was located by the Coast Guard on a boat, along with co-defendants Jhonny Valencia and Francisco Hernandez, traveling in the Eastern Pacific Ocean approximately 205 nautical miles southwest of the Costa Rica/Panama border in international waters. The Coast Guard believed the vessel was transporting cocaine. The vessel was pursed by a helicopter launched from the Coast Guard Cutter Spencer, which fired shots disabling the vessel's engines. Thereafter, the helicopter departed to refuel and the occupants of the vessel jettisoned cocaine into the ocean. A Coast Guard vessel was then dispatched from the Spencer and boarded the targeted vessel which had no registration number or flag visible. Upon questioning, Vargas stated that the nationality of the vessel was Columbian but neither Vargas nor the other two passengers were able to produce proof of registration. The Coast Guard made contact with the Columbian government who failed to confirm or deny the registration of the vessel. Thereafter, the Coast Guard treated the vessel as one without nationality in international waters and thus subject to the jurisdiction of the United States. A search of the vessel revealed approximately 25 fuel drums but no packages and no cocaine was found. Further, ION scans were positive for gasoline but negative for cocaine. The vessel was then sunk and the three occupants of the vessel were transported to the Spencer, taken to Guantanamo Bay, Cuba and thereafter to the Southern District of Florida.

Furthermore, there was no evidence that the vessel containing Vargas had any plan or intention to transport cocaine to the United States. Moreover, there was no evidence of any nexus between the United States and the occupants, the boat or the cocaine.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE PROSECUTION OF A FOREIGN NATIONAL FOR TRAFFICKING CONTROLLED SUBSTANCES IN INTERNATIONAL WATERS EXCEEDS CONGRESS' POWERS, WHERE THERE IS NO CONNECTION BETWEEN THE OFFENSE AND THE UNITED STATES.

A. This case presents a question of exceptional importance, which has never been, but should be, decided by the Court.

Petitioner Camillo Vargas, a Columbian and Ecuadorian citizen who never set foot in the United States prior to his arrest, asks this Court to review what is arguably the most expansive grant of extraterritorial criminal jurisdiction in the United States Code. The Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503 (the "MDLEA"), makes it a crime to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board . . . a vessel subject to the jurisdiction of the United States." The statute applies to any individual found aboard a vessel that is broadly defined to be subject to United States law, and is not limited to United States citizens or residents. 46 U.S.C. § 70503(a)(1). The statute expressly extends its reach beyond the territorial jurisdiction of the United States, and requires no proof whatsoever of a connection between the United States and the offense. *See* 46 U.S.C. § 70503(b). As this case exemplifies, the statute is used to prosecute drug trafficking offenses by

foreign actors in international waters, for trafficking drugs that were never intended to reach the United States.

In drafting the MDLEA, Congress omitted any requirement that the prosecution prove a connection between the offense and the United States, removed jurisdictional questions from the jury's consideration, and precluded defendants from asserting violations of international law as a defense. *See* 46 U.S.C. §§ 70504(a); 70505. The novelty of Congress' jurisdictional grasp alone presents a compelling reason for review. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) ("At the very least, we should 'pause to consider the implication of the Government's arguments' when confronted with such new conceptions of federal power.") (quotation omitted). Perhaps even more compelling is the fact that the presumed constitutional foundation of the MDLEA – Congress' power to "define and punish . . . Felonies committed on the high Seas" under Article I, Section 8, Clause 10 of the Constitution – has not been addressed by this Court in almost 200 years.

Mr. Vargas' conviction raises substantial questions about the extent of Congress' power under the Felonies Clause, and the limits of the United States' ability to enforce its law on foreign actors abroad. Hence, this petition presents an important question of federal law which has never been, but should be, decided by this Court. *See* SUP. CT. R. 10(c).

B. The Court's most recent authoritative pronouncement on the Felonies Clause is nearly 200 years old and has been overlooked by the courts of appeals.

Article I, Section 8, Clause 10 of the United States Constitution grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. It has generally been agreed, by the Courts of Appeals that have reviewed the MDLEA, that the statute is an exercise of Congress' power to define and punish Felonies under this clause ("the Felonies Clause"). *See United States v. Moreno-Morillo*, 334 F.3d 819, 824-25 (9th Cir. 2003); *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006).

These court have assumed that the Felonies Clause knows no limit beyond the geography described in the text. Thus, in *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990), the Ninth Circuit resolved the question with the following syllogism:

> The Constitution gives Congress the power to 'define and punish piracies and felonies on the high seas. . .' U.S. Const. Art. I, sec. 8, cl. 10. The high seas lie seaward of the territorial sea, defined as the three mile belt of sea measured from the low water mark. . . . We therefore find that the Constitution authorized Congress to give extraterritorial effect to the Act.

905 F.2d at 248 (internal citation omitted).

If there is any limit on this power, the Ninth Circuit posited, it resides in the Due Process Clause – not in Article I. *See Davis*, 945 F.2d at 249 ("In this case, Congress explicitly stated that it intended the [MDLEA] to apply extraterritorially. Therefore, the only issue we must consider is whether the application of the [MDLEA] to Davis' conduct would violate due process.").

The Eleventh Circuit similarly merged the Article I inquiry with notions of due process, in *United States v. Estupinan*, 453 F.3d 1336 (11th Cir. 2006), when it disposed of the defendant's Article I challenge as follows:

> The MDLEA was specifically enacted to punish drug trafficking on the high seas, "because drug trafficking aboard vessels (1) 'is a serious international problem and is universally condemned,' and (2) 'presents a specific threat to the security and societal well-being of the United States.'" *United States v. Rendon*, 354 F.3d 1320, 1325 n. 2 (11th Cir. 2003) (citation omitted). Moreover, "this circuit and other circuits have not embellished the MDLEA with [the requirement of] a nexus [between a defendant's criminal conduct and the United States]." *Rendon*, 354 F.3d at 1325 . . . Indeed, as the Third Circuit has recognized, "[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas." *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993). *Estupinan* directs us to no case in which any court has held that the MDLEA was an unconstitutional exercise of Congressional power. Thus, we readily hold that the district court committed no error in failing to *sua sponte* rule that Congress exceeded its authority under the Piracies and Felonies Clause in enacting the MDLEA.[1]

453 F.3d at 1338-1339 (citations omitted).

Thus, the courts of appeals have held, either explicitly or implicitly, that the only limitation on the Felonies power – beyond the geographical limitation in the text itself – is the requirement that prosecutions comport with due process. *See id*.; *See also, e.g., United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993)

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[1] The appellant in *Estupinan* had raised the constitutional challenge for the first time on appeal. The court of appeals did not resolve whether the plain error or *de novo* standard of review should apply, because it concluded that the district court did not err even under the more lenient *de novo* standard. *Id*. at 1338.

(rejecting argument that nexus was required as a matter of due process); *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) (same).

Only a dissenting judge from the First Circuit, Judge Torruella, has delved further, recognizing that this Court's interpretation of the Felonies Clause provides a contrary view. *See United States v. Angulo-Hernandez*, 576 F.3d 59, 63 (1st Cir. 2009) (Torruella, J., dissenting from denial of *en banc* review) ("The term 'Felonies' has not been read to include all felonies, but rather only felonies with an adequate jurisdictional nexus to the United States.") (citing *United States v. Furlong*, 18 U.S. 184, 197 (1820)). *See also United States v. Cardales-Luna*, 632 F.3d 731, 738-751 (1st Cir. 2011) (Torruella, J., dissenting).

In *Furlong*, the Court addressed the distinctions between the treatment of Piracy and other "Felonies committed on the high Seas" under Article I, Section 8, Clause 10. After determining that the petitioner had properly been convicted of Piracy, the Court turned to "[t]he question whether ***murder*** committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner upon a foreigner." 18 U.S. at 194 (emphasis in original). Although presented as a matter of statutory construction, the Court determined first that it should construe the extent of Congress' powers under Clause 10. *See id*. at 195-96 ("we should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that

law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning.").

The Court concluded that the murder of a foreigner, by a foreigner, on a foreign ship, could not be prosecuted under a statute declaring murder to be piracy. *Id*. at 196. "[T]here exist well-known distinctions between the crimes of piracy and murder." *Id.* Piracy – the prototypical universal jurisdiction crime – "is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all." *Id.* at 197. The same is not true for murder. *Id.* And, the Court noted, that if Congress had attempted to punish murder under its Piracies power, it would have -- indefensibly -- extended its own jurisdiction:

> Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it.

Furlong, 18 U.S. at 198.

The Court concluded by finding that there are offenses on the high seas in which Congress has "no right to interfere":

> If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had ***no right to interfere***, nor leave unpunished the crime of piracy in any cases in which they might punish it.

Id. (emphasis omitted and supplied).

Hence, *Furlong* establishes that Congress' power to prosecute Felonies on the high seas is more circumscribed than it is to prosecute Piracy. *See also United States v. Smith*, 18 U.S. 153 (1820) (recognizing distinctions between Piracies and Felonies under the Clause). This reading comports with the Constitutional text, which includes three "distinct grants of power" in Article I, Section 8, Clause 10: "the power to define and punish piracies, the power to define and punish felonies committed on the high seas, and the power to define and punish offenses against the law of nations." *United States v. Bellaizac-Hurtado,* 700 F.3d 1245, 1248 (11th Cir. 2012) (citing *Smith*, 18 U.S. at 158-59). If Congress has plenary authority to define and punish ***any*** offense as a felony on the high seas, then the correlative power to define and punish "Piracies" and "Offences against the Law of Nations" would be superfluous. This is because every Piracy and every offense against the law of nations can be defined as a felony as well. There must be some distinction among them.

When examined by references to the other powers in Clause 10, at least one such distinction becomes clear: Of the three grants of power in Article I, Section 8, Clause 10, the Piracies Clause is the only one that eliminates concerns of prescriptive jurisdiction over the offense. At the time the Constitution was written, Piracy was *sui generis*. *See Smith*, 18 U.S. at 154 (1820) ("[P]irates being *hostes humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all."). Piracy was thus separated from the rest of Clause 10, because it was unique in its

jurisdictional aspect. It was the only universal jurisdiction crime. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190-205 (2004) (discussing piracy's status as the prototypical universal jurisdiction crime). However, unlike the Piracies Clause, there is no indication that the Framers intended either the Felonies Clause or the Offences Clause to act without traditional jurisdictional restraints. *See Bellaizac-Hurtado*, 700 F.3d at 1258 (Barkett, J., specially concurring) ("[W]hen conduct has no connection to the United States, such as the conduct at issue here, it can only be punished as an 'Offence[] against the Law of Nations' if it is subject to universal jurisdiction").

Both the Court's precedents and the constitutional text thus suggest that the Felonies Clause does ***not*** grant Congress unlimited power to prosecute felonies on the high seas without any nexus to the United States. **"**Further," as Judge Torruella noted, "no other Article I power saves the MDLEA." *Angulo-Hernandez*, 576 F.3d at 63 (Torruella, J., dissenting from the denial of *en banc* review) (citing Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes,* 93 MINN. L .REV. 1191, 1237-51 (April 2009) (explaining inapplicability of treaty power and foreign commerce clause to MDLEA offenses)). *See also Bellaizac-Hurtado,* 700 F.3d 1245 (holding that drug trafficking is not an Offence against the Law of Nations). "Thus, the exercise of Congressional power in enacting the MDLEA is not consistent with the Constitution, which limits Congress's power to proscribe crimes on the high sea to

crimes of universal jurisdiction and crimes with a U.S. nexus." *Angulo-Hernandez*, 576 F.3d at 62-63 (Torreulla, J., dissenting from the denial of *en banc* review) (internal footnotes omitted). "By the enactment of 46 U.S.C. §§ 70503(a)(1) and 70502(c)(1)(C) of the MDLEA, allowing the enforcement of the criminal laws of the United States against persons and/or activities in non-U.S. territory in which there is a lack of any nexus or impact in, or on, the United States, Congress has exceeded its powers under Article I of the Constitution." *Cardales-Luna*, 632 F.3d at 739 (Torruella, J., dissenting)

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C. This case presents a recurring question of law which is ripe for review.

Mr. Vargas is one of thousands of foreign nationals who have been arrested in international waters and prosecuted in the United States for crimes bearing no connection to this country.

> Over the past six years, more than 2,700 men ... have been taken from boats suspected of smuggling Colombian cocaine to Central America, to be carried around the ocean for weeks or months as the American ships continue their patrols. These fishermen-turned-smugglers are caught in international waters, or in foreign seas, and often have little or no understanding of where the drugs aboard their boats are ultimately bound. Yet nearly all of these boatmen are now carted from the Pacific and delivered to the United States to face criminal charges here, in what amounts to a vast extraterritorial exertion of American legal might.

Seth Freed Wessler, *The Coast Guard's 'Floating Guantánamos',* N.Y. TIMES, Nov. 20, 2017, https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating guantanamos.html.

Furthermore, although there is no actual circuit split on the question presented herein, further development among the circuit courts is unlikely because the MDLEA provides an express forum selection clause. At the time of Mr. Vargas' offense, 46 U.S.C. § 70504(b) directed that defendants could be tried in the district in which they were first brought into the United States, or in the District of Colombia. The statute has recently been amended to allow for prosecution in any district. National Defense Authorization Act for Fiscal Year 2018, PL 115-91. The

government's ability to control the venue of prosecution makes it unlikely that many additional circuits will be asked to review the statute in the future.

The government's ability to select its forum provides another compelling reason to exercise review. Most MDLEA prosecutions have taken place within the Eleventh Circuit, despite the lack of any obvious nexus between the offense and that jurisdiction. *See* Kontorovich, *Beyond the Article I Horizon,* 93 Minn. L.Rev. at 1205. Additionally, here, as in many MDLEA cases that have reached the Eleventh Circuit, the matter emanates from the Eastern Pacific Ocean, far closer to the Ninth Circuit than the Eleventh. *See, e.g., United States v. Macias*, 654 F. App'x 458, 460 (11th Cir. 2016); *United States v. De La Garza*, 516 F.3d 1266 (11th Cir. 2008); *United States v. Rendon*, 354 F.3d 1320 (11th Cir. 2003); *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002). The two circuits have generated conflicts over specific applications of the statute. Specifically, the Ninth Circuit has held that Due Process requires a connection between the United States and the offense in cases involving registered vessels, and that disputes over jurisdiction must constitutionally be resolved by the jury. *See United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006). The Eleventh Circuit has rejected both propositions. *See United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016); *Tinoco*, 304 F.3d at 1107-08 (11th Cir. 2002); *Rendon*, 354 F.3d at 1325 (11th Cir. 2003). As one Coast Guard lawyer bluntly told the New York Times: "We try not to bring these cases to the Ninth Circuit." Wessler, *The Coast Guard's 'Floating Guantánamos'.*

Finally, this case presents an ideal vehicle for certiorari. The issue was properly preserved in the district court and passed on by the court of appeals. There are no issues of waiver or harmlessness which might otherwise preclude a ruling on the merits.

In sum, this petition raises a significant and far-reaching question of constitutional law on which this Court has not spoken in nearly two hundred years. Whether the United States government had authority to prosecute Mr. Vargas is at best an open question under the law of this Court, and is arguably precluded by the Court's most recent, 198-year old, pronouncement on the issue. Mr. Vargas submits that his offense was one in which Congress had "no right to interfere" *Furlong*, 18 U.S. at 198, and he respectfully asks this Court to grant review.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE MARITIME DRUG LAW ENFORCEMENT ACT IS UNCONSTITUTIONAL BECAUSE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION REQUIRES EVIDENCE THAT A NEXUS EXISTS BETWEEN THE ACTIONS OF A DEFENDANT AND THE UNITED STATES IN ORDER TO PROCEED WITH A PROSECUTION UNDER THE MARITIME DRUG ENFORCEMENT ACT

The Due Process Clause of the Fifth Amendment of the Constitution requires evidence that a nexus exists between the actions of a defendant and the United States in order to proceed with a prosecution under the Maritime Drug Law Enforcement Act. The Ninth Circuit has so held and it appears that the Second and Fourth Circuits will follow.

In *United States v. Perlaza*, the Court of Appeals for the Ninth Circuit found that the United States Coast Guard did not have jurisdiction over crew members

found in possession of narcotics on the high seas absent a showing of a nexus between their activity and the United States. *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006). The court reached this conclusion even though the Coast Guard obtained permission to board the vessel based on an agreement between the United States and Colombia. In its analysis, the court made an important distinction between statutory jurisdiction and constitutional jurisdiction. The *Perlaza* court explained that a nexus between the prohibited conduct and the United States is a condition precedent to applying the MDLEA extraterritorially in order to ensure that the application of the statute to the defendant is not arbitrary and fundamentally unfair. The Ninth Circuit determined that this application of domestic law is required because it believes that international legal principles are insufficient for analyzing a constitutional right. *Id*. at 249 n.2 (noting that "danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?").

The Ninth Circuit rejected the United States' claim that jurisdiction over the defendants met constitutional muster even without a showing of nexus because drug trafficking is both an offense outlawed internationally and a crime against the United States' sovereign interests. *Id*. at 1161-1163. In making these arguments, the prosecution drew upon the two types of extraterritorial jurisdiction that U.S. courts had long sanctioned–jurisdiction over universal crimes and crimes against the sovereign. But the Ninth Circuit ruled that it did not find drug trafficking to be

equivalent to piracy or slave trading, and it refused to accept that "foreign ships 500 miles offshore . . . that . . . might be bound for Canada, South America, or Zanzibar" necessarily offended our country's "security or governmental functions." *Id.* at 1162. The Ninth Circuit concluded, that fair warning to the defendants of their potential criminal liability could not be assumed based on the nature of the offense, thus, the nexus requirement needed to be satisfied in order satisfy the protections guaranteed by the Constitution.

Though the Second Circuit has yet to address the nexus requirement in the MDLEA context, circuit precedent suggests that the court would follow the Ninth Circuit in holding that due process demands a nexus with the United States. *See United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003) (agreeing that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." (citing *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)). Likewise, in an unpublished opinion, the Fourth Circuit followed the Ninth Circuit and adopted a rigorous due process test for evaluating extraterritorial jurisdiction in drug trafficking cases. *See United States v. Mohammad-Omar*, 323 F. App'x 259, 261 (4th Cir. 2009).

The Eleventh Circuit has held that a nexus is not required. "We have twice rejected the argument that Congress exceeded its authority under the Felonies Clause in enacting the MDLEA." *United States v. Walton*, 627 Fed. App'x 911

(2015), citing *United States v Campell*, 743 F.3d 802, 810 (11th Cir.) *cert. denied* ___ U.S. ___, 135 S.Ct. 704 (2014); *United States v. Estupian,* 453 F.3d 1336, 1338 (11th Cir. 2006). The court continued: "Morever, 'conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its extraterritorial reach." *Walton* at 912, citing *Campbell*, 743 F.3d at 810.

Additionally, the Eleventh Circuit held in *Rendon* that the Due Process Clause of the Fifth Amendment does not prohibit the trial and conviction of an alien captured on the high seas while drug trafficking, because the Act provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas." *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003). In *Rendon*, the court held that a Colombian captain of a ship, which had been detained on the high seas and was carrying a large quantity of cocaine, could be prosecuted under federal law without raising due process problems because drug trafficking is "generally recognized as a crime by nations that have reasonably developed legal systems."

The reasoning of the Eleventh Circuit is that, while recognizing that the Due Process Clause requires the defendant to have been afforded notice, such notice is categorically satisfied in drug trafficking cases given that the practice is condemned by many developed states. Until roughly 1980, the United States only sought to apply its penal laws beyond the country's borders in two situations: when foreigners committed "universal crimes," and when they perpetrated crimes against the

United States. Both categories of offenses failed to raise due process problems, however, because they each involved conduct that foreign defendants should have expected would trigger criminal liability in the United States. Acts such as the Maritime Drug Law Enforcement Act are relatively recent developments seeking to greatly expand the reach of the United States with very little thought to the constitutional problems raised. The effect of the statute is to make the United States a police force against drug trafficking in the entire Western Hemisphere, and potentially the entire world. Without something to tie these offenders' conduct to the United States, they are deprived of due process, proper notice, and a convenient forum in which to defend their cases.

This conflict involves the uneven application of federal criminal laws at its most stark. For those defendants prosecuted in jurisdictions holding that no nexus with the United States is required, they face harsh penalties and serve long sentences in the United States even though they and their actions have no connection to the United States. Others, who are prosecuted in jurisdictions requiring a nexus before the case can proceed, will either satisfy the nexus requirement and go forward with their case, or will have their charges dismissed in their entirety, or never be prosecuted because their actions have no connection to the United States.

This Court has yet to rule on the issue of whether there must be a nexus between a vessel on the high seas and the United States under the MDLEA for United States courts to obtain jurisdiction. However, this Court noted in a case

involving the proper interpretation of the Foreign Commerce Clause of Art. I, section 8, clause 3, that the Court had not yet articulated the extent of Congress's power under the Foreign Commerce Clause to enact laws with extraterritorial reach and observing,

> "[T]he Foreign Commerce Clause would permit Congress to regulate any activity anywhere in the world so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other. Congress would be able not only to criminalize prostitution in Australia, but also regulate working conditions in factories in China, pollution from power plants in India, or agricultural methods on farms in France. I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity."

Braxton v. United States, 2017 WL 866364 (March 6, 2017)(J., Thomas dissenting from the denial of the petition for writ of certiorari).

Moreover, in the civil context, this Court has warned that due process precludes federal courts from exercising jurisdiction to adjudicate foreign-bounded disputes because due process requires a nexus to the forum. *See, e.g.*, *DaimlerChrysler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (suit in California by foreign plaintiffs against foreign defendant for actions taken abroad would violate due process). In the criminal context, due process should require no less. *See Klimavicius–Viloria*, 144 F.3d at 1257 (analogizing role of due process clause in criminal context to the "'minimum contacts' test in personal jurisdiction") Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992) (arguing that due process should restrict the extraterritorial application of U.S. jurisdiction).In civil litigation, due

process requires that a defendant have the requisite "minimum contacts" with the forum to justify haling him into court there. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). This requirement stemmed from concerns about comity between the states and providing adequate notice to a defendant, such that courts may only hear those disputes that will not "offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

The same principles require a nexus to the United States—the equivalent of minimum contacts—for extraterritorial criminal prosecutions. *See Perlaza*, 439 F.3d at 1168 ("The nexus requirement . . . . serves the same purpose as the minimum contacts test in personal jurisdiction."). Just as the Due Process Clause's personal jurisdiction requirement limits the ability of a federal court in one state to resolve a dispute involving a resident of a different state if that resident has insufficient connections to the forum state, *see Helicopteros Nacionales*, 466 U.S. at 414, its nexus requirement limits a federal court's ability to adjudicate a criminal complaint involving a citizen of a foreign country, absent a sufficient nexus between that individual or his conduct and the United States, *see Caicedo*, 47 F.3d at 372 ("A defendant [on a ship registered in a foreign country] would have a legitimate expectation that because he has subjected himself to the laws of [that foreign country], other nations will not be entitled to exercise jurisdiction without some nexus."). That the nation in which the vessel is registered consents to the United States' exercise of jurisdiction "does not eliminate the nexus requirement," which is

a constitutional limitation on the federal courts. *Perlaza*, 439 F.3d at 1169. *See also United States v. Angulo-Hernández*, 576 F.3d 59, 60 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review) (calling for the First Circuit to join the Ninth Circuit in requiring a nexus, and arguing that "[t]he consent of the flag nation is not material to a due process analysis focused on our government's power over a foreign individual defendant").

Here, the United States may not constitutionally exercise jurisdiction over Petitioner who is a citizen of Columbia and Ecuador. The boat stopped was stopped in international waters 205 miles southwest of the Costa Rica/Panama border. Absent a sufficient nexus to the United States, Petitioners' conviction violated due process. *Perlaza*, 439 F.3d at 1160. Were it otherwise, the Coast Guard could patrol all the international waters of the world and transport back to the United States for prosecution anyone found transporting drugs. If that is insufficient to grant federal courts jurisdiction over civil matters, *see DaimlerChrysler AG*, 134 S. Ct. at 751, it is insufficient to sustain criminal prosecutions as well.

III. CERTIORARI SHOULD BE GRANTED TO REVIEW WHEHTER THE DUE PROCESS CLAUSE REQUIRES THAT JURISDICTION BE INCLUDED AS AN ELEMENT UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT AND THAT IT BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT IN ORDER TO COMPLY WITH THE PROTECTIONS OF THE FIFTH AND SIXTH AMENDMENTS.

The Due Process Clause of the Fifth Amendment of the Constitution and the Sixth Amendment's jury trial protections require that proof of jurisdiction be submitted to a jury as an element of the offense charged pursuant to the MDLEA

which then must be proven to a jury beyond a reasonable doubt. The Ninth Circuit has so held.

Prior to 1996, "there was a consensus among the circuits that 'the jurisdictional requirement in section 1903(a) is an element of the crime charged and therefore must be decided by the jury.'" *United States v. Moreno-Morillo*, 334 F. 3d 819, 828 (9th Cir 2003) (quoting *United States v. Medjuck II*, 156 F. 3d 916 (9th Cir 1998) (citing cases from the First, Third, and Eleventh Circuits)). In 1996, Congress amended § 1903 by adding a new subsection (f) which purported to remove the element of jurisdiction from the jury's domain with the addition of 46 U.S.C. app. § 1903(f), now 46 U.S.C. § 70504. ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.")

The Ninth Circuit, again in *Perlaza*, 439 F.3d at 1165-67, held that notwithstanding § 1903(f), contested facts underlying the existence of statutory jurisdiction must be resolved by a jury. The court ruled that in light of the Fifth and Sixth Amendments, such facts, though "not formally identified as elements of the offense charged" must be submitted to the jury and proved beyond a reasonable doubt." *Id*. at 1166 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)). The Ninth Circuit explained that, "[T]his is because 'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged.'" (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368) (1970); *see also Harris v. United States*, 536 U.S. 545, 561, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (defining "elements" as 'fact[s] . . . legally essential to the punishment to be inflicted.'" (quoting *United States v. Reese*, 92 U.S. 214, 232, 23 L.Ed. 563 (1876) (Clifford, J., dissenting))). The Court continued, "It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.' These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes . . . ." *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 748, 160 L.Ed.2d 621 (2005) (quoting *United States v. Gaudin*, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

The Ninth Circuit noted that the Supreme Court "has recently admonished that 'Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.'" (quoting *Harris v. United States*, 536 U.S. 545, 556, 122 S.Ct. 2406 (citing *Jones v. United States*, 526 U.S. 227, 240-41, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); *Mullaney v. Wilbur*, 421 U.S. 684, 699, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975))); *see also Ring v. Arizona*, 536 U.S. 584, 606-07, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) ("In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. If a legislature responded to one of these

decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element." (internal citation omitted)).

The Ninth Circuit determined that this "is precisely what Congress did with respect to § 1903" for "[i]n adding subsection (f), it essentially overrode by statute the consensus prevailing at that time that juries, not judges, would decide whether § 1903(a)'s jurisdictional requirement was satisfied. *See* Coast Guard Authorization Act of 1996, Pub.L. 104-324, § 1138(a)(5), 110 Stat. 3901 (1996)." Accordingly, the Ninth Circuit held that when the jurisdictional inquiry turns on factual issues, such as the question of where the vessel was intercepted or whether the vessel was stateless, "the jurisdictional inquiry *must* be resolved by a jury." *Perlaza*, 439 F.3d at 1167.

The Eleventh Circuit has held that, "The statutory language of the MDLEA now unambiguously mandates that the jurisdictional requirement be treated only as a question of subject matter jurisdiction for the court to decide." *United States v. Tinoco*, 304 F.3d 1088, 1106 (11th Cir. 2002). Petitioner respectfully submits that the removal of the jurisdictional element from the jury violates the Fifth and Sixth Amendments of the United States Constitution.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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