No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

EDWARD JAVIER CATANO LOPEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137
Attorney for Petitioner

Issues/Questions Presented

1. For purposes of the Maritime Drug Law Enforcement Act ("MDLEA"), does due process require a nexus between the defendant and the United States where the defendant is on board a foreign-flagged vessel but not a citizen of the nation whose flag is flying?

2. Does "jurisdiction", as that term is used in § 70503(e)(1) of the MDLEA, refer to "subject matter jurisdiction" (a court's legal power to adjudicate a case) or instead to "legislative jurisdiction" (valid exercise of legislative authority to criminalize specified extraterritorial conduct)?

3. Is drug-trafficking an offense against the "Law of nations"?

4. It is not reasonable for the United States to be able to prosecute drug-trafficking that occurs anywhere in the world absent some nexus between the defendant and the United States.

5. The **United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances** does *not* provide notice to a citizen of Columbia (like Petitioner) that he can be haled into a United States district court to be prosecuted under the *Pinkerton* doctrine because international law does not universally recognize conspiratorial liability under the *Pinkerton* doctrine.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward Javier Catano Lopez ("Lopez") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming Walker's convictions and sentences is styled: *United States v. Lopez,* 794 Fed. Appx. 431 (5th Cir. 2020).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner's conviction and sentence was announced on February 19, 2020 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 10

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

U.S. Const. amend. V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

Statutory Provisions

Title 46 U.S.C. § 70503. Prohibited acts

> (a) Prohibitions. While on board a covered vessel, an individual may not knowingly or intentionally—
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
> . . .
>
> (b) Extension beyond territorial jurisdiction. Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.
> . . .
> (e) Covered vessel defined. In this section the term "covered vessel" means—
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

Title 46 U.S.C. § 70502. Definitions

(c) Vessel subject to the jurisdiction of the United States.

(1) In general. In this chapter [46 USC §§ 70501 et seq.], the term "vessel subject to the jurisdiction of the United States" includes--

. . .

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

Title 46 § 70504. Jurisdiction and venue

(a) **Jurisdiction.** Jurisdiction of the United States with respect to a vessel subject to this chapter [46 USC §§ 70501 et seq.] is not an element of an offense. Jurisdictional issues arising under this chapter [46 USC §§ 70501 et seq.] are preliminary questions of law to be determined solely by the trial judge.

. . .

Title 46 U.S.C. § 70506. Penalties

(b) Attempts and conspiracies. A person attempting or conspiring to violate section 70503 of this title [46 USC § 70503] is subject to the same penalties as provided for violating section 70503 [46 USC § 70503].

Restatement (Third) of Foreign Relations Law Provisions

§ 402 Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to:

(1)(a) conduct that, wholly or in substantial part, takes place with its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

§ 403 Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

. . .

§ 404 Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or

hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

§ 721 Applicability of Constitutional Safeguards

The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.

Statement of the Case

On November 26, 2016, in the middle of the Pacific Ocean, approximately 2,360 miles southeast of the federal courthouse in Sherman, Texas (where Lopez was charged and convicted), the U.S. Coast Guard interdicted a fishing boat sailing under the flag of the People's Republic of China. The boat's "last port of call was Hong Kong," and the "next port of call was going to be Hong Kong." Three and a half weeks later, the People's Republic of China authorized a search of the vessel which revealed 983 kilograms of contraband which tested positive for cocaine. The People's Republic of China consented to the exercise of the jurisdiction of the United States over the case. Seven people were aboard the vessel, six Chinese nationals and Lopez. Lopez is a citizen of Columbia. According to Lopez, he was hired "to take care or look over or watch over" the drugs. Lopez and the other defendants were in the custody of the U.S. Coast Guard "on the water" from November 24, 2016 to December 29, 2016, after which time they were transferred to Guantanamo Bay, Cuba, and then flown to McKinney, Texas.

Lopez pled guilty to a four-count second superseding indictment charging him with (Count One) conspiracy to possess with intent to

distribute cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b); (Count Two) possession with intent to distribute cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70503(a)(1) and 18 U.S.C. § 2; (Count Three) conspiracy to possess with intent to distribute cocaine base while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b); and (Count Four) possession with intent to distribute cocaine base while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70503(a)(1) and 18 U.S.C. § 2. The district court sentenced Lopez to 180 months in prison on each count (concurrent).

Lopez raised the following three issues on appeal.

First issue: While the Maritime Drug Law Enforcement Act (MDLEA) specifically provides for extraterritorial application of 46 U.S.C. §§ 70503(a)(1) and 70506(b), Congress did not intend for these statutes to apply where none of the five general principles of criminal jurisdiction (territorial, national, protective, universal, and passive personality) are implicated. Not one of these five principles applies to

Lopez's conduct. None of the conduct at issue took place in the United States so the territorial provision did not apply. Lopez is not a citizen of the United States so the national principle did not apply. No American citizen was a victim so the passive personality principle did not apply. Drug trafficking is not one of the listed universally prescribed offenses. And the protective principle did not apply because Lopez's conduct was not directed against the security of the United States.

Second issue: The Due Process Clause requires that there be some nexus between the charged conduct and the United States. In this case there was none.

Third issue: The Due Process Clause also precludes application of a statute to a defendant when doing so would be arbitrary or fundamentally unfair; e.g., convicting a person under a statute that does not give fair warning to the person that his conduct is unlawful. Arguably, the only possible means by which Lopez, a Columbian citizen who had never set foot in the United States, could be provided with the requisite notice would be through a treaty signed by both Columbia and the United States. In the only treaty between these countries addressing illicit drug trafficking, Columbia makes clear that it does not consider the

export of cocaine to be illegal. Thus, this treaty did not provide Lopez notice that the conduct of which he was convicted was unlawful. Additionally, Lopez's conspiracy counts of conviction rely on application of the *Pinkerton* doctrine. Yet, the *Pinkerton* doctrine is not recognized in international law.

The Government argued that all of Lopez's issues were "foreclosed by *United States v. Suerte,* 291 F.3d 366 (5th Cir. 2002)." And the Fifth Circuit held, with no analysis whatsoever, "[i]n light of *United States v. Suerte,* 291 F.3d 366 (5th Cir. 2002), Catano Lopez fails to show reversible plain error."

(i) United States v. Suerte in the district court[1]

Nestor Suerte ("Suerte") was charged by indictment under Title 46 U.S.C. § 1901 et seq. (the predecessor statutes to 46 U.S.C. 70501 et seq.[2]) with conspiring to possess with intent to distribute cocaine. The government's theory of prosecution was that (1) Suerte was a member of a large Columbia and Venezuela based maritime cocaine smuggling organization, (2) Suerte was the captain of a vessel owned by the

[1] *United States v. Suerte,* No. 4:00-cr-00659-1 (S.D. Tex. 2001).
[2] *United States v. Anchundia-Espinoza*, 897 F.3d 629, 633 n.2 (5th Cir. 2018).

organization, (3) the flag nation of the vessel was Malta, and (4) Suerte was to supervise the smuggling of approximately 4900 kilograms aboard the vessel. Suerte filed a motion to dismiss the indictment arguing as follows:

> [T]he defendant contends that prosecution of this case violates the Due Process Clause of the Fifth Amendment of the Constitution, in that there is no nexus between the alleged illegal activity and the United States.

Other relevant excerpts from the motion to dismiss include:

> Congress has no power to contravene the Fifth Amendment's Due Process protections. . . . The United States may assert jurisdiction over a foreign flag vessel engaged in criminal activity "provided an appropriate nexus is shown between the acts and the United States." United States v. Alvarez-Mena, 765 F.2d 1259, 1267 n. 11 (5th Cir. 1985)[.] . . . The government may show the required nexus by demonstrating that a sufficient effect occurs within the United States as a result of the illicit activity, or by demonstrating an intent that the illegal activity have such an effect, or knowledge that it will.
>
> Due process requires a connection between the alleged illegal activity and the United States.
>
> The instant case involves a foreign flag vessel with foreign nationals on board. The ship was not within the customs waters of the United States, nor was the ship on a course for the United States. The undisputed destination of the shipment was Europe. The law of this circuit and the Due Process Clause do not allow prosecution under these circumstances.

> The defendant does not base this motion to dismiss on international law, although principles of international law may inform the due process analysis.

The district court's fourteen-page memorandum and order granting Suerte's motion to dismiss includes the following language:

> Ultimately, this case is about whether the federal Constitution permits the United States to assert its laws over a person who is not a citizen of the United States, whose acts were committed entirely outside the United States, whose acts had no effect on the United States, whose ship was registered to a country other than the United States, and who, prior to his arrest, had never visited the United States. Put another way, the question is whether the Constitution allows the United States to assert its laws anytime, anywhere against any person, no matter how tenuous their ties to this country.
>
> This issue is a narrow one. Suerte does not challenge whether Congress intended the MDLEA to have extraterritorial effect. Rather, he raises challenge on the slender question of whether the Constitution permits the MDLEA to have extraterritorial effect over him. The Constitution, Suerte argues, requires that he have some nexus to the United States. Because no such nexus exists in this case, he concludes, the MDLEA cannot be applied to him, and the indictment against him must be dismissed. (SMJ)
>
> . . .
>
> The reason for requiring a nexus is clear. Like minimum contacts analysis, a nexus guarantees that a United States court will not assert jurisdiction unless a defendant could "reasonably anticipate being haled into court" in this country. . . . Without a nexus, the United States -- and indeed, other countries -- could attach jurisdiction freely, without regard to

> whether a crime had any connection to the United States. It could, in effect, assert universal jurisdiction over any crime. [prescriptive jurisdiction]
>
> Finally, the Court notes that the Fifth Circuit has implicitly long required a showing of nexus, having adopted the Objective Territorial Principle. *See United States v. Ricardo,* 619 F.2d 1124, 1128 (5th Cir. 1980); *United States v. Postal,* 589 F.2d 862, 885 (5th Cir.,1979); *United States v. Winter,* 509 F.2d 975 (5th Cir. 1975). If a nexus need not be shown, then there would be no need to apply the Objective Territorial Principle. For all these reasons, the Court concludes that the Due Process Clause requires the showing of a nexus.

(ii) United States v. Suerte in the Fifth Circuit

The Fifth Circuit vacated the district court's dismissal, characterizing the question before it as follows: Does the Due Process Clause require an individualized nexus for the extraterritorial application of the MDLEA? *Suerte,* 291 F.3d at 368-69. The Court gave two answers: (1) No, it does not require and individualized nexus, and alternatively, (2) Suerte received due process in the form of notice. *Suerte,* 291 F.3d at 375-77.

(iii) Legislative history of the MDLEA

In 1980, Congress enacted what would later become the MDLEA "to facilitate increased enforcement by the Coast Guard of laws relating

to the importation of controlled substances." Pub. L. No. 96-350, § 1, 94 Stat. 1159, 1159 (1980). Prior to its enactment, the U.S. Government could not "prosecute the crew or others involved in the smuggling operation" in the absence of evidence that the drugs were destined for the United States. S. Rep. No. 96-855, 96th Cong., 2d Sess. 2 (1980), *reprinted in* U.S.C.C.A.N. 2785, 2786 (July 16, 1980). The MDLEA itself was enacted as part of the Anti-Drug Abuse Act of 1986 and codified at 46 U.S.C. § 1901 *et seq.* and later moved in 2006 to 46 U.S.C. § 70501 *et seq. United States v. Carvajal,* 924 F. Supp. 2d 219, 231-32 (D.D.C. 2013). Congress's goal in enacting the MDLEA was "to enhance the government's ability to prosecute members of drug trafficking organizations." *United States v. Ballestas,* 795 F.3d 138, 145 (D.C. Cir. 2015). Congress however made it clear that it did not intend for the statute to exceed the boundaries of international law. See S. Rep. No. 855, 96th Cong., 2d Sess. 2 (1980), (§ 955a would give Justice Department "the maximum prosecutorial authority *permitted under international law*") (emphasis added)*; see also McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963) (When "determining

whether a statute applies extraterritorially, courts presume that Congress did not intend to violate principles of international law.").

<u>First Reason for Granting the Writ</u>: The Fifth Circuit's Suerte opinion is not consistent with Supreme Court precedent regarding the need for an individualized nexus between the defendant and the United States.

The *Suerte* opinion cites *United States v. Palmer,* 16 U.S. 610 (1818) for the proposition that "[e]arly Supreme Court opinions addressing the extraterritorial applications of the 1790 Act [for the Punishment of Certain Crimes Against the United States] intimate that the Fifth Amendment imposes no nexus requirement on the reach of statutes criminalizing felonious conduct by foreign citizens on the high seas." *Suerte*, 291 F.3d at 373. Yet in *Palmer*, Justice Marshall went to great lengths to point out that the phrase "any person or persons" in the 1790 Act had to be construed so as to be within the confines of what the legislature intended:

> The words of the section [of the 1790 Act] are in terms of unlimited extent. The words "any person or persons," are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, *but also to those objects to which the legislature intended to apply them. Did the legislature intend* to apply

> these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas? (emphasis added)

Palmer, 16 U.S. at 631.

> [W]hen the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it.

Id. at 630.

> The title of this act is, "an act for the punishment of certain crimes against the United States." It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish.

Id. at 631.

> The 8th section also commences with the words "any person or persons." But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation.

Id. at 631-32.

In *Murray v. The Schooner Charming Betsy,* 6 U.S. 64 (1804), the Supreme Court was called upon to construe a law prohibiting "all commercial intercourse" between the United States and France (hostilities between the nations then existing). Justice Marshall, writing for the Court, noted:

> It has been observed that an act of Congress ought never to be construed to violate the *law of nations* if any other possible

> construction remains[.] . . . These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration. (emphasis added)

Id. at 81. The phrase "law of nations" is synonymous with "customary international law." *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 735 (2004) (evaluating whether the "prohibition of arbitrary arrest has attained the status of binding customary international law" to determine whether Alvarez could bring a claim under the Alien Tort Statute); *Flores v. S. Peru Copper Corp.,* 414 F.3d 233, 237 n. 2 (2d Cir. 2003) ("[W]e have consistently used the term "customary international law 'as a synonym for the term "law of nations.'").

Justice Marshall's admonition has been and continues to be repeated and relied upon by the Supreme Court. *See e.g., Lauritzen v. Larson,* 345 U.S. 571, 592-93 (1953) (Jones Act[3] held not to apply where the parties were both Danish subjects; the events took place on a Danish ship, not within United States territorial waters); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 20 (1963) (National Labor Relations Act does not regulate the representation of alien seamen recruited in Honduras to serve aboard vessels under Honduran flags);

[3] The Jones Act is found within Title 46 United States Code, as is the MDLEA.

Weinberger v. Rossi, 456 U.S. 25, 32-36 (1982) (Treaty exception to employment discrimination on U.S. military base in Philippines extended to apply to executive agreement between President of the United States and Philippine government providing for preferential treatment of Filipino citizens on military bases overseas); *F. Hoffman-La Roche Ltd v. Empagran S.A.,* 542 U.S. 155, 173-75 (2004) (Where the price-fixing conduct significantly and adversely affects both customers outside and within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the FTAIA exception to the Sherman Act does not apply to a claim based solely on the foreign effect).

Second Reason for Granting the Writ: ***There is a Circuit split regarding whether due process requires a nexus between the defendant and the United States where the defendant is on board a foreign-flagged vessel but not a citizen of the nation whose flag is flying.***

As noted above, one of the bases on which the district court granted Suerte's motion to dismiss was because "the Due Process Clause requires the showing of a nexus." The Ninth Circuit has described the need for a nexus as follows:

> [T]he nexus requirement serves the same purpose as the "minimum contacts" test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who "should reasonably anticipate being haled into court" in this country.

United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

> Punishing crimes committed on a foreign flag ship is like punishing a crime committed on foreign soil; it is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests.

United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995). The Eleventh Circuit, citing the Restatement of Foreign Relations, describes how a nexus may be shown:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with principles of justice generally recognized by states that have reasonably developed legal systems.

United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378 n.4 (11th Cir. 2011). The Second and Fourth Circuits appear to be in agreement with

the Ninth Circuit regarding the need for a nexus. *See United States v. Yousef,* 327 F.3d 56, 111-12 (2d Cir. 2003); *United States v. Mahammad-Omar,* 323 F. App'x 259, 261 (4th Cir. 2009).

As noted above however, the *Suerte* panel held that due process does *not* require an individualized nexus for the extraterritorial application of the MDLEA. Circuits in agreement with The Fifth include the First, Third, and Eleventh Circuits. *See United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) ("We decide today that due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants."); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) ("[T]he government need not establish a domestic nexus to prosecute offenses under the Maritime Drug Law Enforcement Act[.]"); *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014) ("[T]he conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its extraterritorial reach.").

<u>Third Reason for Granting the Writ</u>: Drug-trafficking has never been considered an offense that violates The Law of Nations. Yet there is a Congressional finding, cited in Suerte, that trafficking in controlled substances is "universally condemned."

The Constitution empowers Congress "[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. The Supreme Court has interpreted that Clause to contain three distinct grants of power: to define and punish piracies, to define and punish felonies committed on the high seas, and to define and punish offenses against the law of nations. See *United States v. Smith*, 18 U.S. 153, 158-59 (1820). The *Suerte* panel noted that in *United States v. Furlong,* 18 U.S. 184 (1820), the Supreme Court appeared to take the position that "Congress' Piracies and Felonies power extends *only so far* as permitted by international law." *Suerte,* 291 F.3d at 374. The Supreme Court has more recently stated: "'[T]he law of nations' . . . includes limitations on a nation's exercise of its jurisdiction to prescribe[.]" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993). The Restatement (Third) of Foreign Relations Law lists the following crimes as being recognized by the community of nations: "piracy, slave trade, attacks on or hijacking of

aircraft, genocide, war crimes, and perhaps certain acts of terrorism." Restatement (Third) of Foreign Relations Law § 404. Conspicuously absent from this list, as noted be the Eleventh Circuit, is drug-trafficking. *See United State v. Bellaizac-Hurtado,* 700 F.3d 1245, 1248, 1253-54 (11th Cir. 2012) ("Drug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today."); See also H.R. Rep. No. 96-323, 96th Cong., 1st Sess. at 4-5 (1979) (Regarding MDLEA predecessor statute: "This oversight created a statutory void, resulting in an anomaly in the criminal law whereby possession of narcotics and dangerous drugs on U.S. territory and within the territorial sea is a Federal crime, *while the same conduct on the high seas is not prohibited under existing law*.").

Nonetheless, in *Suerte,* the Fifth Circuit held that because "drug-trafficking is universally condemned by law-abiding nations," no nexus is necessary where a vessel is sailing under the flag of a nation that has expressly consented to the application of the MDLEA. *Suerte,* 291 F.3d at 372. The *Suerte* panel based its "universally condemned" assumption on the following Congressional finding:

> Congress finds and declares that . . . trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States[.]

46 U.S.C. § 70501. The First and Third Circuits agree with the Fifth Circuit in this regard. *See United States v. Cardales,* 168 F.3d 548, 553 (1st Cir. 1999) ("[T]rafficking in controlled substances aboard vessels is a serious international problem and is universally condemned[.]"); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) ("[T]rafficking of narcotics is condemned universally by law-abiding nations[.]").

So there is a split in authority regarding whether or not the MDLEA can properly be applied to drug-trafficking under the Law of Nations Clause.

<u>Fourth Reason for Granting the Writ</u>: There is a circuit split regarding whether "jurisdiction", as that term is used in § 70503(e)(1) of the MDLEA, refers to "subject matter jurisdiction" (a court's legal power to adjudicate a case) or instead to "legislative jurisdiction" (valid exercise of legislative authority to criminalize specified extraterritorial conduct).

Under the MDLEA, "covered vessel" includes a foreign vessel "subject to the *jurisdiction* of the United States." 46 U.S.C. § 70503(e)(1). What does "jurisdiction" mean in this context?

> There is . . . a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction[.]" . . . or "jurisdiction to prescribe[.]" . . . This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate[.]"

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-14 (1993).

Petitioner Lopez argued that Congress did not intend for the MDLEA to reach his conduct, given that none of the general principles of criminal jurisdiction were implicated. His argument therefore proceeds under the assumption that "jurisdiction" refers to legislative jurisdiction. In *Suerte* however, the panel relied on *United States v. Bustos-Useche,* 273 F.3d 622 (5th Cir. 2001) wherein the Fifth Circuit held that "jurisdiction" refers instead to subject matter jurisdiction:

> In our view, the United States' jurisdiction over the vessel and the district court's jurisdiction to act are inextricably intertwined. Because Panama consented to the enforcement of United States law over the M/V China Breeze prior to Bustos's trial, the district court had jurisdiction to act on the case so long as the criminal statute under which Bustos was prosecuted meets the *subject matter jurisdiction requirements* of Article III of the United States Constitution and 18 U.S.C. § 3231. (emphasis added)

Bustos-Useche, 273 F.3d at 628 n. 6. The Eleventh Circuit and D.C. Circuit agree with the Fifth Circuit. *See United States v. Tinoco*, 304 F.3d 1088, 1111 (11th Cir. 2002) ("[T]he jurisdictional requirement goes only to the court's subject matter jurisdiction and does not have to be treated as an element of a MDLEA substantive offense."); *United States v. Munoz Miranda*, 780 F.3d 1185, 1192 (D.C. Cir. 2015) ("We agree with the Fifth and Eleventh Circuits and conclude that, under § 70504(a), the question whether a vessel is "subject to the jurisdiction of the United States" is a matter of subject-matter jurisdiction.").

In contrast, the Second Circuit, in *United States v. Prado,* 933 F.3d 121 (2d Cir. 2019), made a convincing argument that this phrase defining a "covered vessel" specifies the reach, or coverage of the statute and does not in any way address the subject matter jurisdiction of a court:

> The words "vessel subject to the jurisdiction of the United States" specify how far the prohibitions reach into circumstances potentially conflicting with the sovereignty of other nations and make no apparent reference to the limited subject matter jurisdiction of the district courts. The natural meaning of the statutory words, if read in context rather than in isolation, clearly specifies (and limits) the scope, reach, or coverage of the statutory prohibition, *without reference to the court's jurisdiction.* Section 70503(a) makes it a criminal offense to possess controlled substances (with intent to distribute) *if the possession occurs "on board a covered vessel*" (emphasis added). "Covered vessel[s]" include three

> categories: (i) a vessel of the United States; (ii) a vessel on which the individual who possesses the drugs with intent to distribute is a citizen or resident of the United States; (iii) a vessel subject to the jurisdiction of the United States. *See id.* at § 70503(e). "Vessel subject to the jurisdiction of the United States" is an umbrella term, which specifies categories of vessels that are neither vessels of the United States nor vessels on which the person in possession of the drugs is a United States citizen or resident. *This category is tailored to exercise Congressional regulatory authority in circumstances where the regulatory interest of the United States is clear,* and to avoid exercising regulatory authority where doing so would cause conflict with the sovereignty of other nations. . . . The MDLEA thus makes clear in what circumstances vessels are covered by the statute's prohibition. If the vessel falls outside the prescribed coverage, it is not a "covered vessel" and the prohibition specified in § 70503 does not apply to it. *None of this in any way addresses the jurisdiction of the United States courts*[.] (emphasis added)

Id. at 136. The First Circuit agrees with the Second. *See United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir.2002) ("'Jurisdiction' in this context refers to the enforcement reach of the statute-not federal court subject-matter jurisdiction, which extends to any federal felony.").

<u>Fifth Reason for Granting the Writ</u>: The Fifth Circuit's Suerte opinion mischaracterizes the Restatement (Third) of Foreign Relations Law regarding whether consent of a vessel's flag nation precludes consideration of individual constitutional violations of a defendant on board the vessel.

The *Suerte* panel cited to the Restatement for the proposition that "'[i]nterference with a ship that would otherwise be unlawful under international law is permissible if the flag state has consented.' Restatement (Third) of Foreign Relations Law § 522 cmt. e." *Suerte,* 291 F.3d at 375-76. That however is not the end of the matter. The very next sentence in this same comment note provides as follows: "However, some actions by the United States in relation to a foreign vessel *may violate the United States Constitution even if the flag state consented, and may invalidate and arrest, search, or seizure*." Restatement (Third) of Foreign Relations Law § 522 cmt. e (1987). The note then directs the reader to § 433, Comment d and Reporters' Note 4. Comment d of § 433, entitled "Law enforcement on high seas," discusses a federal statute that authorizes the United States Coast Guard to "stop, to search, and in certain conditions to arrest vessels on the high seas," and notes that search for evidence of a crime *is subject to the Fourth And Fifth Amendments to the Constitution."* Restatement (Third) of Foreign Relations Law § 433 cmt. d. Section 721 provides:

> The provisions of the United States Constitution safeguarding *individual rights* generally control the United States government in the conduct of its foreign relations . . . and generally limit governmental authority whether it is

> exercised in the United States *or abroad,* and whether such authority is exercised unilaterally or by *international agreement.*

Restatement (Third) of Foreign Relations Law § 721 (1987). "Any exercise of authority by the United States in the conduct of foreign relations is *subject to the Bill of Rights and other constitutional restraints protecting individual rights*." *Id.* at cmt. a. "*The due process clause requires fair procedure in matters relating to foreign relations*, in civil as in criminal matters, *for aliens as for citizens*." *Id.* at cmt. f.

The Restatement, considered in its entirety, suggests that Nestor Suerte's due process rights could have been violated, irrespective of consent by the nation of Malta.

Sixth Reason for Granting the Writ: ***It is not reasonable for the United States to conduct itself as the world's high seas drug-trafficking policeman to the extent that the United States can prosecute any person anywhere when that person is not a citizen of the nation whose flag is being flown.***

A nation may not exercise jurisdiction to prescribe law with respect to a person having connections with another nation when the exercise of such jurisdiction is unreasonable. Restatement (Third) of Foreign

Relations Law § 403(1). As noted above, the Fifth Circuit in *Suerte* (along with the First and Third Circuits) appears to take the position that the U.S. government can prosecute drug-traffickers on any vessel anywhere in the world so long as that vessel is flying the flag of a nation that is a signatory of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This is so because:

> trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States[.]

46 U.S.C. § 70501. But the "protective principle" does not extend that far.

> [T]he notion that [the] "protective principle" can be applied to "prohibiting foreigners on foreign ships 500 miles offshore from possessing drugs that . . . might be bound for Canada, South America, or Zanzibar" -- as suggested by the Government here -- has been repeatedly called into question by our Court and others.

United States v. Perlaza, 439 F.3d 1149, 1162 (9th Cir. 2006). In *United States v. Yuri Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015), the U.S. government attempted to apply the federal wire fraud and bribery states to "prosecute foreign defendants for foreign acts involving a foreign governmental entity." *Id.* at 1125. The defendants moved to dismiss the

indictments, arguing that the statutes did not apply extraterritorially. The district court agreed:

> Of course, the United States has some interest in eradicating bribery, mismanagement, and petty thuggery the world over. But under the government's theory, there is no limit to the United States's ability to police foreign individuals, in foreign governments or in foreign organizations[.]

Id. at 1132.

Seventh Reason for Granting the Writ: ***The Suerte opinion's reliance on "The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" ("Treaty") as providing notice for purposes of due process, does not address Lopez's situation because (1) Columbia has expressly disavowed the relevant portion of that Treaty, and (2) Lopez was prosecuted under the Pinkerton doctrine which international law does not recognize.***

A treaty between countries *may* provide the notice necessary to satisfy due process. *See United States v. Ali*, 718 F.3d 929, 945 (D.C. Cir. 2013) ("Whatever due process requires here, the Hostage Taking Convention suffices by [internal quotes omitted] expressly providing foreign offenders with notice that their conduct will be prosecuted by any state signatory."). In the instant case, the Government's "Notice of Jurisdictional Filing," included the following affiant's certification:

> [O]n November 28, 2016, pursuant to Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the Government of the United States requested that Chinese authorities re-confirm the vessel's registry, and if confirmed, grant authorization to board and search the vessel.

Both the United States and Columbia are signatories to the U.N. Narcotics Convention, opened for signature Dec. 20, 1988, 1582 U.N.T.S. 95.[4] It is a treaty. *United States v. Mosquera-Murillo,* 902 F.3d 285, 287 (D.C. Cir. 2018). And there is language in the preface to this treaty stating that the parties recognize that the "eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action with the framework of international cooperation is necessary." *Id.* Also, keeping in mind that Petitioner Lopez's offenses of conviction involved cocaine, the treaty makes specific mention of the "[c]oca bush." *Id.* art. 1(c). At first blush, these provisions would thus appear to have given Lopez notice sufficient to comply with the due process clause. A closer examination of the treaty and Columbia's response thereto tells a different story.

[4] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en#EndDec

"[A] treaty will only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles." (emphasis in original) *Flores v. S. Peru Copper Corp.,* 414 F.3d 233, 256 (2d Cir. 2003). "[W]here the customs and practices of States demonstrate that they do not universally follow a particular practice out of a sense of legal obligation and mutual concern, that practice cannot give rise to a rule of customary international law." *Id.* at 252.

The nation of Columbia does not believe the production and export of cocaine is criminal and has explicitly said so in the U.S. Narcotics Convention treaty. Regarding cocaine, Columbia issued the following declaration in disagreement with the U.N. Convention:

> It is the view of Columbia that treatment under the Convention of the cultivation of the coca leaf as a criminal offence must be harmonized with a policy of alternative development, taking into account the rights of the indigenous communities involved[.] . . . In this connection it is the view of Columbia that the discriminatory, inequitable and restrictive treatment *accorded its agricultural export products on international markets* does nothing to contribute to the control of illicit crops[.][5]

[5] See preceding footnote.

Nor has it been Columbia's practice to curb the production and/or export of cocaine. On September 15, 2011, then President Barack Obama sent a memorandum to then Secretary of State Hillary Rodham Clinton, identifying twenty-one countries "as major drug transit or major illicit drug-producing countries."[6] This list included the nation of Columbia. *Id.* Therefore, assuming Lopez, a Columbian citizen, had familiarized himself with the contents of the U.N. Narcotics Convention, including the above-referenced Columbian declaration, he would not have concluded the distribution of cocaine was unlawful.

Additionally, Lopez's conspiracy counts of conviction rely upon the *Pinkerton* doctrine, yet international law does not recognize the *Pinkerton* doctrine. The *Pinkerton* doctrine provides that a defendant may be found liable for the substantive crime of a coconspirator, provided the crime was reasonably foreseeable and committed in furtherance of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). The only conspiracy crimes that have been

[6] https://www.state.gov/j/inl/rls/rpt/149722.htm

last viewed 4/28/2019.

recognized by international law are "conspiracy to commit genocide and common plan to wage aggressive war." *Hamdan v. Rumsfeld,* 548 U.S. 557, 610 (2006). "The Anglo-American concept of conspiracy was not part of European legal systems." *Id.* at 611. International law does not recognize a doctrine of conspiratorial liability that extends to activity encompassed by the *Pinkerton* doctrine. *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 260 (2d Cir. 2009). Thus, a Columbian citizen like Lopez would have no way of knowing that he could be haled into Court in Sherman, Texas and convicted of conspiracy based on the *Pinkerton* doctrine.

Conclusion

For the foregoing reasons, Petitioner Lopez respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN. 00792137
Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 12th day of May, 2020.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Edward Javier Catano Lopez