

NO: 20-5087

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ITALO EBARISSO NAPA MOREIRA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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Respondent United States of America (“Government”) argues, as a threshold matter, this Court should not grant review of any of the petition’s three grounds because petitioner Italo Ebaristo Napa Moreira (“Napa”) could not satisfy the plain-error standard in the Eleventh Circuit. *See United States v. Napa Moreira*, 810 F. App’x 702, 704-05 (11<sup>th</sup> Cir. 2020)(“error is not plain if there is no precedent from this Court or the Supreme Court directly resolving the issue”). Yet, that is precisely the point why now Napa seeks review here: to have the Supreme Court consider three fundamental defects of constitutional magnitude under Title 46, the Maritime Drug Law Enforcement Act (“MDLEA”).

Much of the Government’s opposition to this petition is standard fare that it has deployed to fight off first-time Supreme Court review of a Title 46 case. To this end the Government string-cites thirteen denials of certiorari relating to the lack of nexus issue. Govt. Br. at 6-7. The Government believes that prior denials of certiorari build an impenetrable barrier against Supreme Court review. Precedent is good for predictability about the legal consequences of interactions among governmental, non-governmental, and individual actors. Our sacred Bill of Rights provides individuals with protections from governmental overreach regardless of their origin, celebrity, or station in life. Precedent is the glue which binds an impartial and just legal structure. But precedent is not super-glue. If it

were, then this Court would not have been able to issue watershed cases grounded in our Bill of Rights. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005). The fact that this Court *so far* has not granted certiorari in a Title 46 case may be an accurate observation, but it is not a substantive argument why this Court should deny Napa's petition.

1. Lack Of Nexus Requirement For MDLEA Prosecution: pending before this Court for review is the MDLEA case of *United States v. Van Der End*, 943 F.3d 98 (2d Cir. 2019), petition for cert. pending, No. 19-8832 (filed June 26, 2020). Like Napa, the defendant in *Van Der End* also pled guilty. Relying on *Class v. United States*, 138 S. Ct. 798 (2018), the Second Circuit held that on direct appeal the defendant raised a proper challenge as to whether "the Due Process Clause requires MDLEA crimes committed on board a stateless vessel to have a nexus to the United States...a purely legal question on which the government's constitutional power to prosecute Van Der End turns." *Van Der End, supra*, at 105. This recent Second Circuit precedent appears to be *in conflict* with the Eleventh Circuit's opinion in petitioner's direct appeal. *See United States v. Napa Moreira*, 810 F. App'x 702, 706 (11<sup>th</sup> Cir. 2020).

The second issue which the petitioner in *United States v. Van Der End*, 943 F.3d 98 (2d Cir. 2019), has pending before the Supreme Court is the same issue as the first issue in Napa’s petition, that is, the MDLEA’s lack of a nexus requirement. *See Van Der End v. United States*, No. 19-8832 (filed June 26, 2020)(second issue). The Government filed its response to that petition on September 16, 2020, raising the same arguments as it did in opposition to Napa’s petition. *See Van Der End, supra*, No. 19-8832 at pp. 18-21. Napa respectfully asks this Honorable Court to consider the petitioner’s arguments in *Van Der End, supra*, in conjunction with Napa’s arguments in his petition and this reply.

Notably absent from the Government’s opposition is any attempt to address key authorities which Napa raised in his petition. *See, e.g., J. McIntyre Mach., LTD. v. Nicastro*, 564 U.S. 873, 879 (2011)(plurality op.)(Due Process Clause protects an individual’s right to be deprived of life, liberty, or property *only* by the exercise of lawful power”)(emphasis supplied). Napa submits the time is ripe for the Supreme Court to review this very crucial issue: whether the same Due Process protections afforded litigants in civil cases apply to defendants under criminal statutes which rely on extraterritorial jurisdiction like the MDLEA.

The Government argues against basic constitutional protections in MDLEA cases relying, in part, on the Piracies and Felonies Clause, Article I, §8, cl. 10. *See*

*United States v. Napa Moreira*, 810 F. App'x 702, 705 (11<sup>th</sup> Cir. 2020)(citing *United States v. Campbell*, 743 F.3d 802, 805 (11<sup>th</sup> Cir. 2014)); *see also* Govt. Br. at 8. Over the years since its enactment, the Government has argued against constitutional protections for persons charged under the MDLEA, relying in great part on Title 46 legislative history, principles of international law, and agreements with other countries to combat international drug trafficking. Yet, these arguments cannot override basic constitutional guarantees. *See, e.g., Boos v. Barry*, 485 U.S. 312, 324 (1988) (“rules of international law and provisions of international agreements of the United States are subject to Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution and cannot be given effect in violation of them). The mere fact that Congress declared that the MDLEA was enacted to fight international drug trafficking because it posed a serious threat to the United States<sup>1</sup> cannot supplant an individual’s rights secured by the Fourth, Fifth, and Sixth Amendments. *Boos, supra*, at 324.

The Government points out that Ninth Circuit cases hold the Government must prove a United States nexus only for those vessels where a foreign nation has confirmed their registration. Yet, there is no rational difference why Due Process should be respected for individuals on board those vessels and ignored where the

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<sup>1</sup> *See* 46 U.S.C. §70501 (Findings and Declarations); *see* Govt. Br. at 8.

vessel qualifies as “stateless.” Due Process provides for fundamental guarantees which apply to individuals not objects. Whether an individual is present on an object which has been classified one way or another must not determine whether that person can be denied his Due Process rights. Yet, that is the Government’s precise reasoning why Napa and others found aboard “stateless” vessels are unworthy of such constitutional protections.

2. *Miranda v. Arizona*: The Government’s opposition to Napa’s second issue, the MDLEA’s violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is grounded in two very weak explanations: a) the United States Coast Guard (“USCG”) boarding team’s questions to persons on an interdicted “go-fast vessel” (“GFV”) are the same “routine” questions posed to the crew of any vessel on the high seas; and b) the GFV crew is not “in custody.” *See* Govt. Br. at 12.

MDLEA cases always involve the identification and subsequent pursuit of suspect GFVs.<sup>2</sup> The high-seas boardings in MDLEA cases are not “safety checks” nor other types of encounters unrelated to illegal conduct. The Government cannot credibly take the position that the GFV’s foreign crew members were not “in custody” from their very first moments of contact with USCG officials. The

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<sup>2</sup> The USCG has different methods of identifying drug vessels, including marine patrol aircraft, USCG vessels patrolling international waters, and obtaining intelligence from sources in foreign countries.

USCG small boats have a boarding team with weapons drawn and aimed at the GFV crew. Those individuals are ordered to put their hands up and, from that moment forward, they never are “free to leave.” Rather, the USCG’s restraint on their freedom is continuous during questioning and the crew is released from USCG custody only after it has been transferred to the U.S. Marshals Service and the Bureau of Prisons upon the crew’s arrival in the United States.

In sum, the GFV crew is questioned by Government officials about matters which eventually shall clothe a United States district court with the power to adjudicate them guilty and severely punish them. MDLEA cases might be the only criminal prosecutions in federal jurisprudence where *Miranda v. Arizona*, 384 U.S. 436 (1966), is tossed aside without any consequences for the Government.<sup>3</sup>

3. *Johnson v. United States*: In its response, the Government never addresses the merits of Napa’s claim of error under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Rather, it takes the position that this Court should not review this issue on procedural grounds. Understandably, the Government does not have

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<sup>3</sup> Napa believes the following is worth repeating from his petition: without knowing the consequences answering, or failing to answer, certain USCG questions without assistance of counsel, the GFV crew very likely might maintain a dangerous and erroneous belief: the worst that could happen is that the USCG would seize any contraband it discovered, but the crew would not be arrested and transported thousands of miles away for prosecution in the United States.

a good substantive argument to show why *Johnson v. United States*, 135 S. Ct. 2551 (2015), should not be applied to the MDLEA and have this Court rule that it has provisions “so vague that it fails to give ordinary people notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Id.* at 2556.

The class of individuals interdicted on GFVs in international waters are “ordinary people.”<sup>4</sup> Under §70502(d)(1)(B), a USCG official is not bound by any standards in his communications with persons found on a GFV. That provision allows the official simply to “request” that the “master or person in charge...make a claim of nationality or registry for that vessel.” The official has no duty to explain: a) what it means to “make a claim” of that sort; b) the reason why he is requesting such a claim be made; c) the dire legal consequences of a criminal prosecution to the crew members if the master or person in charge fails to make such a claim; d) whether there is a difference between “nationality” and “registry”; e) the foreign country will be contacted to verify or deny such a claim; nor f) what the consequences are for a verification or denial. The lack of such standards promotes arbitrary enforcement where one USCG official might decide to give a

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<sup>4</sup> There have been many hundreds of Title 46 cases which have made their way to federal appellate courts. The individuals prosecuted almost without exception are illiterate and dirt-poor. They receive very lengthy sentences due to the large quantities of drugs involved. These individuals clearly fall within what the Supreme Court characterizes as “ordinary people.”

GFV suspect all the information he needs to make an informed choice before he divulges key facts to the official. On the other hand, not having any standards he must follow, another USCG official might withhold essential information from a GFV suspect to try and secure a response incriminating him. 46 U.S.C. §70502 (d)(1)(B) violates *Johnson v. United States*, 135 S. Ct. 2551 (2015), rendering it unconstitutional in violation of the Due Process Clause of the Fifth Amendment.

### **CONCLUSION**

To correct the constitutional violations, which federal appellate courts have ignored or glossed over for several decades, it is prayed that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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