No.

In the Supreme Court of the United States

JOHVANNY AYBAR-ULLOA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Congress's authority to define and punish felonies committed on the high seas is unconstrained by Article I, § 8, cl. 10 to the United States Constitution merely because the vessel is deemed "stateless", as the en banc Court of Appeals for the First Circuit held, and further, if either that construction of international law is incorrect or Congress's authority is not so expanded by international law, whether Congress exceeded the limited authority granted under Article I, § 8 cl. 10 when enacting the Maritime Drug Law Enforcement Act?

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF CONTENTS – Cont.

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

TABLE OF AUTHORITIES – Cont.

Page(s)

RULES

CONVENTIONS

OTHER AUTHORITIES

OPINIONS BELOW

The withdrawn panel opinion of the United States Court of Appeals for First Circuit is United States v. Aybar-Ulloa, 913 F.3d 47 (1st Cir. 2019). The judgment of the United States Court of Appeals for the First Circuit is reprinted at Pet. App. 1a. The en banc opinion of the United States Court of Appeals for the First Circuit is reprinted at Pet. App. 2a. See United States v. Aybar-Ulloa, 987 F.3d 1 (1st Cir. 2021).[1] The judgment of the United States District Court for the District of Puerto Rico, Docket No. 3:13-cr-00518-JAG, is reprinted at Add. 1.

JURISDICTION

The First Circuit entered judgment on January 25, 2021. See Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Article I, Section 8, Clause 10 to the United States Constitution provides that "Congress shall have power…[t]o define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," which is at issue.

The Appendix, Pet. App. 21a-34a, reproduces the text of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. §§ 70501-70508, which also is at issue.

STATEMENT OF THE CASE

In August 2013, Aybar was arrested on a complaint charging conspiracy to possess with intent to distribute cocaine onboard a vessel subject to the jurisdiction

[1] The appendix filed with this petition is cited as "Pet. App.;" the addendum to the petitioner's brief filed in the First Circuit is cited as "Add;" and the documents filed in the district court are cited as "Doc."

of the United States, in violation of 46 U.S.C. § 70502(c), § 70503(a)(1), § 70504(b)(1) and § 70506(a) and (b). See Doc. 1. Per the affidavit in support, Aybar was taken into custody on August 9, 2013 in international waters in the Central Caribbean, and then transported to the District of Puerto Rico; Aybar first entered the United States at the port of Ponce, Puerto Rico. See Doc. 1-1.

A grand jury returned an indictment alleging that Aybar conspired to possess with intent to distribute cocaine onboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70506(b) (count one); aiding and abetting possession with intent to distribute cocaine onboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. § 70502(c)(1)(A), § 70503(a)(1), § 70504(b)(1) and § 70506(a) and 18 U.S.C. § 2 (count two); and a forfeiture allegation, under 46 U.S.C. § 70507. See Doc. 14.

Aybar filed a motion to dismiss the indictment, arguing that the Maritime Drug Law Enforcement Act (MDLEA) was unconstitutional: "Congress exceeded its authority under the Piracies and Felonies Clause in enacting the MDLEA without requiring a nexus between the conduct of defendant Aybar and the United States." See Doc. 65 at 3-4. The government opposed the motion, which the district court denied, without a hearing. See Doc. 69, 89.

In March 2015, Aybar entered a "straight" guilty plea to both counts in the indictment, without an agreement, which the district court accepted. See Doc. 188 at 11; Doc. 123.

In support of the plea, the government recounted that the HMS Lancaster, a

"frigate in the British Royal Navy," launched a helicopter, which "spotted a small go fast vessel dead in the water in international waters." See Doc. 188 at 19; Doc. 69 at 10. Law enforcement on the aircraft "observed numerous packages in plain view," and therefore, the "HMS Lancaster launched their small boat in order to conduct a right to visit approach." See Doc. 188 at 19-20.

During the "right of visit approach," Aybar and co-defendant Johnny Felix-Terrero "claimed to be citizens and nationals of the Dominican Republic while [Johnny] Sarmiento Palacios claimed to be a citizen and national of Venezuela." See Doc. 188 at 20. Sarmiento, the master of the vessel, "made no claim of nationality for the suspect vessel;" law enforcement treated it "as one without nationality." See Id. at 20.

The co-defendants and contraband were "transferred to the HMS Lancaster," where the contraband field tested positive for cocaine. See Doc. 188 at 20. The "crew members of the suspect vessel and the contraband were taken into custody and transferred to the U.S. Coast Guard Cutter Chapalo and transported to the District of Puerto Rico." See Doc. 188 at 21. At the port of Ponce, Puerto Rico, United States Customs and Border Protection agents took custody of Aybar, the co-defendants and the contraband. See Id. at 21.

Chemical testing of a "representative sample" of the contraband "yielded positive results for cocaine." See Doc. 188 at 21. A "Homeland Security Laboratory Report" indicated a total net weight of 628.1 kilograms. See Doc. 155 at 6.

During the guilty plea hearing, Aybar and co-defendant Sarmiento clarified

that jurisdiction vested only "as far as it was a vessel without nationality" based on the district court's decision on the motion to dismiss. See Doc. 188 at 24-25.

Aybar filed a sentencing memorandum, explaining that he was offered $3,000 "to participate in the smuggling of narcotics from Venezuela into the Dominican Republic." See Id. at 2. An individual brought Aybar to the airport and purchased his airplane ticket to Bogota, Columbia, where he boarded a bus to a small town in Venezuela. See Id. at 2-3. One co-defendant steered the boat and the other was responsible for the narcotics. See Doc. 169 at 3. Aybar's role included "off-loading" narcotics in the Dominican Republic. See Id. at 2. However, the boat ran out of fuel; the boat was adrift in the Caribbean Sea north of Venezuela for two days before the HMS Lancaster, of the British Royal Navy, found them. See Id. at 3.

At Aybar's April 2016 sentencing hearing, the government noted that Aybar did not tell "British agents at the time of interdiction" the amount of compensation, but "said [it] during his safety valve interview." See Doc. 187 at 8. The government also confirmed that interdiction occurred closer to Venezuela than the Dominican Republic. See Id. at 10. The court then calculated Aybar's guidelines and sentenced him to 135 months in prison. See Id. at 13-15; Doc. 177.

Aybar timely appealed both his conviction and sentence. A panel of the First Circuit reversed Aybar's sentence, but affirmed his conviction with lengthy dissent penned by Judge Torruella on the latter.[2] The First Circuit granted en banc hear-

[2] As the en banc opinion noted, "the panel majority rejected" Aybar's argument "for two reasons: First, we previously held in United States v. Victoria, 876 F.2d 1009 (1st Cir. 1989) (Breyer, J.), that international law does indeed 'give[] the

ing, withdrawing the January 9, 2019 panel decision and ordering supplemental briefing on six detailed questions. After full briefing and telephonic oral argument, the en banc First Circuit, on January 25, 2021, affirmed Aybar's conviction and reversed his sentence; Judge Torruella "did not participate in the issuance of the opinion." See Pet. App. 2a. Judge Barron penned a lengthy concurrence. See Pet. App. 11a. In sum, the en banc opinion concluded:

> prosecution in the United States for drug trafficking on a stateless vessel stopped and boarded by the United States in waters subject to the rights of navigation on the high seas violates no recognized principle of international law…We therefore need not and do not reach the question of whether the application of MDLEA to Aybar would be constitutional were international law otherwise.

Aybar-Ulloa, 987 F.3d at 3.

To so hold, the en banc First Circuit noted that "Aybar adequately preserved his challenge to Congress's constitutional power to criminalize his conduct pursuant to its Article I powers." Aybar-Ulloa, 987 F.3d at 4. The court, further, did not "rely on the protective principle, leaving its potential application for another day" and acknowledging that Cardales could "be read as applying only to the circumstances where a foreign flag nation consents to the application of United States law to persons found on that nation's flagged vessel." See Id. at 3.

This petition for a writ of certiorari is filed timely.

United States…authority to treat stateless vessels as if they were its own.'…Second, our prior opinion in United States v. Cardales, 168 F.3d 548 (1st Cir. 1999), included certain statements construing international law as allowing a nation to define trafficking in controlled substances aboard vessels as a threat sufficient to justify an assertion of jurisdiction under the 'protective principle.'" Aybar-Ulloa, 987 F.3d at 2-3.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTION OF CONGRESS'S AUTHORITY UNDER ARTICLE I, § 8, CL. 10 TO THE UNITED STATES CONSTITUTION TO ENACT THE MARITIME DRUG LAW ENFORCEMENT ACT.

The First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, to wit, whether Congress's authority to define and punish felonies committed on the high seas is unconstrained by Article I, § 8, cl. 10 to the United States Constitution merely because the vessel is deemed "stateless", as the en banc Court of Appeals for the First Circuit held, and further, if either that construction of international law is incorrect or Congress's authority is not so expanded, whether Congress exceeded the limited authority granted under Article I, § 8 cl. 10 when enacting the MDLEA. See S.Ct. R., Rule 10(c).

A. The Maritime Drug Law Enforcement Act.

The MDLEA provides: "[w]hile on board a covered vessel, an individual may not knowingly and intentionally…manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." See 46 U.S.C. § 70503(a)(1).[3] Relevant here, a "covered vessel" includes "a vessel subject to the jurisdiction of the United States." See 46 U.S.C. § 70503(e)(1).

A "vessel subject to the jurisdiction of the United States" includes "a vessel without nationality," see 46 U.S.C. § 70502(c)(1)(A), and in turn, a "vessel without nationality" includes:

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[3] A "person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503." See 46 U.S.C. § 70506(b).

A. a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

B. a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

C. a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

See 46 U.S.C. § 70502(d)(1). Next, a "claim of nationality or registry" includes "a verbal claim of nationality or registry by the master or individual in charge of the vessel." See 46 U.S.C. § 70502(e)(3).

Congress further legislated: "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." See 46 U.S.C. § 70504(a).

Because "Congress intended [jurisdiction] to be a preliminary issue," whether a vessel is "without nationality" is "proven by a preponderance of the evidence." See United States v. Matos-Luchi, 627 F.3d 1, 5-6 (1st Cir. 2010) ("The controlling question is whether at the point at which…authorities confront the vessel, it bears the insignia or papers of a national vessel or its master is prepared to make an affirmative and sustainable claim of nationality.").

B. Article I, § 8, cl. 10 to the United States Constitution.

Article I, section 8, clause 10 to the United States Constitution authorizes Congress: "To define and punish Piracies and Felonies committed on the high Seas,

and Offences against the Law of Nations." To date, few Supreme Court opinions have interpreted Congress's authority thereunder.

"Piracies," "Felonies committed on the high Seas," and "Offenses against the Law of Nations" are "three separate offenses." See United States v. Cardales-Luna, 632 F.3d 731, 741 (1st Cir. 2011) (Torruella, J., dissenting) (citing United States v. Smith, 18 U.S. 153, 158 (1820)). "Piracy" is defined as "robbery when committed upon the sea." See Id. at 745 (citing Smith, 18 U.S. at 162). Further, the "'Law of Nations' is generally understood to be the eighteenth and nineteenth-century term for 'customary international law.'" See Id.

Relevant here, however, is the offense of "Felonies committed on the high Seas." Aybar submits, and this Court should grant certiorari to articulate that, for Congress to define and punish a felony committed on the high seas, either: (1) the conduct underlying the felony must bear a nexus to the United States, or (2) the felony must have attained universal jurisdiction.

1. United States Supreme Court Precedent.

Contrary to the en banc First Circuit opinion, this Court's precedent supports a "general requirement that nations have a *jurisdictional nexus* before punishing extraterritorial conduct committed by non-nationals." See United States v. Shibin, 722 F.3d 233, 239-40 (4th Cir. 2013) (emphasis added).

To begin, in United States v. Palmer, 16 U.S. (3 Wheat) 610, 620 (1818), this Court held that jurisdiction over the offense of piracy is limited in that "the crime of robbery, committed by a person on the high seas, on board…[a] vessel belonging

exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." Id. at 633-34. Congress cannot define and punish piracy committed on a foreign vessel against non-nationals.

Next, in United States v. Klintock, 18 U.S. (5 Wheat) 144, 152 (1820), this Court distinguished Palmer: "general piracy, or murder, or robbery, committed in the places described in [the Act], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States." Congress can define and punish piracy committed by any person on board a vessel who does not acknowledge the authority of any State.

In United States v. Furlong, 18 U.S. (5 Wheat) 184, 197 (1820), this Court importantly clarified that piracy had attained universal jurisdiction (a distinction from drug trafficking, detailed infra.). "Robbery on the seas is considered an offence within the criminal jurisdiction of all nations. It is against all, and punished by all…Not so with the crime of murder." "As to our own citizens," however, there is "no reason why they should be exempted from the operation of the laws of the country, even though in foreign service." Id. at 197. Congress can define and punish murder committed by a United States citizen on a foreign vessel, but not non-nationals on a foreign vessel.

In United States v. Holmes, 18 U.S. (5 Wheat) 412, 417-18 (1820), this Court held that piracy "committed either by a citizen or a foreigner, on board of a piratical vessel, the offence is equally cognizable by the Courts of the United States...it makes no difference whether the offence was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard." Congress can define and punish piracy committed on a vessel or in the sea by any person who does not acknowledge the authority of any State, based on the universal jurisdiction of piracy.[4]

"Taken together, these cases show that Congress can only apply its universal jurisdiction to piracy, which was universally cognizable under the law of nations. Allowing universal jurisdiction for simple felonies would expand the piracy power and blur the distinctions between the two categories," i.e., piracies and felonies committed on the high seas. See Kontorovich, Define and Punish Clause, 191-92.

Thus, Palmer, Klintock, Furlong and Holmes support the conclusion that, to exercise Article I, section 8, clause 10 authority to define and punish drug trafficking committed on the high seas, any congressional enactment must require a juris-

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[4] Piracy "has a salient, well-known feature distinguishing it from other felonies," which is universal jurisdiction. See Eugene Kontorovich, The "Define and Punish" Clause and the Limited Universal Jurisdiction, 10 Nw. U. L. Rev. 149, 164 (2009). Congress's authority over felonies "covers a wider range of conduct but is [more] narrow in its extraterritorial scope than piracy…Piracy's unique status as a universal jurisdiction offense suggests that its separate enumeration in Clause Ten specifically allows Congress to exercise universal jurisdiction over that particular type of offense—but not over other high seas crimes or international law offenses." See Id. at 159.

dictional nexus element with exception only the finite number of crimes that have attained universal jurisdiction status.[5] Cf. Shibin, 722 F.3d at. 239-40. As the Restatement (Fourth) of Foreign Relations Law of the United States § 403 unequivocally provides: "An exercise of prescription jurisdiction by the federal government, any State or any component thereof may not exceed the limits set on the authority of those governments by the Constitution."[6]

2. Universal Jurisdiction.

Next, universal jurisdiction is "an international law doctrine that recognizes a 'narrow and unique exception' to the general requirement that nations have a jurisdictional nexus before punishing extraterritorial conduct committed by non-nationals…It allows any nation 'jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as a universal concern.'" See Shibin, 722 F.3d at 239-40; Cardales-Luna, 632 F.3d at 740 (dissent).

To attain universal jurisdiction, an offense must "reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute that subset of behavior." See Sosa v. Alvarez–Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part,

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[5] The en ban opinion's recitation that "[t]hese founding-era cases…did not hold that a foreign national may be prosecuted in the United States for his conduct on the high seas only if he personally renounces his nationality by engaging in piracy" did not address Aybar's argument. See Aybar-Ulloa, 987 F.3d at 8.

[6] Explained in Reporters' Note 7: "This Section is new. Restatement Third, The Foreign Relations Law of the United States, §§ 402-404 (Am. Law Inst. 1987), addressed only international-law restrictions on the assertion of prescriptive jurisdiction. This Section, by contrast, focuses on domestic, constitutional limitations on exercises of prescriptive jurisdiction." See Restatement (Fourth) § 403 n. 7.

concurring in judgment). The subset of offenses with substantive and procedural agreement that have attained universal jurisdiction are extremely limited, i.e., "torture, genocide, crimes against humanity, and war crimes."[7] Id.

"Since different courts in different nations will not apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the law of those nations. That is to say, substantive uniformity does not *automatically* mean that universal jurisdiction is appropriate." Alvarez–Machain, 542 U.S. at761-62.

For example, in the "18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional[, i.e., procedural] principle that any nation that found a pirate could prosecute him." See Id. at 762 (citing Smith, 18 U.S. at 162). Unlike piracy, there is no substantive or procedural agreement on the offense of drug trafficking.

The relevant Conventions to assess substantive and procedural agreement on the offense of drug trafficking remain those detailed in the Cardales-Luna dissent:

- The Convention on the High Seas (1958) (HSC) specifically prohibits piracy and slavery but is silent on drug trafficking.
- The United Nations Convention on the Law of the Sea (1982) (UNCLOS)

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[7] The Restatement (Fourth) of Foreign Relations Law of the United States § 413 (2019) continues to propound a limited definition of "universal jurisdiction:" "International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated."

is similar to the HSC in relevant part, except under Article 108(2), which provides: "Any state which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances *may request the cooperation* of other States to suppress such traffic."[8] The UNCLOS (the United States is not a signatory) neither requires the criminalization of drug trafficking, nor grants jurisdiction.

- The United Nations Convention Against the Illicit Traffic in Narcotics and Psychotropic Substances (1988), like the UNCLOS, provides only for cooperation and does not require criminalization or grant jurisdiction. E.g., Article 17(1) provides: "The parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea." Subsection (9) encourages that the "Parties shall *consider entering into bilateral or regional agreements or arrangements* to carry out…the provisions of this article."[9]

Bilateral and regional agreements also do not reflect substantive or procedural agreement on the offense of drug trafficking. Of note, the "typical agreement contains a clause that reserves primary jurisdiction over the vessel and crew to the flag state…These clauses make clear that no automatic or ex ante authorization to prosecute should be inferred from the boarding and seizure provisions." See Eugene Kontorovich, Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes, 93 Minn. L. Rev. 1191, 1202-03 (2009).

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8 Emphasis added.

9 Emphasis added.

Applied here, the International Narcotics Control Strategy Report (INCSR) most recently issued by the United States Department of State in March 2019, consistent with the Cardales-Luna dissent, reflects that under bilateral agreements "enforcement of American criminal law aboard foreign vessels" requires "the prior approval of the national government in question." 632 F.3d at 742; INCSR, Vol. I, Drug and Chemical Control (March 2019).[10]

The Dominican Republic "signed and ratified the Caribbean Regional Maritime Agreement," which provides in Article 24: "In all cases arising in the waters of a Party, or concerning a Party's flag vessels seaward of any State's territorial sea, that Party has jurisdiction…Subject to its Constitution and its law, the Party in question may consent to the exercise of jurisdiction by another State in accordance with international law and in conformity with any condition set by it." See INCSR 147. Jurisdiction is not automatic.

The INCSR establishes significant discord with Venezuela. "Drug control cooperation between Venezuela and the United States has been limited and inconsistent since 2005, when Venezuela refused to sign a negotiated addendum to the Memorandum of Understanding (MOU) to improve anti-drug cooperation." See INCSR 271. Jurisdiction is not automatic.

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[10] To be clear, conventions and bilateral agreements are detailed here only to assess substantive and procedural agreement on the offense of drug trafficking on the question of universal jurisdiction. It is beyond dispute that the "Constitution trumps [a] treaty and, if a treaty purports to do something the Constitution forbids, a court would have no choice but to conclude that the treaty, not the Constitution, must give way." See Igartua v. United States, 626 F.3d 592, 608 (1st Cir. 2010) (Lipez, J., concurring).

Drug trafficking has not attained universal jurisdiction; thus, the "general requirement that nations have a jurisdictional nexus before punishing extra-territorial conduct committed by non-nationals" must hold. See Shibin, 722 F.3d at 239-40.

C. International Law on the Statelessness of a Vessel.

The en banc First Circuit opinion sidestepped analysis of the jurisdictional nexus requirement and universal jurisdiction, derived from this Court's precedent, the Restatement (Fourth) and the relevant international conventions, and instead relied on Circuit opinions lacking analysis to summarily state that "international law grants to any state the authority to interdict and exercise physical control over a stateless vessel." See Aybar-Ulloa, 987 F.3d at 6. To do so, the lower court both incorrectly interpreted international law and deemed that international law to grant Congress legislative authority beyond that under Article I, § 8, cl. 10 to the United States Constitution.

First, contrary to the en banc opinion, the statelessness of a vessel is not an independent international law basis for jurisdictions. Any claim to the contrary is debunked by the Restatement (Fourth) published after the panel opinion, but before the en banc opinion. E.g., Restatement (Fourth) § 407 provides that:

> Customary international law permits exercises of prescriptive jurisdiction if there is a *genuine connection* between the subject of the regulation and the state seeking to regulate. The *genuine connection* usually rests on a specific connection between the state and the subject being regulated, such as territory, effects, active personality, passive personality, or protection. In the case of universal jurisdiction, the *genuine connection* rests on the universal

concern of states in suppressing certain offenses.[11]

"Statelessness" of a vessel on the high seas is not a seventh, unique international law basis of jurisdiction; the Restatement articulated the "genuine connection[s]" that establish jurisdiction with knowledge of the decades old decisions later relied on by the en banc opinion, e.g., United States v. Smith, 680 F.2d 255 (1st Cir. 1982) and Victoria.[12]

Had "statelessness" developed into a new international law basis of jurisdiction, it is unfathomable that the American Law Institute would omit that basis when superseding the parts of the Restatement (Third) that "were no longer a true reflection of the present state of the law." This Court should grant certiorari and address, considering the Restatement (Fourth), whether the purported statelessness of a vessel alone affords a State legislative authority over, presumably, any offense, whether felony or misdemeanor, unconstrained by Article I, § 8, cl. 10.

To this end, it is important that the MDLEA, defines a "vessel subject to the jurisdiction of the United States" under 46 U.S.C. § 70502(c)(1)(A), and a "vessel without nationality" under subsection (d)(1), more broadly than the definition of a "stateless vessel" under international law. See Kontorovich, Beyond the Article I Horizon, 1200. Under international law:

"[s]hips have the nationality of the State whose flag they are entitled to

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11 Emphasis added.

12 Noted by the Hon. Torruella in the vacated panel dissent: "allowing all nations to prosecute crewmembers aboard stateless vessels under that nation's own domestic laws simply because of their presence aboard that stateless vessel would convert the operation of a stateless vessel into a universal jurisdiction crime;" it is not. See Aybar-Ulloa, 913 F.3d at 63.

> fly."…[A] vessel is without nationality if it is not authorized to fly the flag of any state…This situation may arise if no state has ever authorized a particular ship to fly its flag, if a state has canceled its authorization, or if the political entity that authorized a ship to fly its flag is not recognized as an international person.

See United States v. Rosero, 42 F.3d 166, 171 (3d 1994).

The MDLEA expands that definition of a stateless vessel to include a vessel whose claim of registry is denied by their government, does not claim nationality by not flying a flag, or whose government does not affirmatively assert that the vessel is of their nationality. See e.g. Kontorovich, Beyond the Article I Horizon, 1228; Rosero, 42 F.3d at 171 (vessel is without nationality under the MDLEA "if (a) the vessel is 'stateless' under international law…or (b)…the vessel falls within subsections (A) or (B)" or, under the amended MDLEA, (C) of 70502(d)(1)"). Thus, the MDLEA definition includes vessels that properly are authorized to fly a nation's flag, despite the lack of flag or affirmation by their government.

A further distinction is that the MDLEA, unlike international law, places the onus of proof on the master of the stateless vessel, rather than the signatory state. The MDLEA requires the master to produce evidence of registry when requested to do so by the United States. See e.g. 46 U.S.C. § 70502(d)(1)(B) ("a vessel aboard which the master…fails, on request of an officer of the United States…to make a claim of nationality or registry for that vessel"). Conventions, however, enacted requirements only upon the signatory States, not the master of the vessel, e.g., to "fix the conditions of the grant of its nationality to ships," see UNCLOS Article 91 and HSC Article 5; and to "maintain a register of ships," see UNCLOS Article 94.

Thus, even assuming arguendo that the statelessness of the vessel attained universal jurisdiction status (it has not) or an independent international law basis for jurisdiction, by defining a "stateless" vessel in the MDLEA more broadly than under international law, Congress failed to exercise that purported jurisdiction. This Court should grant certiorari to address that incongruity, which Aybar maintains further voids his conviction.

Restatement (Fourth) § 403 is clear: "An exercise of prescriptive jurisdiction by the federal government, any State or any component thereof may not exceed the limits set on the authority of those governments by the Constitution." Also clear is Article VI to the United States Constitution: "This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made…under the authority of the United States, shall be the supreme Law of the Land." Neither international law, nor Article I, § 8, cl. 10 to the United States Constitution granted Congress authority to enact the MDLEA as applied here.

D. Application to the MDLEA here.

Aybar did not admit, see Doc. 188 at 24-25, and the government did not offer any facts to support Aybar's "straight" guilty plea, to establish that Aybar, his co-defendants, and the contraband found on their go fast vessel, bore any nexus to the United States. The government merely recounted the location of the vessel in international waters, the net weight of the cocaine seized and the vessel's status as one without nationality under the MDLEA. See Doc. 188 at 21.

Absent a jurisdictional nexus requirement in the MDLEA, see e.g. 46 U.S.C. §

70503(a)(1) and 46 U.S.C. § 70502(d)(1)(B), and absent any fact admitted by the defendant or found by the district court of a nexus between the defendant's possession with intent to distribute cocaine and the United States, Congress exceeded its authority to enact the MDLEA here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,
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