No. 21-____

In the Supreme Court of the United States

PEDRO DINO CEDADO NUÑEZ, ET AL., PETITIONERS

v.

UNITED STATES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Maritime Drug Law Enforcement Act authorizes the United States to prosecute certain drug crimes committed aboard a "covered vessel." 46 U.S.C. § 70503(a). One way the government can prove that a vessel is "covered" and thus subject to the Act is by showing that the vessel is "without nationality, "or nationless. *Id.* § 70502(d)(1). The Act specifies three scenarios in which a vessel can be classified as nationless. *Id.* In two of the scenarios, the master or individual in charge of the vessel must affirmatively claim nationality (which can be done in one of three ways), and the nation being claimed must then deny or fail to corroborate the claim. *Id.* §§ 70502(d)(1)(A) & (C), 70502(e). The third and final scenario arises when the master or individual in charge fails to make a claim of nationality in response to an officer's "request" for such a claim to be made. *Id.* § 70502(d)(1)(B).

The Second Circuit holds that those three enumerated ways of establishing jurisdiction are exhaustive. Thus, if nobody on the vessel makes a claim of nationality or registry and federal law enforcement officers don't ask for one, the prosecution cannot establish jurisdiction. But the Eleventh Circuit here "reached the opposite conclusion," App. 17a, joining the First and Third Circuits in holding that the three enumerated scenarios are merely examples. In those courts' view, customary international law provides the jurisdictional test.

The question presented is whether the three ways to identify nationless vessels enumerated in § 70502(d)(1) are exhaustive.

PARTIES TO THE PROCEEDING

Petitioners are Pedro Dino Cedado Nuñez, Angel Castro Garcia, Manely Enriquez, and Mike Castro Martinez. Petitioners were the defendants before the district court and appellants in the court of appeals.

Respondent, the United States of America, prosecuted Petitioners before the district court and was the appellee before the court of appeals.

RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

United States v. Cedado Nuñez, No. 19-14181 (June 17, 2021) (affirming convictions)

United States District Court (S.D. Ala.):

United States v. Castro Garcia, No. 1:19-cr-33-JB-N(1) (Oct. 22, 2019) (judgment)

United States v. Cedado Nuñez, No. 1:19-cr-33-JB-N(2) (Oct. 22, 2019) (judgment)

United States v. Enriquez, No. 1:19-cr-33-JB-N(3) (Oct. 22, 2019) (judgment)

United States v. Castro Martinez, No. 1:19-cr-33-JB-N(4) (Oct. 22, 2019) (judgment)

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INTRODUCTION

This case presents an acknowledged circuit split over an important issue of federal law: whether the three ways to identify "vessel[s] without nationality" set out in the Maritime Drug Law Enforcement Act (MDLEA or Act) are exhaustive, as the Second Circuit holds, or whether courts should instead treat them only as examples while looking to customary international law, as the First, Third, and Eleventh Circuits hold. The split is clear and, as the Eleventh Circuit acknowledged below, it is outcome-determinative. What's more, the circuit conflict undermines Congress' policy choices and the United States' ability to speak with one voice to foreign nations. This case is an excellent vehicle for resolving the disagreement on this important question.

1. Congress enacted the MDLEA to proscribe drug-trafficking "upon the high seas." 46 U.S.C. § 70504(b)(2). To calibrate the Act's extraterritorial reach, Congress prohibited drug-related activity committed on a "covered vessel," a term the statute comprehensively defines. *See id.* §§ 70502(b), (c)(1), (d)(1), 70503(a), (e). The type of "covered vessel" at issue here is a "vessel without nationality." *Id.* § 70502(d)(1). Congress specified just three ways to find a vessel to be "without nationality" (or "nationless," for short). *Id.* Two of those scenarios require the master or individual in charge of the vessel to make a claim of nationality and the claimed foreign nation to deny or fail to corroborate the claim. *Id.* § 70502(d)(1)(A), (C). The third and final enumerated scenario requires an authorized "officer of the United States" to "request" a claim of nationality. *Id.* § 70502(d)(1)(B). The vessel may be treated as

nationless "on [such a] request" if the master or individual in charge fails to respond. *Id.*

2. In the Second Circuit, those vessels that Congress specified as being "without nationality" are exclusive. *United States v. Prado*, 933 F.3d 121, 129-30 (2d Cir. 2019). In other words, Congress identified every way a vessel can be nationless. Courts are not free to identify other circumstances that might make a vessel nationless. So when no claim of nationality is made, the government must show that the officers *asked* for one, as § 70502(d)(1)(B)'s plain text requires. *Id.* at 130-32. If the government cannot make that showing, then the court must dismiss the prosecution for lack of jurisdiction. *See id.* at 130.

The First, Third, and Eleventh Circuits, in contrast, interpret Congress' categories of "vessel[s] without nationality" as a mere set of "examples," "not an exhaustive list." App. 11a; *United States v. Matos-Luchi*, 627 F.3d 1, 4 (1st Cir. 2010); *United States v. Rosero*, 42 F.3d 166, 169-70 (3d Cir. 1994). Those courts then look to "customary international law" to fill the perceived gaps. And, as relevant here, when no claim of nationality is made, those circuits permit the government to establish jurisdiction without having to show that the officers made a "request" for a claim of nationality. App. 11a-12a; *Matos-Luchi*, 627 F.3d at 6; *Rosero*, 42 F.3d at 170-71.

That disagreement is outcome-determinative. Here, the Coast Guard, suspecting drug-related activity, intercepted Petitioners' vessel about 50 miles from the coast of the Dominican Republic. The boat wasn't flying a flag, and when Coast Guard officers approached, they saw Petitioners throwing overboard bales later discovered to contain cocaine. In the

ensuing interaction, Petitioners made no claim of nationality, and the officers didn't ask for one. The officers arrested Petitioners and charged them in federal court in Alabama.

Alabama made all the difference. Had the government charged Petitioners in New York, the district court would have pointed to *Prado* and thrown out the prosecution. With no affirmative claim of nationality or registry, the government couldn't satisfy § 70502(d)(1)(A) or (C), and because officers made no "request" for such a claim, it couldn't satisfy (B) either. The Eleventh Circuit recognized as much, but simply "reached the opposite conclusion," App. 17a, by turning to customary international law.

3. The question presented is important. Because the Act applies extraterritorially, Congress crafted it carefully to avoid friction with foreign nations. *See United States v. Miranda*, 780 F.3d 1185, 1193-94 (D.C. Cir. 2015); *United States v. Tinoco*, 304 F.3d 1088, 1109 (11th Cir. 2002). Congress determined that only certain vessels should be "covered," and by defining that term in great detail, Congress signaled to foreign nations the precise reach of U.S. law. But the circuit split undermines Congress' judgment, because it leaves both foreign nations and federal officers unsure about how to proceed. The split also prevents the Nation from speaking with a uniform message to foreign sovereigns. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

4. Still worse, the decision below is wrong. The Act's text, structure, context, and purpose all make clear that the definition of "vessel without nationality" in § 70502(d)(1) is exhaustive. The presumption against extraterritoriality requires Congress to speak

clearly when extending American law beyond our borders. And here, Congress did not "affirmatively and unmistakably" instruct courts to supplement the Act to reach vessels not identified in the statute. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016). Much to the contrary, Congress provided a comprehensive and reticulated definition of the term "covered vessel." *See* 46 U.S.C. §§ 70502(b), (c)(1), (d)(1), 70503(e). Congress left no holes in those provisions for courts to plug.

Several other canons of construction point in the same direction. For instance, Congress pointed to international law in *other* provisions of the Act, *see id.* §§ 70502(b)(2)(A), (c)(1)(B), (e)(1), 70508(c)(2)(A), but chose *not* to incorporate international law when defining "vessel without nationality." Courts must presume that choice was deliberate. And to the extent that any ambiguity remains, the question should be resolved in favor of lenity—the venerable rule, "perhaps not much less old than [statutory] construction itself," as Chief Justice Marshall put it, "that penal laws are to be construed strictly." *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820).

The Court should grant review.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 1 F.4th 976. The relevant rulings of the district court (App. 28a-46a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 17, 2021. By orders dated March 19, 2020, and July 19, 2021, the Court extended the time to file a petition for a writ of certiorari to November 15, 2021, 150 days

from the judgment of the court of appeals. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70502–70504, are reproduced in the appendix. *See* App. 47a-53a.

STATEMENT

A. Statutory background

The Maritime Drug Law Enforcement Act criminalizes drug-related activity committed aboard a "covered vessel." 46 U.S.C. § 70503(a). As its name suggests, the Act reaches beyond the Nation's borders, explicitly stating that its prohibitions apply "even though the [conduct] is committed outside the territorial jurisdiction of the United States." *Id.* § 70503(b). Jurisdiction under the MDLEA is "not an element of an offense," but a "preliminary question[] … to be determined solely by the trial judge." *Id.* § 70504(a).

The definition of "covered vessel" is what limits the Act's extraterritorial reach. *See id.* § 70503(e). A vessel is "covered" if the person engaging in the drug crime is a U.S. citizen or resident alien. *Id.* § 70503(e)(2). A vessel is also "covered" if it is "a vessel of the United States" or "a vessel subject to the jurisdiction of the United States." *Id.* § 70503(e)(1).

The question presented here centers on the scope of "vessel subject to the jurisdiction of the United States." Congress defined that term to reach six kinds of vessels, only one of which is relevant here: "a vessel without nationality." *Id.* § 70502(c)(1)(A). The "term 'vessel without nationality' includes" three scenarios. *Id.* § 70502(d)(1).

First, a vessel is "without nationality" when "the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed." *Id.* § 70502(d)(1)(A). *Second*, and similarly, a vessel is "without nationality" when "the master or individual in charge makes a claim of registry … for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." *Id.* § 70502(d)(1)(C). *Finally*, a vessel is "without nationality" when "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." *Id.* § 70502(d)(1)(B). In sum, the first two scenarios require the master or individual in charge to make a claim of nationality, while the third scenario requires an officer to ask for a claim of nationality *and* requires the master or individual in charge not to respond.

The Act defines "claim of nationality or registry" to "include[] only" three things: (1) flying a nation's flag, (2) producing foreign registration documents, and (3) "a verbal claim of nationality or registry by the master or individual in charge." *Id.* § 70502(e). Upon a claim of nationality, the claimed foreign nation can respond via "radio, telephone, or similar oral or electronic means." *Id.* § 70502(d)(2). The foreign nation's response "is proved conclusively by certification of the Secretary of State or the Secretary's designee." *Id.*

B. Factual and procedural background

1. This case arises from the United States Coast Guard's interception of a small, flagless boat sailing between the Dominican Republic and Puerto Rico. App. 2a-3a. The guardsmen who spotted the boat from

the air suspected drug activity because the roughly 25-foot boat carried many fuel containers, lacked a visible name, and did not use navigation lights. App. 3a. So a nearby Coast Guard cutter deployed a crew to investigate. *Id.*

The Coast Guard crew intercepted the boat about 50 nautical miles from the Dominican Republic's coast. *Id.* The crew saw Petitioners, the only passengers aboard, tossing bales into the water (all of which were recovered and later found to contain cocaine). App. 3a-5a. An officer asked "who was the master, who was in charge." Petitioners did not answer. App. 4a. The officer then asked who steered the boat. One man said they all took turns, and the others agreed. *Id.* Petitioners also noted that they were traveling from the Dominican Republic. *Id.* But they did not claim that the boat was registered there. App. 6a. At no point did a Coast Guard officer ask Petitioners to make a claim of nationality. *See* App. 15a.

The guardsmen searched Petitioners' boat, finding personal items, a dozen fuel containers, and seven bales in all (six in the water and one on the boat). App. 3a-4a. The boat did not contain any fishing equipment, and the motor's serial number had been filed off. App. 4a. After gathering the evidence and seizing Petitioners, the guardsmen destroyed the boat. *Id.*

A week and a half later, the Coast Guard brought Petitioners to Alabama and interviewed them individually. *Id.* Petitioners stipulated that the bales contained cocaine, and most of them admitted that they had been offered $5,000 to transport the bales to Puerto Rico. *See* App. 4a-5a. But, consistent with their conversation with Coast Guard officers aboard their boat, no one claimed to be in charge. *See* App. 4a-5a.

And once again, the Coast Guard made no request for a claim of nationality or registry. *See* App. 15a.

2. The government charged Petitioners with possessing and conspiring to possess cocaine with intent to distribute. 46 U.S.C. §§ 70503(a)(1), 70506(b). Petitioners pleaded not guilty. App. 5a.

Before trial, Petitioners moved to dismiss for lack of jurisdiction. App. 6a. The district court found jurisdiction preliminarily. App. 6a, 36a. Petitioners' boat was "without nationality," the court reasoned, because it flew "no flag," carried "no vessel registration documents," and displayed "no other indicia of nationality." App. 37a. The court also observed that nobody "claimed nationality or registry." *Id.*

At trial, Petitioners again challenged jurisdiction, moving first for a mistrial, App. 7a, then for acquittal, App. 8a. The district court denied the motions. App. 31a. The jury convicted Petitioners on all charges. App. 8a.

3. The court of appeals affirmed. In doing so, it expressly split from the Second Circuit over the correct interpretation of "vessel without nationality." 46 U.S.C. § 70502(d)(1); *see* App. 17a.

a. The Eleventh Circuit accepted that "the Act describes three ways to establish that a vessel lacks nationality when the government encounters the master or individual in charge of the vessel." App. 10a. In the court's view, however, Congress did "not list every circumstance in which a vessel lacks nationality." *Id.* The court reasoned that Congress' use of the word "includes" in § 70502(d)(1) meant that the three enumerated types of nationless vessels were "only examples" rather than "an exhaustive list." App. 11a.

Because the government could not show that Petitioners' vessel matched any of those enumerated examples, the court of appeals asked whether the boat was nonetheless stateless for some other, unenumerated reason. *See id.* The court turned to the "reasonably well developed meaning" of "vessel without nationality" in "customary international law." *Id.* Surveying the 1958 Convention on the High Seas and other authorities, the court found that the customary signs of nationality are "flying a flag and carrying official documents." *Id.* And because Petitioners' vessel did neither and "[n]o one on the vessel verbally claimed that it had any nationality," the vessel was "without nationality" under international law and, therefore, under the Act as well. App. 12a.

The court of appeals rejected Petitioners' textual argument that § 70502(d)(1)(B) governs "when the master or individual in charge fails to make a claim of nationality 'on request of an officer of the United States," App. 15a (quoting 46 U.S.C. § 70502(d)(1)(B)), and that § 70502(d)(1)(B) does not reach Petitioners' circumstances. Here, Petitioners explained, the Coast Guard officer made no request. *Id.* In the court's view, however, § 70502(d)(1)(B)'s request "requirement applies only when the master or individual in charge is aboard the vessel." *Id.* And because "[n]o one answered" when asked "who was in charge," App. 4a, the court determined that "no one was in charge," and "the Coast Guard was not required to ask the crew for such a claim," App. 15a.

b. The court of appeals recognized that it was splitting from the Second Circuit in reading the Act to reach "vessel[s] without nationality" beyond those listed in § 70502(d)(1). *See* App. 17a-18a. As the court put it, "the only other circuit to consider a similar set

of facts reached the opposite conclusion." App. 17a (citing *United States v. Prado*, 933 F.3d 121, 130-32 & n.5 (2d Cir. 2019)).

In *Prado*, the Eleventh Circuit recognized, the Second Circuit held that the "'failure to volunteer a claim of nationality does not suffice' to create jurisdiction because the statute is clear that a vessel is stateless only if the master fails to claim registry upon request." *Id.* (quoting *Prado*, 933 F.3d at 131). Like Petitioners' case, *Prado* involved several men in a small vessel, none of whom claimed to be the master or individual in charge. *Id.* (citing *Prado*, 933 F.3d at 130-32 & n.5). To establish jurisdiction, the Second Circuit held, "the Coast Guard should have asked each crew member if he wished to make a claim of nationality or registry." *Id.* (citing *Prado*, 933 F.3d at 131 & n.5). The Coast Guard's failure to do so left it unable to show "that the go-fast was without nationality and subject to the jurisdiction of the United States." *Prado*, 933 F.3d at 132.

The Eleventh Circuit rejected *Prado*. In the Eleventh Circuit's view, the Second Circuit "fail[ed] to grapple with the non-exhaustive nature of the examples in section 70502(d)(1)." App. 18a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision deepens a square circuit split over the reach of the MDLEA's "vessel without nationality" provision. The Second Circuit interprets that jurisdictional provision as an exhaustive list that does not cover Petitioners' vessel. The Eleventh Circuit here, in contrast, joined the First and Third Circuits in interpreting the provision as a mere list of examples about how to apply customary

international law. On that reading, the Eleventh Circuit found jurisdiction over Petitioners' vessel.

The question presented is outcome-determinative and important, and this case is an excellent vehicle for resolving it. The Act represents Congress' policy decisions with respect to foreign relations. But the split disrupts Congress' careful balance on such an important issue and prevents the Nation from speaking with "one voice" to our foreign counterparts. Beyond all that, the decision below is wrong. Several principles of statutory construction—foremost among them the presumption against extraterritoriality—confirm that Congress meant what it said in the MDLEA, and no more. The Court should grant review.

I. The circuits are split over how to interpret the Maritime Drug Law Enforcement Act, and the split is outcome-determinative.

The courts of appeals are split over whether the MDLEA's enumeration of three kinds of stateless vessels is exhaustive. *See* 46 U.S.C. § 70502(d)(1). In the Second Circuit, the answer is "yes." To establish jurisdiction over a "vessel without nationality," the government must show that the vessel fits into one of the three circumstances enumerated in § 70502(d)(1). Thus, absent a claim of nationality, the government must establish that "an officer of the United States authorized to enforce" the Act made a "request" for a claim of nationality. 46 U.S.C. § 70502(d)(1)(B).

In the Eleventh Circuit, however, the answer is "no"—the statutory list is not exhaustive. The enumerated kinds of stateless vessels are just examples, and courts can consult principles of international law to identify additional circumstances in which a vessel may be "without nationality." Thus, the government

can establish jurisdiction even when officers fail to "request" a claim of nationality.

But the circuit conflict doesn't end there. Like the Eleventh Circuit, both the First and Third Circuits interpret the statutory list of "vessel[s] without nationality" as nonexhaustive. Thus, had the government prosecuted Petitioners in either of those circuits, the officers' failure to request a claim of nationality would not have defeated jurisdiction despite § 70502(d)(1)(B)'s request requirement.

The split is clear. The Eleventh Circuit acknowledged it. It involves four circuits. And as this very case shows, and the Eleventh Circuit recognized, the disagreement is outcome-determinative.

A. The Second Circuit interprets the Act's definition of "vessel without nationality" as an exhaustive list.

The Second Circuit requires the government to satisfy the "detailed provisions of the statute" because it reads § 70502(d)(1) as exhaustive. *Prado*, 933 F.3d at 130. Thus, "[t]o establish statelessness in the absence of a claim of registry, the United States officers must make a request of the master or person in charge for a claim of registry." *Id.* at 132. Had the government tried to prosecute Petitioners in the Second Circuit, the case would have been thrown out. *See* App. 17a.

1. The Second Circuit reads § 70502(d)(1) to "offer[] three ways"—and no more—"in which a vessel can be shown to be without nationality." *Prado*, 933 F.3d at 129. And the "detailed provisions of the statute" tell the government how it must satisfy each of those three possibilities. *Id.* at 130. Thus, there is no room for finding jurisdiction beyond the enumerated circumstances in § 70502(d)(1). *Id.* at 132.

The statutory circumstances for establishing jurisdiction in *Prado* (and here in Petitioners' case, too) require the prosecution to show both (1) "the absence of a master's claim of registration," and (2) the presence of an officer's "*request*" for a claim of registration. *Id.* at 130 (emphasis added) (quoting 46 U.S.C. § 70502(d)(1)(B)). (The other two options, in contrast, arise only when the master or individual in charge makes a claim of nationality or registry—something that didn't happen here or in *Prado*. *See id.* at 126; App. 12a.) As the Second Circuit put it, the "statute clearly provides that statelessness is established by the master's failure to assert a claim only when that failure is in response to a request." *Prado*, 933 F.3d at 131. With no option to fall back on unenumerated circumstances, the failure to make both showings requires dismissal. *Id.* at 130.

That was exactly what happened in *Prado*. The court explained that the "Coast Guard boarding party's inattention to the terms of the statute virtually doomed the prosecution to failure at the investigation stage." *Id.* By not requesting a claim of registry, the officers "failed to follow the procedures by which statelessness can be established." *Id.* And by destroying the vessel without first securing "a vessel identification number (or other means of identifying the vessel)," the officers "made it impossible for the government to establish subsequently by other means that the vessel was without nationality." *Id.* The court also rejected the notion that the government could reach beyond the Act's plain terms simply because "none of the three defendants identified himself as the master." *Id.* at 131 n.5. The officers "could have asked all three persons whether the vessel was registered, and if none

responded, that would have shown a failure by whichever was in charge to make a claim." *Id.*

It is "only logical," the Second Circuit added, that the Act requires officers to request a claim of nationality when none is offered. *Id.* at 131. The failure to make a claim of nationality "*when asked* supports a strong logical inference of statelessness." *Id.* "[M]ere silence in the absence of a request for information," in contrast, "supports no inference at all." *Id.* So the statute requires a request. *See id.* at 132. If the individual complies, then communication with the proper foreign sovereign can occur, "and if that person fails to make a claim of registry, then the vessel is deemed 'without nationality.'" *Id.* at 129; *see id.* at 132.

2. Had Petitioners been charged in the Second Circuit, *Prado* would have sunk the prosecution. None of them made a claim of nationality or registry, so § 70502(d)(1)(A) and (C) are off the table. Because the statute is exhaustive in the Second Circuit, that leaves only § 70502(d)(1)(B). But that provision isn't satisfied here because Petitioners *were never asked* to make a claim of nationality or registry. Without such a "request" from a Coast Guard officer, Petitioners' silence could not show that their vessel was stateless. And even though each Petitioner denied being in charge, that "did not prevent the officers from making the inquiry." *Prado*, 933 F.3d at 131 n.5. To the contrary, the officers had a duty to ask Petitioners if "the vessel was registered, and if none responded, that would have shown a failure by whichever was in charge to make a claim." *Id.*

B. The Eleventh Circuit interprets the Act's definition of "vessel without nationality" as a nonexhaustive list.

The Eleventh Circuit here rejected the Second Circuit's interpretation and "reached the opposite conclusion" on a "similar set of facts." App. 17a. Unlike the Second Circuit, the Eleventh Circuit held that the Act's definition of "vessel without nationality" provides "only examples," not "an exhaustive list." App. 11a. After unmooring itself from the vessels in § 70502(d)(1), the Eleventh Circuit held that failure to make a claim of nationality can establish jurisdiction *even if* no officer ever requested such a claim. App. 15a. That departure from the statute's text changed the outcome of Petitioners' case. Where the Second Circuit would have reversed and ordered dismissal, the Eleventh Circuit instead affirmed the trial court's finding of jurisdiction.

1. The Eleventh Circuit began by acknowledging that Congress enumerated only three ways in which a vessel can be "without nationality." App. 10a. But that list, the court said, does not contain "every circumstance in which a vessel lacks nationality." *Id.*

The Eleventh Circuit rested its analysis entirely on the word "includes." Section 70502(d)(1) says that the "term 'vessel without nationality' *includes*" the three kinds of vessels enumerated in paragraphs (A) through (C). 46 U.S.C. § 70502(d)(1) (emphasis added). The word "includes" renders the list of enumerated vessels nonexhaustive, the court reasoned, because it "ordinarily introduces only examples." App. 10a (citing A. Scalia & B. Garner, *Reading Law* 132-33 (2012)). The court also observed that Congress used

the different phrase "includes only" in a neighboring subsection. App. 11a (citing 46 U.S.C. § 70502(e)).

Having found § 70502(d)(1) merely illustrative, the Eleventh Circuit then redefined "vessel without nationality" by resorting to "customary international law." *Id.* "Under customary international law," the court opined, a vessel can be nationless if it flies no flag or carries no registration documents. *See* App. 11a-12a. And because Petitioners' vessel met those conditions and Petitioners made no affirmative claim of nationality or registry, the court reasoned, the vessel was stateless and thus subject to the Act. App. 12a.

2. The Eleventh Circuit rejected Petitioners' argument, accepted by the Second Circuit, that Coast Guard officers are required to ask for a claim of nationality when none is offered. App. 14a-15a; *see* App. 17a-18a. Section 70502(d)(1) speaks of "the master or individual in charge." And according to the court, Petitioners' vessel had no "master or individual in charge" because no one claimed to be in charge or acted as though he had "command authority" over the others. App. 14a. Thus, § 70502(d)(1)(B) did not apply and "the Coast Guard was not required to ask" Petitioners to make a claim of nationality. App. 15a.

The Eleventh Circuit knew it was parting ways with the Second Circuit. App. 17a. In a case with "a similar set of facts," the Eleventh Circuit recognized, the Second Circuit "concluded that even if no one identified himself as the master, the Coast Guard should have asked each crew member if he wished to make a claim of nationality or registry." *Id.* (citing *Prado*, 933 F.3d at 131 & n.5). In the Eleventh Circuit's view, however, the Second Circuit wrongly concluded that § 70502(d)(1) is exhaustive. App. 17a-18a.

3. The disagreement between the Second and Eleventh Circuits is outcome-determinative. Just as a district court in the Second Circuit would have thrown out Petitioners' prosecution, the Eleventh Circuit would have found jurisdiction in *Prado*. The vessel in *Prado* flew no flag, carried no registration documents, and bore no sign of national registry. 933 F.3d at 127. And the defendants made no claim of nationality. *Id.* at 126. Because "none of the[] customary signs of nationality" were present, the Eleventh Circuit would have held that the vessel fell "within the meaning of 'vessel without nationality' in international law and under the Act." App. 12a.

C. The First and Third Circuits likewise read the definition of "vessel without nationality" as a nonexhaustive list.

The First and Third Circuits deepen the split. Both interpret the definition of "vessel without nationality" as just a list of examples. Both courts consult customary international law to fill the perceived gaps. And both circuits allow the government to establish jurisdiction over a non–United States vessel regardless of whether the officers requested a claim of nationality. Once again, that approach is outcome-determinative. Had the government charged Petitioners in Boston or Newark, the prosecution would have gone forward.

1. a. The Third Circuit interpreted the definition of "vessel without nationality" in the MDLEA's precursor as a nonexhaustive list. *United States v. Rosero*, 42 F.3d 166, 169-70 (3d Cir. 1994) (Alito, J.). Like the Eleventh Circuit, the Third Circuit reasoned that because the enumerated nationless vessels are introduced by the word "includes," the statute "does not

attempt to provide an exhaustive definition." *Id.* at 170. The court therefore held that the term "'vessel without nationality' encompasses, not only those vessels that come within the categories described [by the statute], but other vessels as well." *Id.*

Although neither the statutory text nor legislative history "makes clear precisely which other vessels Congress had in mind when it employed the term 'vessel without nationality,'" the Third Circuit thought it "reasonable to assume that the residual category of vessels 'without nationality' … are those that would be regarded as without nationality or stateless under international law." *Id.* at 170-71. One such vessel, the court explained, is a vessel that "is not authorized to fly the flag of any state." *Id.* at 171. And although the court did "not attempt to provide a comprehensive catalog," it added that "[t]here may be other situations in which ships would be regarded as without nationality under international law." *Id.* To resolve the case, the court simply held that the "core of the concept" of a nationless vessel "is that the vessel lacks authorization to fly the flag of any recognized state." *Id.* Thus, in the Third Circuit's view, the jurisdiction of the United States reaches every vessel lacking that authorization, "whether or not that vessel" can satisfy the statutorily enumerated definition of a nationless vessel. *Id.*

b. Under *Rosero*, the Third Circuit would have charted the same course in Petitioners' case as the Eleventh Circuit. Petitioners' vessel "carried no documents, it flew no flag, and it had no name or identifying numbers that would permit entry into a national registry." App. 12a. Because those facts suggest "that the vessel lacks authorization to fly the flag of any recognized state," the Third Circuit would have

affirmed jurisdiction under the Act, "whether or not" Petitioners' vessel fell under the express terms of § 70502(d)(1). *Rosero*, 42 F.3d at 171.

2. a. The First Circuit likewise interprets § 70502(d)(1) as a nonexhaustive list. *United States v. Matos-Luchi*, 627 F.3d 1, 4 (1st Cir. 2010). In *Matos-Luchi*, the court held that "the listed examples do not exhaust the scope of section 70502(d)" and that the Act instead reaches all "those vessels that could be considered stateless under customary international law." *Id.* To reach that conclusion, the court looked to the Third Circuit's decision in *Rosero*, and it relied on "Congress' intent to reach broadly" and Congress' disparate use of the word "includes" in § 70502(d) and "includes only" in § 70502(e). *Id.*

Based on its nonexhaustive reading of the statute and its view of international law, the First Circuit found jurisdiction in *Matos-Luchi* even though the circumstances before it were "merely similar to and not within one of the specific examples given in the statute." *Id.* at 6. The case involved federal officers' request for a claim of nationality aboard a Dominican Republic Coast Guard ship rather than aboard the intercepted vessel itself. *See id.* The court thought that scenario "arguably does not fit within the language of section 70502(d)(1)(B)," *id.*, which lists "a vessel *aboard which* the master or individual in charge fails" to make a claim on request, 46 U.S.C. § 70502(d)(1)(B) (emphasis added). But that didn't matter, in the court's view, because it was enough that no crew member on the intercepted ship made an affirmative claim for nationality and that the ship did not "fly a flag or carry registry papers issued by any state." *Matos-Luchi*, 627 F.3d at 6.

b. Had Petitioners been prosecuted in the First Circuit, their criminal charges would not have been dismissed on jurisdictional grounds. As in the Third and Eleventh Circuits, the government would have been permitted, as it was here, to establish jurisdiction over the vessel even though it did not comply with the terms of the statute.

* * *

The courts of appeals are split on an important question of federal law. The Second Circuit holds that the MDLEA sets out three and only three ways to establish that a vessel is subject to U.S. jurisdiction as a "vessel without nationality." Under that test, as the Eleventh Circuit here acknowledged, the charges against Petitioners would have been dismissed. But the Eleventh Circuit—like the First and Third Circuits—disagrees with the Second Circuit and views the MDLEA's list of "vessels without nationality" as nonexhaustive. That approach captures Petitioners' vessel by looking beyond the terms of the statute to customary international law. Only this Court can resolve this outcome-determinative disagreement.

II. This case is an excellent vehicle for deciding an important question of federal law.

This case is an excellent vehicle for resolving the question presented, and the question is an important one. The Eleventh Circuit's resolution of the question deepened circuit disagreement undermining the uniformity needed to maintain smooth foreign relations. And with four circuits' views on the books and no reason for the government to bring a prosecution outside the First, Third, or Eleventh Circuits, the question presented is past ripe for this Court's review.

A. Start with the basic points: The Eleventh Circuit openly split from the Second Circuit. The split is outcome-determinative, as the Eleventh Circuit recognized. And there are no alternative holdings or procedural impediments that would prevent this Court from reaching and resolving the question.

B. Beyond all that, the question presented is important. When a statute implicates foreign relations, two things are true: Congress' policy decisions are paramount and uniform interpretation is critical. And for statutes specifically calibrated to avoid friction abroad, like the MDLEA, adherence to these principles is all the more important. The circuit conflict undercuts both interests: it frustrates Congress' foreign policy decisions and it forestalls uniformity, leaving foreign nations and federal officers alike guessing as to when and how the Act applies.

1. Congress designed the Act with an eye toward minimizing friction with foreign nations. *See United States v. Miranda*, 780 F.3d 1185, 1193-94 (D.C. Cir. 2015); *United States v. Tinoco*, 304 F.3d 1088, 1109 (11th Cir. 2002). Attempts to enforce the Act against individuals aboard foreign vessels in international waters "could engender considerable tensions in foreign relations." *Miranda*, 780 F.3d at 1194. That's why Congress made the vessel's "covered" status a jurisdictional question for the judge, "not an element of an offense" to be decided by a jury. 46 U.S.C. § 70504(a). That policy decision was "a diplomatic courtesy" grounded in the desire "to avoid 'friction with foreign nations.'" *Tinoco*, 304 F.3d at 1108 (citation omitted); *see also Miranda*, 780 F.3d at 1193-94.

As this Court has made clear, courts must respect rather than undermine the political branches' foreign-

policy judgments. The "very nature of … foreign policy is political." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). And because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," the political branches' foreign-policy judgments must be "largely immune from judicial inquiry or interference." *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020) (citations omitted). Thus, courts must not second-guess or otherwise veer from the course Congress charted. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005).

2. Uniformity as to foreign relations is also important in its own right. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003). In James Madison's words, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No. 42, p. 279 (J. Cooke ed. 1961). The principle applies to the judiciary, too. As Alexander Hamilton put it, "that the peace of the WHOLE ought not to be left at the disposal of a PART," because the Nation "will undoubtedly be answerable to foreign powers for the conduct of its members." *Id.*, No. 80, pp. 535–536. Over the years, the Court has reaffirmed the importance of uniformity in foreign relations, emphasizing, for instance, that the National Government needs to speak with "one voice" when dealing with our foreign counterparts. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

3. The circuit split here threatens both principles. The courts' disagreement about what the MDLEA says undermines Congress' foreign-policy decisions. And the courts' disagreement about the

statute's extraterritorial scope makes uniformity impossible.

Within the Second Circuit, the government can establish jurisdiction over a non–United States vessel only if it shows that the vessel is stateless under the express terms of § 70502(d)(1). Within the First, Third, and Eleventh Circuits, however, the government can establish jurisdiction over a non–United States vessel in many ways, some of which Congress did not contemplate.

Because the circuits disagree about the definition of "vessel without nationality," neither foreign nations nor federal officers can be sure how to proceed. Such uncertainty is not one of Congress' foreign-policy objectives. The difference of opinion also interferes with the uniform message that Congress sent foreign nations: American law will come to bear on non–United States vessels only in certain circumstances. That message "aims to protect the interests of foreign nations." *Miranda*, 780 F.3d at 1194. But the circuit conflict garbles that message, making the full extent of those protections unknowable. Still worse, in the First, Third, and Eleventh Circuits, the standard itself is indeterminate, contrary to the careful balance Congress struck between combating drug trafficking, on the one hand, and respecting the sovereignty of nations abroad, on the other. With the circuits divided, only this Court can restore that balance.

C. Finally, the question presented is ripe for this Court's review. Four courts of appeals have already decided whether § 70502(d) is exhaustive. With the courts split 3–1, there is no reason to wait for other circuits to weigh in. That is especially true given that the government can simply choose to bring suit in the

First, Third, or Eleventh Circuit where precedent is already favorable. Under 46 U.S.C. § 70504(b)(2), venue is proper "in any district" when the offense is "committed upon the high seas." The government therefore has every incentive to pick a district in one of those circuits whenever a defendant might be able to argue that federal officers failed to comply with the enumerated terms of § 70502. And whenever a district court dismisses a prosecution on jurisdictional grounds before empaneling a jury, the government presumably could bring new charges in a more favorable circuit. There is thus no reason for the Court to delay review.

III. The decision below is wrong.

A. The district court should have dismissed the charges for lack of jurisdiction.

The district court should have dismissed the case because the Act does not reach Petitioners. Congress identified only three situations in which a vessel is "without nationality." Those situations are exclusive, and the government failed to establish that Petitioners' vessel qualifies. Because Petitioners made no affirmative claim of nationality or registry, 46 U.S.C. § 70502(d)(1)(A), (C), and the Coast Guard officers failed to ask Petitioners for such a claim, *id.* § 70502(d)(1)(B), the government cannot establish that Petitioners' boat is a "vessel without nationality." And to the extent there is any ambiguity in the statute, the rule of lenity breaks the tie. In short, the Second Circuit has it right.

1. Section 70502(d)(1) is exhaustive. As the Act's text, structure, context, and purpose all make clear, the definition of "vessel without nationality" leaves no gaps for courts to fill.

First, because the Act reaches beyond America's shores, it applies only to the extent Congress spoke clearly. This Court presumes that Congress means to regulate beyond our borders only where Congress gives a "clear indication of an extraterritorial application." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That clear-statement rule reflects the recognition that the United States "does not rule the world," *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013) (citation omitted), and that applying U.S. law abroad risks engendering international discord, *see id.* at 115-16; *RJR Nabisco*, 136 S. Ct. at 2100. "The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116.

That presumption guides the analysis here. In determining whether a particular vessel beyond our borders is a "vessel without nationality," courts must ask whether Congress clearly stated that the Act covers such a vessel. "The question is not whether … 'Congress would have wanted'" the Act to reach certain vessels "if it had thought of the situation before the court," *RJR Nabisco*, 136 S. Ct. at 2100 (citation omitted), but whether Congress identified those vessels clearly. To satisfy that standard, Congress must "ha[ve] affirmatively and unmistakably instructed that the statute will" apply. *Id.* But Congress spoke with that clarity only as to the three kinds of vessels identified expressly in § 70502(d)(1). Congress made no statement, much less a clear one, about any other types of vessels.

Second, the MDLEA's structure likewise shows that Congress' list in § 70502(d)(1) is exhaustive.

Congress designed a comprehensive and reticulated jurisdictional scheme, leaving no room for judicial gap-filling. Jurisdiction turns on the layered definition of "covered vessel." 46 U.S.C. §§ 70503(a), 70504(a). The Act begins by identifying three types of "covered vessels." *Id.* § 70503(e). It then takes two of those vessels—"vessel of the United States" and "vessel subject to the jurisdiction of the United States"—and provides further detailed definitions. *See id.* §§ 70502(b)(1), 70502(c)(1). For "vessel subject to the jurisdiction of the United States," the Act specifies six vessels that fit the bill. *Id.* § 70502(c)(1). The one at issue here, of course, is "a vessel without nationality." *Id.* § 70502(c)(1)(A). Finally, the Act further refines "covered vessel" by detailing three scenarios in which a vessel is "without nationality." *Id.* § 70502(d)(1). Two of those scenarios depend on a foreign nation's response to a claim of nationality. *Id.* § 70502(d)(1)(A), (C). The third scenario depends on whether an officer's request for a claim of nationality goes unanswered. *Id.* § 70502(d)(1)(B). This detailed, multilayered definition of "covered vessel" shows that Congress was leaving nothing to guesswork.

Several interpretive canons point in the same direction. The omitted-case canon says that "a matter not covered is to be treated as not covered." *Reading Law* 93. Applied here, that means vessels not identified under the comprehensive definition of "covered vessel" should not be looped in by courts. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). The negative-implication canon gets at the same idea: the enumeration of many vessels that are "covered" by the Act "implies the exclusion of others." *Reading Law* 107. These principles dispel the "false notion that when a

situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue." *Id.* at 349.

The Act's detailed definitional structure also confirms that Congress knew it was legislating against a presumption against extraterritoriality such that it had to define "covered vessel" in a clear and unmistakable way. "Congress legislates against the backdrop of existing law." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quotation omitted). And well before Congress passed the MDLEA, this Court had held that Congress must state clearly when and how far a law applies abroad. *Compare, e.g.*, *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), *with* Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 3202, 100 Stat. 3207 (the Act's precursor). Congress therefore knew that it needed to be precise when defining the Act's scope. So if Congress wanted the Act to reach some unenumerated vessels, it would have "affirmatively and unmistakably" said so. *RJR Nabisco*, 136 S. Ct. at 2100.

To be sure, Congress left out some vessels that may be stateless under customary international law, as discussed below. But statutes do not pursue perceived policy objectives "at all costs." *Hernandez*, 140 S. Ct. at 741-42 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013)); *see also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). The Judiciary's job is "to apply faithfully the law Congress has written," not "to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

Third, reading § 70502(d)(1) as merely a list of examples would require courts to consult international law to fill the gaps. But the Act's text and structure show that Congress did *not* want courts resorting to international law to identify "vessel[s] without nationality." Congress knows how to invoke international law when it wants. *See Omni Cap. Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987). Indeed, the Act defines various terms by reference to international law (the 1958 Convention on the High Seas), *see* 46 U.S.C. §§ 70502(b)(2)(A), (c)(1)(B), (e)(1), 70508(c)(2)(A). But it does not mention the 1958 Convention or any other international law when defining the phrase "vessel without nationality." Congress' decision not to define "vessel without nationality" in connection with the 1958 Convention "argues forcefully" that it did not want courts to do so either. *Omni Cap. Int'l*, 484 U.S. at 106.

2. Properly construed, the MDLEA does not reach Petitioners' vessel. Because § 70502(d)(1) is exhaustive, the officers had just "three ways" to show that Petitioners' vessel was "without nationality." *Prado*, 933 F.3d at 129. But none of those scenarios applies here. Petitioners' made no claim of nationality, so § 70502(d)(1)(A) and (C) do not apply. *See* App. 6a. That means jurisdiction turns on whether the Coast Guard officers asked Petitioners to make such a claim: Section 70502(d)(1)(B) covers the failure to make a claim only "on request" of an authorized U.S. officer. 46 U.S.C. § 70502(d)(1)(B); *see Prado*, 933 F.3d at 132. But no request was ever made. *See* App. 15a. The Coast Guard's "failure to follow statutorily prescribed steps" thus prevented the government from establishing jurisdiction. *Prado*, 933 F.3d at 132. The district

court therefore should have dismissed the criminal charges against Petitioners.

3. Even assuming there is any ambiguity in the Act, the question should be resolved in favor of lenity. The rule of lenity, which requires courts to "construe penal laws strictly and resolve ambiguities in favor of the defendant," "serves three core values of the Republic": notice and due process; separation of powers; and a respect for liberty. *United States v. Nasir*, No. 18-2888, 2021 WL 5173485, at *10 (3d Cir. Nov. 8, 2021) (en banc) (Bibas, J., concurring). Like the presumption against extraterritoriality, the rule of lenity supplies a clear-statement principle: Where a criminal statute remains ambiguous after a court considers its "text, structure, history, and purpose," the court should choose the interpretation favoring the defendant. *Maracich v. Spears*, 570 U.S. 48, 76 (2013); *see Skilling v. United States*, 561 U.S. 358, 410 (2010). In other words, given two possible readings of a criminal statute, a court should not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted); *see also Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *Evans v. United States*, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting). The rule applies equally to jurisdictional provisions and elements of an offense. *See, e.g.*, *Wiltberger*, 5 Wheat. at 95, 104-06 (Marshall, C.J.).

Of course, there is good reason to think that the rule of lenity does not apply here. The rule is not "in play" where "the text, context, and structure" of a statute "support [the defendant's] reading." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). And text, context, and structure all support *Petitioners*. *Supra*

pp. 24-28. That said, if any ambiguity remains, the rule of lenity breaks the tie in Petitioners' favor.

B. The Eleventh Circuit's analysis is flawed.

The Eleventh Circuit held that the list in § 70502(d)(1) is nonexhaustive for a single reason: Congress introduced it with the word "includes." App. 10a-11a. The court observed that *Reading Law* says that "the word *include* does not ordinarily introduce an exhaustive list," *Reading Law* 132; App. 10a-11a, and that § 70502(d)(1) says "includes" while § 70502(e) says "includes only." But those observations do not bear the weight the court placed on them.

1. The word "includes" does not support reading § 70502(d)(1) as an exhaustive list. *First*, the court failed to heed *Reading Law*'s warnings that "[n]o canon of interpretation is absolute," because "different clues often point in different directions." *Reading Law* 59. And the word "includes" is at best just one clue. Although the word is presumed to introduce a nonexclusive list, *see id.* at 132, that principle is not a strict rule but a rebuttable presumption, *see id.* at 51. Indeed, courts "have not invariably" interpreted the word "include" to precede a nonexclusive list. *Id.* at 133 (citation omitted).

Here, a number of other textual clues, discussed above and below, rebut any such presumption that § 70502(d)(1)'s use of the word "includes" means its list is nonexclusive. For example, no fewer than four other principles of statutory construction suggest that the Congress defined "vessel without nationality" to its limit. *See supra* pp. 25-27 (discussing the presumption against extraterritoriality and other interpretive canons).

Second, the structure of the Act likewise rebuts any presumption that the word "includes" requires nonexclusivity. As discussed, *see supra* pp. 25-26, Congress defined "covered vessel" in great detail, essentially stripping the term to its parts. Congress likely did so given the clear-statement rule supplied by the presumption against extraterritoriality, *see Morrison*, 561 U.S. at 255, not to mention the rule of lenity. Yet the Eleventh Circuit took none of that into consideration. Instead, it fixated on the word "includes" without taking a "wider look at the statute's structure." *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Had the court of appeals looked to "the statutory context," it would have seen that the word "includes" "does not bear the heavy weight" it once thought. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018).

2. Congress' use of "includes only" in § 70502(e) likewise doesn't show that the term "includes" in § 70502(d)(1) introduces a nonexclusive list. For starters, the same interpretive principles discussed above likewise rebut any presumption that "only" must accompany "includes" to introduce an exhaustive list. Section 70502(d)(1) sets out a comprehensive set of circumstances as part of a broader but always detailed definition. Congress did not need to use the word "only" because two clear-statement rules—the presumption against extraterritoriality and the rule of lenity—prohibit inferring gaps from Congress' silence. *See supra* pp. 25-30. Given those principles, the MDLEA can reach only those vessels that Congress "clearly" identified, *see, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2100. And although the Act clearly applies abroad to "covered vessels," such as a "vessel without nationality," it does *not* make clear that a "vessel without

nationality" can be something other than one of the three nationless vessels that Congress specifically listed. At most, all one can say is that "Congress would have wanted" the Act to apply to nationless vessels that it did not expressly contemplate. Even as a general matter, however, "[t]he question … is not what Congress 'would have wanted' but what Congress enacted." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). That principle applies with special force when Congress reaches overseas. Congress must "affirmatively and unmistakably" authorize such applications. *RJR Nabisco*, 136 S. Ct. at 2100. Only the express terms of § 70502(d)(1)(A), (B), and (C) satisfy that test.

There's yet another reason § 70502(d)(1) can't be just a list of examples drawn from "customary international law," as the Eleventh Circuit held. App. 11a. As discussed, Congress chose *not* to invoke international law when defining "vessel without nationality." *Supra* p. 28. Reading "includes" to redefine "vessel without nationality" to mirror international law "read[s] into" the Act "words that aren't there." *Romag Fasteners*, 140 S. Ct. at 1495. But courts, of course, do not hold the legislative pen. What makes the holding "doubly" wrong is the fact that Congress cited international law "elsewhere in the very same statutory provision." *Id.*

Had Congress meant to reach vessels like Petitioners', it could have said so. But Congress did not seek to stop drug trafficking at all costs. *See, e.g.*, *Henson*, 137 S. Ct. at 1725; *Am. Express*, 570 U.S. at 234. Instead, it balanced the United States' interest in fighting drug trafficking with foreign nations' interest in retaining sovereignty. How to strike that balance was a policy question for Congress, not the courts.

* * *

The courts of appeals are split 3–1 over an important question of federal law: how to interpret a jurisdictional provision in a statute carefully calibrated to apply extraterritorially while avoiding international friction. The conflict is clear and outcome-determinative, as this case shows. Had Petitioners been charged in New York rather than Alabama, they would today be free men. Indeed, the Eleventh Circuit here expressly "acknowledge[d]" that the Second Circuit "reached the opposite conclusion" on "a similar set of facts." App. 17a-18a. But it is the Eleventh Circuit that has the test wrong. Congress knows it must speak clearly to legislate beyond the Nation's borders or enact criminal prohibitions. As Chief Justice Marshall put it, "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 5 Wheat. at 95. And the MDLEA's clear text for identifying "vessel[s] without nationality" specifies only three scenarios, none of which applies here. Only this Court can resolve the disagreement and prevent international discord by ensuring that federal courts, federal law enforcement officers, and foreign nations all know what Congress commands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 12, 2021