No. 21-728

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The circuits have split 1–3 over whether the three ways to identify "vessel[s] without nationality" under the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 70502(d)(1), are exhaustive. The issue is important, because the conflict undermines foreign policy choices and the uniform applicability of federal law beyond the Nation's borders. The issue is also ripe for review, because the government can pick its venue and it has no reason to go outside the three circuits that follow its preferred rule.

Rather than engage with these arguments, the government focuses on the merits. But the government's myopic fixation on the word "includes" misses the mark. The MDLEA's text, structure, and context, along with the presumption against extraterritoriality, prohibit courts from inferring unenumerated ways to identify stateless vessels. And the rule of lenity resolves any lingering ambiguity in Petitioners' favor.

What's more, arguing the merits doesn't negate the Eleventh Circuit's express disagreement with the Second Circuit's decision in *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019). So the government tries to change the facts of Petitioners' case, distinguish *Prado* based on minutiae, and suggest that the Second Circuit could depart from *Prado*'s clear holding someday. Those arguments fail. The Eleventh Circuit put it best: *Prado* "consider[ed] a similar set of facts" but "reached the opposite conclusion." App. 17a. That's a clear, outcome-determinative split. Had Petitioners been prosecuted in the Second Circuit, the district court would have dismissed the prosecution. Only this Court can resolve the conflict.

The petition should be granted.

ARGUMENT

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

A. As the Eleventh Circuit recognized, App. 17a, and the government does not dispute, *see* Opp. 9, 17, the circuits have split over whether 46 U.S.C. § 70502(d)(1) sets out an exhaustive list of ways to identify a stateless vessel. In the Second Circuit, the provision is exhaustive: § 70502(d)(1) "offers three ways in which a vessel can be shown to be without nationality," and the government must "follow [those] statutorily prescribed steps" if it wants to establish statelessness. *Prado*, 933 F.3d at 129-32; Pet. 12-14. In the First, Third, and Eleventh Circuits, in contrast, "the three circumstances enumerated in section 70502(d)(1) provide only examples of when a vessel lacks nationality, 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); Pet. 15-20.

That disagreement is outcome-determinative. Here, the government "failed to follow the procedures by which statelessness can be established." *Prado*, 933 F.3d at 130. Petitioners made no claim of nationality or registry, so the government cannot establish statelessness under § 70502(d)(1)(A) or (C). That leaves only § 70502(d)(1)(B), which requires the government to "request" a claim of nationality or registry. Because the Coast Guard made no "request," a district court in the Second Circuit would have dismissed the charges.

But the Eleventh Circuit, disagreeing with *Prado*, affirmed the convictions. App. 17a. In its view, the statutory procedures are merely "non-exhaustive …

examples," meaning the government could find some unenumerated way to show that Petitioners' vessel was stateless. App. 18a. Geography made all the difference.

B. The government downplays *Prado* based on immaterial minutiae.

1. The government claims that "*Prado* involved different facts" because "the officers 'destroyed the vessel without having secured a vessel identification number (or other means of identifying the vessel).'" Opp. 9, 15 (quoting *Prado*, 933 F.3d at 130). More generally, the government says, the boat in *Prado* "might have contained information establishing its nationality," whereas Petitioners' boat didn't. Opp. 16. Those arguments are wrong for two reasons.

First, *Prado* didn't turn on the officers' failure to secure a vessel identification number or on the boat's destruction. Instead, as the Eleventh Circuit recognized, it turned on the officers' failure to request a claim of nationality or registry. *See Prado*, 933 F.3d at 130-31; App. 17a.

As the Second Circuit repeatedly emphasized, the government can establish statelessness under § 70502(d)(1) only if it "follow[s] statutorily specified procedure." *Id.* at 130. "To establish statelessness in the absence of a claim of registry," *Prado* explained, "the United States officers must make a request of the master or person in charge for a claim of registry. And if a claim is made in any of the ways specified by the statute, the United States officers must seek verification from the claimed 'nation of registry.'" *Id.* at 132 (citation omitted). In other words, if "there is a claim of registry," then the Coast Guard can evaluate it. *Id.* at 130; *see* 46 U.S.C. § 70502(d)(1)(A), (C). But without

such a claim, "[s]ection 70502(d)(1)(B) makes clear that it is only if the master or person in charge fails '*on request* of an officer of the United States' to make a claim that the failure establishes statelessness." *Prado*, 933 F.3d at 131 (citation omitted; emphasis in original). Congress didn't provide another way to establish statelessness.

Applying that rule, the Second Circuit dismissed the indictment in *Prado* because there was no claim of registry and "no evidence that the officers inquired of the defendants as to the nationality or registration of the vessel." *Id.* at 126-27. The court's holding didn't turn on the destruction of the boat or what it might have contained. Indeed, the court made clear, for instance, that "nothing turn[ed] on" whether "the flag of Ecuador affixed to the side of the vessel" qualified as "flying the flag." *Id.* at 131. The problem was that the officers in *Prado* didn't ask for a claim of nationality or registry. The officers here didn't either.

Second, as the Eleventh Circuit correctly noted, *Prado did* involve "a similar set of facts." App. 17a. The cases' near-identical facts underscore the direct conflict between the circuits.

In both cases, the vessel flew no flag and carried no registration documents. App. 12a; *Prado*, 933 F.3d at 126-27. In both cases, every defendant denied being the master or individual in charge. App. 13a; *Prado*, 933 F.3d at 126. In both cases, no defendant made a verbal claim of nationality or registry. App. 12a; *Prado*, 933 F.3d at 130. And in both cases, the government failed to ask each defendant to make such a claim. App. 12a-15a; *Prado*, 933 F.3d at 131 & n.5.

The Eleventh Circuit recognized these similarities and understood *Prado*'s clear holding: "a vessel is

stateless only if the master fails to claim registry upon request." App. 17a. So rather than try to distinguish *Prado*, the Eleventh Circuit acknowledged that *Prado* reached "the opposite conclusion" and disagreed with "*Prado*'s reasoning." App. 17a-18a.

2. The government also claims that the Second Circuit is not bound by *Prado*. That's incorrect.

First, the government suggests that *Prado*'s statement that "a boat may not be considered stateless unless the government asks its occupants for a claim of nationality and is rebuffed" is "dictum." Opp. 16. As just explained, that statement reflects the court's holding and reasoning.

Second, the government suggests that the Second Circuit can ignore *Prado* in the future because *Prado* "fail[ed] to account for a scenario like this case, where the boat's passengers affirmatively claim that *none* of them is the master or individual in charge." Opp. 16. That claim is factually false and legally irrelevant.

Factually, as the government's own brief in *Prado* explained, "[a]ll three defendants denied being the captain or master of the [vessel]." Br. for the United States 4, Nos. 16-1055, 16-1212, 16-1214, ECF No. 116. Or, in the court's words, "none of the defendants claimed to be the master or individual in charge." *Prado*, 933 F.3d at 126 (citation omitted).

Legally, *Prado* didn't turn on any distinction between claiming no one was in charge and failing to identify someone in charge. Instead, the Second Circuit's legally sound premise was that *someone* had to be "in charge" even though he was refusing to "identif[y] himself." *Id.* at 131 n.5; *see infra* pp. 11-12.

In short, the government cannot distinguish *Prado*. It can only do what the Eleventh Circuit did: disagree with *Prado*'s reasoning. But the Second Circuit doesn't have that option. Only this Court can resolve the disagreement.

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

A. The government fails to identify any vehicle problem with this case. There are none. The circuit conflict is outcome-determinative, and nothing prevents the Court from resolving the question presented. Pet. 21.

What's more, the question is ripe for review. Pet. 23-24. Four circuits have already decided whether § 70502(d)(1) is exhaustive, and the split likely has reached its depth. The government doesn't dispute that § 70504(b)(2) lets it cherry-pick its preferred venue whenever the offense is "committed upon the high seas," so there is little reason for the government to prosecute defendants outside the First, Third, and Eleventh Circuits.

B. 1. As the petition explained, the circuit conflict undercuts two important principles.

First, the disagreement undermines Congress' care in crafting the MDLEA to minimize friction with foreign nations. *See United States v. Miranda,* 780 F.3d 1185, 1193-94 (D.C. Cir. 2015). Congress' policy decisions are paramount when a statute implicates foreign relations. The nonexhaustive interpretation of § 70502(d)(1) veers from Congress' chosen course and warrants review for that reason alone. Pet. 21-22.

Second, uniform interpretation of statutes implicating foreign relations is critical. But the circuit split

makes uniformity impossible. Sometimes, the United States can enforce U.S. law only when it complies with "the terms of" § 70502(d)(1). *Prado*, 933 F.3d at 130. At other times, the United States can act extraterritorially whenever "customary international law" allows. App. 11a. That disuniformity likewise warrants this Court's review.

2. Rather than confront these first principles, the government says that "no other country has raised concerns about petitioners' prosecution." Opp. 17. But the Eleventh Circuit's rule creates the risk that MDLEA enforcement will cause exactly that kind of international friction. Congress aimed to avoid those tensions by limiting the statute's extraterritorial reach to incidents aboard a "covered vessel," which has a detailed and multilayered definition. *See* 46 U.S.C. §§ 70502, 70503; *infra* pp. 9-10. The circuit split thus undermines Congress' policy choice and creates disuniformity in a field where uniformity is paramount.

The government also says that Petitioners do not "explain how this case would [have] come out differently if they had each been asked to make a claim of nationality for the vessel." Opp. 17-18. But that's not what happened here, and the government cannot eliminate the split or lessen its importance by speculating about changed facts. It's undisputed that the government didn't comply with § 70502(d)(1)(B)—it made "no request" of Petitioners to claim nationality. App. 15a. And in the Second Circuit, that failure matters. *See Prado*, 933 F.3d at 130-32.

III. The decision below is wrong.

A. The district court should have dismissed the prosecution because the MDLEA does not reach

Petitioners' vessel. Pet. 24-32. Congress identified only three situations in which a vessel is "without nationality." Those situations are exclusive, as the statutory text, structure, and context, plus the presumption against extraterritoriality, all make clear. Here, the government failed show that Petitioners' vessel falls within one of those three situations. Petitioners made no 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 thus cannot establish that Petitioners' boat is a "vessel without nationality." 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 and the decision below should be reversed.

B. The government's responses fail.

1. The government first claims that the MDLEA rebuts the presumption against extraterritoriality because its prohibitions "apply 'even though the act is committed outside the territorial jurisdiction of the United States.'" Opp. 9 (citing 46 U.S.C. § 70503(b)). That's incorrect.

To rebut the presumption against extraterritoriality, Congress must "affirmatively and unmistakably" specify the "foreign conduct" subject to U.S. law. *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 335 (2016). So even "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

By its terms, the MDLEA applies extraterritorially *only* to "covered vessel[s]." *See* 46 U.S.C.

§ 70503(a), (b). The statue thus rebuts the presumption against extraterritoriality only to the extent Congress affirmatively and unmistakably specified what constitutes a "covered vessel." And as the petition explained, Congress supplied the requisite clarity only as to the three kinds of vessels identified expressly in § 70502(d)(1). Pet. 25.

The presumption against extraterritoriality leaves no room for courts to speculate about whether "Congress would have wanted" the MDLEA to apply to unenumerated vessels. *RJR Nabisco*, 579 U.S. at 335 (citation omitted). Said differently, even assuming § 70502(d)(1) *could* be construed as nonexhaustive, "possible interpretations of statutory language do not override the presumption against extraterritoriality." *Morrison*, 561 U.S. at 264.

2. The government contends that the word "includes" in § 70502(d)(1), when contrasted against the phrase "includes only" in § 70502(e), indicates that the three scenarios listed in § 70502(d)(1) are not exhaustive. Opp. 10-11. That argument fails because those features of the statute are not dispositive. Pet. 30-32.

Interpretive canons are guides, "not mandatory rules." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). They may "point in different directions," A. Scalia & B. Garner, *Reading Law* 59 (2012), and treating them "like rigid rules … can lead [courts] astray," *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment). Contrary to the government's view (at 14), ignoring "the clarity and weight" of other textual clues doesn't produce a "sound construction." *Reading Law* 59.

Here, several textual clues show that § 70502(d)(1) is exhaustive: the presumption against

extraterritoriality, which prohibits inferring gaps from Congress' silence, *supra* pp. 8-9; the MDLEA's comprehensive and multilayered jurisdictional scheme, which leaves no room for judicial gap-filling; the omitted-case and the negative-implication canons, which confirm that courts shouldn't extend statutes that specifically enumerate some things but leave out others; and, finally, the rule of lenity. Pet. 25-27, 30-31; *see infra* p. 12. For all those reasons, "includes" and "includes only" "do[] not bear the heavy weight the Government puts upon [them]." *National Ass'n of Mfrs. v. Department of Def.*, 138 S. Ct. 617, 629 (2018).

3. The government next argues that courts should supplement § 70502(d)(1)'s enumerated list by looking to international law. Opp. 14. But the government's argument turns on the notion that § 70502(d)(1) "eschews a complete definition" of "vessel without nationality." *Id.* And as discussed, that notion is incorrect.

Nor does the "background" existence "of customary international law" or a treaty dealing with the same "subject matter" warrant supplementing § 70502(d)(1). *Id.* As the petition explained, Congress invoked international law several times in the MDLEA. But it did *not* do so in § 70502(d)(1). Pet. 28, 32. That disparity "argues forcefully," *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987), against reading international law into § 70502(d)(1). So do the presumption against extraterritoriality and Congress' primacy in foreign relations. *See supra* pp. 6-9.

4. Finally, the government makes two arguments about § 70502(d)(1)'s "master or individual in charge" language. Both lack merit.

First, the government says that Petitioners "stymied" the Coast Guard by "refusing to identify a master." Opp. 12. But as *Prado* explained, it's *the Coast Guard's* job to "request … a claim of nationality or registry," even if that means asking each crewmember in order to "show[] a failure by whichever was in charge to make a claim." 933 F.3d at 130-31 & n.5 (quoting 46 U.S.C. § 70502(d)(1)(B)). Without such a request, "mere silence" does not establish statelessness. *Id.* at 131.

Second, the Eleventh Circuit thought, and the government seems to agree, that § 70502(d)(1) cannot be exhaustive because "a vessel may not have a master or individual in charge." App. 18a; *see* Opp. 16. Under that theory, because all three scenarios in § 70502(d)(1) require a "master or individual in charge," there must be other ways to establish statelessness when nobody is in charge.

That argument fails because its premise is false. The "master or individual in charge" is simply the person who directs the vessel's operation or movement, as ordinary usage and regulations show. *See Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 455 (7th Cir. 2006); 33 C.F.R. §§ 107.200, 165.803. Logically, a vessel cannot operate unless *someone* is "in charge." Thus, as Justice Story once explained, when a master died, "the mate succeeded to his place … by mere operation of law." *The George*, 10 F. Cas. 205, 207 (1832). So too when the master was incapacitated for some other reason. *See, e.g.*, *Atkyns v. Burrows*, 2 F. Cas. 115, 116 (D. Pa. 1804); 46 U.S.C. § 8101(i); U.S. Navy Regulations, ch. 10, art. 1026, 1070-88 (Sept. 14, 1990).

In other words, *Prado* got it right. The government can satisfy § 70502(d)(1)(B) by asking each defendant to make a claim of nationality or registry. If nobody responds, "that would … show[] a failure by whichever was in charge to make a claim." *Prado*, 933 F.3d at 131 n.5.

C. Crediting the notion that § 70502(d)(1) is non-exhaustive produces another problem: ambiguity. And at that point, as the petition explained, lenity kicks in. Pet. 29. If there is "any reasonable doubt about the application of a penal law," then the question "must be resolved in favor of liberty." *Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring in the judgment). That's because defendants must "be on clear notice of what the law proscribes." A.C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 130 (2010).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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