

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

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VICTOR GASPAR CHICHANDE

PETITIONER,

- vs -

UNITED STATES OF AMERICA

RESPONDENT.

=====

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

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## **QUESTION PRESENTED FOR REVIEW**

Why do the courts of this country sanction the forced apprehension of foreign nationals who are chained to the steel decks of United States Coast Guard vessels for days and weeks while interdiction operations continue and more men are seized and chained until a full complement are assembled for transport to the United States for trial and eventual lengthy imprisonment? Why does this inhumane treatment of human beings continue year after year under the guise of the Maritime Drug Law Enforcement Act?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment and published opinion of the United States Court of Appeals for the Ninth Circuit entered on July 18, 2022. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing *en banc*, on September 27, 2022.

**JURISDICTION AND CITATION OF OPINION BELOW**

On July 18, 2022 the Court of Appeals for the Ninth Circuit filed an Opinion

(Exhibit A) rejecting Petitioner’s argument, *inter alia*, that his seizure on the high seas and detention chained to the decks of four different Coast Guard vessels over the course of 23 days amounts to outrageous government misconduct for which his case should have been dismissed<sup>1</sup>. The Ninth Circuit denied Petitioner’s petition for rehearing, and for rehearing en banc, on September 27, 2022. (Exhibit B). This Court has jurisdiction to review the Ninth Circuit’s decision pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISION AT ISSUE**

United States Constitution, Amendment V:

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

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<sup>1</sup> The Ninth Circuit’s published opinion affirmed petitioner’s conviction, vacated his sentence and remanded his case to the district court for further sentencing hearing to properly consider his motion for minor role consistent with Ninth Circuit law.

## INTRODUCTION

The United States has a long and ignominious history of arresting by force foreign nationals in their home country or on the high seas, treating them inhumanely and even torturing the presumed innocent accused and bringing them to the United States for prosecution and imprisonment<sup>2</sup>. Often, and particularly as here in the case of Maritime Drug Law Enforcement Act 46 U.S.C. § 70503 [MDLEA] arrests, the accused has no ties to the United States<sup>3</sup>. Indeed, that practice continues to the present day as recent news reports concerning the recent apprehension and transfer

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<sup>2</sup> See, e.g. *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) Matta was kidnaped in Honduras “bound, hooded, beaten, and burned with a stun gun at the direction of United States Marshals while being flown to the United States for prosecution. *Ker v. Illinois*, 119 U.S. 436 (1886) Ker was forcibly kidnaped in Peru, despite provisions in place for a lawful extradition, interrogated, beaten and brought to the United States by force for prosecution. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). Dr. Álvarez, a Mexican citizen, was abducted and brought to the United States at the direction of the DEA for prosecution. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Verdugo, also a citizen of Mexico, his home in Mexico was searched, documents seized and he was forcibly brought to the United States for prosecution. Not only did this Court allowed the use of unlawfully seized documents into evidence at his trial his forcible removal from Mexico was also sanctioned by this Court.

<sup>3</sup> This practice was chronicled at length in a New York Times magazine article on November 20, 2017. See, <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>.

of the Libyan suspect in the 1988 Lockerbie airliner bombing case demonstrates<sup>4</sup>.

Instead of enforcing the guarantees of our constitution and exercising its broad powers to prevent government overreach and abuse, the courts, including this Court, have historically been complicit in this shameful and inhumane practice. The United States routinely ignores standards of human dignity and the humane treatment of people and intentionally interferes with the sovereignty of our global nation state neighbors. We do so at our continuing peril and at the peril of our citizens who travel and live abroad. When other nation states come to the United States to take by force one of our citizens we have no rebuttal in view of our disgraceful record on this score.

The time has come for this court to intervene and stop the dangerous practice of seizing foreign citizens by force and bringing them to the United States for trial and imprisonment. The rule of law and international order demands nothing less.

Against this shameful backdrop, our State department attempts to cultivate honorable relationships with other nation states employing and encouraging diplomacy, including open and transparent relationships with the sovereign nations

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<sup>4</sup> News reports indicate that it is not entirely clear who apprehended and transferred the suspect to United States custody but point to an interim Libyan government suggesting an abduction under “murky circumstances”. New York Times December 14, 2022, <https://www.nytimes.com/2022/12/13/world/middleeast/libya-lockerbie-suspect-us.html>

of the world. That effort is jeopardized and undermined every day by the continued mistreatment of those seized on the high seas during the enforcement actions sanctioned and encouraged by the MDLEA.

This scheme of state sanctioned kidnaping of foreign nationals abroad and, as it turns out in practice, routine torture as authorized by the MDLEA cannot be permitted to continue given our constitution and our declaration of independence. Simply put, this is not who we profess to be. However, in practice this is precisely who we are since we have allowed, and now under MDLEA we have actively encouraged, this behavior for well over thirty years. It is well past time to dispense with the barbaric practice of kidnaping, torturing and rendering to the United States citizens of foreign countries.

### **STATEMENT OF FACTS AND CASE**

The United States Coast Guard encountered Petitioner and two others on December 31, 2017 aboard a forty foot panga boat in the eastern Pacific Ocean approximately 100 miles northwest of the Galapagos Islands. Suspecting the men of drug smuggling, the Coast Guard shot out the panga's engines from a moving helicopter, boarded their boat at gunpoint, and arrested the men. The Coast Guard took Petitioner and his companions to one of its ships, stripped the men to their underwear and took all of their personal belongings. The Coast Guard then issued

them disposable plastic painter suits and flip flops, a thin blanket, and a plastic mat to sleep on. The Coast Guard chained the men to the hard steel deck of the ship using ankle shackles and a two-foot chain. The Coast Guard ordered them not to ask where they were going or how long they would be on the ship. The men remained chained to the decks of various Coast Guard vessels like animals for 23 days without access to family, the consulate of their home country, or counsel and knowing nothing of their fate.

During their time at sea, Petitioner and his companions received mostly undercooked rice and beans to eat for each meal. They used makeshift toilets and showers strapped to the side of the ship, and they did not have a chair to sit on for any portion of their transport to the United States. During their most harrowing days, rain from persistent squalls rushed onto the deck where they lay chained. A Coast Guard watchman forced them to stand up and hold their thin wool blankets rather than sit or lie in standing water. He admitted he could have taken them inside a dry helicopter hanger, but he decided against it, later testifying “You’re not going to die if you get wet.” Petitioner feared he couldn’t stand another day of this treatment; another of his companions contemplated suicide.

The Coast Guard’s treatment of Petitioner and his companions was not anomalous or accidental. The Coast Guard planned this drug interdiction operation

for over a year. Their practices, resembling the seventeenth century trans-Atlantic slave trade rather than contemporary standards of pretrial detention, are business as usual and part and parcel of the United States Coast Guard regular patrols of the Pacific Ocean. Knowing the conditions its detainees faced, one might expect the Coast Guard to transport them to shore as soon as possible or at least arrange for humane conditions of confinement onboard Coast Guard vessels . Instead, in this case as in many other similar MDLEA cases, including those happening today, the Coast Guard took a five day detour to bring Petitioner and his companions to the DEA in San Diego rather than the closest Magistrate Judge in Florida. And the DEA, rather than bringing Petitioner to court, instead convinced him to sign a faulty Rule 5 waiver and interrogated him before taking him to jail and the next day, court.

Faced with prosecution for hauling cocaine from Colombia to Mexico, Petitioner and his companions moved the district court to dismiss their indictments. They argued that their deliberate and horrific mistreatment was outrageous government conduct violating due process.

Petitioner and his companions testified persuasively in pre-trial motions and at trial that they were either duped or forced to become involved in piloting the panga boat, and were then forced by armed narco-traffickers to follow through with the smuggling attempt lest they be killed or their families harmed.

Psychologists who examined Petitioner and his companions concluded that their treatment at the hands of the United States Coast Guard amounted to torture. Psychologists who examined Petitioner and his companions months after they endured these conditions aboard the Coast Guard cutters diagnosed each of them with post-traumatic stress disorder. Petitioner suffers from panic attacks and depression to this day. One of his companions avoids sleeping because the act of lying down and trying to fall asleep triggers memories of the wet deck on one Coast Guard ship in particular. Petitioner's third companion thought of killing himself while on the boat, and wept when he told his story to the psychologist.

A career Bureau of Prisons official after reviewing the testimony of Coast Guard Officials and Petitioner and his companions declared that the Coast Guard's treatment of these men fell well short of what would be required in federal prisons. A former warden of MCC New York, FCI Danbury, and USP Marion, she declared "I believe that the detention of the three men here on board the Coast Guard ships is an abuse of authority and an outrageous human rights violation." She added "[t]o refuse any meaningful information about the length of the detention, to hold men in chains on the decks of Coast Guard ships where they are unable to exercise, have any privacy or climate controlled conditions free from inclement weather and wet conditions is inhumane and immoral".

Prior to trial, Petitioner and his companions moved to dismiss the indictment under the due process clause, arguing that the conditions aboard the Coast Guard ships constituted outrageous government misconduct. After a five day evidentiary hearing with testimony from Petitioner and his companions, members of the Coast Guard who were involved in Petitioner's detention, another detainee aboard one of the coast Guard vessels and Psychologists who examined Petitioner and his companions, the district court denied the motion; the Ninth Circuit concurred and this petition follows.

Although the Coast Guard's drug interdiction missions under the MDLEA over the past thirty years have been designed to capture and detain large numbers of people, Coast Guards cutters are not at all prepared to house detainees in humane conditions. The Coast Guard had no way to secure the interior of the cutters, so they resorted to restraining Petitioner and many others in his situation on the exposed steel decks of Coast Guard ships. Each person had one shackle around his ankle attached to a short chain. That chain was in turn attached to a cable or secondary chain to which all the other detainees were restrained. Multiple detainees associated with other interdiction actions were kept chained together for days and weeks at a time, transferred between multiple Coast Guard vessels when those ships sailed into South American ports so the detainees would not be seen in foreign ports chained to the

decks like animals in the custody of the United States government.

The government's case at trial included video of the Coast Guard's interdiction of the panga, and witness's description of Petitioner and his companion's actions leading up to their apprehension. Petitioner and his companions presented duress defenses. They explained that they had been independently brought into the venture under duress or false pretenses and then were forced to participate by armed narco-traffickers. One companion, Mr. Cortez, testified he was hired for the legitimate job of delivering fuel to vessels at sea, but after arriving and realizing he had been tricked, armed men threatened to harm both him and his family if he did not participate. Another, Mr. Dominguez, testified that a group of armed guerillas kidnaped him and forced him to participate in the venture under threat of death if he refused. Petitioner testified that he had been tricked into joining the voyage with the promise of legitimate work, and upon arrival at the panga, armed men told him that he had to participate or he and his family would be harmed. After a six-day jury trial, the jury convicted Petitioner and his companions on both counts of the indictment.

The district court sentenced Mr. Cortez to 228 months in prison and five years of supervised release. Mr. Dominguez was sentenced to 216 months in prison and five years of supervised release. Petitioner was sentenced 180 months in prison and five years of supervised release. On direct appeal, the Ninth Circuit affirmed the

convictions and the district court's denial of the motion to dismiss for outrageous government conduct.

On September 27, 2022, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing and rehearing *en banc* without further comment. (Exhibit B). This petition for *writ of certiorari* follows.

### **ARGUMENT**

Government conduct violates due process when it is “so grossly shocking and so outrageous as to violate the universal sense of justice.” See *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir.1991)). In the context of pretrial detention, this occurs when conditions of confinement are unrelated to a legitimate security concern, such that they constitute improper pre-trial punishment. See *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). Here, Coast Guard chained Petitioner, his companions and others similarly apprehended to the deck of its ships for at least 23 hours a day. They provided inedible food, inadequate clothing, and insufficient shelter. They subjected Petitioner to this horrific detention without access to counsel and without telling the men where they were going or when they would arrive. This treatment fell well below the standards of decency, justice, and fairness of our contemporary society. It was plainly “outrageous” and violated due process.

The Coast Guard's callous and inhumane treatment of Petitioner was outrageous and violated due process. An indictment may be dismissed when the government's outrageous conduct violates due process in a way " 'so grossly shocking and so outrageous as to violate the universal sense of justice.' " See *Stinson*, 647 F.3d at 1209 (quoting *Restrepo*, 930 F.2d at 712). Although a high standard, Petitioner clearly met it here; he had not yet been convicted (nor even charged) of a crime, Petitioner enjoyed constitutional protection against conditions of confinement that amounted to punishment. See *Bell*, 441 U.S. at 538. While a person may establish his detention constitutes punishment through proof of "express intent to punish," he may also carry his burden by showing his conditions of confinement "appear[] excessive in relation to the alternative [non-punitive] purpose assigned to it." *Id.* Several characteristics of Petitioner's lengthy and inhumane detention constituted punishment under that latter standard.

On New Year's Eve 2017, Petitioner and his two companions were aboard a small panga boat off the coast of South America. Drug traffickers had loaded the boat with 1,320 kilograms of cocaine.

As part of an operation that took a year and a half to plan, the United States Coast Guard spotted the panga while patrolling international waters. The Coast Guard Cutter Stratton launched a helicopter to interdict the boat. The helicopter found

the boat and hovered along side it. When the boat did not stop, a marksman fired a rifle at the engines. Luckily, the rifle shots hit their mark instead of the men onboard, who were standing just a few feet away. Coast Guard boarded the boat and detained the three men. The Coast Guard took Petitioner to the Stratton, the first of four different cutters used to detain the men and others similarly apprehended on their voyage to the United States (Stratton, Northland, Mohawk, and Active). As soon as they came aboard, a Coast Guard officer read them a “Detainee Bill of Rights.” The Bill of Rights claimed the men would be “safe and cared for,” but previewed the harsh conditions the men were about to endure for more than three weeks. The officer explained they would receive three meals a day, consisting of rice and beans, because that is all the Coast Guard carried for them. They would be escorted each time they needed to use the toilet, and they would only be allowed a shower every other day.

The Bill of Rights came with a few warnings too. If the men did not do what the Coast Guard asked, they would be “treated accordingly,” including further restraint and isolation. The Coast Guard did not know how long they would be aboard the vessel, and the Bill of Rights twice told the men not to ask the crew questions about where they were being taken or when they would arrive and what would become of them.

As part of their processing aboard the Stratton, the Coast Guard took Petitioner's clothing and personal belongings. The men each received a Tyvek suit, a thin plastic suit akin to disposable painter's coveralls, and disposable flip-flops. They each also received a small kit with toothbrush and toothpaste, a thin wool blanket, and a thin plastic mat to sleep on. The men received similar provisions when they were transferred to different ships, although some did not include a sleeping mat or pillow. The Tyvek suits often ripped when the men sat or stood, but the Coast Guard would not replace the suits until Appellants showered.

Although the Coast Guard's mission was designed to capture and detain large numbers of people, Coast Guards cutters are not. The Coast Guard had no way to secure the interior of the cutters, so they resorted to restraining Petitioner and his many companions. Each person had one shackle around his ankle attached to a short chain. That chain was in turn attached to a cable or secondary chain to which all the other detainees were restrained.

While chained, the men could sit, stand, or move just a few feet in a small area. They never had chairs or a bench on which to sit. With the exception of an hour of "yard time," the men suffered these restrains for at least 23 hours a day. The meals they received varied over time, but their most common fare was rice and beans. One Coast Guard officer claimed the provision of rice and beans was aimed at avoiding

gastrointestinal problems by providing a South American staple food. Another claimed that rice and beans were all the Coast Guard could afford. In any case, Petitioner often found the rice and beans inedible. Seafood, not rice and beans, was the staple food of his home country, and the rice and beans were unseasoned and often under cooked. The men began to experience stomach pains from the food and at one point refused several meals in a row to avoid more discomfort. The Coast Guard medic gave them antacid.

The men received showers every few days. When his turn arrived, a watchman would escort each man to the side of ship's deck where a makeshift shower was rigged. The men also had to use a makeshift toilet on the side of the boat. They would raise their hands and, if not too busy with other tasks, a watchman would unchain and escort them to the toilet.

Petitioner's location on the four boats varied. Aboard the Stratton and Northland, the men were detained inside an empty helicopter hangar. While not climate controlled, the hangar provided ventilation when the door was open and shelter from the elements when it was closed. Aboard the Mohawk, and Active, the men were detained outside, with some form of tarp or tent providing the only shelter. When the weather was mild, most discomfort came from tight ankle chains and the hot Tyvek suits. Mr. Cortez would get so hot that he needed to roll the suit down to

his waste. Petitioner still has a scar on his ankle where the shackles dug in to his flesh for over three weeks.

When the weather worsened, however, the men suffered. Aboard the Active, the temperature at times dropped into the 50's, causing the Coast Guard to move the men to a more protected area of the ship. But Petitioner and his companions still could not keep warm in the sustained cold and wind. Petitioner lost feeling in his feet and hands. Another, Mr. Dominguez, worried he "could not take the cold [another] day." The worst conditions came aboard the Mohawk when it rained. (Mr. Dominguez: "The one that I cannot forget is the Mohawk because that one was my nightmare.") Although the men sat under a makeshift tent, water rushed in where the sides of the tent made contact with the deck. As inches of water collected beneath them during three days of rain squalls, watchmen would order them to stand and hold their blankets to avoid getting them wet. A Coast Guard officer admitted there was no way for the men to sleep when it rained. He also admitted that he could have taken the men to a covered hangar much like the one that held the men on the Stratton, but he reasoned, "You're not going to die if you get wet." Mr. Cortez became so exhausted that he eventually laid down in the water.

Psychologists who examined Petitioner and his companions months after they endured these conditions aboard the Coast Guard cutters diagnosed each of them with

post-traumatic stress disorder. Petitioner suffers from panic attacks and depression. Mr. Dominguez avoids sleeping because the act of lying down and trying to fall asleep triggers memories of the wet deck on the Mohawk. Mr. Cortez thought of killing himself while on the boat, and wept when he told his story to the psychologist.

A career Bureau of Prisons official declared that the Coast Guard's treatment of Petitioner and his companions fell well short of what would be required in federal prisons. A former warden of MCC New York, FCI Danbury, and USP Marion, she declared "I believe that the detention of the three men here on board the Coast Guard ships is an abuse of authority and an outrageous human rights violation." She added:

To refuse any meaningful information about the length of the detention, to hold men in chains on the decks of Coast Guard ships where they are unable to exercise, have any privacy or climate controlled conditions free from inclement weather and wet conditions is inhumane and immoral.

At the pretrial hearings in the district court on motions to dismiss, an officer from each of the Coast Guard cutters testified about the conditions of confinement aboard each ship. All three defendants did the same. The psychologists testified about the effect of the mistreatment on the three men. The district court excluded the testimony of the BOP warden, ruling that detention in prisons is "very different" from detention at sea and complaining that the expert's opinions are "basically usurping my decision in this case about whether this was outrageous or not."

Without permitting oral argument, the court denied the motions on the testimony and the parties' briefs. The court ruled the government's misconduct needed to be more than "flagrant misconduct" or "despicable conduct." The court found that the men were not malnourished because before-and-after pictures did not show extreme weight loss. It found "for at least 23 hours a day they were shackled, but the shackling was such that it allowed them to stand up, sit down, move around in a small, confined area." It also found that "occasionally there was very limited space because of the number of prisoners." The Court found "there was no other method of restraining the defendants that could keep them from jumping off the boat."

Regarding the weather, the court remarked, "I know there is nothing worse than feeling chilled, but there's no evidence that the temperature, either the heat or the cold, was life-threatening or was in any way dangerous to the defendant's health." The court dismissed the wet conditions on the Mohawk, reasoning that "this was during a period where the temperatures were warmer" and "[t]he coast guard security watch standers experienced the same conditions."

The court's "biggest concern" was the Coast Guard's refusal to tell Petitioner and his companions where they were going or how long they would be at sea. It explained:

[T]he defendants were arrested down off the coast of the Galapagos, they were Ecuadoran [sic] citizens<sup>5</sup>, and it doesn't appear that they were told what was going to happen to them, how long it was going to take, whether they were going to stay at sea ad infinitum. It seems to me that the government should have informed defendants, "You are in the custody of the United States Government on suspicion that you transported drugs. You will be transported to the United States for prosecution in a court of law in the United States. We don't know how long that transportation will take, but we are transporting you. While we're transporting you, you'll receive the following rights:" That would have been the prudent thing for the government to do, and I find they did not in this case.

"Nonetheless," the court ruled, "I don't find that those circumstances constitute outrageous governmental misconduct such that the indictment should be dismissed."

The Coast Guard's barbaric treatment of Petitioner and his companions unquestionably violated principles of due process governing pretrial detention. While a detainee's "understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment,' " *Bell*, 441 U.S. at 534, Petitioner's conditions of confinement far exceeded anything necessary to secure them aboard the ships. These men's incommunicado detention in chains without proper food, clothing, or shelter was cruel, shocking, and outrageous.

First, the Coast Guard unnecessarily restricted Petitioner's range of movement through the use of painful ankle shackles and short chains for at least 23 hours a day.

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<sup>5</sup> Mr. Dominguez is a citizen of Colombia.

As the district court found, these chains allowed the men only “to stand up, sit down, move around in a small, confined area.” The shackles were so tight and restrictive that Petitioner wears a permanent scar on his ankle to this day. Nothing warranted such severe curtailment of movement. The government offered no testimony that any of the men presented unique safety concerns. None had been violent upon arrest or had any known history of violence. None were armed upon arrest. All had complied with Coast Guard commands throughout their detention.

Nonetheless, Officer Welzant of the Stratton testified that Petitioner and his companions had to be restrained for “safety and security” reasons. He explained that detainees are not allowed access to the rest of the ship, and he complained they had too few watch standers and too many detainees to allow defendants more movement. But this claim is belied by Welzant’s own testimony, which established that the Coast Guard provided the detainees “an hour per day of just unrestrained time walking around on the flight deck.” The government offered no reasons why that freedom of movement was impossible for no more than one hour per day. It also offered no reason why it chose a short metal chain and ankle shackle (rather than something longer, more comfortable, and less restrictive) to guard the men its mission was specifically intended to capture and detain.

The district court oddly found that “there was no other method of restraining

the defendants that could keep them from jumping off the boat.” Aside from providing a purpose for the restraint never offered by the government, the district court’s finding has no basis in the record evidence. To the extent the district court meant to imply that the restraints were necessary to prevent escape by jumping into the expanse of the Pacific Ocean, the thousand mile swim to shore accomplished that task without the need for ankle chains. And to the extent the district court meant to imply the restraints were necessary to avoid the men jumping to their deaths on purpose (a thought Mr. Cortez contemplated) that only raises the question of why the Coast Guard created conditions so severe that they prompted thoughts of suicide. In either case, the court’s finding does little to support a conclusion that the use of short, painful chains and shackles for at least 23 hours a day was necessary to achieve a goal never stated by the government.

The Coast Guard also provided loathsome meals to the detainees. While the men admitted the food improved as they neared shore, they ate rice and beans—three times a day—for large parts of their voyage. The district court claimed “[t]here’s no evidence they were malnourished” based on its review of before and after pictures. That finding is clearly erroneous, as it is “ ‘without any support in the record.’ ” See *United States v. Gardenhire*, 784 F.3d 1277, 1280 (9th Cir. 2015) (quoting *United States v. Fitch*, 659 F.3d 788, 797 (9th Cir. 2011)). The men testified without

contradiction that the rice and beans were often served raw, so disgusting and upsetting to their stomachs that all three men refused several servings in a row. The Coast Guard logs confirm these refusals and show Mr. Cortez received only antacid as treatment. That is malnourishment by any standard, whether or not the men lost weight. The focus of the due process inquiry is not the effect on the men (whether they lost weight), but rather whether the Coast Guard's treatment (what they fed the men) was objectively unreasonable. See *Kingsley v. Hendrickson*, 576 U.S. 389, 389 (2015) (“a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable”). Feeding the men rice and beans until their stomachs hurt was not reasonable.

The Coast Guard gave conflicting reasons for its provision of rice and beans. One officer testified that they provided the men “primarily” rice and beans “largely due to dietary concerns because we don’t know what they were eating beforehand, before they came on board.” He claimed “feeding more complex meals can lead to digestive and health concerns” and “rice and beans is also a known staple in Central and South America in their diets[.]” These claims are far-fetched.

First, as Mr. Dominguez testified, rice and beans are not a staple on the Pacific coast of Columbia and Ecuador. (“In our countries, we’re used to eating seafood and not a lot of beans. And if we eat rice and beans in our countries, they’re well

cooked”). And the men are living proof that a diet consisting of rice and beans for every meal is the cause of digestive problems, not a preventative measure. (Coast Guard log entry: “Detainees fed beans and rice refused the bean complained of stomach pain from beans”). Moreover, the Coast Guard could easily have asked what the men had eaten before they came aboard and if they preferred the meal prepared for the rest of the crew. They never did. An officer on the Mohawk gave away the real reason for denying the men better food: “if we provided the detainees with the same food that the crew got, logistically speaking, we wouldn’t be able to feed our crew, so rice and beans is the only affordable option for sustaining people.” Starving detainees with raw beans is hardly a “reasonable” solution to the Coast Guard’s budget problems, and it serves no legitimate security purpose.

Next, the Coast Guard provided Petitioner and his companions inadequate clothing and shelter. The Coast Guard took the clothes they were wearing after arrest, but gave them no new underwear, no t-shirt, no sweatshirt for warmth, and no rain gear. The men were forced to wear thin plastic Tyvek suits that offered no protection from the cold and heated up quickly in the sun. The men “at times had a foam pad for sleeping.”(describing a half inch plastic mat). At other times, they slept on the rough metal surface of the ship with no pillows. They had just a thin blanket for warmth. The Coast guard never provided a chair or bench in the three weeks the men were

detained on board the Coast Guard ships.

Lack of shelter from the elements compounded the men's mistreatment. Mr. Cortez got so hot on the deck that he had to roll down his suit to his waist to avoid overheating. When the temperature dropped into the 50s on the Active, Petitioner lost feeling in his hands and feet, while Mr. Dominguez worried he "could not take the cold [another] day,"

Mr. Dominguez lamented, "The one that I cannot forget is the Mohawk because that one was my nightmare." While detained on the Mohawk, the men experienced "numerous" rain squalls resulting in a wet deck. Water freely entered under the sides of a makeshift tarp onto the deck where the men were chained. The men had to stand in order to stay dry, holding their blankets and towels at the command of the watch stander. Officer Meyer, the deck watch officer and supervisor of all the law enforcement officers on board the Mohawk, conceded there was no way for the men to sleep without getting wet. Unable to stand any longer, Mr. Cortez eventually gave up and laid down in what he described as "two fingers" of water. Officer Meyer admitted that he could have moved the men into a covered helicopter hangar, but callously quipped, "You're not going to die if you get wet."

Without more, this sustained, deliberate, and severe treatment of three men—who were presumed innocent—plainly violated the protections of the due

process clause. One inexcusable act most forcefully illuminates the Coast Guard's conduct as "shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." See *United States v. Russell*, 411 U.S. 423, 431 (1973). The Coast Guard never informed Appellants of their destination or their fate. The district court called this fact its "biggest concern," finding "it doesn't appear that they were told what was going to happen to them, how long it was going to take, whether they were going to stay at sea ad infinitum." The Coast Guard had just shot out the panga boat engine from a helicopter, boarded their boat with military rifles, dragged Petitioner and his companions onto a Coast Guard cutter, taken their clothes, and chained them to the deck. The men had no ability to talk with their families, lawyers, or consulates. Yet these government agents had not the decency to tell the men where they were going or provide them with some comfort that they were headed toward the United States for court proceedings rather than some other grim end. In fact, the Detainee Bill of Rights they heard as they boarded the Stratton stated "We do not know how long you will be aboard" and warned them "please do not ask the crew questions regarding where we are taking you or when." This was cruelty, plain and simple, and it highlights the due process violation, because the Coast Guard offered no legitimate reason for it. Indeed, there exists no non-punitive reason for keeping Petitioner and his companions completely in the dark for three weeks.

The Coast Guard's vague reference to safety and security does nothing to justify their inhumane and unconstitutional conduct. While some restraint might have been necessary to secure the ships, forcing Petitioner to sleep on rough steel has no rational relationship to that goal. Forcing the men to wear thin plastic suits with no warm clothes or rain protection has no rational relationship to that goal. Forcing the men to stand and sleep in inches of water when a sheltered space was available has no rational relationship to that goal. Forcing the men to choke down raw rice and beans has no rational relationship to that goal. By any measure, the Coast Guard's inhumane treatment of Appellants was "excessive" to achieve any legitimate goal of pretrial detention. See *Bell*, 441 U.S. at 538.

What makes the Coast Guard's conduct even more outrageous and shocking is that it was the result of careful and lengthy deliberation. A logistics officer testified that the drug interdiction operation resulting in Petitioner's capture took a year and a half to put together. The Coast Guard planned for the location of several ships working together in the vast Pacific Ocean. They ensured proper training, equipment, and supplies. They planned stops for food and fuel months in advance to navigate logistical and diplomatic obstacles. Yet in the years of planning this "very complex" operation specifically intended to interdict drugs and detain suspected drug smugglers, the Coast Guard made no provision for the humane treatment of the

people they knew they would capture. No floating brig. No shelter from the elements. No chairs. On some boats, not even a pillow or a mat to sleep on. Just disposable plastic painter suits, rice and beans, and a two foot chain. Our shared “canons of decency and fairness” demand more. See *Rochin v. California*, 342 U.S. 165, 169 (1952).

The district court disagreed, relying principally on the Ninth Circuit’s decisions in *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), and *United States v. McClelland*, 72 F.3d 717 (9th Cir. 1995). Those cases are inapposite because of their subject matter<sup>6</sup>, but they are more importantly distinguishable because of their anachronism. The Supreme Court cautioned in *Rochin* that the due process clause does not have a “fixed technical content,” but rather “exacts a continuing process of application.” 342 U.S. at 170. In other words, the protections of substantive due process are not static, but rather necessarily reflect the shifting norms of society. But in citing *McClelland*’s caution in 1995 that dismissal for outrageous conduct posed an “extremely high standard,” the district court failed to consider the needs “of change in a progressive society.” See *Rochin*, 342 U.S. at 172. Instead, the district

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<sup>6</sup> *Matta-Ballasteros* concerns the obscure question of whether U.S. agents may kidnap a suspect abroad, while *McClelland* deals with the propriety of a reverse-sting operation. Neither deals squarely with the constitutionality of pretrial conditions of confinement.

court adopted *Matta-Ballesteros*’s reasoning that being “bound, hooded, beaten, and burned with a stun gun at the direction of the U.S. Marshals . . . was not sufficient outrageous conduct to warrant dismissal.” But that ruling reflects a 25-year-old public sentiment that thankfully no longer exists. One need only look out the window to realize that our society’s assessment of law enforcement’s brutality has changed since the era of Rodney King.

The district court made no attempt to compare the Coast Guard’s conduct to contemporary standards of decency and humanity. For example, the court refused to hear the testimony of a career Bureau of Prisons warden and supervisor prepared to explain that the Coast Guard’s conduct did not comply with the standards of care expected in federal prisons. The court similarly ignored the defense’s citation to the 2015 Nelson Mandela Rules, the United Nation’s current standard for care of pre-trial detainees. Under those internationally accepted rules, “Instruments of restraint are to be imposed only when no lesser form of control would be effective to address the risk posed by unrestricted movement,” and, critically here, should be “the least intrusive method that is necessary and reasonably available to control the prisoner’s movement[.]”

Closer to home, the Coast Guard’s conduct doesn’t even comply with Newport Beach, California’s prescriptions. Those rules provide:

- Food “shall be free from contamination, wholesome, palatable, and of sufficient quantity and nutritive value to meet the normal daily requirement”;
- “There shall be adequate shelter from the elements and sufficient space for exercise”;
- “When sunlight is likely to cause overheating or discomfort, sufficient shade shall be provided”;
- There must be “access to shelter to allow them to remain dry during inclement weather”;
- There shall be provided a minimum square footage of floor space equal to twice the mathematical square of the sum of height plus six inches, expressed in square feet (for a five-foot, six-inch man, this would be 72 square feet);
- For temporary housing, the space must allow for standing, sitting, and lying in a comfortable position, and for each 12 hours of confinement, one full hour of exercise must be provided.

Newport Beach Municipal Code, Ch. 7.35. These are Newport Beach’s rules governing the maintenance of dog kennels, so the Coast Guard ought to provide at least these protections for human beings. See also Cal. H & S Code § 122335(b) (making it a misdemeanor to “tether, fasten, chain, tie, or restrain a dog, or cause a dog to be tethered, fastened, chained, tied, or restrained, to a dog house, tree, fence, or any other stationary object” for more than 3 hours in a 24 hour period).

Ultimately, the district court never consulted any contemporary norms governing pretrial detention. The court merely expressed that Petitioner and his companions faced an “extremely high standard” and that the Coast Guard’s conduct

needed to be more than “flagrant” or “despicable” conduct. The district court and the Ninth Circuit got it wrong. No modern notion of justice and decency permits our government to treat human beings as they did Petitioner and his companions here. The government’s conduct is egregious, shocking, and inhumane, and it violates the guarantees of the due process clause.

### **CONCLUSION**

To end the abuses suffered by Petitioner and his many companions during the first weeks of 2018 and to stop the United States Coast Guard from continuing their inhumane treatment of human beings on the high seas every day of their interdiction operations under the MDLEA, Petitioner urges this Court to grant this Petition for *Writ of Certiorari*.

Dated: December 20, 2022

/s/ Mark F. Adams  
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