NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

PAULINO VASQUEZ-RIJO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Margaret Y. Foldes
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

This case raises two matters of constitutional and jurisdictional importance concerning the Felonies Clause of the United States Constitution, Article I, §8, cl. 10, and the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §70501, et. seq. These questions are federal matters of exceptional importance which this Court should resolve for their uniform treatment and application in the lower courts. These questions are:

1. Whether MDLEA §70502(d)(1)(C) is Unconstitutional Because Its Definition of "a Vessel Without Nationality," Provides for Foreign Vessels to Be Deemed Stateless Vessels for Purposes of Jurisdiction, Contrary to the Requirements of the Felonies Clause and Its Incorporated Customary Principles of International Law.

2. Whether the MDLEA is Unconstitutional as Applied to Vessels Within a Foreign Nation's Exclusive Economic Zone (EEZ), Because the EEZ Does Not Constitute the "high Seas" Within the Meaning of the Felonies Clause and Its Incorporated Customary Principles of International Law.

INTERESTED PARTIES

Petitioner is Paulino Vasquez-Rijo ("Vasquez-Rijo"). He and Alexander Rafael Santos-Santana ("Santos-Santana") were defendants in the case before the district court and appellants in the court of appeals. The United States prosecuted the case before the district court and was appellee in the court of appeals. There are no other interested parties.

RELATED PROCEEDINGS

The Eleventh Circuit Court of Appeals consolidated defendants' appellate proceedings, with *Alexander Rafael Santos-Santana* as the lead case:

> *United States v. Alexander Rafael Santos-Santana*, No. 22-10367 (Dec. 28, 2022)
>
> *United States v. Paulino Vasquez*, No. 22-10367 (Dec. 28, 2022)

In the district court proceedings, Mr. Vasquez-Rijo was listed as the first defendant:

> *United States v. Paulino Vasquez-Rijo*, No. 21-20384-Cr-Bloom(1) (Jan. 31, 2022)
>
> *United States v. Alexander Rafael Santos-Santana*, No. 21-20384-Cr-Bloom(2) (Jan. 31, 2022)

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PETITION FOR WRIT OF CERTIORARI

Paulino Vasquez-Rijo respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-10367 in that court on December 28, 2022, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1). This opinion was unpublished and was not in any reporter; however, the decision is accessible on Westlaw, 2022 WL 17973602 (11th Cir. 2022).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on December 28, 2022. This Court granted a 30-day extension to the filing of Mr. Vasquez-Rijo's instant petition; thus, the petition is timely pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. Const. Art. I, §8, cl. 10

> The Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

46 U.S.C. §70501 – 46 U.S.C. §70507

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STATEMENT OF THE CASE

Petitioner Paulino Vasquez-Rijo, a Dominican national, was arrested by the United States Coast Guard (USCG) in connection with a drug trafficking offense committed in the Exclusive Economic Zone of the Dominican Republic, approximately 80 nautical miles southwest of Mona Island, Puerto Rico. The offense was not alleged to have any connection to the United States: No United States citizen or resident was involved; the offense was not committed on a U.S. vessel; there was no evidence that the drugs were *en route* to or destined for any entrance into the United States. In relation to these events, Petitioner raises significant complex constitutional and jurisdictional questions concerning the grant of power given to Congress through the Felonies Clause, Art. I, §8, cl. 10, of the United States Constitution and the Maritime Drug Law Enforcement Act ("MDLEA), 46 U.S.C. § 70501, et seq. He asserts that the MDLEA unconstitutionally expands its jurisdictional reach beyond what is allowed by the Felonies Clause through an improper definition of stateless vessels and an improper definition of "high Seas." The petition should be granted because these questions are significant and complex issues of exceptional importance which have not been, but should be decided by this Court.

Statement of Facts

The incident that gave rise to the indictment occurred on July 5, 2021, when the United States Coast Guard (USCG) was patrolling the Caribbean Sea.

According to the USCG, it detected a go-fast boat approximately 80 nautical miles southwest of Mona Island, Puerto Rico. The USCG obtained authorization for a boarding team to conduct a Right of Visit boarding to ascertain the vessel's nationality. The boarding team encountered two individuals, Mr. Vasquez-Rijo and Mr. Santos-Santana, who were both nationals of the Dominican Republic. Mr. Vasquez-Rijos was treated as the person in charge, and he orally claimed Dominican Republic nationality for the vessel. The Dominican Republic was contacted, and it responded that it neither confirmed nor denied the nationality of the vessel.

Based on the response of the Dominican Republic, the USCG treated the vessel as stateless and therefore, subject to the jurisdiction of the United States. A full law enforcement boarding followed, and the USCG boarding team recovered 12 bales of cocaine.

Vasquez-Rijo and Santos-Santana were transported from their location to the Southern District of Florida for prosecution.

District Court Proceedings

Mr. Vasquez-Rijo and his co-defendant Santos-Santana were indicted for cocaine conspiracy and a substantive count of possession with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§70503(a)(1),70506(b). The defendants pled guilty to the conspiracy count, and the government dismissed the remaining count at sentencing. There was

no plea agreement; however, Mr. Vasquez-Rijo executed a factual proffer stating the facts as outlined above.

The defendants were both sentenced to 120 months' imprisonment.

Appellate Proceedings

Vasquez-Rijo and Santos-Santana timely appealed, and the Eleventh Circuit consolidated their appellate cases. Even though defendants had pled guilty to the charges, they raised substantive constitutional issues in their appeals that dealt with the subject matter jurisdiction of the district court. They argued that MDLEA's stateless vessel provision under 46 U.S.C. §70502(d)(1)(C), which was the jurisdictional basis of their prosecution, was unconstitutional under the Felonies' Clause of Article I, §8 cl. 10, of the Constitution. *United States v. Vasquez-Rijo*, No. 22-10367 (appellant's brief). They further argued that the Felonies Clause incorporated terms of customary international law, and that the MDLEA's definition of statelessness under §70502(d)(1)(C) did not comport with those terms. In making this argument, they brought to the court's attention the First Circuit case *United States v. Davila-Reyes*, 23 F.4th 153, 179 (1st Cir. 2022), w*ithdrawn, reh'g en banc granted*, 38 F.4th 288 (1st Cir. July 5, 2022) (oral argument held; case pending). In addition, the appellants argued that their MDLEA prosecutions based on the Felonies' Clause was unconstitutional because their vessel was stipulated to be in an area that was in the Exclusive Economic Zone ("EEZ") of the Dominican Republic, and that such zone did not constitute the "high Seas," under the Felonies Clause.

The Eleventh Circuit issued an unpublished opinion affirming the judgment. *United States v. Santos-Santana, Vasquez-Rijo*, Case No. 22-10367, 22 WL 17973602 (Dec. 28, 2022) (hereinafter referred to as *Vasquez-Rijo*). The court stated that it had held under prior panel precedent that Congress "did not exceed its power under the Felonies Clause in enacting the MDLEA." *Vasquez-Rijo* at *6, *citing United States v. Hernandez*, 864 F.3d 1292, 1301 (11th Cir. 2017); *United States v. Campbell*, 743 F.3d 802, 805 (11th Cir. 2014); and *United States v. Estupinan*, 453 F.3d 1336 (11th Cir. 2006); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012). However, it noted through its parentheticals to these cases that those cases did not consider or address the arguments that Mr. Vasquez-Rijo made challenging §70502(d)(1)(C)'s definition of statelessness or the definition of the "high Seas" as violating the Felonies Clause. *See Vasquez-Rijo* at 6.

Nonetheless, the court stated that under *Campbell*, "the conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its extraterritorial reach." *Vasquez-Rijo* at 6, *citing Campbell,* 743 F.3d at 810. It also cited *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016), for the holding that "the lack of a nexus requirement does not render the MDLEA unconstitutional."

The Eleventh Circuit also stated that its prior panel precedent found MDLEA to be "constitutional as applied to vessels on the high seas under the Piracies and Felonies Clause," but not as to vessels "in the territorial waters of another state."

Vasquez-Rijo at 7, *citing United States v. Cabezas-Montano*, 949 F.3d 567 (11th Cir. 2020); *Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012); *United States v. McPhee*, 336 F.3d 1269 (11th Cir. 2003). The Eleventh Circuit cited to regulations that defined "territorial seas" as waters "up to 12 nautical miles adjacent to the coast of a nation for territorial jurisdiction purposes," and defined "high seas" under customary international law as "all waters that are not included in the EEZ, territorial sea, or internal water of a nation." *Vasquez-Rijo* at 7, *citing* 33 C.F.R. §§2.22, 2.32.

Returning to the statelessness definition under §70502(d)(1)(C), the Eleventh Circuit applied a "plain error" standard of review, finding that Vasquez-Rijo could not show that any error was plain because there was no binding precedent from the Eleventh Circuit or from this [U.S. Supreme] Court that "directly addresses the specific issue of whether §70502(d)(1)(C) is constitutional under the Felonies Clause." As an alternative "jurisdictional" holding, the Court found that Vasquez-Rijo's arguments "still fail[], as we [the Eleventh Circuit] have consistently found that the MDLEA is a permissible exercise of congressional power under the Felonies Clause." *Vasquez-Rijo* at 7, *citing Hernandez,* 864 F.3d at 1303; *Campbell*, 743 F.3d at 810-12; *Estupinan*, 453 F.3d at 1338. Due to its heavy reliance on the prior panel precedent rule, the Eleventh Circuit did not substantively analyze Vasquez-Rijo's arguments concerning the jurisdictional defects of §70502(d)(1)(C). Additionally, the Eleventh Circuit failed to explain how its prior panel precedent rule could dictate the result since it had just acknowledged in its plain error ruling that no binding Eleventh

Circuit or Supreme Court authority existed on the issue. Furthermore, the Eleventh Circuit dedicated only one sentence to the *Davila-Reyes* case: "And we decline to adopt the holding of the First Circuit's now-withdrawn opinion in *Davila-Reyes* given our precedent concluding that other provisions of the MDLEA are constitutional under the Felonies Clause." *Vasquez-Rijo* at 7.

The Eleventh Circuit concluded its MDLEA discussion by circling back to the EEZ issue. In this concluding paragraph, the court acknowledged that the defendants' made a jurisdictional argument involving the EEZ. It also noted that the argument did not turn on any disputed jurisdictional facts because the arguments were based on stipulated facts. It then reasoned in three sentences that "jurisdiction was proper because the USCG located the [defendants'] vessel in [the] high seas"; it referred back to regulations that defined a state's territorial jurisdiction up to 12 nautical miles; and it further found that "prior panel precedent compels us [Eleventh Circuit] to hold that their [defendants] vessel was in the high seas, as it was not within the twelve nautical miles of a nation's coast." *Vasquez-Rijo* at 7, *citing to Cabezas-Montano*, 949 F.3d at 587; *McPhee*, 336 F.3d at 1273; *Archer*, 531 F.3d at 1352. As with the prior issue, the Eleventh Circuit failed to give a substantive analysis regarding Vasquez-Rijo's EEZ challenges. Moreover, it failed to discuss the relevance of 33 C.F.R. §2.32(d) which it had previously cited, i.e., "Under customary international law, high seas refer to all waters that are not included in the EEZ, territorial sea, or internal water of a nation." Also similar to the prior issue, the

Eleventh Circuit failed to explain how the prior panel precedent rule could govern based on "*see*" cites that did not consider or decide the EEZ argument made by Mr. Vasquez-Rijo, especially in light of the fact that these challenges went to the court's jurisdiction. The Eleventh Circuit concluded by affirming the defendants' convictions.

Mr. Vasquez-Rijo seeks review by this Court.

REASON FOR GRANTING THE WRIT

The Constitutional issues raised by Mr. Vasquez-Rijo about the grant of power given to Congress through the Felonies Clause, Art. I, §8, cl. 10, and whether the MDLEA comports with the Felonies Clause's requirements are important constitutional issues concerning the subject matter jurisdiction of the federal courts and Congress' limited and enumerated powers to define and punish felonies on the high seas. These issues present questions of exceptional importance which have never been, but should be decided by this Court. Additionally, as is evident from the *Davila-Reyes* opinion, 23 F.4th 153, 179 (1st Cir. 2022), w*ithdrawn, reh'g en banc granted*, 38 F.4th 288 (1st Cir. July 5, 2022), the circuits are grappling with these complex and weighty issues and are in conflict over their proper resolution. Thus, Mr. Vasquez-Rijo requests that this Court grant the instant petition to bring clarity and uniformity to this important area of the law. Alternatively, Mr. Vasquez-Rijo requests that this Court hold his petition pending the resolution of the *Davila-Reyes* case.

I. Congress Exceeded Its Powers When It Enacted Certain Provisions of

the MDLEA in a Manner That Was Contrary to the Felonies Clause, Article I, §8, cl. 10 of the United States Constitution.

A. The Felonies Clause of the Constitution

Congress's authority to enact the MDLEA, rests on the "Felonies Clause," which is a sub-part of the larger "Define and Punish Clause" set out in Article I, §8, cl. 10. This clause, as a whole, was adopted as part of Congress's enumerated powers, enabling it to act in matters of importance that occurred outside its territorial jurisdiction.

The Define and Punish Clause grants Congress the power, "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . . ." It contains three separate grants of power: (1) "the power to define and punish piracies," (2) "the power to define and punish felonies committed on the high seas," and (3) "the power to define and punish offenses against the law of nations." *Bellaizac-Hurtado*, 700 F.3d at 1248 (*citing United States v. Smith*, 18 U.S. (5 Wheat) 153, 158-139 (1820)).

Caselaw establishes that the Felonies Clause is the only sub-part of Art. I, §8, cl. 10, that grants Congress authority to enact the MDLEA, because domestic drug trafficking laws do not qualify as piracies or offences against the law of nations. *Cf., United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820) (domestic crimes such as murder and robbery cannot be recast as "piracies" for purposes of extraterritorial prosecution of such crimes); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1257

(11th Cir. 2012) (domestic drug trafficking laws not "offenses" against the "Law of Nations."). Further, caselaw has found that Congress's power to enact MDLEA could not be based on other constitutional provisions such as the Foreign Commerce Clause or the Necessary and Proper Clause to the Treaty Power. *United States v. Davila-Mendoza*, 972 F.3d 1264 (11th Cir. 2020) (MDLEA not based on the Foreign Commerce Clause or the Necessary and Proper Clause of the Treaty Power).

B. MDLEA's Provisions

The Maritime Drug Law Enforcement Act, 46 U.S.C. §§70501, et. seq. ("MDLEA") gives the United States extraterritorial jurisdiction to enforce its domestic drug trafficking laws on the "high Seas" when such activity is taking place on board a "covered" vessel which is "subject to the jurisdiction of the United States." As relevant here, the main drug trafficking prohibition states:

> While on board a covered vessel, an individual may not knowingly or intentionally -- **(1)** manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance; . . . .

46 U.S.C. §§70503(a)(1) (2021).

"The term 'covered vessel'" includes, ". . . a vessel subject to the jurisdiction of the United States." 46 U.S.C. §70503(e). For purposes of Mr. Vasquez-Rijo's case, the relevant definition of a vessel "subject to the jurisdiction of the United States," is "a vessel without nationality." 46 U.S.C. §70502(c)(1)(A). At the time of Mr. Vasquez-Rijo's case, the MDLEA defined "a vessel without nationality" in three ways:

> (1)(A) a vessel aboard which the master or individual in charge

> makes a claim of registry that is denied by the nation whose registry is claimed;
>
> (B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of the United States law, to make a claim of nationality or registry for that vessel; and
>
> (C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

46 U.S.C. §70502(d)(1)(A)-(C) (2021).

Furthermore, MDLEA provided that a claim of nationality or registry could be established in three ways:

> (1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;
>
> (2) flying its nation's ensign or flag; or
>
> (3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

46 U.S.C. §70502(e).

Foreign nations can respond to a claim of nationality or registry under §70502(d)(A) and (C) by "radio, telephone, or similar oral or electronic means." 46 U.S.C. §70502(d)(2).

The MDLEA makes clear that finding a vessel "subject to the jurisdiction of the United States" is a matter of subject matter jurisdiction, stating:

> Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are

> preliminary questions of law to be determined solely by the trial judge.

46 U.S.C. §70504(a). *United States v. Iguaran*, 821 F.3d 1335, 1336 (11th Cir. 2016), *citing United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008). The government bears the burden of making this showing. *See Iguaran*, 821 F.3d at 1338.

C. The Felonies Clause Incorporates Customary Principles of International Law Into Its Text.

It is well established that Congress' powers under the Define and Punish Clause relating to Piracies and Offences against the Law of Nations, incorporates terms of art from customary principles of international law. *Bellaizac-Hurtado*, 700 F.3d at 1249-1251. It follows that the Felonies Clause—which lies in between them—is similarly constrained. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) ("The Latin phrase, *noscitur a sociis* means 'it is known by its associates'—a classical version, applied to textual explanation, of the observed phenomenon that birds of a feather flock together.").

This Court's longstanding authority, *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), confirms the same. Although *Furlong* was technically a statutory construction case, it gave an analysis which differentiated between the crime of piracy and non-piratical murders on the high seas, and it made its analysis with reference to the power granted to Congress through the Define and Punish Clause. *See Furlong* at 196. *Furlong* involved consolidated claims of several

seamen who were charged with various crimes on the high seas, including piracies and murder. The Court stated that it presumed Congress intended to legislate within the full extent of its authority, and the Court then sought to determine the scope of Congress' power, in order to determine the permissible reach of the relevant statute. The Court wrote:

> To me it appears . . . that in construing [the statute] we should test each case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; . . . . As far as those powers extended, it is reasonable to conclude, that Congress intended to legislate,

Furlong, at 196.

The Court then explained the difference between piracies and non-piratical felonious murders on the high seas, which it stated was a crucial distinction dictating whether or not the United States could prosecute the offense. The Court stated that piracies could be "punished by all," but that Congress did not have the power to punish a murder "committed by a foreigner upon a foreigner on a foreign ship." *Furlong* at 197. The sole basis for this restriction on Congress's Article I powers was the application of international law as the proper application of those Article I powers. *Furlong stated:*

> Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all, and punished by all . . . . Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction, or, (what is the same thing,)

> in the vessel of another nation, has not been acknowledged as a right, much less an obligation.

Furlong, at 197; *see also United States v. Palmer,* 16 U.S. (3 Wheat.) 610, 630-34 (1818) (holding that Congress could not extend U.S. jurisdiction to foreigners on foreign vessels for the common law offense of robbery).

Importantly, the Court explained that Congress could not simply "define murder as 'piracy,'" and thereby "punish it under the Piracies Clause." *Bellaizac-Hurtado*, 700 F.3d at 1249 (discussing *Furlong*, 18 U.S. at 198). This restriction too, was grounded on international law:

> Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it . . . .

Furlong, 18 U.S. at 197 (as quoted in *Bellaizac-Hurtado*, 700 F.3d at 1249). The *Furlong* Court thus identified the limits of Congress' powers under both the Piracies Clause and the Felonies Clause by reference to the jurisdictional principles of international law.

As suggested by *Furlong*, Congress could not redefine terms within Article I, §8, cl. 10, for convenience of prosecution. Rather the term "define" in that clause was understood to limit Congress "to codify and explain offenses" that were recognized by the international community. *See Furlong*, 18 U.S. at 197; *see also Bellaizac-Hurtado*, 700 F.3d at 1249-50 (explaining that, during the Founding period the "word 'define' meant [t]o give the definition; to explain a thing by its qualities and to circumscribe; to mark limits."). Without this limitation, "Congress could define any conduct as 'piracy' or as a 'felony' or an 'offense against the law of nations,' [and] its power would be limitless and contrary to our constitutional structure." *Bellaizac-Hurtado*, 700 F.3d at 1248-49.

The above legal authorities which reference the text of the Define and Punish Clause through principles of international law are consistent with the history and purpose of Article I: "[W]hen the framers gathered to write the Constitution they included among their chief priorities endowing the national government with sufficient power to ensure the country's compliance with the law of nations." *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018) (Gorsuch, J., concurring) (explaining that, under the Articles of Confederation, the States' regular failures to redress injuries caused by their citizens to foreigners posed an "existential threat to the new nation"). Not surprisingly, therefore, when it came to Clause 10—the only expressly extraterritorial grant of power in the Constitution—the Framers incorporated terms from international law. Accordingly, Article I, §8, cl. 10, and the Felonies Clause in

that provision must be read to incorporate customary principles of international law.

As a panel of the First Circuit noted in *United States v. Davila-Reyes*, 23 F.4th 153, Offences against the Law of Nations," "Piracies," and "Felonies" are "all concepts taken directly from international law." These terms were "familiar shorthand" for "international law concepts," and their inclusion in the Constitution provides "strong evidence that the Framers intended the Define and Punish clause to align with the international law understanding of those concepts." *Id.* Although the panel decision in *Davila-Reyes* has been withdrawn pending *en banc* review, its historical analysis is both sound and fully consistent with the authorities cited above and with this Court's decision in *Furlong*.

As more fully explained below, **t**he MDLEA violates the Felonies Clause in two ways because it fails to incorporate customary principles of international law into its provisions. The two constitutional breaches recur frequently in MDLEA cases. First, MDLEA expands its subject matter jurisdiction beyond what is allowed by the Felonies Clause by defining the concept of a stateless vessel beyond what that term means in customary international law. Second, MDLEA defines "high Seas" in an expansive way that exceeds the Felonies' Clause definition of that concept.

II. MDLEA §70502(d)(1)(C) is Unconstitutional Because Its Definition of "a Vessel Without Nationality," Provides for Foreign Vessels to Be Deemed Stateless Vessels for Purposes of Jurisdiction, Contrary to the Requirements of the Felonies Clause and Its Incorporated Customary

Principles of International Law.

For reasons previously discussed, Congress's authority to "define and punish . . . Felonies committed on the high Seas," U.S. CONST. art. I, § 8, cl. 10, is inherently limited by principles of international law. Congress exceeded that authority when it defined the term "vessel without nationality," in 46 U.S.C. § 70502(d)(1)(C), to include vessels that are not considered stateless under international law.

"To insure the principle of freedom of the seas, international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas." See *Furlong*, 18 U.S. at 197-98 (recognizing the existence of cases in which Congress "had no right to interfere"). Indeed, such vessels are normally considered within the exclusive jurisdiction of the country whose flag they fly. *See* 1982 United Nations Convention on the Law of the Seas, 1833 U.N.T.S. 397, 21 ILM 1261 (1982) ("UNCLOS")[1] art. 92 ("Ships sail under the flag of one State only and, save in exceptional cases . . . shall be subject to its exclusive jurisdiction on the high seas.").

Although this principle is subject to recognized exceptions, such exceptions are not at issue in this case because jurisdiction was based squarely on MDLEA § 70502(d)(1)(C)'s overbroad definition of a "vessel without nationality," that the vessel was stateless and thus no such exception was required. However, §70502(d)(1)(C) is

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1 The full text of the UNCLOS is available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed Nov. 2, 2022).

unconstitutional because it exceeds the limitations of the Felonies Clause.

"International law recognizes that an oral claim by the vessel's master constitutes *prima facie* proof of the vessel's nationality." *Davila-Reyes*, 23 F.4th at 186. In recognition of this principle, the MDLEA has specifically stated that a claim of nationality or registry may be asserted through, *inter alia*, "a verbal claim of nationality or registry by the master or individual in charge of the vessel." 46 U.S.C. § 70502(e). Under MDLEA §70502(d)(1)(C), however, a foreign country's response stating only that the country is unable to confirm nationality, or the country's failure to provide any response, suffices to nullify even an unequivocal claim of nationality or registry made by the person in charge of the vessel. *Id.* Section 70502(d)(1)(C) thus "displaces the *prima facie* showing of nationality that arises from an oral assertion of nationality or registry—made in accordance with international law—without any affirmative evidence to the contrary." *See Davila-Reyes*, 23 F.4th at 186.

Under customary principles of international law there are three situations that establish statelessness: the refusal to claim nationality, claiming more than one nationality, and a foreign country's disavowal of a claim of nationality. Thus, International law "recognizes two specific circumstances in which a vessel may be deemed stateless regardless of its actual status and absent any effort to determine its nationality: when the vessel refuses to claim any nationality or when it claims more than one nationality." *See Davila-Reyes*, 23 F.4th at 187. *See also* UNCLOS art. 92 ("A ship which sails under the flags of two or more States, using them

according to convenience, . . . may be assimilated to a ship without nationality.").

But no similar principle exists for the mere failure of the named country to immediately verify a claim. This is for good reason. First, an equivocal response from a named country "may have more to do with the responding country's bureaucracy than with the vessel's status." *See Davila-Reyes*, 23 F.4th 153. Alternatively, an equivocal response may result from a lack of complete information being provided to the named country. *See e.g., United States v. Lopez Hernandez*, 864 F.3d 1292, 1299 (11th Cir. 2017) (MDLEA jurisdiction based on §70502(d)(1)(C) due to equivocal response from Guatemala, even though vessel was in fact registered with Guatemala and registry documents were on board the vessel when the request to confirm was made).

Accordingly, MDLEA § 70502(d)(1)(C) adds a new category to statelessness which results in an end-run around concepts of jurisdictional principles of international law that are contained within the Felonies Clause. *See e.g., Lopez Hernandez*, 864 F.3d at 1299 (explaining that statutory jurisdiction under § 70502(d)(1)(C) does not depend on the actual statelessness of the vessel, and that § 70502(d)(1)(C) allows the United States to treat as stateless a vessel that is in fact registered to a foreign nation and subject to the exclusive jurisdiction of its flag-state under international law).

Furthermore, MDLEA's expansion of extraterritorial jurisdiction through §70502(d)(1)(C) is contradicted by established theories of international jurisdiction.

"Customary international law recognizes five theories of jurisdiction: territorial, protective, national, passive personality, and universality." *Bellaizac-Hurtado*, 700 F.3d at 1259 (Barkett, J., specially concurring). "The first four theories permit nations to exercise jurisdiction over offenses that implicate domestic interests—that is, offenses that occur within a nation's territory and those that occur outside the territory but have effects within it." *Id*. at 1260. However, none of those theories are relevant here. The offense did not occur within U.S. territory, nothing in the record implicates a domestic interest, and no U.S. citizen or resident was involved as a participant in the offense or as a victim.

Although the court below suggested that petitioner's MDLEA prosecution might or could be justified under the protective principle of international law, that suggestion is in error. The clear principle of international jurisdiction at play in a wholly foreign drug trafficking offense is the one recognized in *Furlong* when it stated that the United States could not prosecute a murder "committed by a foreigner upon a foreigner on a foreign ship." *Furlong* at 197.

The protective principle makes an exception to this basic principle when foreign nationals commit offenses against "the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, *e.g.*, espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws." RESTATEMENT

(THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 402(f).

Because the protective principle presupposes some level of connection between the crime and the interests of the offended nation, it has no relevance to a wholly foreign drug trafficking crime such as the one in the instant case. If there are no ties, there is no need for protection under the protective principle. In fact, "commentators stress that the category of protective jurisdiction offenses is quite small, and none suggest drug smuggling as one of them." Kontorovich, *Beyond the Article I Horizon*, 93 MINN. L. REV. at 1229. Rather, it is recognized that "the security of the state," intended by the protective principle, "refers to the safety and integrity of the state apparatus itself (its 'government functions' or 'state interests'), not its overall physical and moral well-being." *Id.* (citation omitted). Since wholly foreign drug trafficking crimes are not "aimed at" the government apparatus of the United States, they do not fall within the protective principle. See Kontorovich, *Beyond the Article I Horizon*, 93 MINN. L. REV. at 1130, n. 268 (citing comment in the Restatement (Third) of Foreign Relations that "[t]he protective principle may be seen as a special application of the effects principle. . . .").

If the law were to eliminate the connection required by the protective principle, it would obliterate any distinction "between protective jurisdiction and universal jurisdiction." *Id*. at 1131. And principles of international law do not recognize universal jurisdiction as applying to drug trafficking crimes. The scope of universal jurisdiction is 'ascertained by consulting the works of jurists, writing professedly on

public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Id.* (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

For reasons similar to those that led the *Bellaizac-Hurtado* Court to hold that that drug trafficking is not an Offence against the Law of Nations, drug trafficking is also not subject to universal jurisdiction. Specifically, "[n]o source of customary international law has designated drug trafficking as being subject to universal jurisdiction" and "[t]he academic community is in accord that drug trafficking is not considered a universal jurisdiction offense." *Bellaizac-Hurtado*, 700 F.3d at 1260-61 (Barkett, J., specially concurring). *See also* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINN. L. REV. 1191, 1229 (April 2009) ("Drug trafficking is not recognized in [customary international law] as a universally cognizable offense."). Because the MDLEA disregards the limitations on statelessness as required by the Felonies Clause read through customary principles of international law, MDLEA's §70502(d)(1)(C) is unconstitutional. This Court should grant the petition and declare §70502(d)(1)(C) void.

III. The MDLEA is Unconstitutional as Applied to Vessels Within a Foreign Nation's Exclusive Economic Zone (EEZ), Because the EEZ Does Not Constitute the "high Seas" Within the Meaning of the Felonies Clause and Its Incorporated Customary Principles of International Law.

MDLEA is also limited by the Felonies Clause to prosecuting felonies on the high seas. The term "high seas," like the other terms in the Define and Punish Clause – as explained previously through *Furlong, Belliazac,* and other referenced authorities – must be read in connection with customary principles of international law.

Under international law, "the waters seaward of and adjacent to the territorial sea, not extending beyond 200 nautical miles from the territorial sea baseline," are part of a coastal nation's Exclusive Economic Zone ("EEZ"). *See* 33 C.F.R. § 2.30(b). *See also* 1982 United Nations Convention on the Law of the Seas, 1833 U.N.T.S. 397, 21 ILM 1261 (1982) ("UNCLOS"), art. 55.

The 1982 United Nations Convention on the Law of the Seas specifically provides: "The exclusive economic zone is an area beyond and adjacent to the territorial sea . . . under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." UNCLOS art. 55. Coastal states have sovereign rights regarding the conservation, management, and exploitation of natural resources within their EEZ. UNCLOS art. 56. All states may enjoy the freedoms of navigation and overflight, as well as other "internationally lawful uses of the sea" within the EEZ. UNCLOS art. 58. The UNCLOS makes clear, however, that the EEZ is not part of the High Seas. See UNCLOS Part VII, Sec. 1, art. 86 ("The provisions of this Part [entitled "HIGH SEAS"] apply to all parts of the sea that ***are not included in the***

exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.") (emphasis added).

Taken together, "Articles 55 and 86 of the Convention establish that the exclusive economic zone is unique, neither part of the territorial sea nor part of the high seas." George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL W. INT'L L.J. 253, 278 (2002).

> In describing the high seas, UNCLOS art. 86 excludes the exclusive economic zone from the high seas, stating, "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone . . . ." UNCLOS art. 55 excludes the exclusive economic zone from the territorial sea by stating, "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime . . . ." *Id.*

Id. at n.136. Thus, under the UNCLOS, the EEZ "is explicitly no longer treated as part of the high seas regime." Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction*, 93 MINN. L. REV. 1191, 1233 & n.278 (April 2009) (citation omitted).

The drafting of the EEZ into UNCLOS makes clear that the EEZ was given its own designation that is distinguishable from the high seas. In fact it was the United States which gave the impetus to an EEZ when it declared control over marine resources that were beyond its territorial sea in 1945. Galdorisi and Kaufman, at 258. This set off a domino effect in which multiple nations laid claims of sovereignty over waters and resources beyond their territorial seas. Therefore,

the first United Nations Conference on the Law of the Seas gave formal recognition to these extended areas of sovereignty in 1958. *Id.* at 261. By 1970, several nations had declared sovereignty over the seas extending 200 miles out from their coast. *Id*. at 261. Negotiations continued over the scope and substance of these areas. *Id.* at 262. As the third UNCLOS grew closer, a general agreement emerged that this extended area would be neither territorial nor high seas, but a separate zone altogether. It gave sovereign rights to coastal nations, but preserved the right of lawful navigation and communication to other nations. Out of concern that these areas would become unavailable for military and strategic purposes, the United States sought to preserve what it termed, "Other internationally lawful uses of the sea . . . such as those associated with the operation of ships, aircraft and submarine cables, and compatible with other priovisions of the convention." *Id*. at 272 (footnote omitted). In exchange for those rights, however, the coastal nations extracted protections, one being that the EEZ was unambiguously established as something different than the high seas. *Id.* at 272-273.

Consistent with that agreement, the UNCLOS provisions explicitly uphold the distinction between the high seas and the EEZ. *See*, UNCLOS art. 7, ¶6; UNCLOS art. 36; UNCLOS art. 37; UNCLOS art 38 ¶1; UNCLOS art 38 ¶2; UNCLOS art 45 ¶1(b); UNCLOS art. 47; UNCLOS art 53.

This is not altered by the reservation of rights agreed to, found at UNCLOS art. 58, which reserves to all nations the right to certain "internationally lawful

uses of the sea," and which provides that "other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." See UNCLOS art. 58(1), (2). The text of art. 58 clearly states that all nations retain the right to lawful uses of "the sea," within EEZ – and it clearly does not refer to this area as the "high seas." See Galdorisi and Kaufman, at 272-273.

Thus, both the history and the language of UNCLOS "unambiguously establish[]" that the exclusive economic zone is not considered the "high seas" under international law. Galdorisi and Kaufman, at 272-273. *See also, e.g.*, Horace B. Robertson, *Naval War College International Law Studies* 64-385 at 6 (2014) (defining the "high seas" to "include all parts of the ocean seaward of the exclusive economic zone"); Katrina M. Wyman, *Unilateral Steps to End High Seas Fishing*, 6 TEX. A&M L. REV. 259, 260 (Fall 2018) (noting that "[t]he high seas [are] defined as the waters beyond these EEZs").

In sum, Congress's authority to punish felonies on the high seas is limited to the "high Seas" as that term is defined by customary international law. And that definition, as discussed above, excludes the EEZ.

In Petitioner's case, the location of the vessel was stipulated to be "approximately 80 nautical miles southwest of Mona Island, Puerto Rico." That location constitutes the EEZ of the Dominic Republic. Thus, under customary international law, that location did not constitute the "high Seas" for purposes of the Felonies Clause and consequently the MDLEA. Accordingly, the prosecution of

petitioner was in violation of the Constitution. In light of the above, this Court should grant the petition to make clear that enforcement of the MDLEA in another nation's EEZ is an unconstitutional exercise in violation of the Felonies Clause of the United States Constititon.

CONCLUSION

Based on the above, the Court should grant the petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit or, in the alternative, hold the petition pending the outcome in *Davila-Reyes*.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Margaret Foldes*
Margaret Foldes
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
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