23- ____

SUPREME COURT OF THE UNITED STATES OF AMERICA

Cristian Rodriguez

Petitioner

v.

United States of America

Respondent

On Peition for Writ of Certiorari to the United States of Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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Julio César Alejandro Serrano

QUESTIONS PRESENTED

Whether denial of a pretrial challenge to the court's subject matter jurisdiction under the Maritime Drug Enforcement Law warrants interlocutory review since citizens of foreign states, don't have to follow United States Laws and hence are effectively immune from criminal prosecution when they have not acted in contravention to United States interests or are present therein.

Whether the Maritime Drug Enforcement Law is authorized under the Define and Punish Clause as a Felony on the High Seas, as per the meaning of that term of art in the Eighteen century when it was developed to encompass a particular set of criminal acts that was incidental to piratical conduct.

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PETITION FOR WRIT OF CERTIORARI

Cristian Rodriguez, a fisherman accused of participating in a drug smuggling attempt while on international waters in the Caribbean Sea, petitions this court for a writ of certiorari to review the denial of his motion to dismiss because the Constitution of the United States of America did not authorize the Congress of the United States to criminalize drug trafficking in international waters.

OPINIONS BELOW

The district court opinion denying the motion to dismiss on the grounds that the Constitution of the United States does not authorize the enactment of a criminal statute to prohibit drug trafficking in the high seas by non-resident foreign citizens is reported at, United States v. Gutiérrez-Moreno, 615 F. Supp. 3d 97 (D.P.R. 2022). The order of the First Circuit Court of Appeals dismissing the case for want of appellate jurisdiction is attached to the appendix to this petition, at pages 1-2.

JURISIDICTION

Mr. Rodriguez's appeal was dismissed on April 13, 2023 and an order denying his petition for *en banc* review was entered on August 14, 2023. This court has jurisdiction under 28 U.S.C. § 1257 because Mr. Rodriguez has filed this petition within 90 days of the denial of the motion for rehearing *en banc.*

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, section 9, clause 10:

The Congress shall have Power […] [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations[…]

STATEMENT OF THE CASE

Pirates were the bane of the eighteen century. They predate the Caribbean and the Mediterranean seas, forcing European governments to develop a common ground on how to deal with pirates, their disruption of commerce and their threat to maritime security to all nations alike. The union which resulted from the Constitution had to empower the federal government with the authority to address piracy and felonies and offenses recognized by the consensus amongst nations. 19 Journals of the Continental Congress 315 and 361; Washington Government Printing Office (1912) ; 20 id. at 762; 21 id. at 1136–37, 1158 and Wombwell, A. James. The Long War Against Piracy: Historical Trends. Fort Leavenworth, Kansas: Combat Studies Institute Press., p. 28-49 (2010).

. The power to "declare the law and punishment of piracies and felonies committed on the high seas" was considered to be essential to this catalog of obligations that must be met pursuant to the customs and usage of civilized nations. 2 Records of the Federal Convention of 1787, at 168, 182, Max Farrand ed. (1937).

The legal principles that were developed responded to two main concerns. First, which conduct would be considered piratical and which conduct would not. Secondly, how to distinguish between non-commissioned pirates and corsairs or buccaneers, who were private individuals authorized by Government to attack and disrupt the merchant marines of enemy nations.

Mr. Cristian Rodriguez was the cook on a fishing vessel named the Mi Liny. The Mi Liny embarked from a small port in Venezuela and took to the Caribbean Sea. Once in the high seas its crew encountered a reportedly unmanned go-fast vessel. On board the vessel there were engines and bales of narcotics which the crew of the Mi Liny chose to bring on board. The United States charged all of the crewmembers under the Maritime Drug Enforcement Law 46 USC §70501 et seq., hereinafter also referred to as the MDLEA. upon detecting, boarding the Mi Liny, and seizing its crew.

Mr. Rodríguez was no pirate. The actions of the crew of the Mi Liny, even if true, did not turn him into a pirate. The prevailing view is that the MDLEA was enacted pursuant to the delegation of power in the Define and Punish Clause. United States v. Nueci-Peña, 711 F.3d 191, 198 (1st Cir. 2013) Hence, Congress had no authority to enact legislation that prohibits drug trafficking in the High Seas pursuant to a Constitutional provision that was meant to address piratical activities during the Eighteen Century.

A) Piracy was a practice defined by original body of legal principles known as the Laws of Nations and later on considered as customary international law, the felonies incident to piracy came to be defined at common law back then and known as Felonies on the High Seas.

The body of legal principles known as the law of nations developed a small subdiscipline with legal principles directed at piratical conduct. First a definition that piracy was depredation or theft upon the sea was easily achieved. Along with

theft, came other conduct that was not technically theft, but also amounted to unwanted disruption and deplorable conduct while at sea, such as murder.

The Drafters of the Constitution recognized that these "accompanying offenses" needed to be defined by the nation and not incorporated from the definitions prevailing at common law. United States v. Smith, 18 U.S. (5 Wheat) 153, at 158-59 (1820); . 5 Debates on the Federal Constitution 437 (Jonathan Elliot ed., 2d ed. 1836). Immediately following the founding of the union, Congress codified these offenses in Section 8 of the Law of 1790. Currie, David P.; The Constitution in Congress, The Federalist Period 1789-1801, at p. 93, and 296 Second Edition, The University of Chicago Press (1997):

"*And be it enacted, that if any person or persons shall commit, upon the high seas*, or in any river, haven, basin or bay*, out of the jurisdiction of any particular state,* 1) *murder or* 2) *robbery, or* 3) *any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or* 4) *if any captain or mariner of any ship or other vessel, shall, piratically and feloniously,* ***run away with such ship or vessel***, or 5) *any goods or merchandise, to the value of fifty dollars*, or 6) *yield up such ship or vessel voluntarily to any pirate*; or 7)*if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust*, or 8) *shall make a revolt in the ship*; every such offender shall be deemed, taken and adjudged to be a *pirate and felon*, and being thereof convicted, shall *suffer death*; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

As cited in United States v. Palmer, 16 U.S. 610, 626-27 (1818) (the enumeration and italics identify the felonies enacted pursuant to the crimes that the Framers considered Felonies on the High Seas.)

Secondly, that whoever overtook a vessel from its owner without commission from a recognized sovereign became an enemy of all nations alike, -e.g. stateless-; and was therefore subject to the intervention and jurisdiction of all recognized nations or sovereigns. United States v. Holmes, 18 U.S. (5 Wheat.) 412, 417–18 (1820). This second principle avoided a result in which a privateer, a corsair, or a buccaneer was prosecuted for piracy notwithstanding that his actions were really aggressions of war and not criminal acts. The authorization by commission to attack a vessel from an adversary nation made piracy legal.

But, whatever crimes occurred in ships overtaken by non-commissioned crews, regardless of their nationality, would be subject to the prosecution of whichever sovereign detained the rogue vessel. United States v. Klintock, 18 U.S. (5 Wheat.) 144, 145-46 (1820) The crew would be considered stateless and subject to prosecution by the nation that detained them for the crimes committed while the ship was under pirate control. United States v. Furlong, 18 U.S. 184, 196 (1820). However, if these crimes occurred while the vessel was under the control of a recognized sovereign they would not be considered as Offenses in the High Seas even if they occurred in the maritime demarcation known as international waters or the high seas. United States v. Palmer 16 U.S. 610, 634 (1818)

The recurrence of the piracy theme in the above cited opinions is not the coincidence. In these cases the Supreme Court differentiated felonies occurred in international waters which were within the reach of the federal courts in which were not, and the operative set of conditions that rendered them reachable was that they

shared the same piratical origin. Kontorovich, Eugene, The Define and Punish Clause and the Limit of Universal Jurisdiction 103 Northwestern Law Review 149, at page 193 (2009). The anxieties of the preconstitutional period certainly played a substantial role in the definition of offenses that could be enacted pursuant to the Define and Punish Clause. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013); *citing* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 and 719, (2004). The case law cited above – - Furlong, McKlintock, and Palmer - recognize that although that power was delegated to the national government it was limited in its scope and reach.

This historical analysis of the context in which the wording of the Constitution was approved, at least in so far as it pertain to the Government recognizing its own boundaries and limitation, is appropriate as it illustrates the meaning of legal concepts and principles as understood back then. . New York State Rifle & Pistol Assn., Inc. v. Bruen, No. 20-843, slip copy page 15 , 597 U.S. ___, 142 S. Ct. 2111, 213 L.Ed.2d 387 (June 23, 2022).

B) The MDLEA does not define a Felony on the High Seas as per the meaning of the Define and Punish Clause.

The Maritime Drug Enforcement Law is a statute that criminalizes drug trafficking in the high seas. It is applicable to all ships subject to the jurisdiction of the United States of America. And the way that the statute defines which ships are subject to the jurisdiction of the United States of America includes all ships which are stateless because they bear no indicia of nationality or because the United States naval or law enforcement authorities cannot confirm the flag state for the detained

vessel, or because the flag state of the vessel waives its jurisdiction over it. 46 USC §70503 (e) and §70502(d). .

For purposes of this petition it will be assumed that all these options for deeming a vessel stateless – i.e. that the vessel bears no indicia of nationality, that nationality has not been confirmed, or that jurisdiction has been waived – all comport to international law practices.

The contrast between the international law method, and the method which prevailed in the Eighteen Century is the main reason for this petition. In the 18th century it was the crew's conduct which rendered a vessel stateless. . United States v. Holmes 18 US 412, 416 (1820). The crew rendered a vessel stateless when it took possession of the ship and converted it to the crew's own use outside the authorization given by the flag state or sovereign. US v.Klintock 18 US 144, at 152 Thereby, a vessel became stateless not by virtue of its registration but by the actions of its crew.

All sovereigns or nations of the world could intervene and prosecute the rogue crew. No nation had priority over another. By dispossessing the authorized owner of the vessel, that crew had cut all ties with all sovereign authorities of the world. No nation owed assistance or protection to the rogue crew and all nations could prosecute the renegades, regardless of the nationality of the vessel's rightful owner or the pirates who overtook it. United States v. Klintock, 18 U.S. 144, 152 (1820)

That is not the statelessness test urged by the MDLEA. The MDLEA invokes registry, which is the method currently recognized by international law to assess the owner of a vessel. If no registry is found, regardless of the conduct of the crew; the

vessel is subject to the jurisdiction of the United States of America. Moreover, and somewhat contradictorily; if the crew of the vessel claims nationality or can produce registry papers, then American law enforcement agents may seek confirmation and/or waiver of the registry claim from the flag nation. No such practice would have been allowed or necessary under the historical meaning and reach of the concept of statelessness as a manner to acquire jurisdiction over a foreign vessel.

C) Historical analysis of the Define and Punish Clause yields that Piracies, Felonies on the High Seas, and Offenses Against the Laws of Nations corresponded to a legal body of principles reached by consensus amongst all nations of the world and did not respond to the policy considerations of any particular sovereign.

The historical approach to the definition of felonies on the high seas, and statelessness serves an important role in curbing the reach of Congressional prescriptive jurisdiction in international waters. The approach preserves the original intent of the drafters of the Constitution.

The Drafters were concerned that the new nation could respond to its international obligations with other sovereign nations. That the authority of the federal union would sufficient to meet its obligation to criminalize piratical activities and to prosecute criminal acts executed by rogue sailors while onboard pirate vessels. The Drafters deemed those prerogatives as inherent to the States' sovereign condition, and the reason for the delegation of power to the federal government was premised on the grounds of consistency in the extraction of the criminal statutes and their codification into federal law. So that a foreigner who ran away with vessels and

was found by Massachusetts authorities was exposed to the same criminal liability as someone who was found by the authorities in Pennsylvania.

The body of sovereign prerogatives that were vested upon the young nation were known as the law of nations. It was not inherited from England, or otherwise developed from common law. The body of legal principles that constituted the law of nations was developed and applied coextensively by all sovereign nations in the world and reflected the consensus amongst sovereigns rather than the policies of any particular nation.

The debate as to the extent and nature of the delegation of power were clear. The States delegated to the federal government their sovereign prerogative under the law of nations, to criminalize piracy, which was a term defined by the laws of nations. At the same time, the States delegated to the federal government their prerogative to criminalize conduct that accompanied piracy but did not constitute "theft on the high seas". If an offense was not catalogued as one that transgressed that international consensus, it was not reachable and applicable to foreigners through the Define and Punish Clause. . The Antelope 23 US 66, 117 (1825)

Hence, a historical analysis of the power delegated to the federal government provides the entire framework necessary to answer the question of which crimes or felonies may be enacted pursuant to the Define and Punish Clause.

No such international consensus exists as to drug trafficking offenses. Kontorovich, Eugene; Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes 93 Minnesota Law Review 1191, at page

1208 (2009) There is no evidence that the text of the Define and Punish Clause allowed Congress to invent international law altogether. Id at pages 1222-1223. Even the staunchest defenders of the constitutional authority to enact the MDLEA agree that drug trafficking is yet to become a universal jurisdiction offense. A.J. Casavant, In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach, 8 Harv. Nat'l Security J. 191, 196 (2017). Even if it could be argued that the Define and Punish Clause was a sort of authority window historically left open so that the United States of America could temper its extraterritorially reaching criminal statutes to the new requirements of international cooperation on the high seas; there is no evidence that the MDLEA was enacted pursuant to the consensus of all civilized nations.

Any new or novel offenses that may have to be incorporated as part of the body of offenses that may require the exercise of the jurisdiction delegated through the Define and Punish Clause must be defined and delineated, pursuant to the common perception by the international community that the conduct in question is equally offensive to all nations alike. That is not the issue with drug trafficking. Although drug trafficking is criminalized by all civilized nations in the world, such as murder, or rape, or even theft; the practice of trafficking narcotics is not borne out of the relationship amongst nations. The prohibition against drug trafficking is not the result of the necessary common use of the sea as a universal resource; and ultimately the prohibition is not the result of the interaction of sovereigns in the common arena.

Although prohibiting drug trafficking is a venerable policy aggressively sponsored by the United States Congress, it is not universally frowned upon with the intensity. While most civilized drugs prohibit the trafficking of controlled substances, their approaches vary widely. Hence, it would matter which sovereign detains a defendant, and would also matter what steps a person would have taken so that his commercial activity would not facilitate or otherwise assist drug trafficking endeavors. Gonzalez v. Raich 545 US 1, 25 (2005). (Congress may criminalize possession with intent to distribute through the powers enumerated in the Commerce Clause).

In other words, a person who fixes a cargo boat of a known drug trafficker to make it seaworthy might not be in violation of the drug trafficking prohibitions in his own country. However, that person would be in violation of the MDLEA if the vessel takes to the high seas, or worse yet, if the United States Coast Guard detects the vessel in the territorial waters of the flag country and requests a waiver of jurisdiction.

An opinion from the Supreme Court providing a limiting framework for Congressional action in this topic is necessary to preserve the original delegation of power made to the Congress of the United States of America through the Define and Punish Clause.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In the instant case the First Circuit Court of Appeals held that the challenge to the dispositions through which the federal government reached and intends to

prosecute his conducts merely challenge the district court;s personal jurisdiction. And that insofar as the motion merely claims that the indictment fails to state an offense, both issues are not amenable to interlocutory appeal. See opinion in Appendix. Both statements also exemplify the reasons why certiorari should be granted. Because the indictment reaches both conduct and individuals who are functionally immune from the authority and delegations delineated in the Constitution of the United States of America.

There is a significant conflict amongst the Circuits as to whether the jurisdictional test required by the MDLEA for the applicability of the statute to a vessel results from the district court's extension of its personal jurisdiction over crew members or the application of subject matter jurisdiction to vessels deemed stateless.

At first glance the statutory provision defining the scope of the prohibition in the MDLEA seems to limit the substantive reach of the statute. The statute itself indicates that it extends to vessels under the jurisdiction of the United States of America. And the First Circuit has held that 46 USC §70503 (c)(1) simply limits the reach of the statute without amplifying or otherwise requiring an extension of the Court's subject matter jurisdiction. United States v. Dávila-Reyes, No. 16-2089, at p. 4 and p. 25 (1st Cir. Oct. 5, 2023). The opinion itself recognizes the circuit split at p. 25 As several circuits have considered that the extension of the applicability of the MDLEA to foreign vessels extends the subject matter jurisdiction of the Court, United States v. Miranda, 780 F.3d 1185, 1191 (D.C. Cir. 2015); United States v. Tinoco, 304 F.3d 1088, 1106 (11th Cir. 2002); United States v. Bustos-Useche, 273

F.3d 622, 626 (5th Cir. 2001) while the First Circuit and the Second Circuit have held that it does not. United States v. Gonzalez, 311 F.3d 440 (1st Cir. 2002), United States v. Prado, 933 F.3d 121, 132-51 (2nd Cir. 2019).

However, upon closer inspection, the statute really extends the subject matter jurisdiction of Congress by roping in vessels which could not otherwise be reached but for the fact that they carried narcotics. US v. Rendon 354 F3d 1320, 1324 (11th Cir. 2003) These vessels in the high seas are not subject to United States naval regulations, trade laws, or custom powers of the federal government. But, because they carry narcotics, that fact, and that fact alone, makes them amenable to prosecution pursuant to the MDLEA. Since virtually all circuits to consider the matter have discarded the need for a nexus between the United States and the illicit cargo, the issue becomes then whether the vessel is carrying narcotics or not, and not whether these were intended for distribution or importation into the United States. Id at 1325.

The naval authorities of the United States have a right of inspection inherent in the international law consensus regarding the use of the high seas. All domestic vessels are subject to inspection by any sovereign's naval authority. Foreign vessels cannot be said to be under the jurisdiction of the United States until the naval authorities detect that controlled substances are carried within it.

Hence, the statutory provisions of the MDLEA are not meant to instrument or regulate the acquisition of personal jurisdiction by the Courts, but to establish that

the Courts have subject matter jurisdiction over the crew of the vessel because of the drug trafficking conduct.

The United States needs to establish such conduct before being able to prosecute the crew and there is a difference between being able to establish an offense and not being able to prosecute. Blackledge v. Perry, 417 U.S. 21, 30 (1974).. Before that operative factual assessment, the Government is unable to prosecute the defendants, and not merely unable to establish an offense at trial. Class v. United States, 138 S. Ct. 798, 805 (2018) The crewmembers of the vessel are wholly and entirely exempt from complying or even minding the laws of the United States of America. They should also be entitled to pretrial resolution of that claim. . Abney v. United States, 431 U.S. 651, 659 (1977)

Their vessel remains the territory of the nationality of its owners, the crewmembers may respond to that sovereign and to their own national sovereign for their conduct. But, crewmembers are not bound to the laws of the United States prior to the detection of drug trafficking conduct.

Unlike other US citizens and residents who may owe allegiance to federal laws regardless of where they are *see* Carlisle v. United States 16 Wall. 147, 83 US 147, 154 (1872); these individuals owe no such allegiance. They are effectively immune from application of the laws of the United States to their conduct. Congress cannot prescribe criminal prohibitions to foreign crewmembers on board foreign vessels no more than it could prescribe naval regulations, trade prohibitions, or impose taxes upon those vessels and their crew. Morrison v. National Australia Bank Ltd. 561 US

247, 255 (2010). (recognizing that Congress usually legislates to regulate domestic and not foreign matters.)

The argument in this case is that the enabling constitutional provision for the MDLEA does not reach the type of conduct that Congress criminalized. Hence, the Define and Punish Clause did not recognize an abrogation of the de facto immunity against the application of United States laws that has be recognize to foreigners on board foreign vessels. The defendant, a Venezuelan national, did not need to even mind the existence of the MDLEA and its prohibitions.

A review of the congressional debates, some legal historians, contemporaneous commentators, and legislation enacted during the First Congress all lead to the same conclusion. The intended delegation of powers was limited to the narrow set of offenses enacted by Congress in the Act of 1790. Possession with intent to distribute a controlled substance is not a felony rooted in the common law tradition.

The extension of prescriptive jurisdiction delegated under the Define and Punish Clause is distorted by the MDLEA. The crew of the vessel in which the defendant was arrested did absolutely nothing to render the Mi Liny or themselves *hostis humani generis* a rogue vessel acknowledging the authority, or owing allegiance to no sovereign. No tradition existed that considered drug traffickers as individuals acknowledging the authority of no nation. The Define and Punish Clause did not delegate to Congress the power to reach the conduct of foreigners in foreign vessels, that had not been rendered stateless through the actions of their crews.

As prosecution continues in this case, that de facto immunity is lost. That issue is sufficiently collateral to warrant interlocutory review. Cohen v. Beneficial Industrial Loan Corp. 337 US 541, 546 (1949) Hence, a rule that clarifies whether such lack of allegiance is tantamount to immunity; and whether such immunity is effectively lost if a MDLEA charge is allowed to proceed against a foreign crewmember onboard a foreign vessel is an important question of law as well.

Another conflict between the circuits is apparent when one looks to the application of the prohibition to vessels that may not be in international waters, or vessels not in the high seas.

Each circuit to have tackled the issue seems to have developed a different approach as to when and how to concern itself with the fact that the conduct criminalized by the MDLEA may not only occur far away from the territory of the union, but that prosecution may impinge upon the policy interests of foreign states. Where and when was the person detected with the illegal cargo plays a role on whether the MDLEA was violated or not, depending on the circuit. That is precisely the inconsistencies that the Drafters sought to avoid.

Four circuits have held that the extraterritorial application of the MDLEA is premised upon the recognition that international drug trafficking is a serious problem for which Congress was allowed to enact proper prohibitions through legislation. United States v. Ballestas 795 F3d 138, at p. 144-45 (D.C. Cir. 2015); US. V. Antonius 73 Fed. 4th 82, 88 (2nd Cir. 2023); US v. Davila Mendoza 972 F3d 1264, 1275 (11th Cir. 2020), US v. Suerte 291 F3d 366 (5th Cir. 2002).

In United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) the Eleventh Circuit held that a foreign vessel detained in the territorial waters of a foreign nation was not amenable to prosecution pursuant to the MDLEA because the statute did not define an offense against the law of nations.

Meanwhile, the First Circuit's *en banc* opinion in United State v. Aybar-Ulloa 987 F3d 1, 3-4 (1st Cir. 2021) has at the very least implicitly recognized that the extension of jurisdiction under the statute beyond the contours of the territorial principle of prescriptive international law is problematic. Aybar-Ulloa along with the Ninth Circuit decision in US v. Moreno Morillo 334 F3d 819, 827 (9th Cir. 2003) are premised upon a finding that individuals onboard an unregistered vessel are amenable to jurisdiction under the MDLEA because failure to provide proof of registry is tantamount to statelessness and stateless vessel allow the exercise of jurisdiction by any interdicting sovereign.

A clarification of the rule of the game in the enactment of extraterritorial legislation criminalizing conduct in the high seas is long overdue.

Requiring that Congress enact and define an extraterritorial offense within the proper operative framework might stimulate international consensus as to the policies that should govern a truly universal prohibition of controlled substances. It would also certainly place the nation in a position to better exploit its bargaining position with foreign nations when articulating the terms of covenants that implement policies which prohibit international controlled substances trade.

CONCLUSION

This Court must grant certiorari to review the determination of the First Circuit that the determination of whether the MDLEA applies or not to foreign crewmember is an issue that only pertains to the extension of the court's personal matter jurisdiction.

The Court should clarify that applicability of the MDLEA is a subject matter jurisdictional issue with profound constitutional implications. Moreover, it should also clarify that the Define and Punish Clause only authorizes the enactment of criminal statutes that prohibit piracy and criminal conduct that is incidental to or related to such piratical conduct of rogue crewmembers. Hence the MDLEA, which prohibits drug trafficking on board all vessels found in the high seas, was not a proper exercise of Congressional authority pursuant to the Define and Punish Clause.

PROOF OF SERVICE

A copy of the petition for certiorari and the motion to proceed in forma pauperis has been sent to the United States Attorney's Office for the District of Puerto Rico at Suite 1201 Torre Chardón, 350 Chardón Street, San Juan, Puerto Rico 00918 and to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D. C. 20530–0001.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this November 13, 2023.

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US Supreme Court No. 252167

INDEX TO APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 22-1629
22-1832

UNITED STATES,

Appellee,

v.

CRISTIAN RODRIGUEZ,

Defendant - Appellant.

Before

Barron, Chief Judge,
Lynch and Kayatta, Circuit Judges.

JUDGMENT

Entered: April 13, 2023

The government moves to dismiss these consolidated appeals as premature requests for review of the district court's denial of a motion to dismiss an indictment. Having carefully reviewed the record and the filings of the parties, we conclude that this court lacks jurisdiction to consider these appeals because the challenged orders are not final and are not immediately appealable under the collateral order doctrine.

In a criminal case, a defendant usually must wait until after sentencing to obtain appellate review of an interlocutory order. See Flanagan v. United States, 465 U.S. 259, 263 (1984) ("In a criminal case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence."). Here, defendant asserts that his motion to dismiss was based on a claim of "immunity," but he does not identify an explicit constitutional or statutory pronouncement giving rise to the claim of "immunity." See United States v. Joseph, 26 F.4th 528, 533-34 (1st Cir. 2022) (discussing requirement "that a right not to be tried must be explicitly rooted in a statute or the Constitution" in order to "serve as a basis for interlocutory review").

Further, to the extent defendant's immunity claim is, in substance, a claim that the district court lacks personal jurisdiction, such a claim is insufficient to anchor an immediate appeal. See United States v. Sorren, 605 F.2d 1211, 1214 (1st Cir. 1979) ("Nor does the fact that this case

involves personal jurisdiction over a criminal defendant necessarily elevate this inconvenience to a basis for immediate appeal."). "Finally, to the extent that [defendant] merely allege[s] that the indictment fails to state an offense, this theory is not amenable to interlocutory appeal. As the Supreme Court has explained, 'an order denying a motion to dismiss an indictment for failure to state an offense . . . may be reviewed effectively, and, if necessary, corrected if and when a final judgment results.'" Joseph, 26 F.4th at 535–36 (1st Cir. 2022) (quoting Abney v. United States, 431 U.S. 651, 663 (1977)).

We, accordingly, grant the government's motion and dismiss these appeals without expressing any views beyond those expressly set out above. All pending motions, to the extent not mooted by the foregoing, are denied.

DISMISSED.

By the Court:

Maria R. Hamilton, Clerk

cc:
Cristian Rodriguez
Nicholas Warren Cannon
David Christian Bornstein
Antonio Perez-Alonso
Corinne Cordero-Romo
Jordan Huffman Martin
Mariana E. Bauzá-Almonte
Jenifer Y. Hernández-Vega
Julio César Alejandro-Serrano

United States Court of Appeals
For the First Circuit

Nos. 22-1629
22-1832

UNITED STATES,

Appellee,

v.

CRISTIAN RODRIGUEZ,

Defendant - Appellant.

Before

Barron, Chief Judge,
Lynch, Kayatta, Gelpí*,
Montecalvo and Rikelman, Circuit Judges.

ORDER OF COURT

Entered: August 14, 2023

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Julio César Alejandro-Serrano, Cristian Rodriguez, Jenifer Y. Hernández-Vega, Mariana E. Bauzá-Almonte, Nicholas Warren Cannon, David Christian Bornstein, Antonio Perez-Alonso, Corinne Cordero-Romo, Jordan Huffman Martin

* Judge Gelpí is recused and did not participate in the determination of this matter.