

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

CHRISTIAN LEONARDO FRANCO POSLIGUA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*

The Petitioner, Christian Leonardo Franco Posligua, requests leave, pursuant to Rule 39.1 of the Supreme Court Rules, to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously sought and been granted leave to proceed *in forma pauperis* in the following court: The United States District Court for the Eastern District of Texas.

Undersigned counsel was admitted to practice before the U.S. Supreme Court June 23rd, 2014. Additionally, undersigned counsel has

been appointed under the Criminal Justice Act of 1964, 18 USC § 3006A.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137

Attorney for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

CHRISTIAN LEONARDO FRANCO POSLIGUA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137

Attorney for Petitioner

Questions Presented

1. For purposes of the Maritime Drug Law Enforcement Act (MDLEA), does a district court have authority to make its “preliminary” determination of “jurisdiction”, two years after the defendant entered his guilty plea, and a year and a half after the district court signed the defendant’s written judgment?
2. For purposes of 46 U.S.C. § 70504(a), does the term “jurisdiction” refer to a district court’s subject matter or jurisdiction, or does it instead refer to the extraterritorial reach of the statute?

Table of Contents

	Page
Questions Presented	ii
Table of Contents	iii-iv
Table of Authorities	v-vii
Citation to Opinion Below	1
Jurisdiction	1
Federal Statutes	2-5
Statement of the Case	6-9
First reason for granting for granting the Writ: The Government failed to establish a factual predicate necessary for the district court to have subject matter jurisdiction.	10-11
Second reason the Court should grant the Writ: Timing matters; because the district court had not preliminarily determined that it was possessed of jurisdiction, the district court was without authority to accept Posligua's guilty plea, and also without authority to sentence him.	12-14
Third reason the Court should grant the Writ: When a federal court is shown to lack subject matter jurisdiction, the court's only option is dismissal without prejudice to refile.	14-16
Fourth reason for granting the Writ: The Fifth Circuit's decision not to dismiss the charge against Posligua when that Court was first made aware that the district court had not established jurisdiction will set a dangerous precedent which would allow MDLEA cases to proceed without a court ever determining whether or not it has jurisdiction.	16-17

Fifth reason for granting for granting the Writ: There is a circuit 17-20 split as to whether the word “jurisdiction” in 46 U.S.C. § 70504(a) refers to subject matter jurisdiction or instead to the extraterritorial reach of the MDLEA.

Conclusion 20

Certificate of Service 21

Appendix A: Opinion of Fifth Circuit Court of Appeals

Table of Authorities

Page(s)

Cases

<i>Arbaugh v. Y & H Corp.</i> , 546 U.S. 500 (2006).....	15
<i>Gonzalez v. Crosby</i> , 545 U.S. 524 (2005).....	12
<i>Griener v. United States</i> , 900 F.3d 700 (5th Cir. 2018).....	15
<i>Grupo Dataflux v. Atlas Glob. Grp., L.P.</i> , 541 U.S. 567 (2004).....	13
<i>Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee</i> , 456 U.S. 694 (1982).....	13, 14
<i>Keene Corp. v. United States</i> , 508 U.S. 200 (1993).....	13
<i>Newman-Green, Inc. v. Alfonzo-Larrain</i> , 490 U.S. 826 (1989).....	13
<i>Ruhrgas Ag v. Marathon Oil Co.</i> , 526 U.S. 574 (1999).....	13
<i>Sanchez-Llamas v. Oregon</i> , 548 U.S. 331 (2006).....	13
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	13
<i>United States Catholic Conference v. Abortion Rights Mobilization, Inc.</i> , 487 U.S. 72 (1988).....	12

<i>United States v. Bustos-Useche</i> , 273 F.3d 622 (5th Cir. 2001)	6, 9, 19
<i>United States v. Cabezas-Montano</i> , 949 F.3d 567 (11th Cir. 2020)	11
<i>United States v. Canario-Vilomar</i> , 128 F.4th 1374 (11th Cir. 2025)	20
<i>United States v. Dávila-Reyes</i> , 84 F.4th 400 (1st Cir. 2023)	18
<i>United States v. De La Garza</i> , 516 F.3d 1266 (11th Cir. 2008)	14
<i>United States v. Gonzalez</i> , 311 F.3d 440 (1st Cir. 2002)	14
<i>United States v. Guerro</i> , 789 F. App'x 742 (11th Cir. 2019)	15
<i>United States v. Iguaran</i> , 821 F.3d 1335 (11th Cir. 2016)	16
<i>United States v. Lipscomb</i> , 299 F.3d 303 (5th Cir. 2002)	17, 18
<i>United States v. Male Juvenile</i> , 148 F.3d 468 (5th Cir. 1998)	11
<i>United States v. Mitchell-Hunter</i> , 663 F.3d 45 (1st Cir. 2011)	14
<i>United States v. Munoz Miranda</i> , 780 F.3d 1185 (D.C. 2015)	20
<i>United States v. Perlaza</i> , 439 F.3d 1149 (9th Cir. 2006)	11, 15

<i>United States v. Prado</i> , 933 F.3d 121 (2d Cir. 2019)	11, 15, 17, 19
--	----------------

<i>United States v. Ritchie</i> , 15 F.3d 592 (6th Cir. 1994)	10
--	----

<i>United States v. Scruggs</i> , 714 F.3d 258 (5th Cir. 2013)	10
---	----

Statutes

18 U.S.C. § 5032	10
------------------------	----

46 U.S.C. § 70502	2
-------------------------	---

46 U.S.C. § 70503	4, 5, 18
-------------------------	----------

46 U.S.C. § 70504(a)	6, 12, 17, 20
----------------------------	---------------

46 U.S.C. § 70506	5
-------------------------	---

Other Authorities

<u>Webster's New World Dictionary</u> (2nd college ed. 1970)	12
--	----

PETITION FOR WRIT OF CERTIORARI

Petitioner Christian Leonardo Franco Posligua respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Posligua's conviction is styled: *United States v. Posligua*, No. 22-40393, 2025 U.S. App. LEXIS 7133 (5th Cir. March 27, 2025).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Posligua conviction was announced on March 27, 2025 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the date of the entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statutes:

46 U.S.C. § 70502. Definitions

...

(c) Vessel subject to the jurisdiction of the United States.

(1) In general. In this chapter [46 USCS §§ 70501 et seq.], the term “vessel subject to the jurisdiction of the United States” includes—

- (A) a vessel without nationality;
- (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
- (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;
- (D) a vessel in the customs waters of the United States;
- (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and
- (F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that—
 - (i) is entering the United States;
 - (ii) has departed the United States; or
 - (iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(d) Vessel without nationality.

(1) In general. In this chapter [46 USCS §§ 70501 et seq.], the term “vessel without nationality” includes—

- (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 United States law, to make a claim of nationality or registry for that vessel;
- (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; and
- (D) a vessel aboard which no individual, on request of an officer of the United States authorized to enforce applicable provisions of United States law, claims to be the master or is identified as the individual in charge, and that has no other claim of nationality or registry under paragraph (1) or (2) of subsection (e).

(2) Response to claim of registry. The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of nationality or registry. A claim of nationality or registry under this section includes only—

- (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. § 70503. Prohibited Acts

(a) **Prohibitions.** 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;
- (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or
- (3) conceal, or attempt or conspire to conceal, more than \$100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) **Extension beyond territorial jurisdiction.** Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

...

(d) **Burden of proof.** The United States Government is not required to negative a defense provided by subsection (c) in a complaint, information, indictment, or other pleading or in a trial or other proceeding. The burden of going forward with the evidence supporting the defense is on the person claiming its benefit.

(e) **Covered vessel defined.** In this section the term “covered vessel” means—

- (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
- (2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70504. Jurisdiction and Venue

(a) **Jurisdiction.** Jurisdiction of the United States with respect to a vessel subject to this chapter [46 USCS §§ 70501 et seq.] is not an element of an offense. Jurisdictional issues arising under this chapter [46 USCS §§ 70501 et seq.] are preliminary questions of law to be determined solely by the trial judge.

(b) **Venue.** A person violating section 70503 or 70508 [46 USCS § 70503 or 70508]—

(1) shall be tried in the district in which such offense was committed; or

(2) if the offense was begun or committed upon the high seas, or elsewhere outside the jurisdiction of any particular State or district, may be tried in any district.

46 U.S.C. § 70506. Penalties

...

(b) **Attempts and conspiracies.** A person attempting or conspiring to violate section 70503 of this title [46 USCS § 70503] is subject to the same penalties as provided for violating section 70503 [46 USCS § 70503].

Statement of the Case

Posligua was charged in a one-count indictment (filed May 12, 2021) with conspiracy to possess with intent to distribute a controlled substance (cocaine) onboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b). He ostensibly entered a guilty plea to that offense on January 6, 2022. He was sentenced June 15, 2022, with the district court signing the written judgment June 17, 2022.

On appeal, Posligua argued that because the district court did not have subject matter jurisdiction at the time he entered his plea and was sentenced, the court's actions were void. The MDLEA provides:

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). The Fifth Circuit interprets “jurisdiction” to refer to subject matter jurisdiction. *United States v. Bustos-Useche*, 273 F.3d 622, 626 (5th Cir. 2001). The Government has the burden at this preliminary determination to establish that the vessel at issue comes within one of six “vessel subject to the jurisdiction of the United States”

categories. In this case, the district court made no attempt to fulfill its obligation to make a preliminary finding of subject matter jurisdiction. Nor did the Government attempt to satisfy its burden to prove that the vessel in which Posligua was arrested was subject to the jurisdiction of the United States.

In the Fifth Circuit's initial opinion, the Court determined that "[t]he district court ultimately did not make a determination as to its jurisdiction before accepting Posligua's plea agreement." *United States v. Posligua*, No. 22-40393, 2023 U.S. App. LEXIS 14914, at *3 (June 15, 2023). The Court ordered a limited remand "to permit the district court to determine, *in the first instance*, whether it has jurisdiction." *Id.* at *4.

On August 16, 2023, more than a year and a half after Posligua entered his guilty plea, the Government attempted to satisfy its burden after the fact, styling its brief: "Brief and Motion for Preliminary Determination of Jurisdiction Under the Maritime Drug Law Enforcement Act." Attached to this pleading was a certificate of a Coast Guard Commander setting forth some facts regarding the seizure and arrest of the occupants. Posligua argued in his brief to the district court

that the word “preliminary” does not allow the Government to meet its burden of establishing jurisdiction, *post hoc*.

On January 2, 2024, nearly two years after the district court signed Posligua’s written judgment, in reliance on the Coast Guard Commander’s certificate, the district court issued an order finding that it now had jurisdiction over Posligua’s case.

Posligua again appealed, making the same arguments to the Fifth Circuit that he made to the district court on remand. The Fifth Circuit, while acknowledging that a district court “should and usually will make the required jurisdictional determination before taking certain actions,” determined that the district court did in fact have subject matter jurisdiction:

This preliminary determination is not a prerequisite to the court’s jurisdiction in the sense that the district court must complete some formalistic procedure before it is imbued with judicial power. Rather, it is a prerequisite in the sense that the vessel predicated an MDLEA charge must have been subject to the jurisdiction of the United States for the district court to have subject matter jurisdiction over the charge. Whether the vessel was subject to the jurisdiction of the United States is not dependent on the timing of the district court’s determination.

Posligua, 2025 U.S. App. LEXIS 7133, at *12.

The Fifth Circuit also noted a circuit split as to whether the phrase “subject to the jurisdiction of the United States” refers to subject matter jurisdiction, or instead refers to the prescriptive reach of the MDLEA. The Fifth Circuit – rather half-heartedly – affirmed that in the Fifth Circuit, the phrase refers to subject matter jurisdiction:

Our decision in *United States v. Bustos-Useche*, 273 F.3d 622 (5th Cir. 2001)] instructs us to construe the language as a limit on subject matter jurisdiction. . . . We concluded that the district court’s preliminary jurisdiction of whether a vessel is subject to the jurisdiction of the United States is a “prerequisite to the court’s jurisdiction.”

We further observed in a somewhat cryptic footnote . . . that the language “could arguably be interpreted to relate to the district court’s authority to act on this case, separate and apart from whether the United States had jurisdiction over the vessel.”

Posligua, 2025 U.S. App. LEXIS 7133, at *7-8.

First reason for granting for granting the Writ: The Government failed to establish a factual predicate necessary for the district court to have subject matter jurisdiction.

Subject matter jurisdiction can be attacked on two fronts, one facial, the other factual. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack challenges the sufficiency of the pleading itself. *Id.* If the charging instrument tracks the relevant federal statute, that is usually all that is necessary to vest a federal court with subject matter jurisdiction. *United States v. Scruggs*, 714 F.3d 258, 262 (5th Cir. 2013) (“To invoke that grant of subject matter jurisdiction, an indictment need only charge a defendant with an offense against the United States in language similar to that used by the relevant statute.”).

But some federal criminal statutes also include a factual component in establishing subject matter jurisdiction. *See Scruggs*, 714 F.3d at 262 n. 14 (The government can fail to establish criminal subject matter jurisdiction by failing to comply with another statutory jurisdictional requirement). For example, if the government wants to charge a juvenile with committing acts of juvenile delinquency, there has to be certification under 18 U.S.C. § 5032 by the Attorney General of certain facts. 18 U.S.C.

§ 5032. If that certification is not produced or it not signed by the Attorney General, the district court does not have subject matter jurisdiction. *United States v. Male Juvenile*, 148 F.3d 468, 472 (5th Cir. 1998).

In an MDLEA case, it is the government’s burden to show as part of the district court’s preliminary determination of jurisdiction that the vessel at issue comes within one of the six “vessel subject to the jurisdiction of the United States” categories. *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006); *United States v. Cabezas-Montano*, 949 F.3d 567, 588 (11th Cir. 2020); *United States v. Prado*, 933 F.3d 121, 129 (2d Cir. 2019).

Because the Government in this case never established this factual predicate, the district court did not have subject matter jurisdiction at the time Posligua was convicted and sentenced. Because the district court was not possessed of subject matter jurisdiction, Posligua’s judgment of conviction was void. The fact that the Government later provided some evidence tending to show that the vessel at issue was subject to the jurisdiction of the United States does not cure the original void judgment.

Second reason the Court should grant the Writ: Timing matters; because the district court had not preliminarily determined that it was possessed of jurisdiction, the district court was without authority to accept Posligua's guilty plea, and also without authority to sentence him.

Again,

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). Preliminary means “coming before or leading up to the main action.” Webster's New World Dictionary 1122 (2nd college ed. 1970).

It is undisputed that at the time Posligua entered his guilty plea, and at the time he was sentenced, the Government had not carried its burden to establish jurisdiction. A judgment issued by a federal court not possessed of subject matter jurisdiction is void. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005).

There is plenty of Supreme Court authority for the proposition that timing matters:

- “The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.” (Cleaned up.) *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998);
- “[T]he jurisdiction of the Court depends on the state of things at the time of the action brought.” *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993);
- The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989);
- “This time-of-filing rule is hornbook law . . . taught to first-year law students in any basic course on federal civil procedure.” *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-71 (2004);
- “[J]urisdiction is the power to declare the law and without jurisdiction the court cannot proceed at all in any cause.” (Cleaned up.) *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999);
- “[A]n adversary system . . . relies chiefly on the *parties* to raise the significant issues and present them to the courts in the appropriate manner *at the appropriate time for adjudication*. . . . The consequence of failing to raise a claim for adjudication *at the proper time* is generally forfeiture of the claim.” (Emphasis added.) *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356-57 (2006);
- “The validity of an order of a federal court depends upon that court’s having jurisdiction over both the subject matter and the parties.” *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701 (1982).

In the context of the MDLEA, the rule is the same, irrespective of whether jurisdiction refers to subject matter jurisdiction or the

extraterritorial reach of the statute. *See United States v. Mitchell-Hunter*, 663 F.3d 45, 50 n.7 (1st Cir. 2011) ("[J]urisdiction under the MDLEA may be established at any time prior to trial[.]"); *United States v. Gonzalez*, 311 F.3d 440, 447 (1st Cir. 2002) (Torruella, J., concurring) ("whether a vessel is within the jurisdiction of the United States for purposes of the MDLEA is a proper question for the judge, as it bears upon the right of the court to entertain the claim."); *United States v. De La Garza*, 516 F.3d 1266, 1272 (11th Cir. 2008) ("[F]or a district court to have adjudicatory authority over a charge that a defendant conspired to violate the [MDLEA], the Government must preliminarily show that the conspiracy's vessel was, when apprehended, subject to the jurisdiction of the United States.") (Cleaned up.).

Third reason the Court should grant the Writ: *When a federal court is shown to lack subject matter jurisdiction, the court's only option is dismissal without prejudice to refile.*

A party cannot waive subject matter jurisdiction. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court

must dismiss the complaint in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). A dismissal by a district court based on lack of subject matter jurisdiction is to be a dismissal without prejudice to refile. *Griener v. United States*, 900 F.3d 700, 705-06 (5th Cir. 2018).

In the context of the MDLEA, the rule is the same, irrespective of whether jurisdiction means subject matter jurisdiction or the extraterritorial reach of the statute. *See United States v. Prado*, 933 F.3d 121, 153-54 (2d Cir. 2019) (“[I]f the government fails to establish the jurisdictional element, such as by failing to show that the vessel was subject to the jurisdiction of the United States, the court should dismiss the indictment.”); *United States v. Guerra*, 789 F. App'x 742, 750-51 (11th Cir. 2019) (“These failures to comply with the MDLEA's jurisdictional requirements mean we must vacate the convictions and sentences[.] . . . On remand, the District Court is directed to dismiss the indictment for lack of jurisdiction and vacate the judgments of conviction.”); *United States v. Perlaza*, 439 F.3d 1149, 1153 (9th Cir. 2006) (“We reverse the convictions of all ten Defendants who opted for trial and direct the district court to dismiss the indictment because the district court erroneously exercised jurisdiction over them without first requiring the Government

to allege in the indictment and prove to a jury beyond a reasonable doubt certain facts necessary to establish jurisdiction.”); *Cf. United States v. Iguaran*, 821 F.3d 1335, 1338 (11th Cir. 2016) (case remanded for additional factual development because record contained no facts supporting jurisdiction).

Fourth reason for granting the Writ: The Fifth Circuit’s decision not to dismiss the charge against Posligua when that Court was first made aware that the district court had not established jurisdiction will set a dangerous precedent which would allow MDLEA cases to proceed without a court ever determining whether or not it has jurisdiction.

But for Posligua’s complaint on appeal, the district court herein would never have addressed the issue of whether it had jurisdiction. If the Fifth Circuit’s handling of this case is not corrected, the decision will be precedent for the proposition that a finding of subject matter jurisdiction in a MDLEA case does not have to be a preliminary finding. In fact, it will be precedent for the notion that a district court doesn’t ever have to make a jurisdictional finding at all – unless the defendant

somehow fortuitously manages to convince an appellate court to remand the case back to the district court for such a finding.

Fifth reason for granting for granting the Writ: *There is a circuit split as to whether the word “jurisdiction” in 46 U.S.C. § 70504(a) refers to subject matter jurisdiction or instead to the extraterritorial reach of the MDLEA.*

The Second Circuit in *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019) described the conceptual difference between subject matter jurisdiction (“judicial jurisdiction”), as compared to the reach or coverage of a statute (“legislative jurisdiction”):

Judicial jurisdiction raises the question whether a case comes within the judicial power of the court, so that the court possesses the legal power to adjudicate the case. Legislative, or prescriptive, jurisdiction concerns itself with the reach of a nation’s (or any political entity’s) laws. With respect to conduct occurring outside of a nation’s territory, it asks whether the nation possesses, or has exercised, legislative power over those acts.

Id. at 133.

Judge Wiener noted in *United States v. Lipscomb*, 299 F.3d 303 (5th Cir. 2002):

[L]egislative jurisdiction flows from the Constitution to the Congress and limits, in today's context, the subject matter and the classes of persons that Congress may regulate by statute. In contrast, adjudicative jurisdiction generally flows from Congress to the courts as grants of subject-matter jurisdiction, grants made by Congress in enacting laws pursuant to its power to constitute inferior federal courts.

Id. at 316. Legislative jurisdiction must always precede subject matter jurisdiction:

[A] court's adjudicative jurisdiction to convict a defendant of a federal crime cannot exist in the absence of Congress's legislative jurisdiction to criminalize the particular conduct of which the particular defendant is accused.

Id.

The First and Second Circuits have held that “jurisdiction” refers to the extraterritorial reach of the MDLEA.

First Circuit

Thus, § 70503(e)(1) does not by using the term “jurisdiction” impose a limitation on the Article III subject matter jurisdiction of courts. It instead defines the scope of the regulatory jurisdiction that Congress is asserting through the MDLEA.

United States v. Dávila-Reyes, 84 F.4th 400, 412 (1st Cir. 2023).

Second Circuit

The natural meaning of the words of the statute, if they are read in context in the manner in which the various provisions and definitions fit together, make clear that the term "vessel subject to the United States" specifies the reach, or coverage, of the statute and does not in any way address the jurisdiction of the court.

United States v. Prado, 933 F.3d 121, 134 (2d Cir. 2019).

The Fifth, Eleventh and D.C. Circuits have held that the phrase “jurisdiction” refers to subject matter jurisdiction.

Fifth Circuit

Bustos's argument hinges on whether the jurisdictional requirements of [the MDLEA] are merely substantive elements of the crime or prerequisites to the district court's subject matter jurisdiction. . . . [W]e conclude that the district court's preliminary determination of whether a flag nation has consented or waived objection to the enforcement of United States law is a prerequisite to the court's jurisdiction[.] Bustos is therefore not foreclosed from raising the issue on appeal.

Bustos-Useche, 273 F.3d at 626.

Eleventh Circuit

Nonetheless, whether a vessel is subject to the jurisdiction of the United States is not an element of an MDLEA offense, but instead is solely an issue of subject matter jurisdiction that

should be treated as a preliminary question of law for the court's determination. (Cleaned up.)

United States v. Canario-Vilomar, 128 F.4th 1374, 1379-80 (11th Cir. 2025).

D.C. Circuit

In their second claim under the statute, appellants contend that their charged offenses did not involve "vessel[s] subject to the jurisdiction of the United States" as defined by the MDLEA. . . . Unlike appellants' other arguments, this one, we conclude, goes to the district court's subject-matter jurisdiction.

United States v. Munoz Miranda, 780 F.3d 1185, 1191 (D.C. 2015).

The placement of § 70504(a) reinforces that it pertains to the subject-matter jurisdiction of district courts rather than the legislative "jurisdiction" of Congress.

Id. at 1196.

Conclusion

For the foregoing reasons, Petitioner Posligua respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN. 00792137
Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 7th day of May, 2025.

/s/ John A. Kuchera
John A. Kuchera,
Attorney for Christian Leonardo Franco Posligua

Appendix A

United States v. Posligua

United States Court of Appeals for the Fifth Circuit

March 27, 2025, Filed

No. 22-40393

Reporter

2025 U.S. App. LEXIS 7133 *; 2025 WL 927324

UNITED STATES OF AMERICA, Plaintiff—Appellee, versus CHRISTIAN LEONARDO FRANCO POSLIGUA, Defendant—Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Eastern District of Texas. USDC No. 4:21-CR-132-3.

United States v. Posligua, 2022 U.S. Dist. LEXIS 14199 (E.D. Tex., Jan. 26, 2022)

Counsel: For United States of America, Plaintiff - Appellee: Jonathan Richard Hornok, Assistant U.S. Attorney, U.S. Department of Justice, Washington, DC; Colleen Elizabeth Bloss, Assistant U.S. Attorney, U.S. Attorney's Office, Tyler, TX; Stephan Edward Oestreicher Jr., Bradley Elliot Visosky, Assistant U.S. Attorney, U.S. Attorney's Office, Plano, TX.

For Christian Leonardo Franco Posligua, Defendant - Appellant: John Andrew Kuchera, Waco, TX.

Judges: Before DENNIS, RICHMAN, and HO, Circuit Judges.

Opinion

PER CURIAM:*

Christian Leonardo Franco Posligua pleaded guilty to conspiracy to possess, with intent to distribute, a controlled substance on board a vessel subject to the jurisdiction of the United States in violation of the *Maritime Drug Law Enforcement Act (MDLEA)*. Posligua appealed his conviction, arguing both that the district court did not have subject matter jurisdiction, and, alternatively, that he did not enter a knowing and voluntary guilty plea. We previously "order[ed] a limited remand for the district court to consider, in the first instance, whether it ha[d] jurisdiction."¹ The district court concluded it did. We agree, and we now [*2] conclude that Posligua's plea was knowing and voluntary. Accordingly, we affirm Posligua's conviction.

I

* This opinion is not designated for publication. See *5TH CIR. R. 47.5*.

¹ *United States v. Posligua*, No. 22-40393, 2023 U.S. App. LEXIS 14914, 2023 WL 4044438, at *1 (5th Cir. June 15, 2023) (per curiam).

In April 2021, United States Coast Guard officers encountered a low-profile vessel in the Pacific Ocean while on a routine patrol. The vessel was "seaward of any State's territorial sea." Suspecting the vessel to be trafficking illicit contraband, officers approached it. They found four individuals aboard, including Posligua, who is a fisherman from Ecuador.

None of the individuals claimed to be the vessel's captain, although the Government represented during Posligua's sentencing hearing—and Posligua did not contest—that two of the individuals later stated Posligua was the captain. The vessel had no physical indicia of nationality and no state documents on board. Posligua asserted the vessel was of Colombian nationality, but Colombia could neither confirm nor deny the vessel's nationality. Upon boarding, Coast Guard officers found 1,100 kilograms of cocaine.

A grand jury charged Posligua with conspiracy to possess, with intent to distribute, a controlled substance on board a vessel subject to the jurisdiction of the United States in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b).² The indictment charged that the [*3] vessel was "subject to the jurisdiction of the United States" because it was "a vessel without nationality" under 46 U.S.C. § 70502(c)(1)(A).³

Posligua pleaded guilty pursuant to a plea agreement. As part of that agreement, Posligua signed a factual basis admitting he "made an agreement to commit the crime charged in the [i]ndictment." The factual basis did not, however, mention the vessel from which the cocaine was seized. Posligua also agreed to waive his right to appeal except in limited circumstances, although the parties agree his waiver is inapplicable here. This was the second time Posligua had pleaded guilty to participating in a conspiracy to violate the MDLEA; "[f]our years before the events that led to the present appeal, Posligua . . . was found on a vessel that was transporting cocaine," and "[h]e pled guilty in the District Court for the Southern District of New York."⁴

At his plea hearing in the present case, Posligua responded in the affirmative when the magistrate judge asked him whether he "underst[ood] the nature of the charges," "underst[ood] the elements of the offense that were set forth in [his] case," and "admit[ted] that [he] committed each one of those elements." The magistrate [*4] judge recommended that the district court accept Posligua's plea. The district court accepted Posligua's plea, as well as the plea agreement, and sentenced Posligua to 180 months of imprisonment.

However, neither party asked the district court to decide, and the district court did not determine, whether the vessel was subject to the jurisdiction of the United States.

Posligua timely appealed, challenging the district court's subject matter jurisdiction under the MDLEA. Because the question of whether a vessel is subject to the jurisdiction of the United States under the MDLEA is a "preliminary question[] of law to be determined solely by the trial judge,"⁵ we "order[ed] a limited remand for the district court to consider, in the first instance, whether it ha[d] jurisdiction."⁶ After our limited remand, the Government submitted an

² See 46 U.S.C. § 70503(a)(1) ("While on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance."); *id.* § 70506(b) ("A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.").

³ See 46 U.S.C. § 70502(c)(1)(A) ("In this chapter, the term 'vessel subject to the jurisdiction of the United States' includes . . . a vessel without nationality.").

⁴ *Posligua*, 2023 U.S. App. LEXIS 14914, 2023 WL 4044438, at *1.

⁵ 46 U.S.C. § 70504(a) ("Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.").

⁶ *Posligua*, 2023 U.S. App. LEXIS 14914, 2023 WL 4044438, at *1.

affidavit reiterating that Posligua had been the person in charge of the vessel, and the district court concluded it had subject matter jurisdiction.

Posligua separately appealed that order, and that second appeal was assigned to a different panel.⁷ However, that panel dismissed the second appeal because our panel retained jurisdiction over Posligua's first appeal [*5] after we ordered a limited remand, and the district court's "order on limited remand does not qualify as a final decision that is appealable in this court."⁸ Now that the district court has determined its jurisdiction in the first instance, we address the merits of Posligua's first appeal.

II

A

The MDLEA prohibits, among other things, conspiring to possess with intent to distribute a controlled substance aboard a "covered vessel," which includes "a vessel subject to the jurisdiction of the United States."⁹ The MDLEA makes clear that "[j]urisdiction of the United States with respect to a vessel . . . is not an element of an offense."¹⁰ However, circuit courts have split on whether the term "subject to the jurisdiction of the United States" limits the subject matter jurisdiction of federal courts, similar to diversity jurisdiction's amount-in-controversy requirement,¹¹ or defines the prescriptive reach of the MDLEA.¹² The Second Circuit has explained that "[i]nterpreting the phrase as a limitation *on the court's jurisdiction*, rather than *on the reach of the statute*, would give the prohibitory clauses a highly expansive and improbable meaning that would affront the sovereignty of other nations." [*6]¹³

Our decision in *United States v. Bustos-Useche*¹⁴ instructs us to construe this language as a limitation on subject matter jurisdiction.¹⁵ In that case, we considered "whether the jurisdictional requirements of [the MDLEA, then

⁷ See *United States v. Posligua*, 120 F.4th 1293 (5th Cir. 2024).

⁸ *Id.* at 1294 (quoting *Blunt v. Shelby*, 781 F. App'x 376, 377 (5th Cir. 2019) (per curiam)).

⁹ 46 U.S.C. §§ 70503(a)(1), (e)(1), 70506(b).

¹⁰ *Id.* § 70504(a).

¹¹ *United States v. Bustos-Useche*, 273 F.3d 622, 626 (5th Cir. 2001) ("[T]he district court's preliminary determination of whether a flag nation has consented or waived objection to the enforcement of United States law [such that the vessel is subject to jurisdiction of the United States] is a prerequisite to the court's jurisdiction"); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008) ("We have interpreted the 'on board a vessel subject to the jurisdiction of the United States' portion of the MDLEA as a congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement contained in 28 U.S.C. § 1332."); *United States v. Miranda*, 780 F.3d 1185, 1192, 414 U.S. App. D.C. 305 (D.C. Cir. 2015) ("[T]he question whether a vessel is 'subject to the jurisdiction of the United States' is a matter of subject-matter jurisdiction.").

¹² *United States v. Prado*, 933 F.3d 121, 132 (2d Cir. 2019) ("[I]ts function is not to confer subject matter jurisdiction on the federal courts, but rather to specify the reach of the statute beyond the customary borders of the United States."); *United States v. Dávila-Reyes*, 84 F.4th 400, 412 (1st Cir. 2023) (en banc) ("In sum, the MDLEA's statutory text provides no support for the conclusion that Congress intended the phrase 'subject to the jurisdiction of the United States' in § 70503(e)(1) to impose a limitation on the subject matter jurisdiction of courts."), cert. denied, 144 S. Ct. 2634, 219 L. Ed. 2d 1270 (2024).

¹³ *Prado*, 933 F.3d at 134.

¹⁴ 273 F.3d 622 (5th Cir. 2001).

codified at 46 U.S.C. app. § 1903,] are merely substantive elements of the crime or prerequisites to the district court's subject matter jurisdiction."¹⁶ We concluded "that the district court's preliminary determination of whether" a vessel is subject to the jurisdiction of the United States "is a prerequisite to the court's jurisdiction."¹⁷

We further observed in a somewhat cryptic footnote—in our analysis of whether the vessel there was subject to the jurisdiction of the United States such that there was subject matter jurisdiction—that the language "could arguably be interpreted to relate to the district court's authority to act on this case, separate and apart from whether the United States had jurisdiction over the vessel."¹⁸ We were "not convinced," however, that "this [was] a proper interpretation" because "the United States's jurisdiction over the vessel and the district court's jurisdiction to act are inextricably intertwined."¹⁹ In the same footnote, we noted [*7] that "the district court had jurisdiction to act on the case so long as the criminal statute . . . meets the subject matter jurisdiction requirements of Article III of the United States Constitution and 18 U.S.C. § 3231,"²⁰ the latter of which provides that "[t]he district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."²¹

The United States argues that our citation to the general grant of federal criminal subject matter jurisdiction in 18 U.S.C. § 3231 "contradicts the view" that the MDLEA's jurisdiction language is better understood as limiting subject matter jurisdiction rather than defining the MDLEA's prescriptive reach. Whatever merit there may be to this argument, however, it is clear that Bustos-Useche requires us to consider the MDLEA's jurisdictional requirements here as part of the subject matter jurisdiction inquiry. To the extent the United States invites us to chart a new course, we decline to do so because our "well-settled" rule of orderliness prevents us from "overturn[ing] another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court."²² Accordingly, we review the district court's determination [*8] of subject matter jurisdiction de novo.²³

B

"[T]he term 'vessel subject to the jurisdiction of the United States' includes," as relevant here, "a vessel without nationality."²⁴ A "'vessel without nationality' includes . . . a vessel aboard which the master or individual in charge

¹⁵ *Id.* at 626.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 628 n.6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 18 U.S.C. § 3231.

²² *Anderson v. Hutson*, 114 F.4th 408, 416 n.11 (5th Cir. 2024), petition for cert. filed, No. 24-1022 (U.S. Mar. 25, 2025) (quoting *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)).

²³ *United States v. Isgar*, 739 F.3d 829, 838 (5th Cir. 2014).

²⁴ 46 U.S.C. § 70502(c)(1)(A).

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."²⁵

The record establishes that the vessel here was a vessel without nationality such that the district court had subject matter jurisdiction over Posligua's MDLEA charge. Posligua was the individual in charge of the vessel. He asserted the vessel was of Colombian nationality. But the vessel had no physical indicia of nationality or state documents on board, and Colombia did not affirmatively and unequivocally assert that the vessel was Colombian. Rather, Colombia could neither confirm nor deny that the vessel was Colombian. All these facts appear in either (or both) the Government's affidavit it submitted after our limited remand or Posligua's presentence report. Posligua stated in his district court sentencing memorandum that he "does [*9] not deny the[] facts" in his presentence report, and he affirmed during his sentencing hearing that he both reviewed and understood the report, and that it "adequately covers [his] background."²⁶

Still, we acknowledge that Posligua's claim of Colombian *nationality* arguably does not constitute a claim of Colombian *registry*.²⁷ In *United States v. Dávila-Reyes*,²⁸ then-Chief Judge Howard of the First Circuit argued in a concurrence that the difference matters when applying this definition of "vessel without nationality" under the MDLEA.²⁹ However, the parties here do not advance this argument, and, in any event, we remain satisfied that the district court had subject matter jurisdiction for several additional reasons. First, we are persuaded by the majority's retort to Chief Judge Howard's argument: "Although the terms 'nationality' and 'registry,' in formal usage, are not interchangeable, the MDLEA treats them as such throughout § 70502."³⁰ While the First Circuit en banc reversed the panel on other grounds, the en banc court did not expressly reject this contention.³¹ Second, other circuits have treated the two terms as interchangeable in this context.³²

And third, even if the distinction between a claim of registry and a claim of nationality proved dispositive here, we note that the definition of a "'vessel without nationality' *includes* . . . a vessel aboard which the master or individual in charge makes a claim of registry."³³ Relying on the MDLEA's use of "includes," the First Circuit concluded that "[t]he listed examples [of vessels without nationality] do not exhaust the scope of section 70502(d),"³⁴ and the

²⁵ *Id.* § 70502(d)(1)(C).

²⁶ ROA.86 (Posligua's district court sentencing memorandum) ("Mr. Franco [(Posligua)] was involved in this drug offense and he accepts full responsibility for his involvement in the offense as charged and as generally described in the Presentence Report. He does not deny these facts and he does not negate the seriousness of this crime or his involvement in it."); *see also* ROA.147 (Posligua affirming in sentencing that presentence report "adequately covers [his] background").

²⁷ *See* ROA.178 (PSR ¶ 7) ("Posligua advised the vessel was of Colombian nationality."); Ex. A Supp'ing Government's Br. & Mot. Prelim. Determination of Jurisdiction Under MDLEA at 2, *United States v. Posligua*, No. 4:21-CR-132-3 (E.D. Tex. Jan. 2, 2024), ECF No. 184-1 (affidavit stating that "the person in charge made a verbal claim of Colombian nationality for the vessel"); *cf.* Order on Jurisdiction, ECF 91, at 3 ("The affidavit states that . . . [t]he person in charge of the vessel—Defendant Posligua—claimed the vessel was Colombian.").

²⁸ 23 F.4th 153 (1st Cir. 2022), *rev'd on other grounds en banc*, 84 F.4th 400 (1st Cir. 2023).

²⁹ *Id.* at 195-96 (HOWARD, C.J. [*10], concurring).

³⁰ *Dávila-Reyes*, 23 F.4th at 165 (majority opinion).

³¹ *See United States v. Dávila-Reyes*, 84 F.4th 400, 415-17 (1st Cir. 2023) (en banc).

³² *See Dávila-Reyes*, 23 F.4th at 168-69 (collecting cases).

³³ 46 U.S.C. § 70502(d)(1)(C) (emphasis added).

Eleventh Circuit agreed that "[s]ection 70502(d)(1) does not list every circumstance in which a vessel lacks nationality."³⁵ We need not and do not decide today whether to adopt a similar construction because we are satisfied the Government has established that the vessel was without nationality under § 70502(d)(1)(C).³⁶ However, we make this observation to emphasize that it would be anomalous to conclude Posligua's vessel was *not* "without nationality" simply because he claimed it was of Colombian *nationality* rather than *registry*, even though Colombia could not unequivocally confirm his claim.

At bottom, under the MDLEA, subject matter jurisdiction exists if the vessel [*11] predicated the MDLEA charge is subject to the jurisdiction of the United States, and a vessel without nationality is subject to the jurisdiction of the United States. The indictment charged that the vessel was without nationality, and the record, as described above, adequately establishes that the vessel was without nationality.

C

Posligua's primary argument against subject matter jurisdiction emphasizes the district court's failure to determine that it had jurisdiction *before* accepting Posligua's plea. Essentially, Posligua argues that the district court lacked judicial power until it expressly determined its jurisdiction, meaning the court could not accept his plea and enter judgment. Posligua suggests that a post hoc express confirmation that jurisdiction existed at the case's outset is insufficient to sustain his conviction. We are unpersuaded.

To be sure, the MDLEA makes clear that "[j]urisdictional issues . . . are *preliminary* questions of law to be determined solely by the trial judge,"³⁷ and we have stated that this "preliminary determination . . . is a *prerequisite* to the court's jurisdiction."³⁸ Of course, "[w]ithout jurisdiction the court cannot proceed at all."³⁹ But read in context, [*12] these statements do not support the contention that a district court lacks subject matter jurisdiction over an MDLEA charge unless and until it expressly declares otherwise. Congress added the "preliminary questions of law" language in 1996 to make clear that jurisdictional issues are "not issues of fact to be decided by the jury."⁴⁰ This preliminary determination is not a prerequisite to the court's jurisdiction in the sense that the district court must complete some formalistic procedure before it is imbued with judicial power. Rather, it is a prerequisite in the sense that the vessel predicated an MDLEA charge must have been subject to the jurisdiction of the United States for the

³⁴ *United States v. Matos-Luchi*, 627 F.3d 1, 4 (1st Cir. 2010); see also *Dávila-Reyes*, 84 F.4th at 416-17.

³⁵ *United States v. Nunez*, 1 F.4th 976, 984 (11th Cir. 2021) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 132-33 (2012)). But cf. *United States v. Prado*, 933 F.3d 121, 131-32 (2d Cir. 2019) (rejecting argument that vessel lacked nationality where defendants failed to make claim of nationality and officers never asked because statute "makes clear that it is only if the master or person in charge fails 'on request of an officer of the United States' to make a claim that the failure establishes statelessness").

³⁶ See 46 U.S.C. § 70502(d)(1)(C) ("In this chapter, the term 'vessel without nationality' includes . . . 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.").

³⁷ *Id.* § 70504(a) (emphasis added).

³⁸ *United States v. Bustos-Useche*, 273 F.3d 622, 626 (5th Cir. 2001) (emphasis added).

³⁹ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868)).

⁴⁰ *United States v. Prado*, 933 F.3d 121, 139 (2d Cir. 2019) (quoting H.R. REP. NO. 104-854, at 142 (1996) (Conf. Rep.)); see also *Bustos-Useche*, 273 F.3d at 626.

district court to have subject matter jurisdiction over the charge. Whether the vessel was subject to the jurisdiction of the United States is not dependent on the timing of the district court's determination.

Practically, a district court should and usually will "mak[e] the required jurisdictional determination" before taking certain actions,⁴¹ typically at the Government's request.⁴² Doing so enhances judicial efficiency by eliminating the need for us to order a limited remand "permit[ting] [*13] the district court to determine, in the first instance, whether it has jurisdiction."⁴³ But any procedural requirement that a district court determine its jurisdiction in the first instance before taking certain actions does not preclude its judicial power until it has made its determination. Even granting that the district court procedurally erred by accepting Posligua's plea without having determined its jurisdiction, that does not mean the "prerequisite to the court's jurisdiction"—that the vessel was subject to the jurisdiction of the United States—was not satisfied. Here, it was satisfied because the vessel predicated Posligua's MDLEA charge was a vessel without nationality and thus subject to the jurisdiction of the United States. The district court's actions were not void ab initio.

To the extent the MDLEA and our cases impose a procedural requirement on the district court to make its jurisdictional determination before taking certain actions, the district court's failure to do so here was harmless error because it did "not affect [Posligua's] substantial rights."⁴⁴ Nothing prevented Posligua from raising, on his own motion, any potential challenges to the court's subject [*14] matter jurisdiction at an earlier time, and we see no basis for concluding that the outcome would have been any different if the district court had confirmed its jurisdiction before accepting Posligua's plea and entering its judgment.

III

Posligua also argues that his guilty plea was not knowing and voluntary. *Rule 11* "ensure[s] that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea."⁴⁵ Two steps are relevant to Posligua's claim. Under *Rule 11(b)(1)(G)*, the district court must, before accepting a guilty plea, "have a colloquy with the defendant that would lead a reasonable person to believe that the defendant understood the nature of the charge."⁴⁶ Additionally, under *Rule 11(b)(3)*, "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."⁴⁷ Posligua argues both that "the magistrate court failed to make sure Posligua understood the nature of the offense to which he was pleading," and that "the factual basis does not support Posligua's conviction."

Because Posligua did not object in the district court, the parties agree our review is for plain error. Accordingly,

⁴¹ *United States v. Posligua*, No. 22-40393, 2023 U.S. App. LEXIS 14914, 2023 WL 4044438, at *2 (5th Cir. June 15, 2023) (per curiam).

⁴² See, e.g., *United States v. Nunez*, 1 F.4th 976, 982 (11th Cir. 2021) ("Before trial, the government moved for a ruling that the United States had jurisdiction over the smugglers' boat as a stateless vessel under the Maritime Drug Law Enforcement Act.").

⁴³ *Posligua*, 2023 U.S. App. LEXIS 14914, 2023 WL 4044438, at *2.

⁴⁴ *Fed. R. Crim. P. 52(a)*; see also *Nunez*, 1 F.4th at 989 ("To be sure, the district court was obliged to determine whether it had jurisdiction before the trial started," but "[t]he smugglers suffered no prejudice from the delay of that ruling.").

⁴⁵ *United States v. Vonn*, 535 U.S. 55, 58, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002).

⁴⁶ *United States v. Reyna*, 130 F.3d 104, 110 (5th Cir. 1997); see also *Fed. R. Crim. P. 11(b)(1)(G)*.

⁴⁷ *Fed. R. Crim. P. 11(b)(3)*.

to prevail on [his *Rule 11*] claim, [*15] [Posligua] must show that (1) the district court erred in accepting his guilty plea . . . , (2) the error was plain, (3) there is a reasonable probability that but for the error, he would not have pleaded guilty, and (4) the error seriously affected the fairness, integrity, or public reputation of the proceedings.⁴⁸

"Even if the first three prongs of plain-error review are satisfied, . . . [u]nder the fourth prong, 'the court of appeals has the *discretion* to remedy the error.'"⁴⁹ "Plain error is error so clear or obvious that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant[']s timely assistance in detecting it.'"⁵⁰ Thus, "[m]eeting all four prongs is difficult, 'as it should be.'"⁵¹

Posligua has not shown error—plain or otherwise—under either *Rule 11(b)(1)(G)* or *Rule 11(b)(3)*. "Neither *Rule 11* nor the case law specifies the minimum that the district court must do to inform the defendant . . . of the nature of the charge."⁵² The nature of the charge "refers to the elements of the offense."⁵³ When determining whether there is a factual basis for the plea, "the district court compare[s] (1) the conduct to which the defendant admits with (2) the elements of the offense charged in the indictment." [*16]⁵⁴

At his plea hearing before the magistrate judge, Posligua affirmed that he understood the nature of the charge alleged against him. The Government read the individual elements of the offense to which Posligua was pleading guilty. He responded yes when the magistrate judge asked if he "admit[ted] each one of those elements." Posligua confirmed that no one "tried to force [him] or threaten[ed] [him] to plead guilty. The Government read the factual basis Posligua had signed, and Posligua affirmed that everything in his factual basis was true and correct. He listened to the judge repeat that the charge against him was "conspiracy to possess with the intent to distribute a controlled substance onboard a vessel subject to the jurisdiction of the United States" immediately before the judge asked how he pled. He pleaded guilty without expressing any confusion regarding the reference to the vessel. That this was his second MDLEA conspiracy conviction only reinforces the likelihood that he understood the nature of the charge. The district court accordingly found that "[his] plea [was] knowing and voluntary, and there [was] a factual basis to support [his] plea."

This colloquy "would lead a reasonable [*17] person to believe that the defendant understood the nature of the charge,"⁵⁵ and the district court properly "determine[d] that there [was] a factual basis for the plea."⁵⁶

⁴⁸ *United States v. Alvarado-Casas*, 715 F.3d 945, 951 (5th Cir. 2013).

⁴⁹ *United States v. Rivera*, 784 F.3d 1012, 1018 (5th Cir. 2015) (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)).

⁵⁰ *United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010) (quoting *United States v. Hope*, 545 F.3d 293, 295-96 (5th Cir. 2008)).

⁵¹ *Puckett*, 556 U.S. at 135 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)).

⁵² *United States v. Reyes*, 300 F.3d 555, 559 (5th Cir. 2002) (alteration in original) (quoting *United States v. Reyna*, 130 F.3d 104, 110 (5th Cir. 1997)).

⁵³ *United States v. Jones*, 969 F.3d 192, 198 (5th Cir. 2020) (quoting *Reyes*, 300 F.3d at 559).

⁵⁴ *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001).

⁵⁵ *United States v. Reyna*, 130 F.3d 104, 110 (5th Cir. 1997); see also *Fed. R. Crim. P. 11(b)(1)(G)*.

⁵⁶ *Fed. R. Crim. P. 11(b)(3)*.

Posligua's argument to the contrary asserts that "nothing in the record establishes that Posligua understood what the Government would have to prove to establish that Posligua was on a 'vessel subject to the jurisdiction of the United States.'" In support, he cites a Second Circuit case that found an MDLEA guilty plea deficient because "the court made no reference either to the requirement that the vessel have been subject to the jurisdiction of the United States or to the crucial issue of its statelessness," and the defendants did not say "anything about the boat's nationality or of its being subject to the jurisdiction of the United States."⁵⁷ However, in the Fifth Circuit, we require a colloquy "that would lead a reasonable person to believe that the defendant understood the nature of the charge,"⁵⁸ i.e. the "elements of the offense,"⁵⁹ and, as Posligua concedes, "[j]urisdiction of the United States with respect to a vessel . . . is not an element of an offense."⁶⁰ Moreover, unlike in the Second Circuit case, the [*18] court here *did* make reference to the requirement that the vessel be subject to the jurisdiction of the United States—immediately before Posligua entered his guilty plea.

Posligua has also failed to establish either of the remaining plain-error prongs. He has not shown that there is a reasonable probability that but for the alleged error, he would not have pleaded guilty. "Posligua argues that he would never have entered a guilty plea to the charged offense if he had known that the purported conduct upon which his plea rested failed to establish that he had violated the MDLEA." However, as the United States points out, it is highly unlikely Posligua would have risked going to trial and losing the benefits of his plea bargain in the face of strong evidence as to both his guilt and the vessel being without nationality. Although Posligua conclusively asserts "that the district court's failure to make sure he understood what he was pleading to affected the fairness, integrity, and public reputation of the proceedings," he does not explain how the fourth prong applies to the facts of his case beyond a citation to a Ninth Circuit case. We have "refused to correct plain errors when, [*19] as here, the complaining party makes no showing k as to the fourth prong."⁶¹ Accordingly, even if Posligua had shown plain error, we would decline to exercise our remedial discretion.

* * *

For the foregoing reasons, Posligua's conviction is AFFIRMED.

End of Document

⁵⁷ *United States v. Prado*, 933 F.3d 121, 152-53 (2d Cir. 2019).

⁵⁸ *Reyna*, 130 F.3d at 110; see also *Fed. R. Crim. P. 11(b)(1)(G)*.

⁵⁹ *United States v. Jones*, 969 F.3d 192, 198 (5th Cir. 2020) (quoting *United States v. Reyes*, 300 F.3d 555, 559 (5th Cir. 2002)).

⁶⁰ 46 U.S.C. § 70504(a).

⁶¹ *United States v. Rivera*, 784 F.3d 1012, 1018 n.3 (5th Cir. 2015).