

No. 17-7879

IN THE SUPREME COURT OF THE UNITED STATES

DESMOND ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., exceeds Congress's powers under the Piracies and Felonies Clause, U.S. Const. Art. I, § 8, Cl. 10, by criminalizing drug trafficking on board stateless vessels in international waters without requiring proof of a nexus between the drug trafficking and the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 713 Fed. Appx. 919. The order of the district court is not published in the Federal Supplement but is available at 2016 WL 10892322.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2017. The petition for a writ of certiorari was filed on February 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1) and 70506(a)-(b), and 21 U.S.C. 960(b)(1)(G); and possessing with intent to distribute 1000 kilograms or more of marijuana while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1) and 70506(a), 21 U.S.C. 960(b)(1)(G), and 18 U.S.C. 2. Pet. App. A2, A8. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Id. at A9-A10. The court of appeals affirmed. Id. at A1-A7.

1. The Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 et seq., makes it unlawful for any person to possess a controlled substance with the intent to distribute it, or to attempt or conspire to do the same, on board "a vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a) and (e)(1), 70506(b).¹ Congress enacted the MDLEA because it found that "trafficking in controlled substances aboard vessels is a

¹ The MDLEA was amended in February 2016. See Coast Guard Authorization Act of 2015, Pub. L. No. 114-120, § 314(a), 130 Stat. 59. The amendments, which are not otherwise relevant to this case, moved the phrase "vessel subject to the jurisdiction of the United States" from Section 70503(a) to Section 70503(e)(1). Because the relevant language is unchanged, this brief cites the current version of the statute for simplicity.

serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. 70501(1). Congress accordingly provided that the MDLEA would apply to any "vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1), "even though the act is committed outside the territorial jurisdiction of the United States," 46 U.S.C. 70503(b).

As relevant here, the MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel without nationality." 46 U.S.C. 70502(c)(1)(A). A "vessel without nationality" is defined to include "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. 70502(d)(1)(C).

2. In September 2015, the United States Coast Guard recovered more than 1000 kilograms of marijuana from a "go-fast" vessel in international waters about 70 miles south of the Dominican Republic. Pet. App. A1; Gov't C.A. Br. 2-3, 7. An aircraft on routine patrol noticed the vessel traveling at high speed and without lights in a known smuggling area. Gov't C.A. Br. 2-3. The aircraft notified a Coast Guard cutter, which launched a chase boat to intercept the vessel. Id. at 3. As the vessel attempted to flee, the Coast Guard crew saw a man, later identified as petitioner, fall or jump overboard. Ibid. The

vessel continued to flee until the chase boat fired a warning shot. Ibid.; Pet. App. A1.

After the vessel stopped, the chase boat rescued petitioner. Pet. App. A2. Meanwhile, the two remaining men aboard the vessel began throwing bales of marijuana overboard. Ibid. The chase boat retrieved the bales and returned to the vessel. Ibid. The vessel's master claimed the vessel was of Jamaican origin, but the vessel did not display a national flag or any other markings to identify its home country. Ibid.; Gov't C.A. Br. 4. The Jamaican government could not initially confirm the vessel's registry, but, as the "presumptive flag state," it authorized the Coast Guard to board the vessel. Gov't C.A. Br. 23 (citation omitted). The Jamaican government later confirmed that the go-fast vessel was not registered to Jamaica, and the United States therefore deemed the vessel "without nationality." Ibid. (citation omitted) The Coast Guard ultimately recovered a total of 49 bales of marijuana, which weighed a total of more than 1250 kilograms. Pet. App. A2.

3. A federal grand jury in the Southern District of Florida indicted petitioner and the other two men who had been on the go-fast vessel on one count of possession with intent to distribute 1000 kilograms or more of marijuana while on board a vessel, in violation of 46 U.S.C. 70503(a)(1) and 70506(a), 21 U.S.C. 960(b)(1)(G), and 18 U.S.C. 2; and one count of conspiring to commit that offense, in violation of 46 U.S.C. 70503(a)(1) and

70506(a) and (b), and 21 U.S.C. 960(b)(1)(G). Pet. App. A2. Petitioner's co-defendants pleaded guilty. Ibid.

Petitioner moved to dismiss the indictment, asserting a variety of constitutional challenges to the MDLEA. The district court rejected those challenges as foreclosed by Eleventh Circuit precedent. Pet. App. A2. Petitioner then proceeded to a trial before a jury, which returned a verdict of guilty on both counts. Id. at A3. The district court sentenced him to 120 months of imprisonment. Id. at A9.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A7. As relevant here, it rejected as foreclosed by circuit precedent petitioner's contention that "Congress's power to punish felonies on the high seas does not extend to drug-trafficking offenses with no nexus to the United States." Id. at A5; see id. at A6.

ARGUMENT

Petitioner renews his contention (Pet. 8-16) that the MDLEA exceeds Congress's authority under the Piracies and Felonies Clause to the extent it reaches drug-trafficking activity that lacks a proven nexus to the United States. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. The Court has recently and repeatedly denied petitions for writs of certiorari presenting similar constitutional challenges to the MDLEA. Cruickshank v. United States, 137 S. Ct.

1435 (2017) (No. 16-7337); Campbell v. United States, 135 S. Ct. 704 (2014) (No. 13-10246); Brant-Epigmelio v. United States, 565 U.S. 1203 (2012) (No. 11-6306); Cardales-Luna v. United States, 565 U.S. 1034 (2011) (No. 10-10731); Renegifo v. United States, 565 U.S. 835 (2011) (No. 10-10382); Estrada-Obregon v. United States, 555 U.S. 997 (2008) (No. 08-5044); Moreno v. United States, 549 U.S. 1343 (2007) (No. 06-8332); Estupinan v. United States, 549 U.S. 1267 (2007) (No. 06-8104). The same result is warranted here.

1. The Piracies and Felonies Clause empowers Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. Const. Art. I, § 8, Cl. 10. Every court of appeals to consider the question has concluded that the MDLEA falls within that grant of authority, because the Clause authorizes Congress to define and punish felonies “on the high Seas.” See, e.g., United States v. Campbell, 743 F.3d 802, 809-810 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014); United States v. Perlaza, 439 F.3d 1149, 1158-1160 (9th Cir. 2006); United States v. Ledesma-Cuesta, 347 F.3d 527, 531-532 (3d Cir. 2003); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056-1057 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994); United States v. Alvarez-Mena, 765 F.2d 1259, 1264-1267, 1265 n.9 (5th Cir. 1985); see also United States v. Nueci-Peña, 711 F.3d 191, 197-198 (1st Cir. 2013) (resolving the issue on plain-error review).

Petitioner asserts (Pet. 12-14) that this uniform body of precedent upholding the MDLEA conflicts with United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820), which stated that a statute prohibiting murder committed on the high seas should not be interpreted to reach an offense “committed by a foreigner upon a foreigner in a foreign ship.” Id. at 197. But Furlong was a statutory-interpretation case, and the statements on which petitioner relies did not purport to define the outer limits of Congress’s authority under the Felonies Clause. Id. at 196-198; see United States v. Saac, 632 F.3d 1203, 1210 (11th Cir.) (“Furlong, a statutory interpretation case, * * * does not resolve the parties’ debate over the scope of Congress’s constitutional authority.”), cert. denied, 565 U.S. 835 (2011); see also Nueci-Peña, 711 F.3d at 198 n.7 (similar).

In any event, even if it could be read as establishing the bounds of Congress’s constitutional authority, Furlong expressly limited its statement to crimes committed on “foreign ship[s].” 18 U.S. (5 Wheat.) at 197. And less than a month later, this Court sustained the viability of a prosecution under the same statute for a murder committed “on board a vessel having no national character.” United States v. Holmes, 18 U.S. (5 Wheat.) 412, 418 (1820) (emphasis omitted). The Court explained that the statute reached “murder or robbery committed on the high seas” if those offenses are committed on a vessel held by “persons not lawfully sailing under the flag of any foreign nation.” Id. at 417; see

United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820) (“[T]he Court is satisfied[] that general piracy, or murder, or robbery, committed * * * by persons on board of a vessel * * * in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is * * * punishable in the Courts of the United States.”). Those subsequent decisions make clear that Congress has authority to define and punish crimes committed on “a vessel without nationality” like the one at issue here. 46 U.S.C. 70502(c)(1)(A).

2. Petitioner observes (Pet. 16) that, in enacting the MDLEA, Congress found that “trafficking in controlled substances aboard vessels * * * is universally condemned.” 46 U.S.C. 70501. Petitioner asserts (Pet. 16) that “[c]hanging attitudes toward marijuana” have undermined that justification for the statute. But the fact that some nations have modified or lifted their restrictions on marijuana (Pet. 16-18) does not suggest that they tolerate the sort of large-scale illicit trafficking targeted by the MDLEA and at issue here. And, more fundamentally, even if petitioner were correct that the policy justification for the MDLEA has changed or weakened, that would not support his assertion that the statute exceeds Congress’s constitutional authority.²

² To the extent that courts have relied on the fact that drug trafficking is “universally condemned” in upholding the MDLEA, they have done so in rejecting challenges under the Due Process Clause -- not in concluding that the statute falls within Congress’s authority under the Piracies and Felonies Clause. See Martinez-Hidalgo, 993 F.2d at 1056.

3. Petitioner correctly acknowledges (Pet. 19) that “there is no actual circuit split on the question presented.” And he identifies no sound reason for this Court to depart from its usual practice by taking up that question absent a circuit conflict.

First, petitioner discusses (Pet. 12) two dissenting opinions by Judge Torruella. But those opinions could not establish a circuit conflict warranting this Court's review. See Sup. Ct. R. 10. And in any event, Judge Torruella argued only that the Piracies and Felonies Clause requires a nexus between the offense and the United States in cases involving “foreign nationals on a foreign-flag ship.” United States v. Angulo-Hernández, 576 F.3d 59, 60 (1st Cir.) (Torruella, J., dissenting from the denial of rehearing en banc), cert. denied, 558 U.S. 1063 (2009). He has acknowledged that his “analysis may be quite different” where, as here, the vessel at issue is stateless because the claimed flag nation has repudiated the assertion of nationality. Id. at 63 n.3; see United States v. Cardales-Luna, 632 F.3d 731, 747 (1st Cir.) (Torruella, J., dissenting) (acknowledging this Court's decisions about congressional authority to regulate stateless vessels), cert. denied, 565 U.S. 1034 (2011).

Second, petitioner states (Pet. 20) that, although the Ninth Circuit has rejected the contention that the MDLEA exceeds Congress's authority under the Piracies and Felonies Clause, see Perlaza, 439 F.3d at 1158-1160, it has disagreed with the Eleventh Circuit about other issues arising under the MDLEA. But those

other issues are not presented here, and this case thus would not be a suitable vehicle for considering them.

Finally, petitioner contends (Pet. 19) that the Court should grant certiorari despite the absence of a circuit conflict because “[m]ost MDLEA prosecutions have taken place within the Eleventh Circuit.” But the Third, Fifth, and Ninth Circuits have also upheld the MDLEA as a valid exercise of Congress’s authority under the Piracies and Felonies Clause. See p. 6, supra. And other courts of appeals continue to hear cases arising under the MDLEA. See, e.g., United States v. Sarmiento-Palacios, 885 F.3d 1, 3 (1st Cir. 2018); United States v. Trinidad, 839 F.3d 112, 113 (1st Cir. 2016); United States v. Ballestas, 795 F.3d 138, 139 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 1229 (2016); see also, e.g., United States v. Clark, 266 F. Supp. 3d 573, 577 (D.P.R. 2017); United States v. Aragon, No. 15-cr-292, 2017 WL 2889499, at *1 (S.D.N.Y. July 5, 2017). Petitioner thus lacks a sound basis for asserting (Pet. 19) that it is “unlikely that many additional circuits will be asked to review the statute” in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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