No. 24-6177

In The

Supreme Court of The United States

JHONATHAN ALFONSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents an important question of federal constitutional law that has never been answered by this Court: Whether Congress's Article I power to "define and punish ... Felonies committed on the high Seas" encompasses an offense committed by a foreign national, inside a foreign nation's exclusive economic zone ("EEZ"). The government does not dispute: (1) that this case turns exclusively on an unanswered question of federal constitutional law; (2) that the answer to this question will affect a wide array of criminal prosecutions; or (3) that this case presents the ideal vehicle for resolving this previously unaddressed question of constitutional law. For these reasons, the petition should be granted.

1. This case presents an important and unanswered question of federal constitutional law.

"Perhaps no Article I power of Congress has received less attention than 'Piracies and Felonies.'" Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction,* 93 MINN. L. REV. 1191, 1194 (April 2009). *See also* Curtis A. Bradly*, Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 327 (2001) ("[T]he scope of the Define and Punish Clause is unclear."). Yet the government engages only superficially in the constitutional debate.

In his petition, Mr. Alfonso demonstrated that the constitutional text, this Court's precedents, and the historical record all reveal that Congress's powers under the Define and Punish Clause are implicitly limited by international law. (Pet. 9-17).

And, under contemporary international law, the exclusive economic zone ("EEZ") in which Mr. Alfonso's offense occurred is not the high seas. (Pet. 17-23).

The government does not respond to Mr. Alfonso's constitutional arguments. It simply declares, without citation, that the Felonies Clause "expressly permits Congress at least to punish offenses on open water outside foreign territorial waters, committed on stateless vessels." (Br. Opp. 7). But the Felonies Clause says no such thing. Rather, the Clause empowers Congress to punish "Felonies committed on the high Seas." U.S. CONST. art. I, § 8, cl. 10. Whether those high seas include a foreign nation's EEZ is an open question in this Court. To be clear, this Court has never held that the high seas, within the meaning of the Felonies Clause, include all "open waters outside foreign territorial waters" as alleged in the government's *ipse dixit*. And nothing in the government's brief shows otherwise.

The government has cited no case addressing the meaning of the high seas as it relates to Congress's authority under the Felonies Clause. The decisions in *United States v. Ross*, 27 F. Cas. 899, 900 (1813) (C.C.D.R.I. 1813), *United States v. Rodgers*, 150 U.S. 249 (1849), and the portions of *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820) cited at pages 7-8 of the government's brief turn on questions of statutory—not constitutional—interpretation. And the statement the government quotes from Justice Story's *Commentaries on the Constitution* (Br. Opp. 7) is ambiguous, at best.[1]

[1] After the quoted portion, Justice Story discusses other terminology used to describe the sea, and concludes that: "[s]o far ... as regards the states of the Union, 'high seas'

The government's invocation of *Furlong* is particularly misplaced. The government notes that in *Furlong*, the Court "sustained convictions for offenses on a stateless pirate ship 'within a marine league' (i.e., three nautical miles) of a foreign shore, explaining that a vessel can be 'upon the high seas' even it if its 'within the jurisdictional limits of a foreign State.'" (Br. Opp. 8). But that section of the statute related specifically to *piracy*—and the decision invoked the principal of universal jurisdiction over piracy offenses to support its holding. *See Furlong*, 18 U.S. at 200-201 ("Nor can it be objected that it was within the jurisdictional limits of a foreign State; for, those limits, though neutral to war, are not neutral to crimes.").

As discussed in the Petition, the *Furlong* Court distinguished between Congress's distinct powers under the Piracies and Felonies Clauses. The Court recognized that, while piracies are subject to universal jurisdiction and punishable by any nation, there are Felonies on the high seas with which Congress has "no right to interfere." *Furlong*, 18 U.S. at 198. *Furlong*'s relevance to the instant case is thus not for its pronouncement on the meaning of the "high seas" under the specific language of an 18th century piracy statute, but rather for its implicit holding that Congress's powers under the Felonies Clause are limited by principles of international law. (Pet. 13-15). The government has notably failed to address this, most important, aspect of the *Furlong* decision.

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may be taken to mean that part of the ocean, which washes the sea-coast, and is without the body of any county, according to the common law; and so far as regards foreign nations, any waters on their sea-coast, below low-water mark." Joseph L. Story, *Commentaries on the Constitution of the United States* § 1159 (1833).

2. The status of the vessel cannot expand Congress's Article I powers.

The government seemingly believes that the vessel's alleged statelessness alone "renders it subject to United States law." (Br. Opp. 8). But this assertion is not only wrong; it confuses distinct questions of constitutional and international law.

"We start with first principles. The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). "The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'" *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 534-35 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)). "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions ... elsewhere in the Constitution." *Id*. at 535. Relevant here, the Felonies Clause grants Congress the power to punish "Felonies committed on the high Seas." U.S. CONST. art. I, §8, cl. 10. If Mr. Alfonso's offense did not occur on the "high seas," it fell beyond Congress's power under the Felonies Clause—even if the prosecution would not violate any other provision of constitutional or international law, *i.e.,* even if the vessel was stateless.

"To insure the principle of freedom of the seas, international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas." *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982). This may be viewed as an application of the general rule that, "[u]nder international law, a

nation may lack power to punish criminally the actions of a foreign citizen outside its territory .... These limits are referred to as limits on a nation's jurisdiction to proscribe." *United States v. Hernandez*, 864 F.3d 1292, 1304 (11th Cir. 2017). "Customary international law recognizes five theories of jurisdiction: territorial, protective, national, passive personality, and universality." *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1259 (11th Cir. 2012) (Barkett, J., specially concurring). Where a basis for prescriptive jurisdiction exists, the Eleventh Circuit recognizes an "exception" to the general prohibition on the exercise of jurisdiction over foreign vessels on the high seas. *See Marino-Garcia*, 679 F.2d at 1380-81.

However, while there is some disagreement on the matter,[2] the federal courts have generally held that "[t]hese restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability with stateless vessels." *Marino-Garcia*, 679 F.2d at 1382. Under this theory, a defendant arrested aboard a stateless vessel could not object to the application of United States law based on the absence of a basis for prescriptive jurisdiction, such as the nationality or universality principle. *See id; see also* Dubner & Arias, *supra*, at 122 ("[I]t is commonly considered that either ships having no nationality or falsely

[2] *See* Barry Hart Dubner & Mary Carmen Arias, *Under International Law*, *Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel?,* 29 U.S.F. MAR. L.J. 99, 122 (2016-2017) ("Scholars disagree as to whether or not customary international law and conventional law allows any country to exercise jurisdiction over stateless ships.").

assuming a nationality are almost completely without protection."). But this does not mean that the Federal government may act where no enumerated power exists.

The government quotes then-Judge Breyer's statement in *United States v. Victoria*, that United States courts have interpreted international law to "giv[e] the 'United States ... authority to treat stateless vessels as if they were its own.'" 876 F.2d 1009, 1010 (1st Cir. 1989) (citation omitted). But this simply reflects the prevailing view that international law does not limit the exercise of jurisdiction over stateless vessels. The *Victoria* Court did *not* hold that Congress could act outside of its Article I powers based on the vessel's status. To the contrary, the court presumed that the vessel was found on the "high seas," and was thus subject to Congress's authority under the Felonies Clause. *See id*. at 1010 ("Thus the United States, as a matter of international law, may prosecute drug offenders on stateless ships found on the high seas.").[3]

The government's citations to *United States v. Klintock*, 18 U.S. 144 (1820), and *Furlong*, 18 U.S. at 194 (Br. Opp. 9) are even further afield, because in both instances the Court was discussing *piracies*. *See Klintock,* 18 U.S. at 153 (holding "[t]hat the act of the 30th of April, 1790, does extend to all persons on board all vessels

[3] The vessel in *Victoria* was located 60 miles off the coast of Colombia, and perhaps an argument could have been made that the vessel was in an EEZ and not on the high seas. However, this argument was neither presented to, nor considered by, the court. *See Webster v. Fall*, 266 U.S. 507 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

which throw off their national character by cruising piratically and committing piracy on other vessels"); *Furlong*, 18 U.S. at 194 ("But, we have decided, that in becoming a pirate, the Mary of Mobile, from which the prisoner committed this offense, lost her national character. Could she then be denominated an American vessel? We are of the opinion, that the question is immaterial ..."). These passages reflect Congress's authority under the *Piracies* Clause, and say nothing about the scope of the *Felonies* Clause, even with respect to stateless vessels. *See* Pet. 11-13 (discussing distinction between Congress's powers under the Piracies and Felonies Clauses); *Furlong,* 18 U.S. at 198-99 (same).

While piracy has always been subject to universal jurisdiction, "[n]owhere is it said that a stateless vessel has committed a universal crime by being 'stateless.'" Dubner & Arias, *supra*, at 119. Thus, while the alleged statelessness of Mr. Alfonso's vessel could, *in arguendo*, have removed one barrier to the United States' exercise of jurisdiction,[4] it could not have expanded Congress's authority to act beyond the grant of power provided by the Felonies Clause. And Congress's power under that Clause is expressly limited to the high seas.

[4] Mr. Alfonso argued on appeal that the government failed to establish that his vessel was stateless under international law; he therefore maintained that the prosecution violated the Felonies Clause based on the absence of a basis for prescriptive jurisdiction over his offense. The Eleventh Circuit rejected this claim on plain error grounds. *See United States v. Alfonso*, 104 F.4th 815, 828-29 (11th Cir. 2024); Pet. 25 n.4.

3. The government does not defend the decision below.

The government does not defend the flawed reasoning of the Eleventh Circuit. The court below held that because the waters in the EEZ would have been considered the high seas at the Founding, they are the high seas, for constitutional purposes, today. *Alfonso*, 104 F.4th at 821-22. But the opinion has a glaring inconsistency: It recognizes that that the United States' territorial sea has changed since the Founding, "to conform with current international law." *Id.* at 821 n.9. But it held that the definition of the high seas—which, at the Founding, constituted all waters outside the territorial seas—remained unchanged. *Id.* at 821, 825. The government has failed even to acknowledge, let alone reconcile, the obvious tension between these two propositions.

Nor does it address Mr. Alfonso's critique of *United States v. Beyle*, 782 F.3d 167 (4th Cir. 2015), in which the court engaged in no constitutional analysis, but simply assumed, wrongly, that if the vessel was not in territorial waters, then it must have been on the high seas. (Pet. 21-22). Under current international law, this is demonstrably untrue. (Pet. 17-18).

To the extent the issue was considered by the Second Circuit in *United States v. Alarcon Sanchez*, 972 F.3d 156 (2d Cir. 2020), it appears that court made the same mistake. There, an appellant argued, in a single, perfunctory paragraph, that a vessel 132 nautical miles off the coast of Coast Rica was not on the high seas.[5] The Second

[5] *See Brief for Defendant-Appellant Carlos Alberto Salinas Diaz*, *United States v. Aragon, et. al.*, 2018 WL 5905729, *9 (2d Cir. Oct. 5, 2018).

Circuit rejected the argument just as summarily, concluding that the vessel was "comfortably beyond Costa Rica's territorial waters as the framers would have understood the term and under current international law." 972 F.3d at 170. The words "exclusive economic zone" or "EEZ" do not even appear in the decision.

Thus, while there are now arguably three circuits that have considered the issue,[6] none has meaningfully parsed the constitutional text, or addressed the impact of this Court's analysis in *Furlong* on the scope of the Felonies Clause. Nor, for that matter, has the government done so here.

At its most fulsome, the government's argument appears to be that the Constitution "does not require federal statutes to comport with international law." (Br. Opp. 9). And while this may generally be true, it cannot be true if the Framers incorporated international law into the specific grant of power in the Felonies Clause. (Pet. 23). Once again, the government has failed to respond to this argument.

4. The Petition should be granted.

The government does not dispute that this case presents an important and unanswered question of federal constitutional law. Nor does it dispute that this Court regularly grants review of important constitutional questions, even where no conflict exists. *See* Pet. 25 (collecting cases). The Court should do the same here.

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[6] The appellants in *United States v. Aybar-Ulloa*, 987 F.3d 1, 4 n.1 (1st Cir. 2021) (en banc) (Br. Op. 11) do not appear to have raised any argument regarding the status of the EEZ, and the First Circuit "[did] not address any potential limitations on freedom of navigation ... that may be imposed in this area."

The government fails to address the forum-selection provisions in 46 U.S.C. § 70504(b)(2) and 18 U.S.C. § 3238, which allow the government to try MDLEA cases, and any criminal case emanating out of an EEZ, in a district of the government's choosing. (Pet. 24). And, while the government notes that MDLEA cases are tried outside of the Fourth and Eleventh Circuits, it does not deny that the United States strategically chooses where to bring MDLEA cases. *See* Pet. 24 (quoting Coast Guard lawyer's admission that they "try not to bring these cases to the Ninth Circuit"). *See also United States v. Santana et. al.,* 22-cr-20220-KMM Dkt. # 64 at 25 (S.D. Fla. Nov. 6, 2022) (testimony from Coast Guard officer that the Department of Justice typically takes "five to seven days" to decide where to prosecute an MDLEA offense after an arrest at sea).

Tellingly, the government routinely brings MDLEA cases in the Eleventh Circuit after arrestees are brought into the country and presented to magistrate judges in other jurisdictions. *See*, *e.g.*, *United States v. Mero-Mero*, No. 23-cr-20477-JB Dkt. # 8 (S.D. Fla. Dec. 27, 2023) (documents reflecting the defendant's initial appearance in the Southern District of California—the Ninth Circuit—before being transferred to the Southern District of Florida); *United States v. Gonzalez*, No. 22-cr-20350-RKA Dkt. # 10 (S.D. Fla. Jan. 5, 2023) ("Defendant ... remained in Puerto Rico until September 22, 2022, at which time he was transported to the Southern District of Florida."). This is not like a typical situation, therefore, where the Court may reliably anticipate that additional circuits will consider a recurring legal issue in due

course. Congress has given the executive branch a statutory means to avoid that development.

Finally, the fact that the Court has previously declined to review other challenges to the MDLEA is no reason to deny the Petition. Only one of the cases identified in footnote 2 of the government's brief raised the question presented herein; and there the issue was arguably subjected to plain error review, before the Eleventh Circuit issued the precedential decision in this case. *See Vasquez-Rijo v. United States*, 143 S. Ct. 602 (2024) (No. 22-7442). Here, by contrast, the issue was fully litigated in both the district court and the court of appeals, and decided on the merits in a published decision. The government has not even alleged that there are any impediments to review.

In summary, this case presents an important, unanswered question of federal constitutional law, regarding one of the least-reviewed provisions of the United States Constitution. The government has not disputed the importance of the question presented; nor has it denied that the question before the Court will implicate a vast number of criminal prosecutions, both in the MDLEA context and in other areas where the United States seeks to apply its criminal laws extraterritorially pursuant to the Felonies power. Finally, the government has not alleged that this case presents anything less than a perfect vehicle for review.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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