IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **20-11188-HH**

Robert Dexter Weir, David Roderick Williams,
and Luther Fian Patterson,

Appellants,

- versus -

United States of America,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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Weir et al. v. United States, Case No. 20-11188-HH

Certificate of Interested Persons

American Civil Liberties Union, Inc.

American Civil Liberties Union of Florida, Inc.

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

Cohen, Eric Martin

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Malone, Todd Omar

Matzkin, Daniel

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O'Sullivan, Hon. John J.

Patterson, Luther Fian

Weir et al. v. United States, Case No. 20-11188-HH

Certificate of Interested Persons (Continued)

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Quencer, Kevin

Simonton, Hon. Andrea M.

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Tarre, Michael S.

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Tilley, Daniel B.

Torres, Hon. Edwin G.

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United States of America

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Weir, Robert Dexter

White, Hon. Patrick A.

Williams, David Roderick

Counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final order of the United States District Court for the Southern District of Florida denying a petition for writ of coram nobis. The Petitioners asserted the district court's jurisdiction under 28 U.S.C. § 1651(a). The district court denied the petition on the merits on January 30, 2020 (CVDE:17).[1] The Petitioners filed a timely notice of appeal from the judgment in a civil case against the United States on March 26, 2020 (CVDE:18); *see* Fed. R. App. P. 4(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[1] References to the instant coram nobis petition civil docket in Case No. 19-cv-23420-UU will be to "CVDE."

Statement of the Issues

I. Whether Congress has the Constitutional authority to define and punish obstruction of Coast Guard boardings on the high seas, authorized by treaty, and necessary to the enforcement of United States criminal laws combatting international drug commerce.

II. Whether prosecuting foreign nationals for false statements to Coast Guard officers investigating a violation of the Maritime Drug Law Enforcement Act on a vessel subject to the jurisdiction of the United States, with the consent by treaty of the vessel's flag nation, violates the Due Process Clause's restriction on arbitrary law enforcement actions and actions without fair notice.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

Petitioners, Robert Dexter Weir, David Roderick Williams, and Luther Fian Patterson, pled guilty regarding their responses to Coast Guard boarding officers investigating maritime drug trafficking on the high seas. They were originally named in a criminal complaint, in the Southern District of Florida, alleging violations of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70501, *et seq.* (CRDE:1).[2] Petitioners waived charging by indictment (CRDE:44, 48, 50) and

[2] References to the underlying criminal case docket in Case No. 17-cr-20877-UU will be to "CRDE."

ultimately pled guilty to an information charging them each with knowingly and intentionally providing materially false information to a Federal 1aw enforcement officer, regarding their vessel's destination, during the boarding of a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B) (CRDE:43).

The district court entered judgment against Petitioners on January 10, 2018, sentencing them each to time served (CRDE 67, 68, 70).

On August 15, 2019, Petitioners filed the instant coram nobis petition asserting that the district court had "lacked jurisdiction over their extraterritorial conduct" (CVDE 1). The government opposed the petition, both on procedural waiver grounds and on the merits of Congress's enumerated powers and compliance with due process (CVDE:15), and Petitioners responded (CVDE:16).

The district court denied the petition (CVDE:17), rejecting the government's procedural challenge, but ruling against Petitioners on the merits. The district court ruled that because the Petitioners "challenge the constitutionality of the federal statute 18 U.S.C. § 2237(a)(2)(B) that served as the basis for their convictions," their "claim is jurisdictional and they need not 'show cause' to justify their failure to raise these claims in their trial proceedings or on direct appeal" (CVDE:17:6-7 (citing *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), and *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000)). The district court ruled, however, that asserting

extraterritorial jurisdiction was within Congress's power over felonies on the high seas and did not violate due process, especially when acting with the consent of a vessel's nation of registry; the court otherwise ruled that Petitioners' argument that extraterritorial jurisdiction required a nexus with the United States was foreclosed by controlling precedent (CVDE:17).

Petitioners filed a timely notice of appeal (CVDE:18) and have been released and removed from the United States.

2. Statement of the Facts

In pleading guilty, Petitioners stipulated that, on September 14, 2017, a United States Coast Guard cutter investigated the wake of a vessel heading in the direction of Haiti from Jamaica (CRDE:59:1; CRDE:63:1).[3] Petitioners initially "refused to stop," when approached, but ultimately stopped "in international waters near Haiti" after Coast Guard boarding officers drew their weapons (*id.*).

Petitioners stipulated that after they claimed Jamaican registry for their vessel: "Jamaica confirmed the registration of the vessel, but authorized the United States to board and search the vessel. Jamaica also later waived jurisdiction over the vessel. Therefore, the vessel was subject to the jurisdiction of the United States" (*id.*).

[3] Neither Patterson's factual proffer nor his plea transcript are found in the criminal docket, but his plea agreement (CRDE:66) and judgment (CRDE:67) indicate that he entered his plea on January 5, 2018. Petitioners' appeal makes no argument attempting to distinguish the facts of Patterson's case.

Responding to the jurisdictional challenge raised for the first time in the coram nobis petition, the government submitted the certificate of Coast Guard Commander Francis J. DelRosso, designee of the United States Secretary of State, who certified that the Coast Guard officers in international waters "suspected the [Petitioners' vessel, the *Jossette*] of illicit drug trafficking" and "conducted right-of-approach questioning" (CVDE:15-1:1). "Pursuant to Article 3 of the Agreement Between the Government of the United States and the Government of Jamaica Concerning Cooperation In Suppressing Illicit Maritime Drug Trafficking," the United States contacted Jamaica which "confirmed the [registration claim] and authorized United States law enforcement to board and search the vessel" (CVDE:15-1:1). Subsequently, again pursuant to Article 3, the United States requested that Jamaica "waive its primary right to exercise jurisdiction over the vessel, its cargo, and crew to the extent necessary for the enforcement of United States law" (CVDE:15-1:1, 3). On October 9, 2017, "the Government of Jamaica consented to the exercise of jurisdiction by the United States" (*id.* at 3). On this basis, the United States determined that the *Jossette* was "subject to the jurisdiction of the United States, pursuant to 46 U.S.C. § 70502(c)(1)(C) and 18 U.S.C. § 2237(e)(3)" (*id.*).

Although 613 pounds of marijuana were ultimately recovered during the operation (CVDE:15-1:3), the government proffered during Petitioners' change of plea hearing that although the marijuana was found "nearby," "the Government was

not convinced it could prevail at a trial to prove [the marijuana] was in fact connected to this boat" (CRDE:93:23).

Petitioners stipulated that "[w]hen asked about the destination of the vessel, each of the members of the crew … told the United States Coast Guard boarding officers that the vessel's destination was the waters near the coast of Jamaica, where they intended to fish. This was not true" (CRDE:59:1-2; CRDE:63:1-2). Petitioners admitted they knew "the vessel's true destination was Haiti" (CRDE:59:2; CRDE:63:2) and stipulated: "This falsehood was material to the federal law enforcement officers … during their boarding of the vessel because the destination of a vessel is an important part of the information gathered by the Coast Guard officers during the boarding of a vessel and can influence the United States' decision-making process on what action to take next during such a boarding" (*id.*).

3. Standards of Review

This Court "review[s] de novo the legal question of whether a statute is constitutional." *United States v. Tinoco*, 304 F.3d 1088, 1099 (11th Cir. 2002). Whether a statute applies extraterritorially, and whether such application is proper, are "question[s] of statutory interpretation subject to plenary review." *United States v. MacAllister*, 160 F.3d 1304, 1306 (11th Cir. 1998).

In reviewing the denial of a coram nobis petition for abuse of discretion, "an error of law is an abuse of discretion per se." *United States v. Peter*, 310 F.3d 709,

711 (11th Cir. 2002) (quoting *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000)).

Summary of the Argument

Petitioners concede that controlling law would allow their prosecution for trafficking drugs on the high seas in a vessel over which its flag nation of registry has consented, pursuant to existing treaty, to the application of United States law. Their argument that the United States could not, however, prosecute them for obstructing the authorized boarding and investigation into that crime is without merit.

The Coast Guard serves a law enforcement role both in United States waters and on the high seas, where consistent with international law and treaties. It is authorized to detain and board foreign vessels with the consent of the vessel's flag nation. Jamaica's consent, here, authorized the Coast Guard to board Petitioners' vessel and apply United States law to their statements materially affecting the boarding officers' ability to enforce the MDLEA.

This and other circuits have long recognized Congress's authority to assert United States jurisdiction over drug trafficking on vessels on the high seas, especially with the consent of the vessel's flag nation. Coast Guard boarding of foreign vessels for this purpose is authorized by United States treaties and depends on the negotiated consent of our treaty partners. Criminalizing obstructive conduct,

such as providing materially false information during a Coast Guard boarding, is thus within Congress's enumerated powers to define and punish felonies on the high seas, regulate foreign commerce, and enact laws necessary and proper to carrying out United States laws and treaties.

Exercising this authority is consistent with due process requirements, because it is neither arbitrary nor without fair notice. Although this is a question of domestic law, and compliance with international law is not required to satisfy due process, Petitioners' prosecution complied with international law and treaties.

Although this Court has cited the protective principle of international law as one basis for rejecting due process challenges to the MDLEA's extraterritorial application, Petitioners misread this Court's precedent as requiring that the protective principle be satisfied in all cases involving the extraterritorial application of United States criminal laws. This Court has never so held. In fact, it has cited other methods of complying with international law, including compliance with treaties and other principles of international law.

Both the bilateral agreement between the United States and Jamaica and the multilateral United Nations convention under which it was negotiated give global notice that flag nations of vessels suspected of drug trafficking may consent to United States boardings and the enforcement of United States law. Other circuits deem such treaty notice sufficient to satisfy due process concerns. Having cited those

decisions, without resolving that issue, this Court has nevertheless acknowledged other bases for deeming compliance with international law to satisfy due process concerns, including the territorial principle, the consent of a vessel's flag nation, and the right of any nation to assert jurisdiction over stateless vessels on the high seas.

The United States, in Congressional findings and as a party to international treaties, has recognized that drug trafficking on vessels is a threat to United States security, corrupts and destabilizes international commerce, and is universally condemned. Due process protections were thus satisfied in this case because it is neither arbitrary nor without fair notice for Petitioners to be prosecuted for obstructing a Coast Guard law enforcement boarding authorized by treaty and the consent of their vessel's flag nation. Restricting the ability of the Coast Guard to enforce United States law in the manner authorized by the vessel's flag nation and by United States treaties would impair the United States's foreign relations and comprehensive scheme to combat the international drug trade negotiated with its treaty partners.

Finally, even if a United States nexus were required to support Petitioners' convictions, such a nexus exists in this case. Having established that it would be within the United States's authority to prosecute Petitioners for an MDLEA offense, their obstruction of the Coast Guard's lawful authority to board their vessel and

enforce the MDLEA would sufficiently affect significant United States interests to satisfy any nexus requirement.

Argument

Criminalizing the Obstruction of a Lawful Coast Guard Boarding on the High Seas, Conducted in Compliance with United States Treaties and International Law, Is Within Congress's Enumerated Powers and Satisfies Due Process Requirements.

It is the United States Coast Guard's duty to, among other responsibilities, "enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States," and to "engage in maritime … interdiction to enforce or assist in the enforcement of the laws of the United States." 14 U.S.C. § 102(1)-(2).

In carrying out such law enforcement interdictions, Congress has granted the Coast Guard the authority to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." 14 U.S.C. § 522(a). This authority includes the power to "address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance." *Id.* "The officers of the Coast Guard insofar as they are engaged … in enforcing any law of the United States shall … be deemed to be acting as agents of the particular

executive department or independent establishment charged with the administration of the particular law." 14 U.S.C. § 522(b)(1).

This Court has long given the Coast Guard's authority "a reading broad enough to cover the stop on the high seas of foreign vessels subject to extra-territorial application of domestic law." *United States v. Conroy*, 589 F.2d 1258, 1265 (5th Cir. 1979).[4] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (adopting as binding precedent decisions of the former Fifth Circuit issued on or before September 30, 1981).

To allow the Coast Guard to carry out this broad authority, with respect to "a vessel of the United States, or a vessel subject to the jurisdiction of the United States," Congress has made it a crime under United States law "to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel," "[to] forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding or other law enforcement action authorized by any Federal law or to resist a lawful arrest," or "[to] provide materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew." 18 U.S.C. §§ 2237(a)(1) and (2).

[4] Applying 14 U.S.C. § 522's predecessor statute, 14 U.S.C. § 89.

The Coast Guard exercises this boarding authority to enforce the MDLEA and other United States criminal and commercial laws. It does so in compliance with United States treaties and international law. Prosecuting those who obstruct or lie to Coast Guard officers during such boardings is neither arbitrary nor without notice in violation of due process requirements.

Petitioners acknowledged the material effect of their false statements on the Coast Guard's law enforcement efforts (CRDE:59:2; CRDE:63:2). The district court's denial of their coram nobis petition challenging their convictions should be affirmed.

I. Congress Acted Within Its Enumerated Powers to Regulate Boarding of Vessels on the High Seas Suspected of the International Commerce in Illicit Drugs.

Pursuant to Congress's enumerated authority to "define and punish … Felonies committed on the high Seas," "regulate Commerce with foreign Nations," and "make all Laws which shall be necessary and proper for carrying into Execution" its lawful powers and United States treaty obligations, U.S. Const., art. I, § 8, cls. 3, 10, and 18, the United States has made it a crime for any person to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board … a vessel subject to the jurisdiction of the United States." 46 U.S.C. § 70503(a)(1), (e)(1). A vessel subject to the jurisdiction of the United States includes "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." 46 U.S.C. § 70502(c)(1)(C).

The Coast Guard enforces the MDLEA, and other United States laws, through its 14 U.S.C. § 522(a) boarding authority. The MDLEA being valid, § 2237(a)'s criminalization of any attempt to obstruct Coast Guard enforcement operations falls within Congress's enumerated powers to define and punish felonies on the high seas, regulate foreign commerce, and enact laws necessary and proper to the execution of valid United States laws and treaties.

Petitioners conflate due process limitations with the threshold question of Congress's enumerated powers and incorrectly state that this Court requires that Congress's High Seas Clause authority "must be supported by a principle of extraterritorial jurisdiction recognized by customary international law" (Br. at 26). The scope of Congress's enumerated power to enact legislation is separate from the question of whether due process places limitations on the extraterritorial enforcement of an otherwise valid law. *See United States v. Noel*, 893 F.3d 1294, 1301 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 157 (2019) (addressing the "empowerment argument" "[b]efore turning to the second requirement to satisfy due process").

Both the scope of Congress's Article I powers and any limitations placed on them by the Fifth Amendment's Due Process Clause are questions of United States

law. "To determine whether an exercise of extraterritorial jurisdiction satisfies due process, we have sometimes consulted international law, … but due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair, a question of domestic law." *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016) (internal citation omitted). Neither the text nor history of the High Seas Clause limits Congress's ability to define felonies on the high seas to crimes under customary international law. Even so, the assertion of jurisdiction over MDLEA boardings and other boardings with the consent of a vessel's flag nation complies with both international law and treaties.

Untangling Congress's enumerated powers from due process limitations shows why the district court's ruling does not, as Petitioners suggest, allow consent alone to grant the United States jurisdiction over crimes "in the territorial waters of Panama, in the mountains of Bolivia, or on a foreign-flagged vessel off the coast of Haiti" (Br. at 30). Congress must first have its own enumerated power to pass such a law, and only then would the issue of a foreign nation's consent over its vessels or territory be one of the factors bearing on the due process analysis. That Congress has the enumerated authority to criminalize conduct in the mountains of Bolivia or even within Haiti itself is not a novel proposition. *See United States v. Toro*, 840 F.2d 1221, 1227, 1235 (5th Cir. 1988) (affirming drug conviction based on extraterritorial conduct in Bolivia); *Noel*, 893 F.3d at 1301-02 (affirming Congress's enumerated

power to criminalize kidnapping by a Haitian citizen within Haiti). Such extraterritorial jurisdiction, of course, must satisfy due process requirements.

Before addressing due process limitations, therefore, the government will first address whether criminalizing obstructive statements during the Coast Guard's law enforcement boarding was within Congress's enumerated powers.

A. Congress's Authority to Assert Jurisdiction Over Vessels Trafficking Drugs on the High Seas is Well Established.

This Court has "repeatedly held that Congress has the power, under the Felonies Clause, to proscribe drug trafficking on the high seas." *United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014) (citing *United States v. Estupinan*, 453 F.3d 1336, 1339 (11th Cir. 2006); *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003)). "Congress's High Seas Clause power includes the authority to punish offenses other than piracies outside the territorial limits of the United States…. [This Court has] refused to read a jurisdictional nexus requirement into the clause." *United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011).

Conducting a similar historical exploration of Congress's power to " "define and punish … Felonies committed on the high Seas," U.S. Const., art. I, § 8, cl. 10, to the one conducted by this Court in *Campbell*, 743 F.3d at 809-12, the Fifth Circuit found no external constraint on Congress's power to assert extraterritorial jurisdiction under the clause where the flag nation of the vessel consented to the

application of United States law. *See United States v. Suerte*, 291 F.3d 366, 372-75 (5th Cir. 2002).

To the extent a nexus is at issue, it is "as a proxy for due process requirements." *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (internal quotation omitted).

B. MDLEA Enforcement with the Consent of a Vessel's Flag Nation Complies with United States Treaties.

Congress's authority to proscribe extraterritorial acts is not limited to its authority under the Define and Punish Clause. An offense that is "not piracy, was not committed on the high seas, and could not be deemed an offense against the Law of Nations" may still be prosecuted in the United States under "congressional authority … found in the Necessary and Proper Clause" to implement a valid United States treaty. *Noel*, 893 F.3d at 1301-02 (recognizing Congress's authority to carry out the International Convention Against the Taking of Hostages).

The United States and Jamaica, like 189 other nations, are parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 ("Convention Against Illicit Traffic").[5] The treaty directs that "Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea."

[5] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en

Id., Art. 17(1). To carry out this and other cited treaties, the United States and Jamaica entered into the Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking ("the Jamaica Bilateral Agreement"), State Dept. No. 98-57, 1998 WL 190434. *See* Convention Against Illicit Traffic, Art. 17(9) (encouraging bilateral enforcement agreements).

The Convention Against Illicit Traffic provides that "Parties shall co-operate closely with one another … with a view to enhancing the effectiveness of law enforcement action to suppress the commission" of trafficking offenses. *Id.*, Art. 9(1). As the vessel's flag nation, Jamaica had primary jurisdiction over crimes committed on the vessel, including suspected drug trafficking, pursuant to the Convention Against Illicit Traffic, Art. 4(a)(ii); Convention on the High Seas of 1958, Art. 5(1), 13 U.S.T. 2312, T.I.A.S. No. 5200; and the Jamaica Bilateral Agreement, Art. 15(2). Through their bilateral agreement, the United States and Jamaica are carrying out the Convention's "purpose: 'to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.'" *Suerte*, 291 F.3d at 377 (quoting Convention Against Illicit Traffic, Art. 2(1)).

The cooperation provided by the Convention Against Illicit Traffic includes having the vessel's flag state authorize a treaty partner to "[b]oard the vessel," "[s]earch the vessel," and otherwise "take appropriate measures in regard to that vessel." Convention Against Illicit Traffic, Art. 17(1), (3), and (4). It specifically recognizes "the possibility of [parties] transferring to one another proceedings for criminal prosecution of offences." *Id.*, Art. 8.

The Jamaica Bilateral Agreement provides that if one party encounters on the high seas a vessel registered in the nation of the other party, and there is "reasonable grounds to suspect that the vessel is engaged in illicit traffic," the encountering party may request that the flag nation "authorize the boarding and search of the suspect vessel, cargo and persons found on board by the law enforcement officials of the first Party." Jamaica Bilateral Agreement, Art. 3, §1. The flag nation may also "waive its right to exercise jurisdiction and authorize the other Party to enforce its laws against the vessel." Jamaica Bilateral Agreement, Art. 3, § 5.

Petitioners stipulated that Jamaica "authorized the United States to board and search the vessel [and] later waived jurisdiction over the vessel," rendering the *Jossette* "subject to the jurisdiction of the United States" (CRDE:59:1; CRDE:63:1). Although Petitioners now dispute the sufficiency of this factual proffer (Br. at 31-32), this Court has never required precise language to satisfy § 70502(c)(1)(3)'s jurisdictional requirement. *See United States v. Hernandez*, 864 F.3d 1292, 1303

(11th Cir. 2017) (refusing "to impose an undue and burdensome formality on the content of the Secretary's certification"); *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) ("we have never required the language in [the flag nation's response] to precisely mirror the language contained in the MDLEA").

Nevertheless, "[w]hen a party's failure to challenge the district court's jurisdiction is at least partially responsible for the lack of a developed record," the government is permitted to produce such proof when jurisdiction is challenged. *United States v. Iguaran*, 821 F.3d 1335, 1338 (11th Cir. 2016). Here, when challenged, the government produced the certification conclusively proving that Jamaica granted the United States's request that it "waive its primary right to exercise jurisdiction over the vessel, its cargo, and crew to the extent necessary for the enforcement of United States law" and "consented to the exercise of jurisdiction by the United States," pursuant to §§ 70502(c)(1)(3), (c)(2)(B) (CVDE:15-1:1, 3).

It is immaterial that Jamaica's consent was obtained after the Petitioners' false statements were made. "Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense." 46 U.S.C. § 70504(a). Section 70502's jurisdictional provisions "merely allocate power between the courts and the executive as to which of the two will be responsible for complying with U.S. obligations under the international law of criminal jurisdiction." *Hernandez*, 864

F.3d at 1303-04. "There is nothing anomalous about basing that decision on actions taken after the criminal activity." *Id.* at 1304.

Without needing to reach the question of whether Jamaica could consent to the application of United States law only for some purposes, such as the enforcement of the MDLEA alone, "the certification does not indicate that [Jamaica] denied consent with respect to any particular" application of United States law. *See United States v. Mosquera-Murillo*, 902 F.3d 285, 291 (D.C. Cir. 2018).

Carrying out the MDLEA boarding here complied with United States treaties "that oblige[] it to 'co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.'" *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018) (quoting the Convention Against Illicit Traffic, Art. 17(1)); *see also United States v. Bravo*, 489 F.3d 1, 7 (1st Cir. 2007) ("The USCG acted within both international treaty law and customary international law.").

C. The Coast Guard's Boarding Authority Extends Beyond the MDLEA.

Various statutes provide the Coast Guard with boarding authority, including the authority on the high seas to board stateless vessels or foreign vessels with the consent of the vessel's flag nation. In addition to enforcing maritime drug laws, such as the MDLEA and the Drug Trafficking Vessel Interdiction Act ("DTVIA"), 18 U.S.C. § 2285, the Coast Guard's law enforcement duties include enforcing Title 18,

sections 2280 (violence against maritime navigation) and 2280a (transporting a weapon of mass destruction). Each of these statutes cites and incorporates the same MDLEA jurisdictional provisions regarding vessels subject to the jurisdiction of the United States that are incorporated by § 2237(e)(3). *See* 18 U.S.C. § 2280(b)(1)(a)(i); 18 U.S.C. § 2280a(b)(1)(a)(i); 18 U.S.C. § 2285(h). Any person providing false material information to Coast Guard officials enforcing these laws would be subject to the same prosecution as Petitioners.

Additionally, Coast Guard officers, as "'officers of the customs,'" "are permitted to board and examine a foreign vessel 'under special arrangement' with the vessel's home government." *United States v. Reeh*, 780 F.2d 1541, 1546 (11th Cir. 1986). When acting in its customs enforcement authority under 19 U.S.C. § 1401(i), the Coast Guard may board vessels "at any place in the United States or within the customs waters or, as [they] may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or *at any other authorized place*." 19 U.S.C. § 1581(a). This authority may include actions "upon the high seas upon a foreign vessel … to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States" where not "in contravention of any treaty with a foreign government" and "such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government." 19 U.S.C. § 1581(h). These statutes provide "ample authority

for the Coast Guard to board and search a foreign flag vessel on the high seas when the flag state consents," consistent with the 1958 Convention on the High Seas and other United States treaties. *United States v. Green*, 671 F.2d 46, 52 (1st Cir. 1982); *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979). *See also Reeh*, 780 F.2d at 1546.

Obstructing such boardings would violate 18 U.S.C. § 2237. This Court has affirmed the prosecution for failure to heave to during Coast Guard investigations of alien smuggling, *United States v. Espildora*, 383 F. App'x 907, 909 (11th Cir. 2010), including in a case involving an interdiction in international waters, north of Cuba, *see United States v. Tapanes*, 284 F. App'x 617 (11th Cir. 2008).[6]

D. Criminalizing Obstruction of Coast Guard Boardings is Within Congress's Powers to Define and Punish Felonies on the High Seas and to Enact Laws Necessary and Proper to Executing United States Laws and Treaties.

Protecting the Coast Guard's authority to board vessels and question their crews is necessary to carry out its authority to enforce United States laws criminalizing designated felonies on the high seas and regulating foreign commerce, all in accordance with United States treaty obligations. *See* U.S. Const., Art. I, § 8, cl. 18.

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[6] The circumstances in *Tapanes* are found in the Government's Brief in Case No. 07-14763, a fact accessible to this Court in its docket. *See Nguyen v. United States*, 556 F.3d 1244, 1259 n.7 (11th Cir. 2009) ("A court may take judicial notice of its own records ….").

"[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010) (quoting *United States v. Comstock*, 560 U.S. 126, 133-34 (2010)).

Coast Guard boarding authority is part of recognized MDLEA enforcement actions. *See United States v. Williams*, 865 F.3d 1328, 1345-47 (11th Cir. 2017) (affirming crew's MDLEA conviction and master's conviction for failure to heave to); *Wilchcombe*, 838 F.3d at 1185-86 (same); *see also United States v. Diaz-Doncel*, 811 F.3d 517 (1st Cir. 2016) (defendant pled guilty to MDLEA conspiracy and aiding and abetting failure to heave to).

MDLEA enforcement actions are supported by Congress's express extraterritorial authority to define and punish felonies on the high seas. *See United States v. Valois*, 915 F.3d 717, 722 (11th Cir. 2019); *see also Suerte*, 291 F.3d at 370 (noting the Constitution's "specific grant of power … for the punishment of offenses outside the territorial limits of the United States").

Such boardings carry out United States treaty obligations to suppress international drug trafficking on vessels and cooperate with its treaty partners in the prosecution of offenders. *See Castillo*, 899 F.3d at 1213 (citing the Convention

Against Illicit Traffic, Art. 17(1)); *Bravo*, 489 F.3d at 7 (same, as well as other treaties).

Coast Guard enforcement boardings also help the United States regulate the channels and instrumentalities of the international drug trade, and other shipping on the high seas, that has an aggregate effect on United States commerce with foreign nations. "Congress's power under the Foreign Commerce Clause includes *at least* the power to regulate the 'channels' of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a 'substantial effect' on commerce between the United States and other countries." *Baston*, 818 F.3d at 668 (emphasis added). Indeed, "the Supreme Court has suggested that 'the power to regulate commerce ... when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce,'" given the lack of federalism concerns. *Id.* at 668 (quoting *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932)).

The Convention Against Illicit Traffic was premised on its international signatories' recognition that "traffic in narcotic drugs and psychotropic substances … adversely affect[s] the *economic*, cultural and political foundations of society, "undermin[ing] the legitimate *economies* and threaten[ing] the stability, security and sovereignty of States." Convention Against Illicit Traffic, Preamble (emphasis added). "[I]llicit traffic generates large financial profits and wealth enabling

transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels." *Id.*

The Coast Guard's MDLEA enforcement addresses the international commerce in various drugs, including cocaine—96% of which enters the United States over land and maritime trafficking routes from Colombia and Peru and whose trafficking routes shift between the United States and other global markets in response to enforcement and aggregate market forces. *See* Drug Enforcement Administration, 2019 National Drug Threat Assessment, at 60, 70-71 (Dec. 2019).[7] The Coast Guard's boarding authority, of course, extends to vessels and customs law enforcement beyond the international drug trade, affecting all manner of international trade by commercial cargo vessels.

The MDLEA enforcement action in this case, and the Coast Guard's high seas boarding authority in general, being valid, § 2237's criminalization of any attempt to obstruct the Coast Guard's boarding operations is "rationally related to the implementation of [these] constitutionally enumerated power[s]." *Belfast*, 611 F.3d at 804 (quoting *Comstock*, 560 U.S. at 134).

[7] *See* https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf.

E. Congress's Power to Define and Punish Felonies on the High Seas Is Not Limited By the Separate Piracy or Law of Nations Clauses.

Congress's enumerated power to define and punish felonies on the high seas is a question of United States law. As the defendants did in *Baston* and *Noel*, Petitioners mistakenly read the High Seas Clause to limit Congress's extraterritorial jurisdiction to only cases treated under international law comparably to piracy or an offense against the law of nations. *See Noel*, 893 F.3d at 1302. Piracy and offenses against the law of nations implicate international legal doctrines, and the courts have looked to customary international law to help define their contours. Neither Congress nor the courts have so constrained Congress's separate enumerated power to define and punish felonies on the high seas. Even so, Congress's grant and protection of the Coast Guard's boarding authority with the consent of flag nations is fully consistent with international law and treaties, and this Court need not resolve whether the High Seas Clause is constrained by international law. It can assume that it is and conclude that such limits are satisfied where the flag nation with primary jurisdiction over the vessel consents, by treaty, to boarding by the Coast Guard to investigate offenses of mutual concern and to the application of United States law to conduct during that boarding.

Nevertheless, the text and history of Article I, § 8, cl. 10 do not support an international law constraint on Congressional authority under the High Seas Clause. The Supreme Court first interpreted the provision in *United States v. Smith*, 18 U.S.

(5 Wheat.) 153 (1820), involving a federal statute making it a crime for any person, "upon the high seas, [to] commit the crime of piracy, as defined by the law of nations." *Id.* at 157 (internal quotation omitted). The Court recognized Congress's power to define and punish three categories of offenses: (1) piracies, (2) felonies committed on the high seas, and (3) offenses against the Law of Nations. *Id.* at 158-59; *see United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012). Only the Law of Nations Clause textually references international law. And while piracy was well understood in the international law of the day, the Court explained that Congress's decision to incorporate that understanding into federal law by linking the definition of piracy to "the law of nations" was a product of legislative choice, not constitutional obligation. 18 U.S. (5 Wheat.) at 157-60.

Congress certainly *can* limit the reach of United States laws to that allowed by international law, as this Court found Congress did in the Marijuana on the High Seas Act (21 U.S.C. § 955a). *See United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982) (cited in Petitioners' Br. at 28). There, "Congress intended to extend jurisdiction only to the "maximum ... permitted under international law." *Id.* at 1379 (citing legislative history). *Marino-Garcia* cited as authority for the general prohibition against "any country … asserting jurisdiction over foreign vessels on the high seas" the 1958 Convention on the High Seas, to which Jamaica and the United States are parties and which expressly allows a vessel's flag nation to authorize

boardings by other countries by treaty. *Marino-Garcia*, 679 F.2d at 1380. *See* 1958 Convention on the High Seas, Art. 22(1). Here, Jamaica authorized both the Coast Guard boarding and the application of United States law, pursuant to the Jamaica Bilateral Agreement with the United States (CVDE:15-1).

As to whether Congress's authority to "define and punish … Felonies committed on the high Seas" is *always* restrained by international law, *Smith* recognized that the term "Felonies" had no settled meaning at the Founding that was tied to international law. The Court cited with approval James Madison's statement that "felonies" did not "have a very exact and determinate meaning" even for common-law offenses committed on land, and further explained that the term was "necessarily somewhat indeterminate" for "offences on the high seas," "since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law." 18 U.S. (5 Wheat.) at 159 (citing *The Federalist* No. 42); *see Campbell*, 743 F.3d at 811 (chronicling the ambiguities in the meaning of "felony" at the Founding). Given the indeterminacy in both that term and the category of offenses against the law of nations, the Court saw "a peculiar fitness in giving [Congress] the power to define as well as to punish," and found "not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question." *Smith*, 18 U.S. (5 Wheat.) at 159; *accord* 3 J. Story, *Commentaries on the Constitution* §§ 1155-58, at 54-56 (1833). Nothing in that

reasoning suggests that, in exercising the definitional power afforded it, Congress would be constrained by still-nascent principles of international law.

The drafting history of the clause points strongly against such constraints. The substitution of the phrase "define and punish" for an earlier version that would have granted Congress the power "[t]o declare the law and punishment of piracies and felonies," was the product of a suggestion by Madison at the Constitutional Convention. M. Farrand, ed., *Records of the Federal Convention* 315-16 (1911). When one delegate objected that the change was unnecessary because "felonies" was "sufficiently defined by Common law," Madison responded that the term as used in English common law was both "vague" and "defective." *Id.* at 316. "Besides," he continued, "*no foreign law* should be a standard farther than is expressly adopted." *Id.* (emphasis added).

Madison then reiterated the impropriety of tying the Felonies Clause to foreign law both in *Federalist 42* and in his remarks to the Virginia Convention in support of ratification. *See The Federalist* No. 42, p. 268 (R. Scigliano ed. 2000) (opining that "neither the common nor the statute law of [England], or of any other nation, ought to be a standard for the proceedings" under the Felonies Clause, and that English law "would be a dishonorable and illegitimate guide"); *The Virginia Convention, 20 June 1788, Debates*, in 10 *The Documentary History of the Ratification of the Constitution*, at 1413 (1993) (explaining that "Felony is a word

unknown to the law of nations, and is to be found in the British laws," but that "[i]t was thought dishonorable to have recourse to th[e latter] standard"). The specific effort to disassociate the Felonies Clause from the body of foreign law most familiar to the Founding generation makes it unlikely that the Constitution nevertheless incorporated an unnamed set of international-law limits into the clause *sub silentio*.

Petitioners' proposed limitation is hard to square with legislation enacted by the First Congress, a source the Supreme Court has afforded significant weight in construing the Constitution. *See Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). The Crimes Act of 1790 punished "any seaman or other person [who] commit[s] manslaughter upon the high seas." Ch. 9, § 12, 1 Stat. 112, 115. *See Campbell*, 743 F.3d at 811; *Suerte*, 291 F.3d at 372. Congress would have enacted this prohibition under the High Seas Clause, since manslaughter was neither piracy, *see Smith*, 18 U.S. (5 Wheat.) at 160, nor an offense against the law of nations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

The absence of an international-law limit is consistent with other Congressional powers implicating foreign relations. *Cf.* J. Story, *Commentaries on the Constitution* (1833), § 1160, at 57 (calling it "obvious" that Congress's Define and Punish power "has an intimate connexion and relation with the power to regulate commerce and intercourse with foreign nations"). Courts recognize Congress's constitutional authority there to enact legislation that would violate precepts of

international law. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting); *see, e.g.*, *Ballestas*, 795 F.3d at 144 ("'Congress is not bound by international law,' so 'it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.'") (quoting *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003)). International law remains relevant principally for purposes of statutory construction—*viz.*, courts employ the *Charming Betsy* canon to ensure that Congress's intent to contravene international law is clear. *See, e.g.*, *United States v. Victoria*, 876 F.2d 1009, 1010 (1st Cir. 1989) (Breyer, J.); *United States v. Robinson*, 843 F.2d 1, 2-3 (1st Cir. 1988) (Breyer, J.). But such Congressional intent, when clear, is given effect. *E.g.*, *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

Here, however, Congress has not only not acted contrary to international law, but it has in fact given effect to the Jamaica Bilateral Agreement which allows Jamaica, as the *Jossette's* nation of registry, to "authorize the boarding and search of the suspect vessel, cargo and persons found on board by the law enforcement officials of the [requesting] Party." Jamaica Bilateral Agreement, Art. 3, §1. Jamaica was also authorized to "waive its right to exercise jurisdiction and authorize the other Party to enforce its laws against the vessel," *id.*, Art. 3, § 5, thus carrying out the Convention Against Illicit Traffic's call for cooperation including having a vessel's

flag state authorize a treaty partner to "[b]oard," "[s]earch," and otherwise "take appropriate measures in regard to [the] vessel." *Id.*, Art. 17(1), (3).

These treaties supplement the authority provided in international law to take action against pirate vessels or vessels suspected of violating customary international law. The Convention on the High Seas, to which Jamaica and the United States are parties, otherwise limits a nation's authority to interfere with another nation's vessels to cases of suspected piracy, slave trading, or where it is suspected the vessel is actually its own nation's vessel, "*[e]xcept where acts of interference derive from powers conferred by treaty*." Convention on the High Seas, Art. 22(1).[8]

Petitioners simply assume (Br. at 27) that, because the Define and Punish Clause contains three distinct grants of authority, offenses defined under Congress's High Seas authority must therefore include a United States nexus not required by the adjacent provisions. The clause's text, however, contains no such requirement.

Petitioners are correct that Congress's High Seas Clause authority is distinct. Unlike piracy, offenses on the high seas do not rely on universal jurisdiction to supersede other nations' jurisdiction. In the case of stateless vessels, any nation can assert jurisdiction because such "pariah" vessels can claim the protection of no state. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 (11th Cir. 2011). In the

[8] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&clang=_en

case of foreign-flagged vessels, however, Congress has only asserted the authority to apply United States law with the consent of the foreign nation. Universal jurisdiction would itself allow any state to punish a violation. Unlike offenses against the Law of Nations, Congress's High Seas Clause authority is limited geographically. Congress would have the authority to define and punish an offense against the Law of Nations anywhere in the world. Such crimes, however, would be limited to "violations of customary international law." *Bellaizac-Hurtado*, 700 F.3d at 1249. Petitioners' reliance (Br. at 29-30) on *Bellaizac-Hurtado's* rejection of the foreign nation's consent to support the assertion of Congress's authority here is inapposite, because that case "was limited to the Offences Clause." *Baston*, 818 F.3d at 666. The consent of the vessel's flag nation cannot create a crime under customary international law, reachable under Congress's Law of Nations Clause authority. It can, however, allow Congress to assert jurisdiction over conduct which Congress otherwise has the power to proscribe.

Petitioners' reliance (Br. at 37-38) on *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820), is also misplaced, because "in *Furlong* the Supreme Court examined the scope of a statute … rather than the scope of Congress's power." *Saac*, 632 F.3d at 1209-10. *Furlong* merely construed the 1790 Crimes Act not to reach murder by one foreign national of another committed on a foreign-flagged vessel. 18 U.S. (5 Wheat) at 194. This Court rejected the argument that *Furlong*, "a statutory

interpretation case," "support[s] the proposition that the High Seas Clause allows Congress to reach only conduct with a connection to the United States." *Saac*, 632 F.3d at 1209-10.

Moreover, the Court held the same year as *Furlong* that the statute *did* criminalize murder on a vessel lacking national character, *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 418 (1820); *see also United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820)—a category analogous to a stateless vessel, which Congress may assert high seas jurisdiction over regarding crimes without any United States nexus. *Ibarguen-Mosquera*, 634 F.3d at 1379.

"The constitution having conferred on congress the power of defining and punishing" a felony on the high seas, "[t]he only question is, has the legislature enacted such a law?" *See Suerte*, 291 F.3d at 374 (quoting and discussing *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818)'s interpretation of a piracy statute). "[T]o the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause." *Id.* at 375.

II. Congress's Assertion of Jurisdiction Over the Conduct of MDLEA Boardings on the High Seas, with the Consent By Treaty of the Vessel's Flag Nation, is Neither Arbitrary nor Without Fair Notice, Thus Satisfying Due Process.

In order for Congress to criminalize extraterritorial conduct, it "must state that it intends the law to have extraterritorial effect," and "application of the law must

comport with due process." *Ibarguen-Mosquera*, 634 F.3d at 1378. Section 2237 plainly applies to boardings on the high seas. In the case of foreign-flagged vessels on the high seas, this and other courts have recognized various sources of authority, including treaties, the territorial principle, and flag nation consent, to reject due process challenges to United States prosecutions of foreign nationals for extraterritorial conduct in the absence of a United States nexus. Petitioners misread this Circuit's cases to ignore these other sources of authority and incorrectly assert that *only* universal condemnation may authorize Congress's extraterritorial reach in the absence of a United States nexus. Moreover, while this and other circuits have affirmed the United States's ability to prosecute MDLEA offenses without showing a United States nexus, once such prosecutions are acknowledged to be within the United States's Constitutional power, the obstruction of the Coast Guard's treaty-negotiated boarding authority to enforce the MDLEA does establish a sufficient nexus with a significant United States interest to withstand Petitioners' due process challenge.

The MDLEA plainly addresses drug trafficking on vessels "even though the act is committed outside the territorial jurisdiction of the United States." 46 U.S.C. § 70503(b). Section 2237's application to MDLEA boarding actions will necessarily have the same extraterritorial scope. Moreover, § 2237 incorporates the MDLEA's definition of a "vessel subject to the jurisdiction of the United States," which

includes not only "a vessel in the customs waters of the United States," but also "a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas," "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," as well as (like here) "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." 46 U.S.C. § 70502(c). Section 2237 plainly has extraterritorial effect.

Where Congress gives a statute such effect, "due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair." *Baston*, 818 F.3d at 669. Although this is "a question of domestic law," "[c]ompliance with international law satisfies due process because it puts a defendant on notice that he could be subjected to the jurisdiction of the United States." *Id.* (internal quotation omitted). However, while compliance with international law is sufficient to satisfy United States due process requirements, "compliance with international law is not necessary to satisfy due process." *Id.*

To the extent the Due Process Clause limits Congress's assertion of extraterritorial jurisdiction, any such limits are not confined to a geographic or citizenship nexus but address more broadly the fundamental fairness and notice that offenders will face prosecution. "The ultimate question under the Due Process Clause is not nexus, but is whether application of the statute to the defendant [would]

be arbitrary or fundamentally unfair." *Ballestas*, 795 F.3d at 148 (internal quotations omitted).

While this Court has recognized that "the MDLEA provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas," *United States v. Cruickshank*, 837 F.3d 1182, 1188 (11th Cir. 2016) (internal quotation omitted), it has not held that only those who commit crimes so universally condemned may "reasonably anticipate being haled into court in this country." *See Noel*, 893 F.3d at 1304 (internal quotation omitted).

Like MDLEA offenders themselves, those who obstruct MDLEA enforcement boardings are on notice that their vessel's nation of registry may consent both to the vessel's boarding and to the application of United States law (including § 2237) to their conduct on board. Both the MDLEA and § 2237 define a "vessel subject to the jurisdiction of the United States" to include one for which the vessel's nation of registry has "consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. § 70502(c)(1)(3); 18 U.S.C. § 2237(e)(3). "Those subject to [such] reach are on notice." *Suerte*, 291 F.3d at 377.

This Court and other circuits have repeatedly recognized that due process limitations do not bar MDLEA prosecutions of aliens transporting drugs on the high seas where the vessel's flag nation has waived its primary jurisdiction and consented to the application of United States law. *Accord Wilchcombe*, 838 F.3d at 1186 (citing

"[t]he Constitution and principles of international law" in rejecting a due process challenge to assertion of MDLEA jurisdiction over Bahamian flag vessel with its consent, and noting other circuit agreement). Such prosecutions have passed Constitutional muster despite the fact that neither this Court, nor most circuits to have addressed the issue, have "embellished the MDLEA with [the requirement of] a [United States] nexus." *Estupinan*, 453 F.3d at 1338. *See Wilchcombe*, 838 F.3d at 1186 (noting the agreement of the Fifth, First, and Third Circuits); *but see United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006).[9]

The MDLEA, United States treaty obligations, and international law provide both notice and support for the United States's investigation and prosecution of aliens trafficking drugs on the high seas with the consent of their vessel's flag nation. Such investigations and prosecutions are also supported by the protective principle and by flag nation rights under international law.

The Coast Guard's MDLEA boarding authority and investigation procedures are expressly provided for in applicable treaties. Crew members are thus on notice that their vessel's flag nation may authorize the application of United States law to their conduct, including § 2237's criminalization of obstructive conduct during an

[9] The Second Circuit recently avoided answering whether the Due Process Clause requires a United States nexus to prosecute foreign nationals for an MDLEA violation on a foreign-flagged vessel. *See United States v. Van Der End*, 943 F.3d 98, 105 n.4 (2d Cir. 2019).

authorized Coast Guard MDLEA boarding. Indeed, the masters of the vessel in *Williams* and *Wilchcombe* were each prosecuted for both their MDLEA conspiracies and under 18 U.S.C. § 2237(a)(1) for failing to heave to. *See Williams*, 865 F.3d at 1345-47; *Wilchcombe*, 838 F.3d at 1185-86.

A. Both International Treaties and United States Law Provide Global Notice That Flag Nations May Consent To Coast Guard Law Enforcement Boarding Operations and the Application Of United States Law Over the Vessel and Crew.

The United States's bilateral treaty with Jamaica carrying out the Convention Against Illicit Traffic provides that the flag nation may, upon request, when there are "reasonable grounds to suspect that the vessel is engaged in illicit traffic," "authorize the boarding and search of the suspect vessel, cargo and persons found on board by the law enforcement officials of the [requesting] Party." Jamaica Bilateral Agreement, Art. 3, § 1. This puts into effect the Convention Against Illicit Traffic's call for flag nation authorization of "[b]oard[ings]," "[s]earch[es]," and other "appropriate measures in regard to [their] vessel," including "the possibility of transferring to one another proceedings for criminal prosecution of offences." *Id.*, Art. 17(1), (3)-(4), Art. 8. Petitioners were thus on notice that Jamaica could "waive its right to exercise jurisdiction and authorize [the United States] to enforce its laws against the vessel, its cargo and persons on board." Jamaica Bilateral Agreement, Art. 3, § 5.

These treaties expand international law's recognition of boardings to combat piracy or other violations of customary international law. The 1958 Convention on the High Seas, to which Jamaica and the United States are parties, notes a nation's authority to interfere with another nation's vessel in cases of suspected piracy or slave trading, but also in cases "where acts of interference derive from powers conferred by treaty." 1958 Convention on the High Seas, Art. 22(1).

The UN Convention on the Law of the Seas ("UNCLOS") similarly allows boarding authority "derive[d] from powers conferred by treaty." UNCLOS Art. 110(1).[10] Although the United States is not a party to UNCLOS, it accepts that its relevant provisions reflect customary international law. *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992). Like the Convention Against Illicit Traffic, UNCLOS provides that "[a]ll States shall cooperate in the suppression of illicit traffic" and provides notice that "[a]ny State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic." UNCLOS, Art. 108. Where the "suspicion[s]" justifying the action remain after the initial boarding, the boarding party "may proceed to a further examination on board the ship." UNCLOS Art. 110(1).

[10] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Treaties to which the United States are a signatory "provide[] global notice to the world" that the proscribed acts may be subject to prosecution by any signatory party. *See Noel*, 893 F.3d at 1303-04.

Just as the First Circuit has cited the MDLEA and the Convention Against Illicit Traffic as providing notice to offenders "subject to its reach," satisfying due process concerns, *Suerte*, 291 F.3d at 377, Petitioners were on notice that the Coast Guard could receive authority from Jamaica to board their vessel to conduct an MDLEA investigation and that United States law—including § 2237—would be applied to their conduct on board the vessel.

The fair notice provided by treaty has been recognized in other contexts. In *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013), the District of Columbia Circuit affirmed the extraterritorial application of the Hostage Taking Act (18 U.S.C. § 1203) to kidnappings by a foreign national in foreign territorial waters. *See id.* at 933-34. "Ali's prosecution under § 1203 safely satisfie[d] the requirements erected by the Fifth Amendment," because §1203 "fulfills U.S. treaty obligations under the widely supported [Hostage Convention[11]]" and that treaty "provide[s] global notice that certain generally condemned acts are subject to prosecution by any party to the treaty." *Id.* at 943-44.

[11] The International Convention Against the Taking of Hostages ("the Hostage Convention"), T.I.A.S. No. 11,081. https://treaties.un.org/doc/db/Terrorism/english-18-5.pdf.

Moreover, this global notice principle is not limited to cases of piracy or offenses against customary international law. In *United States v. Murillo*, 826 F.3d 152 (4th Cir. 2016), the Fourth Circuit affirmed the United States's prosecution of a Colombian national for a kidnapping committed in Colombia, without requiring any proof that the defendant was aware or intended that this foreign crime was against a United States citizen protected by international treaty.[12] Citing *Ali's* holding that "a treaty may provide notice sufficient to satisfy due process," the Fourth Circuit held "that global notice alone is sufficient to quell any concern that [the Colombian defendant's] prosecution in the United States for his crimes [in Colombia] against Agent Watson contravened due process." *Murillo*, 826 F.3d at 158 (emphasis added). The Fourth Circuit's analysis did not make any reference to customary international law's treatment of piracy or offenses against the law of nations.

Though this Court, in *Noel*, recognized that the Fourth, Ninth, and D.C. Circuits have held "that global notice [by treaty] *alone* is sufficient to quell any concern [that prosecution of a foreign national for extraterritorial conduct] contravened due process," it did not reach whether such notice was sufficient, without more, to satisfy due process, because it held that the victim's United States

[12] The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T. 1975, 1035 U.N.T.S. 167. The text of the IPP Convention can be located at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf.

contacts (though unknown to the defendant) were sufficient. *See Noel*, 893 F.3d at 1305 (emphasis added).[13]

In being prosecuted for obstructing the Jamaican-authorized MDLEA enforcement boarding of their vessel, Petitioners were not "ensnared by a trap laid for the unwary when [they] engaged in conduct that is self-evidently criminal." *Murillo*, 826 F.3d at 157-58 (quoting *Ali*, 718 F.3d at 945, and *United States v. Brehm*, 691 F.3d 547, 554 (4th Cir. 2012)). "[F]air warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." *Murillo*, 826 F.3d at 157 (quoting *Brehm*, 691 F.3d at 554). Indeed, if they had obstructed Jamaica's own boarding officials, they would have been in violation of Jamaican law and subject to Jamaican prosecution. Jamaican Maritime Areas Act, ¶ 27.(1)(d).[14]

[13] Citing *Murillo*, 826 F.3d at 158; *Ali*, 718 F.3d at 945; *United States v. Shi*, 525 F.3d 709, 723 (9th Cir. 2008).

[14] https://moj.gov.jm/sites/default/files/laws/Maritime%20Areas%20Act.pdf

B. Applying United States Law Regarding an MDLEA Enforcement Boarding with the Consent of the Vessel's Flag Nation Complies with the Protective Principle and a Territorial Flag Nation's Rights Under International Law.

Even if treaty notice were not sufficient to satisfy due process, Petitioners' prosecution was also supported by the protective principle and Jamaica's flag rights under international law.

Petitioners concede (Br. at 18) that this Circuit acknowledges the government's ability to prosecute foreign nationals trafficking drugs on vessels on the high seas, without violating due process, supported by the protective principle of international law. The protective principle describes "the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems." Restatement (Third) of Foreign Relations § 402, cmt. f (1987).[15] *See Rendon*, 354 F.3d at 1325 (discussing the protective principle).

Congress found and declared that "trafficking in controlled substances aboard

[15] Though the American Law Institute is in the process of adopting a new Fourth edition of the Restatement of Foreign Relations, the Restatement's provisions are not binding authority, and are merely a source cited by this and other courts to reflect understanding of applicable law. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting); *see, e.g.*, *Hernandez*, 864 F.3d at 1304 (citing Restatement (Second) of Foreign Relations).

vessels is a 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. The MDLEA "provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas." *Campbell*, 743 F.3d at 812 (citing *Rendon*, 354 F.3d at 1326).

The Convention Against Illicit Traffic similarly notes its signatories' recognition that "traffic in narcotic drugs and psychotropic substances … adversely affect[s] the economic, cultural and political foundations of society," "undermin[ing] the legitimate economies and threaten[ing] the stability, security and sovereignty of States," as the basis for its call for parties to "co-operate to the fullest extent possible to suppress illicit traffic by sea." Convention Against Illicit Traffic, Preamble, Art. 17(1). The Jamaica Bilateral Agreement authorizing the boarding and application of United States law in this case is premised on similar recognition of "the special nature of the problem of illicit maritime drug traffic" and the need for "bilateral arrangements to carry out, or to enhance the effectiveness of, the provisions of Article 17" of the Convention Against Illicit Traffic. Jamaica Bilateral Agreement, Preamble.

The boarding in this case, carried out with specific reference to the Jamaica Bilateral Agreement (CVDE:15-1:1, 3), is thus premised on the same recognition of the universal problem and condemnation of drug trafficking on vessels as underlies

the MDLEA. If the United States may, with the flag nation's consent and without violating due process, prosecute foreign nationals on a foreign-flagged vessel for violating the MDLEA, it may prosecute them for obstructing the enforcement of the MDLEA. Their offense obstructs the suppression of the very conduct whose "adverse effect" and condemnation by "nations that have reasonably developed legal systems," *Rendon*, 354 F.3d at 1325, has been recognized in both United States law and treaties.

In addition to the rights granted by the protective principle, a vessel's flag nation also has authority under international law to consent to another nation's actions on its vessel, much in the same way that it has authority to grant rights within its territory. Vessels, like the *Jossette*, have "the nationality of the State whose flag they are entitled to fly [which] must effectively exercise its jurisdiction … over ships flying its flag." Convention on the High Seas, Art. 5. A vessel's "flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship." Restatement (Third) of Foreign Relations Law § 502. "The application of law to activities on board a state's vessels, aircraft, or spacecraft has sometimes been supported as an extension of the territoriality principle but is better seen as an independent basis of jurisdiction." Restatement (Third) of Foreign Relations Law § 402.

"When the foreign flag nation consents to the application of United States law, jurisdiction attaches under the statutory requirements of the MDLEA without violation of due process or the principles of international law because the flag nation's consent eliminates any concern that the application of United States law may be arbitrary or fundamentally unfair." *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999). *See also Suerte*, 291 F.3d at 372 ("[W]here the flag nation has consented or waived objection to the enforcement of United States law by the United States, … due process does not require a nexus for the MDLEA's extraterritorial application." (internal quotation omitted)).

Contrary to Petitioners' argument (Br. at 24), both the First Circuit in *Cardales* and the Third Circuit in *United States v. Perez-Oviedo*, 281 F.3d 400 (3d Cir. 2002), identified flag nation consent as an independent source of international legal authority supporting Congress's application of United States law to foreign-flagged vessels. *Cardales* concluded that because "the Venezuelan government authorized the United States to apply United States law to the persons on board the CORSICA, therefore, jurisdiction in this case is consistent with the territorial principle of international law." *Cardales*, 168 F.3d at 553. The First Circuit only then cited the protective principle "[i]n addition" to its primary reliance on Venezuela's consent. *Id.*

Similarly, the Third Circuit noted "that there was no reason for us to conclude

that it is fundamentally unfair for Congress to provide for the punishment of a person apprehended with narcotics on the high seas," "[s]ince drug trafficking is condemned universally by law-abiding nations." *Perez-Oviedo*, 281 F.3d at 403. It then held, however, that "an even stronger case for concluding that no due process violation occurred" existed because "[t]he Panamanian government expressly consented" to the application of the MDLEA to the defendants' vessel. *Id.* Like the *Cardales*, *Perez-Oviedo* explained that "[s]uch consent from the flag nation *eliminates* a concern that the application of the MDLEA may be arbitrary or fundamentally unfair." *Id.* (emphasis added). *See Cardales*, 168 F.3d at 553.

The Fifth Circuit has likewise recognized that "[i]nterference with a ship that would otherwise be unlawful under international law is permissible if the flag state has consented." *Suerte*, 291 F.3d at 375 (quoting the Restatement (Third) of Foreign Relations § 522 cmt. e). This is because "[a] flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's rights under international law." *Id.*

Though the Ninth Circuit has held that "[d]ue process requires a district court to find sufficient nexus even when the flag nation has consented to the application of United States law," that requirement may be satisfied when the offense is "likely to have effects in the United States." *United States v. Zakharov*, 468 F.3d 1171, 1177-78 (9th Cir. 2006). As discussed, *infra*, if an MDLEA boarding is itself a constitutional exercise of the Coast Guard's authority, then even if no nexus is

required to establish a violation of the MDLEA, obstructing the Coast Guard's authorized law enforcement operation sufficiently impacts significant United States interests to satisfy any nexus requirement.

C. This Court Has Not Required Universal Condemnation In All Cases Where Extraterritorial Jurisdiction Has Satisfied Due Process Requirements.

Though satisfied here, Petitioners are incorrect in asserting that the protective principle must always be satisfied in order to support extraterritorial application of United States criminal law.

Petitioners misread *Unites States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985) (Br. at 18). There, this Court noted that "international law does not prohibit the enforcement scheme set forth in the Marijuana on the High Seas Act." *Gonzalez*, 776 F.2d at 938. Like the MDLEA, that earlier law "require[d] consent by the foreign nation before enforcement of the United States law," and this Court recognized that "nothing prevents two nations from agreeing that the domestic law of one nation shall be extended into [its vessel on] the high seas." *Id.*

This Court then additionally explained that "*[e]ven absent consent*, however, the United States could prosecute foreign nationals on foreign vessels under the 'protective principle' of international law … which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental

functions." *Id.* (emphasis added). This Court did not hold that the protective principle must be satisfied in all cases where United States law is applied extraterritorially to foreign nationals.

The protective principle is one basis for supporting Congress's assertion of extraterritorial authority, and it has indeed been repeatedly cited as a basis for rejecting Constitutional challenges to the MDLEA. *See Campbell,* 743 F.3d at 810 (reaffirming that "that the conduct proscribed by the [MDLEA] need not have a nexus to the United States because universal and protective principles support its extraterritorial reach"); *Estupinan*, 453 F.3d at 1338-39 (citing the universal condemnation of drug trafficking on vessels).

Petitioners have not, however, established that this Court *requires* universal condemnation in order for Congress to criminalize extraterritorial conduct. This Court recognizes that "[i]n determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles *such as* the objective principle, the protective principle, or the territorial principle." *Ibarguen-Mosquera,* 634 F.3d at 1378-79 (emphasis added). Moreover, "[t]hese international law principles … only apply to laws that govern the conduct of flagged vessels." *Id.* at 1379. "Congress *also* may assert extraterritorial jurisdiction because 'the law places no restrictions upon a nation's right to subject stateless vessels to its jurisdiction.'" *Campbell*, 743 F.3d at 810 (emphasis added).

Petitioners' claim that only universal condemnation may support Congress's assertion of extraterritorial authority would deny these other bases for satisfying due process requirements.

D. Universal Jurisdiction is Not At Issue When Jurisdiction Arises by Treaty, the Protective Principle, or With the Cooperation of the Vessel's Flag Nation.

This case does not present the question of whether the United States has universal jurisdiction to unilaterally prosecute obstruction of Coast Guard boardings anywhere in the world without regard to other nations' jurisdiction or rights. Section 2237 only asserts jurisdiction in the cases of otherwise lawful boardings, which in the case of flagged vessels requires the consent of the foreign nation with primary jurisdiction.

Universal jurisdiction is neither implicated nor claimed by § 2237. It refers to the power "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, *even where none of the bases of jurisdiction indicated in § 402 is present*." Restatement (Third) of Foreign Relations § 404 (emphasis added). Neither the protective principle nor transfer of flag state jurisdiction, by treaty or otherwise, depend on the application of universal jurisdiction.

Sustaining the United States's jurisdiction in this case "will not result in the unrestrained, global law enforcement by the United States decried by [Petitioners]," because § 70502(c)(1)(3) by its terms only permits jurisdiction over "a vessel whose flag nation consents to enforcement of United States law." *See Suerte*, 291 F.3d at 376-77.

In *Gonzalez*, 776 F.2d 939, this Court quoted at length the analysis of Chief Justice John Marshall, from *Church v. Hubbart*, 6 U.S. (2 Cranch) 187 (1804), in which the Supreme Court held that "[t]he right of a nation to seize vessels, attempting an illicit trade, is not confined to their harbors or to the range of their batteries." *Church*, 6 U.S. at 187. Chief Justice Marshall observed that sovereign nations' own interests in safeguarding their authority against foreign interference would police the limits of extraterritorial application of national laws. "If they are such as unnecessarily to vex and harrass [sic] foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to." *Id.* at 235. "If this right be extended too far, the exercise of it will be resisted." *Id.* (quoted in *Gonzalez*, 776 F.2d at 939).

Here, as in *Gonzalez*, the foreign nation has not only not resisted, it has actively joined with the United States to "cooperate in combatting illicit maritime drug traffic to the fullest extent possible." Jamaica Bilateral Agreement, Art. 1.

"Apparently, foreign nations … recognize the reasonableness of current United States enforcement efforts, for consent has been given." *Gonzalez*, 776 F.2d at 939.

E. Though Due Process Does Not Require the Existence of a United States Nexus, Obstruction of the Coast Guard's Otherwise Authorized Law Enforcement Function Would Satisfy Any Nexus Requirement.

Although neither Article I nor the Due Process Clause of the Constitution require a United States nexus in this case, the existence of a United States nexus would satisfy due process. It would not be arbitrary or without notice to prosecute an offense affecting United States interests, occurring on a United States vessel, or involving a United States citizens. Here, though other factors independently satisfy due process concerns, such a nexus does in fact exist. Obstruction of otherwise constitutional Coast Guard enforcement actions sufficiently affects significant United States interests to satisfy any nexus requirement.

This is not an argument that § 2237 creates its own nexus. But where it is established that the Constitution permits the extraterritorial enforcement of one statute (such as the MDLEA)—even without its own nexus—the offense of obstructing the Coast Guard's lawful attempt to enforce that statute sufficiently affects a "significant interest" of the United States to establish the necessary nexus. *See Noel*, 893 F.3d at 1305 (holding that a "significant interest" is a sufficient nexus). Even the Ninth Circuit, which requires a United States nexus to satisfy due process requirements for the prosecution of foreign crew members with the consent of their

vessel's flag nation, considers the nexus requirement satisfied where the offense "was likely to have effects in the United States." *Zakharov*, 468 F.3d at 1178.

Petitioners stipulated that their false statements were "material to the federal law enforcement officers … because the destination of a vessel is an important part of the information gathered by the Coast Guard officers during the boarding of a vessel and can influence the United States' decision-making process on what action to take next during such a boarding" (CRDE:59:2; CRDE:63:2).

The United States considers its ability to detain and board vessels to enforce the MDLEA to be of such importance that it has negotiated this ability as part of its bilateral agreements with Jamaica and other Convention Against Illicit Traffic treaty partners. *Accord* Jamaica Bilateral Agreement, Art. 3; *see also*, *e.g.*, Agreement Between the Government of the United States of America and the Government of the Republic of Colombia To Suppress Illicit Traffic By Sea, ¶ 7, State Dept. No. 97-57, T.I.A.S. No. 12835. The United States has "clearly expressed [its] significant interest" by negotiating boarding rights in these treaties. *See Noel*, 893 F.3d at 1305. Such bilateral agreements establishing boarding rights and procedures expressly reference the "urgent need for international cooperation in suppressing illicit maritime drug traffic … recognized in" the Convention Against Illicit Traffic, which itself expressed its worldwide signatories' "[d]eep[] concern[]" and "[d]etermin[ation] to improve international co-operation in the suppression of illicit

traffic by sea." Jamaica Bilateral Agreement, Preamble; Convention Against Illicit Traffic, Preamble.

The obstruction of these efforts by the provision of materially false information affecting the ability of the Coast Guard to carry out MDLEA enforcement boardings therefore constitutes a sufficient nexus with significant United States interests to allow the Petitioners' prosecution upon Jamaica's consent to the application of United States law over the *Jossette* and its crew.

Conclusion

For the foregoing reasons, the district court's decision denying Petitioners' coram nobis action should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,434 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 30th day of June, 2020, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on Petitioners' Counsel.

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