20-11188-HH

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

ROBERT DEXTER WEIR, DAVID RODERICK WILLIAMS,

AND LUTHER FIAN PATTERSON,

Petitioners-Appellants,

- v. -

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-CV-23420-UU

REPLY BRIEF OF PETITIONERS-APPELLANTS

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STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petitioners-Appellants do not have a parent corporation and are not publicly held corporations.

Interested parties are as follows:

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

Colan, Jonathan D.

Cronin, Sean Paul

Emery, Robert

Fajardo Orshan, Ariana

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Garber, Hon. Barry L.

Goodman, Hon. Jonathan

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O'Sullivan, Hon. John J.

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Simonton, Hon. Andrea M.

Smachetti, Emily M.

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Thompson, George Garee

Tilley, Daniel B.

Torres, Hon. Edwin G.

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United States of America

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White, Hon. Patrick A.

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INTRODUCTION

At the outset, Petitioners must correct some apparent misconceptions the United States has about Petitioners and the issues they raise on this appeal. First, Petitioners' convictions had nothing whatsoever to do with illicit drugs, drug trafficking, or obstruction of a drug investigation. Petitioners each pled guilty to one count of making a false statement during a boarding of their vessel to Coast Guard officers about their intended destination in violation of 18 U.S.C. § 2237(a)(2)(B). At the time Coast Guard officials intercepted their vessel, Petitioners were traveling towards Haiti, a fact known to the officials from the moment they first spotted Petitioners' vessel. (Doc. 4-4 [A-61].) Although the United States initially charged Petitioners with drug-related offenses, it subsequently admitted it "would have required a miracle" to prove those charges, one that it "could not have pulled off." (Doc. 4-11 at 24:4-7 [A-125].) Instead, Petitioners pled guilty to violating section 2237(a)(2)(B) because, when asked, they told the Coast Guard officials that they were destined for Jamaica, not Haiti.

Second, Petitioners are *not* challenging the Coast Guard's authority to board foreign-flagged vessels on the high seas. They are *not* challenging Congress's authority to enact extraterritorial legislation aimed at criminalizing drug trafficking, such as the Maritime Drug Law Enforcement Act ("MDLEA"). And they are *not* challenging the Coast Guard's authority to investigate potential

violations of the MDLEA. The United States' repeated attempts to make this case about those unrelated issues should not distract from the otherwise straightforward challenges Petitioners *are* making.

Petitioners make only two: (1) whether the statute underlying their convictions violated the Due Process Clause because the proscribed conduct—making a false statement to Coast Guard officials during a boarding about a vessel's destination—is *not* contrary to the laws of all reasonably developed legal systems; and (2) whether the United States otherwise has the constitutional authority to criminalize the making of such false statements by foreign nationals about their vessel's destination during a boarding by the Coast Guard that occurs on a foreign-flagged vessel on the high seas. These two challenges are independent of one another. The United States' attempt to conflate them finds no support in Petitioners' opening brief, the decision below, or this Court's precedent.

Under this Court's precedent, Petitioners' convictions violate the Due Process Clause, and, due process violation aside, Congress lacks the authority to criminalize the making of false statements during a boarding about a vessel's destination. Petitioners' petition for writs of error coram nobis should be granted, and their convictions should be vacated.

ARGUMENT

I. Petitioners' Convictions Violate the Due Process Clause

In *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985), this Court first addressed whether, consistent with the Due Process Clause, the United States could apply its laws extraterritorially to foreign nationals aboard foreign-flagged vessels on the high seas. That case involved marijuana trafficking. Relying on the fact that "embarking on voyages with holds laden with illicit narcotics . . . is contrary to laws of all reasonably developed legal systems," this Court rejected the defendants' due process argument because they engaged in inherently criminal conduct "with the awareness of the risk that their government may consent to enforcement of the United States' laws against the vessel." *Id.* at 941.

Over the ensuing 35 years, this Court has reaffirmed its holding in *Gonzalez* four times, including, most recently, eight months ago. *See United States v. Cabezas-Montano*, 949 F.3d 567, 587 (11th Cir. 2020) ("[T]his Court has held that the Fifth Amendment's Due Process Clause does not prohibit the trial and conviction of aliens captured on the high seas while drug trafficking because the MDLEA provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas."); *United States v. Valois*, 915 F.3d 717, 722 (11th Cir. 2019); *United States v. Campbell*, 743 F.3d 802, 812 (11th Cir. 2014); *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003).

Because the crime of *making false statements* during a boarding about a vessel's destination is *not* prohibited and condemned by all nations with reasonably developed legal systems, under *Gonzalez*, *Cabezas-Montano*, *Valois*, *Campbell*, and *Rendon*, Petitioners' convictions violate the Due Process Clause. None of the United States' attempts to avoid this conclusion has merit.

A. No International Treaty Provides Global Notice that Making False Statements During A Boarding About A Vessel's Destination is a Crime

Relying on four treaties, the United States' primary argument in opposing Petitioners' due process claim is that "[t]reaties 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.'" (Brief for the United States at 40, filed June 30, 2020 ("U.S. Br.") (quoting *United States v. Noel*, 893 F.3d 1294, 1303-04 (11th Cir. 2018)) (emphasis added).[1]) The key principle derived from *Noel*—as indicated by the emphasized language—and the other authorities the United States relies on is that constitutionally required notice *can be* provided by

[1] The four treaties are (1) the Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, Mar. 10, 1998, State Dept. No. 98-57, 1998 WL 190434 (the "Jamaica Bilateral Agreement"); (2) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 1989 WL 503670 (the "Convention Against Illicit Traffic"); (3) the 1958 Convention on the High Seas; and (4) the UN Convention on the Law of the Seas ("UNCLOS"). (U.S. Br. at 38-39.)

international treaties *but only if* those treaties condemn the specific conduct proscribed by federal law. *See Noel*, 893 F.3d at 1303-04; *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013) (finding no due process violation where treaty "provide[d] global notice that *certain generally condemned acts* are subject to prosecution by any party to the treaty") (emphasis added); *United States v. Murillo*, 826 F.3d 152, 158 (4th Cir. 2016) ("[W]hen a treaty provides 'global notice that certain generally condemned acts are subject to prosecution by any party to the treaty,' the Fifth Amendment 'demands no more.'"). That principle is not applicable here for the simple reason that none of the four treaties the United States relies on proscribes Petitioners' crime of conviction—making false statements about a vessel's destination during a boarding.

Instead, as the United States concedes, the Jamaica Bilateral Agreement "authorize[s] the boarding and search of . . . [a] vessel [suspected to be engaged in illicit trafficking, the vessel's] cargo and persons found on board [the vessel]." (U.S. Br. at 38.) The Convention Against Illicit Traffic calls for—but does not require—flag nations to authorize boardings, searches, and "other 'appropriate measures in regard to [their] vessel,' including 'the possibility of transferring to one another proceedings from criminal prosecution of offences [*established in accordance with article 3, paragraph 2* of the Convention Against Illicit Traffic].'"

(*Id.* (quoting Convention Against Illicit Traffic, Art. 8) (emphasis added).[2]) And the 1958 Convention on the High Seas and the UNCLOS authorize under certain circumstances one nation to interfere with or board another nation's vessel. (U.S. Br. at 39.) None of these treaties purport to criminalize making false statements about a vessel's destination during a boarding of a foreign-flagged vessel on the high seas. None therefore provides notice to foreign nationals that making such statements while they are on board their foreign-flagged vessel on the high seas subjects them to criminal prosecution for such conduct in the United States.

Accordingly, the United States' position finds no support in the cases it cites because, unlike here, in those cases, the defendants were charged with inherently criminal conduct that was explicitly proscribed by international treaties. In *Noel* and *Ali*, for example, the defendants were charged with hostage-related offenses prohibited by the International Convention Against the Taking of Hostages. *See Noel*, 893 F.3d at 1305 (treaty "provides global notice to the world that the hostage taking criminalized [in the United States] can be prosecuted by any signatory

[2] The emphasized language in brackets, omitted from the United States' brief, makes clear that the "criminal prosecution of offences" contemplated by the Convention Against Illicit Traffic is not the prosecution of *any* offense whatsoever, but rather specifically limited to the "criminal prosecution of offences *established in accordance with article 3, paragraph 1*" of the Convention Against Illicit Traffic. Convention Against Illicit Traffic, Art. 8 (emphasis added). Article 3, paragraph 1, in turn, refers to specific crimes related to narcotics trafficking. Notably absent from this enumerated list of offenses is the false-statements crime charged here.

nation of which the hostage is a citizen"); *Ali*, 718 F.3d at 944 (treaty "provide[s] global notice that certain generally condemned acts are subject to prosecution by any party to the treaty").

Similarly, *Suerte* involved a drug-related prosecution under the MDLEA, and, in rejecting a due process argument, the Fifth Circuit relied on the fact that "[t]hose subject to [the] reach [of the MDLEA] are on notice" of their potential prosecution in the United States because Congress has found "that trafficking in controlled substances aboard vessels . . . presents a specific threat to the security and societal well-being of the United States," and that "such activity 'is a serious *international* problem and is *universally* condemned.'" *United States v. Suerte*, 291 F.3d 366, 377 (5th Cir. 2002) (emphasis in original). Moreover, the Fifth Circuit *also relied* on the fact that the purpose of the Convention Against Illicit Traffic was to permit signatories to "address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension" – *i.e.*, to criminalize that conduct and, by extension, provide global notice that such conduct is criminal. *Id.* Likewise, *Murillo* involved a defendant convicted of kidnapping conspiracy and murder after stabbing a DEA agent four times. There, the Fourth Circuit rejected a due process challenge because "kidnapping and murder are 'self-evidently criminal'" *and* because an international treaty provided notice that all signatories "*must* criminalize particular acts

committed against an [Internationally Protected Person], *including kidnapping and murder*." *Murillo*, 826 F.3d at 157-58 (emphasis added). *Brehm* is ever farther afield than the other cases. There, the defendant, a private contractor supporting the NATO-led war effort in Afghanistan, was convicted of assault resulting in serious bodily injury after he stabbed someone. The Fourth Circuit rejected the defendant's due process argument because the defendant should have "reasonably understood" that stabbing someone "was criminal and would subject them to prosecution somewhere" *and* because his employment agreement warned him that he might be subject to "the criminal jurisdiction asserted by the United States." *United States v. Brehm*, 691 F.3d 547, 554 (4th Cir. 2012).

These cases bear no relationship whatsoever to the situation presented here. The defendant in *Noel* held a United States citizen hostage for three days, during which time he kept her blindfolded, handcuffed, and gagged. 893 F.3d at 1297. The defendant in *Ali* assisted in the negotiation of the ransom of a merchant vessel and its crew after his compatriots and fellow marauders, armed with AK-47s and a rocket-propelled grenade, forcibly boarded the vessel, seized the crew, and forced the crewmembers at gunpoint to reroute the ship. 718 F.3d at 932-33. The defendant in *Suerte* was the captain of a freighter used by a drug trafficking organization to transport over 4,000 kilograms of cocaine. 291 F.3d at 367-68. The defendant in *Murillo* kidnapped and murdered a DEA agent. 826 F.3d at 153. And

the defendant in *Brehm* stabbed someone after signing an employment agreement noting the possibility that he would be prosecuted in the United States. 691 F.3d at 548. In stark contrast to these inherently criminal acts, Petitioners told Coast Guard officials they were traveling to Jamaica when, in fact, they were traveling towards Haiti. The notice of potential prosecution provided by treaties to the defendants in *Noel*, *Ali*, *Suerte*, *Murillo*, and *Brehm* is absent here. Petitioners did not have fair notice they were subjecting themselves to criminal prosecution when responding to the Coast Guard.

Finally, the United States makes passing reference to the Jamaican Maritime Areas Act and states, without any actual analysis, that Petitioners would have violated Jamaican law and been subject to Jamaican prosecution "if they had obstructed Jamaica's own boarding officials." (U.S. Br. at 42.) The Jamaican Maritime Areas Act defines Jamaica's "internal waters," its "archipelagic waters," and its "territorial sea." Jamaican Maritime Areas Act §§ 3-5, 12. It authorizes Jamaican courts to exercise jurisdiction over Jamaica's internal and archipelagic waters, as well as its territorial sea. *Id.* §§ 10-11. And it authorizes "Marine Officers" to engage in investigatory activities in Jamaica's contiguous zone, its archipelagic waters, and its territorial sea. *Id.* § 20. Although the Jamaican Maritime Areas Act makes it a crime to "obstruct[] any Marine Officer in the execution of his duty," *id.* § 27(d), unlike section 2237(a)(2)(B), the conduct

proscribed by the Act does not extend to international waters and does not provide notice that such conduct is criminal regardless of where it occurs.

More importantly, the United States' argument ignores Petitioners' actual crime of conviction. Notwithstanding its repeated claims to the contrary, Petitioners were *not* convicted of "obstruction." They were convicted of making a false statement about their vessel's destination. The statute of conviction clearly differentiates between the two categories of offenses. Obstruction is covered by section 2237(a)(2)(*A*), which proscribes acts "to forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding *or other law enforcement action* authorized by any Federal law." (Emphasis added.) Providing false information is covered by section 2237(a)(2)(*B*) and, unlike section 2237(a)(2)(A), does not require proof of an obstructive act or an underlying "law enforcement action authorized by any Federal law." Petitioners were convicted under the latter subsection, not the former. And there is no indication in the Information or Factual Proffer underlying their convictions even remotely suggesting that their false statement about their destination "obstructed" the Coast Guard or that they were, or reasonably should have been, aware that the Coast Guard was investigating potential violations of the MDLEA. Thus, even assuming the Jamaican Maritime Areas Act provided notice that "obstruction" in international waters subjects the obstructer to criminal prosecution *anywhere in the world*, Petitioners still lacked

notice that they could be prosecuted for the separate crime of providing false information about their destination.

B. The Protective Principle Does Not Justify Petitioners' Actual Crime of Conviction, and Jamaica's Consent Cannot Cure the Due Process Violation

Next, the United States argues that "Petitioners' prosecution was also supported by the protective principle and Jamaica's flag rights under international law." (U.S. Br. at 43.) The United States incorrectly argues that Petitioners have conceded that the protective principle applies to justify the United States' criminalization of making false statements and because it does there is no Due Process violation. (*Id.* (citing Pet. Br. at 18).) But Petitioners conceded no such thing, and page 18 of their opening brief does not even mention the protective principle. Regardless, the protective principle does not justify Petitioners' actual crime of conviction, and the United States does not argue otherwise. Instead, the United States argues that, because the protective principle justifies extraterritorial application of the drug trafficking crimes proscribed by the MDLEA, it must also justify extraterritorial application of the entirely separate false-statement crime charged here. Not so.

The crux of the United States' position is that, consistent with the Due Process Clause, it can constitutionally "prosecute [Petitioners] for obstructing the enforcement of the MDLEA." (U.S. Br. at 45.) But, the United States did not

charge Petitioners with obstruction nor did it charge them under the MDLEA. Although section 2237(a)(2)(*A*) criminalizes certain obstructive acts, including, theoretically, acts to obstruct an MDLEA investigation, Petitioners were convicted of violating a separate subsection of that statute—section 2237(a)(2)(*B*). Their crime of conviction is not an obstruction offense, and it has no substantive connection to the MDLEA. Section 2237(a)(2)(B) and the MDLEA are codified in different chapters of the U.S. Code, and no element of section 2237(a)(2)(B) requires the United States to rely on the offenses proscribed by the MDLEA because, unlike section 2237(a)(2)(A), section 2237(a)(2)(B) does not require proof of an underlying "enforcement action authorized by any Federal law." The only connection section 2237(a)(2)(B) has to the MDLEA is definitional. Two terms used throughout section 2237—"vessel subject to the jurisdiction of the United States" and "vessel of the United States"—are defined by reference to the definitions section of the MDLEA. 18 U.S.C. § 2237(e)(3) and (e)(4). Those two definitional cross references alone cannot transform section 2237(a)(2)(B) into an omnibus "obstruction of enforcing the MDLEA" provision, especially because Congress knows how to criminalize the general obstruction of law enforcement action (as it did in section 2237(a)(2)(A)) and chose not to do so in section 2237(a)(2)(B). *See United States v. Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986) ("[T]he principle of lenity . . . requires the strict construction of penal statutes.").

This Court need look no further than the documents the United States used to support Petitioners' convictions to see that those convictions had nothing to do with the MDLEA or obstructing the Coast Guard's enforcement of that statute. Neither the Information used to charge Petitioners nor the Factual Proffer offered as support for their convictions references the MDLEA, drugs, or any act of obstruction. The United States cannot manufacture a new connection between the charges it brought against Petitioners and the MDLEA to support their convictions. If the United States wanted to charge Petitioners with obstructing MDLEA enforcement activity or with a drug-related offense, it could have attempted to do so under section 2237(a)(2)(A) or the MDLEA. It chose not to and cannot reverse course now. Cases upholding extraterritorial application of the MDLEA have no bearing on the constitutionality of section 2237(a)(2)(B).[3]

The United States is also wrong in arguing that the Due Process Clause is satisfied because Jamaica consented to their prosecution 25-days after Petitioners made their statements. (*See* U.S. Br. at 45-47; Doc. 15-1 [A-156-158].) Its position finds no support in *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999), *United*

[3] Similarly, the United States' passing references to a handful of cases involving convictions under section 2237(a)(1) for failure to heave cannot support Petitioners' convictions. (U.S. Br. at 21-22, 38.) None of those cases involved constitutional challenges to the failure to heave statute. *See United States v. Williams*, 865 F.3d 1328 (11th Cir. 2017); *United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016); *United States v. Diaz-Doncel*, 811 F.3d 517 (1st Cir. 2016); *United States v. Espildora*, 383 F. App'x 907 (11th Cir. 2010).

States v. Perez-Oviedo, 281 F.3d 400 (3d Cir. 2002), or *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002). None of those courts held that a flag-nation's consent independently satisfied the Due Process Clause. The cases all involved prosecutions for drug trafficking under the MDLEA, and they all relied on the nature of drug trafficking *coupled with a flag-nation's consent* to support their analysis. The inherent criminal nature of drug trafficking was critical to the courts' holdings. Absent inherently criminal conduct, the result would be different.

In *Cardales*, the First Circuit discussed both the flag-nation's consent *and* the threat to our nation's security posed by drug trafficking when it upheld the constitutionality of the MDLEA on due process grounds. After analyzing both aspects of the case before it, the court concluded: "We therefore hold that *when individuals engage in drug trafficking aboard a vessel*, due process is satisfied when the foreign nation in which the vessel is registered authorizes the application of United States law to the persons on board the vessel." 168 F.3d at 553 (emphasis added). Here, Petitioners were not engaged in drug trafficking aboard a vessel nor were they engaged in other conduct that threatened our nation's security. To the extent *Cardales* applies at all, these missing factors alter the due process analysis significantly.

Similarly, in *Perez-Oviedo*, the Third Circuit reasoned that, because "drug trafficking is condemned universally by law-abiding nations," it was not

"fundamentally unfair for Congress to provide for the punishment of a person apprehended with narcotics on the high seas." 281 F.3d at 403. The court went on to conclude that the flag-nation's consent made the defendant's "state of facts . . . an even stronger case for concluding that no due process violation occurred" because "consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair." *Id.* Unlike in *Perez-Oviedo*, Petitioners' crime of conviction is not condemned universally by law-abiding nations. *Perez-Oviedo* does not speak to a situation where the crime of conviction is not universally condemned. There is nothing to suggest the Third Circuit would have reached the same conclusion absent universal condemnation. The structure of the opinion indicates that universal condemnation served as the court's primary rationale, which it bolstered by relying on the flag-nation's consent to eliminate one additional due process "concern." Eliminating that concern, however, does nothing to address the court's primary discussion of the nature of the crime charged and the notice provided to individuals across the globe through universal condemnation of certain conduct.

Likewise, in *Suerte*, the Fifth Circuit held that "[e]nforcement of the MDLEA" was not "arbitrary [or] fundamentally unfair" because "[t]hose subject to its reach are on notice." 291 F.3d at 377. To support its "notice" determination, the court relied on Congress's findings "that trafficking in controlled substances

aboard vessels . . . presents a specific threat to the security and societal well-being of the United States" and "that such activity 'is a serious *international* problem and is *universally* condemned.'" *Id.* (emphasis in original). Congress has not made similar findings about making false statements during a boarding about a vessel's destination. That conduct does not pose a specific threat to the security and societal well-being of the United States, is not a serious international problem, and is not universally condemned.

C. This Court Requires Universal Condemnation to Satisfy the Due Process Clause Even With Flag-Nation Consent

More fundamentally, even assuming Jamaica's consent, on its own, would satisfy the Due Process Clause had Petitioners' prosecution occurred in the First, Third, or Fifth Circuits, *this Court* already rejected reliance on consent alone for prosecutions occurring *within this Circuit*. In *Gonzalez*, the defendants were intercepted by the Coast Guard while aboard a Honduran-flagged vessel traveling on the high seas. The Coast Guard recovered 114 bales of marijuana aboard the vessel, and Honduras consented to the search, seizure, and prosecution of the defendants. After they were convicted of marijuana offenses, the defendants appealed, arguing their convictions violated the Due Process Clause. 776 F.2d at 933-34.

This Court spent numerous pages discussing the protective principle, including affirming that the protective principle only applies to conduct "generally

recognized as a crime by nations that have reasonably developed legal systems." *Id.* at 930. It then rejected the defendants' due process claim because "[t]hose embarking on voyages with holds laden with illicit narcotics, *conduct which is contrary to laws of all reasonably developed legal systems*, do so with the awareness of the risk that their government may consent to enforcement of the United States' laws against the vessel." *Id.* at 941 (emphasis added). According to this Court, "[d]ue process does not require that a person who violates the law of all reasonable nations be excused on the basis that his own nation *might* have requested that he not be prosecuted by a foreign sovereign." *Id.*; *see also id.* at 940 n.14 ("We remain confident that the appellants were aware that their conduct violated the law of all nations with reasonably developed legal systems.").

If, as the United States argues, foreign-nation consent alone was sufficient to overcome a due process challenge made by nationals of that country engaging in extraterritorial conduct, then this Court's entire discussion of and ultimate reliance on the universal condemnation of drug trafficking to support its holding would have been unnecessary. Honduras's consent would have ended the inquiry. But that was not how this Court analyzed the due process issue raised in *Gonzalez*. The statute there, like the statute here, required the foreign-nation's consent before the United States was authorized to prosecute. Consent was a precursor to the grant of prosecutorial authority to the United States, but not itself a basis for finding that

Honduras' consent somehow provided the defendants with constitutionally required notice. Only after this Court determined that the charged conduct was "contrary to laws of all reasonably developed legal systems" did it conclude that the requirements of due process were satisfied because the universal condemnation of drug trafficking put the defendants on notice that they might be subject to prosecution anywhere. Unlike in *Gonzalez*, the charged conduct here is *not* contrary to laws of all reasonably developed legal systems. Jamaica's consent to Petitioners' prosecution in the United States cannot satisfy the Due Process Clause because Petitioners lacked notice that they were subjecting themselves to criminal prosecution when they answered the Coast Guard's questions.

Since deciding *Gonzalez*, this Court has reaffirmed its holding four times. Those cases support Petitioners' position that universal condemnation is required to prosecute foreign nationals for extraterritorial conduct. In *Cabezas-Montano*, for example, the Court rejected a due process argument because "the Fifth Amendment's Due Process Clause does not prohibit the trial and conviction of aliens captured on the high seas while drug trafficking because the MDLEA provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas." 949 F.3d at 587; *see also Valois*, 743 F.3d at 812; *Campbell*, 743 F.3d at 812; *Rendon*, 354 F.3d at 1326. The United States does not cite one case in which the Court relied exclusively on a foreign-nation's

consent to reject a Due Process Clause claim. But there is an unbroken, 35-year chain of cases holding that universal condemnation is required. The United States offers no justification to deviate from that standard.

At best, the United States points to the general principle acknowledged in *Campbell* that "the law places no restrictions upon a nation's right to subject *stateless vessels* to its jurisdiction." (U.S. Br. at 49 (quoting *Campbell*, 743 F.3d at 810) (emphasis added).) The Court cited this principle in assessing a challenge to the MDLEA under the High Seas Clause, not the Due Process Clause. When it addressed the defendant's separate due process claim, it relied on the universal condemnation of drug trafficking, not the stateless status of the vessel, to reject the claim. 743 F.3d at 812. Under *Campbell*'s due process holding, even when confronted with defendants aboard a stateless vessel, this Court *still* inquired into the nature of the offense to ensure the foreign nationals received constitutionally required notice of their potential prosecution. Petitioners should be afforded the same notice protection. Regardless, Petitioners were not aboard a stateless vessel. Whatever principles of international law might justify the prosecution of foreign nationals aboard stateless vessels even absent universal condemnation, those principles have no application here.

D. Petitioners Conduct Had No Nexus to the United States

Finally, the United States argues that due process is satisfied because there is a nexus between the United States and Petitioners' conduct. Although the United States claims that "[t]his is not an argument that § 2237 creates its own nexus" (U.S. Br. at 52), that is clearly the logical extension of its position; the United States has a "significant interest" in enforcing its statutes and, therefore, any conduct violative of those statutes has a nexus to the United States because it affects that interest. This circular argument would render meaningless any nexus restriction on the extraterritorial application of United States law. The Coast Guard intercepted Petitioners' foreign-flagged vessel as it was traveling towards Haiti. The Coast Guard should not be allowed to use the ensuing interaction to fabricate a nexus between Petitioners and the United States when one otherwise would not exist.

Further, the United States' argument is premised on its claim that Petitioners *obstructed* "otherwise constitutional Coast Guard enforcement actions." (U.S. Br. at 52.) For the reasons discussed above, *see supra* at 10-13, the United States did not charge Petitioners with the obstruction subsection of section 2237(a)(2). And the facts make clear that Petitioners statements to the Coast Guard did not obstruct, impede, interfere with, affect, or have a likely effect on any Coast Guard enforcement action. When the Coast Guard intercepted Petitioners, they were

aboard a foreign-flagged vessel objectively traveling in the direction of Haiti—a fact Coast Guard officials observed the first moment they saw Petitioners' vessel and before they even boarded the vessel and interacted with Petitioners. (Doc. 4-4 [A-61].) Petitioners nevertheless told Coast Guard officials they were destined for Jamaica. The Coast Guard apprehended and detained them anyway. Even accepting that the statements Petitioners made were false and that the falsehood was material (as Petitioners stipulated in their factual proffers), the factual proffers themselves fall well short of demonstrating an actual or likely effect on the Coast Guard, as is required to show a nexus to the United States. (*See* Doc. 4-4 [A-62] (admitting that "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") (emphasis added); *see also* U.S. Br. at 52 (admitting that nexus requires "affect" on a "significant interest" of the United States.) Just because something *can* influence Coast Guard officials, does not mean that it *did* influence them or that it was *reasonably likely* to influence them. Under the facts presented here, nothing Petitioners said about their destination would, or reasonably could, have made any difference to the Coast Guard. Their conduct had

no nexus to the United States. The Coast Guard should not be allowed to create one just by asking foreign nationals a question in international waters.[4]

II. The United States Otherwise Lacks the Constitutional Authority to Criminalize the Making of False Statements Aboard a Foreign-Flagged Vessel Traveling on the High Seas

This Court has consistently held that Congress can criminalize conduct committed on foreign-flagged vessels on the high seas if extraterritorial application is supported by a principle of extraterritorial jurisdiction recognized by customary international law. *See Campbell*, 743 F.3d at 809-12 (upholding constitutionality of the MDLEA over a High Seas Clause challenge by reference to the universal and protective principles of jurisdiction); *United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011) (Drug Trafficking Vessel Interdiction Act is "justified under the universal principle and thus a constitutional exercise of Congress's power under the High Seas Clause"); *see also United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-82 (11th Cir. 1982). The making of false statements during a boarding of a foreign-flagged vessel about a vessel's destination is not supported by any such principle. The United States spends much of its brief arguing why the MDLEA and other drug-

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[4] The United States admits that "[u]niversal jurisdiction is neither implicated nor claimed by § 2237." (U.S. Br. at 50.) Accordingly, the portion of the District Court's opinion relying on universal jurisdiction should be vacated. (Doc. 17 at 17-19 [A-190-192].)

related crimes can be enforced extraterritorially. But those issues have no relevance here because Petitioners were not convicted under the MDLEA, and their actual crime of conviction had nothing to do with drug-related activity. Whatever authority the United States might have to criminalize drug trafficking on the high seas, that authority should not be extended to a generalized false statements crime completely untethered to drug trafficking.

A. Congress's Authority to Assert Jurisdiction Over Vessels Trafficking Drugs on the High Seas is Not at Issue Here

The United States makes much of the fact that it has the authority to assert jurisdiction over vessels trafficking drugs on the high seas. (U.S. Br. at 14-15. True, but Petitioners were *not* trafficking drugs on the high seas, and they were not convicted of a drug-related offense. The United States' authority over drug trafficking does not address the separate question raised by Petitioners—whether the United States has similar authority to criminalize the false-statement crime Petitioners challenge.

B. Congress Did Not Enact Section 2237(a)(2)(B) to Implement a Treaty, and Section 2237(a)(2)(B) is Not Constitutional Under the Necessary and Proper Clause

Next, the United States argues that Congress had the authority to enact section 2237(a)(2)(B) under the Necessary and Proper Clause because its enactment was necessary to implement valid United States treaties, namely the Convention Against Illicit Traffic and the Jamaica Bilateral Agreement. (U.S. Br.

at 15-19.) But nothing in those two treaties requires or obligates the United States to criminalize the making of false statements during a boarding about a vessel's destination. The Convention Against Illicit Traffic enumerates the "measures" each signatory "shall adopt . . . as criminal offences under its domestic law." Convention Against Illicit Traffic, Art. 3, § 1. The enumerated offenses are all drug crimes – *e.g.*, the production or distribution "of any narcotic drug." *Id.*, Art. 3, § 1(a)(i). Signatories to the Convention Against Illicit Traffic are not required, or even encouraged, to proscribe the false-statements crime at issue here. Accordingly, the United States' position finds no support in *Noel* because the treaty at issue there "*require[d]* signatory states to 'prosecute or extradite' offenders found within their territory regardless of where the offense was committed," and, "to satisfy this obligation, *it was necessary for* the United States to codify the [treaty's] 'extradite or prosecute' requirement into federal law." 893 F.3d at 1304 (emphasis added). Because the Convention Against Illicit Traffic did not require the United States to enact section 2237(a)(2)(B) or anything remotely resembling section 2237(a)(2)(B), it cannot be used as a constitutional justification for that statute under the Necessary and Proper Clause. *See United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) ("[L]egislation implementing a treaty" is constitutional under the Necessary and Proper Clause if it "bears a 'rational

relationship' to that treaty" by "track[ing] the language of [the] treaty in all *material* respects.") (emphasis in original).

As for the Jamaica Bilateral Agreement, that treaty requires the United States and Jamaica to "*cooperate* in combatting illicit maritime drug traffic to the fullest extent possible consistent with available law enforcement resources and related priorities." Jamaica Bilateral Agreement, Art. 1 (emphasis added). It does not require the criminalization of *any* specific drug crimes, let alone a non-drug crime, like section 2237(a)(2)(B). And the mere fact that Jamaica consented to application of United States law cannot serve as a constitutional basis for section 2237(a)(2)(B). At most, the United States was obligated to board the *Jossette* and investigate for potential violations of United States drug laws. No treaty required the United States to prosecute Petitioners for making a non-drug related false statement about their destination.

C. The Coast Guard's Authority to Board Vessels is Not at Issue

In its third argument, the United States relies on the fact that the Coast Guard is authorized to board vessels under a number of different circumstances. (U.S. Br. at 19-21.) Petitioners have never argued otherwise. Just because the Coast Guard is authorized to board a vessel does not mean the United States can criminalize any conduct occurring on the vessel without regard to the limitations imposed by the Constitution.

D. Congress Did Not Enact Section 2237(a)(2)(B) to Regulate Foreign Commerce

The United States returns to its reliance on international treaties and the Necessary and Proper Clause as part of its fourth argument. (U.S. Br. at 21-24.) For the reasons discussed above, *see supra* at 23-25, section 2237(a)(2)(B) was not necessary to implement any international treaty.

The United States also adds a new argument: claiming in conclusory fashion that section 2237(a)(2)(B) is constitutional as a necessary and proper implementation of Congress's authority under the Foreign Commerce Clause. (U.S. Br. at 23-24.) Section 2237(a)(2)(B) was enacted to make "refusal to stop" a crime. H.R. Conf. Rep. 109-333, at *103 (Dec. 8, 2005). It does not textually regulate the channels or instrumentalities of commerce between the United States and other countries. Nor is there any rational basis to conclude that the false-statement crimes proscribed by section 2237(a)(2)(B) have a "substantial effect" on the international drug trade or other commercial activities between the United States and other countries. (U.S. Br. at 23.) The United States' authority over foreign commerce, although broad, is not unlimited. It does not extend so far as to reach section 2237(a)(2)(B).

E. This Court Has Limited Congress's Authority Under the High Seas Clause By Reference to Principles of International Law

Finally, the United States argues that "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." (U.S. Br. at 25.) Petitioners did no such thing. Relying on this Court's precedent, Petitioners demonstrated that extraterritorial application of United States law must be supported by a principle of extraterritorial jurisdiction recognized by customary international law. *See, e.g.*, *Campbell*, 743 F.3d at 809-12. This is a restriction on Congress's authority to apply United States law extraterritorially. It is not, as the United States suggests, a restriction on the meaning of "felonies." (U.S. Br. at 27.) Because extraterritorial application of a false-statement crime is not supported by principles of international law, under this Court's precedent, Congress exceeded its delegated authority when it extended section 2237(a)(2)(B) to the high seas.

Similarly, Petitioners showed how the United States' interpretation of the High Seas Clause renders the separate Piracy Clause redundant. (Opening Brief of Petitioners-Appellants at 35-41); *United States v. Dire*, 680 F.3d 446, 455 (4th Cir. 2012) (favorably discussing distinction drawn by District Court between "general piracy" punishable as a universal-jurisdiction offense under the Piracies Clause and "municipal piracy" punishable under the High Seas Clause, the latter of which "is

flexible enough to cover virtually any overt act Congress chooses to dub piracy," but "is necessarily restricted to those acts that have a jurisdictional nexus with the United States"). That does not, as the United States argues, mean the High Seas Clause only reaches conduct "treated under international law comparably to piracy or an offense against the law of nations." (U.S. Br. at 25.) Under Petitioners' interpretation of the High Seas Clause, each of the three clauses address *different* conduct—felonies with a nexus to the United States are covered by the High Seas Clause, acts of piracy (without regard to a United States nexus) are covered by the Piracy Clause, and offenses against the law of nations are covered by the Offences Clause. Because the conduct at issue here does not have a nexus to the United States, it cannot be criminalized under the High Seas Clause.

CONCLUSION

Petitioners respectfully request that this Court vacate the District Court's Order denying their petition and remand with instructions to grant the petition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman.

Dated: August 14, 2020

/s/ Patrick N. Petrocelli
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CERTIFICATE OF SERVICE

I certify that on August 14, 2020, the foregoing Reply Brief of Petitioners-Appellants was filed with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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