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Via CM/ECF

June 16, 2021

Patrick N. Petrocelli
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ppetrocelli@stroock.comHon. Beverly B. Martin
Hon. Robin S. Rosenbaum
Hon. Robert J. Luck
United States Court of Appeals
for the Eleventh Circuit
Room 1212
James Lawrence King Federal Justice Building
99 N.E. 4th Street
Miami, Florida 33132Re: United States v. Weir et al., Case No. 20-11188-X*Letter Response to Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j)
and Eleventh Circuit I.O.P.—6*

Dear Judge Martin, Judge Rosenbaum, and Judge Luck:

This Court's decision in *United States v. Davila-Mendoza*, 972 F.3d 1264 (11th Cir. 2020), confirms that Petitioners' convictions for violating 18 U.S.C. § 2237(a)(2)(B) should be vacated. First, *Davila-Mendoza* confirms that Congress's authority under the Foreign Commerce Clause "is subject to outer limits." *Id.* at 1276; Reply at 26. The government's contention that the making of false statements can be regulated just because the statements are made while a defendant is on the high seas would eviscerate any outer limits on Congress's power.

Second, this Court found that Congress exceeded its authority under the Foreign Commerce Clause, in part, because the MDLEA lacked a "jurisdictional hook or nexus to tie wholly foreign extraterritorial conduct to the United States." *Davila-Mendoza*, 972 F.3d at 1275. The same deficiency is present here—section 2237(a)(2)(B) lacks any jurisdictional hook or connection tying extraterritorial false statements to the United States. The mere fact that the Court referenced its prior decisions holding that the High Seas Clause does not contain a nexus requirement says nothing of Congress's authority when it is purportedly acting under separate authority conferred on it by the Foreign Commerce Clause. *Davila-Mendoza* confirms that there is a nexus requirement in the Foreign Commerce Clause; that required nexus is lacking here. 972 F.3d at 1277 ("[T]he Constitution grants Congress the authority to regulate commerce 'with foreign nations' not 'among and within foreign nations.'").

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Third, *Davila-Mendoza* confirms that the Foreign Commerce Clause does not grant the government license to “globally polic[e] wholly foreign” conduct. *Id.* at 1276. When Petitioners purportedly violated section 2237(a)(2)(B), they were onboard a foreign-flagged vessel traveling towards Haiti. The government cannot look to the Foreign Commerce Clause as conferring on Congress the authority to criminalize the making of a false statement about Petitioners’ destination.

Finally, Petitioners never argued that the government’s reliance on the Necessary and Proper Clause failed because section 2237(a)(2)(B) pre-dated ratification of the treaties the government relied on. Instead, Petitioners showed that section 2237(a)(2)(B) was not enacted to implement any of those treaties. Reply at 23-25. *Davila-Mendoza* has no bearing on Petitioners’ actual argument.

Respectfully submitted,

/s/ Patrick N. Petrocelli

Patrick N. Petrocelli

cc: Respondent’s Counsel (via CM/ECF)