No. 21-

IN THE

Supreme Court of the United States

ROBERT DEXTER WEIR, DAVID RODERICK WILLIAMS and LUTHER FIAN PATERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article I, section 8, clause 10, of the United States Constitution grants Congress the "Power . . . To define and punish Piracies and Felonies committed on the high Seas." The Eleventh Circuit held that Congress may rely on this authority to criminalize conduct that lacks any connection to the United States—including the extraterritorial acts of foreigners aboard foreign-flagged vessels that have no effect whatsoever on the United States. The question presented is:

Whether Congress's power to define and punish felonies committed on the high seas extends to conduct committed by foreign nationals on a foreign-flagged vessel, with no connection to the United States.

RELATED PROCEEDINGS

- *Weir v. United States*, No 21A367, U.S. Supreme Court. Application granted on January 26, 2022.

- *Weir v. United States*, No. 20-11188, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on November 16, 2021.

- *Weir v. United States*, No. 19-cv-23420-UU, U.S. District Court for the Southern District of Florida. Judgment entered on January 30, 2020.

- *United States v. Weir*, No. 17-cr-20877-UU, U.S. District Court for the Southern District of Florida. Judgment entered on January 10, 2018.

- *United States v. Williams*, No. 17-cr-20877-UU, U.S. District Court for the Southern District of Florida. Judgment entered on January 10, 2018.

- *United States v. Paterson*, No. 17-cr-20877-UU, U.S. District Court for the Southern District of Florida. Judgment entered on January 8, 2018.

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Robert Dexter Weir, David Roderick Williams, and Luther Fian Paterson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' decision (App. 1a-18a) is not reported in the Federal Reporter, but is available at 2021 WL 3197179. The district court's opinion (App. 19a-47a) is not reported in the Federal Supplement or available on Westlaw.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on July 29, 2021. App. 1a. It denied petitioners' petition for rehearing *en banc* (with panel rehearing) on November 8, 2021. App. 48a-49a. It entered judgment on November 16, 2021. The Court granted an extension of time to February 28, 2022 to file a petition for a writ of certiorari. *See Weir v. United States*, No 21A367 (U.S. Jan. 26, 2022). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 10, of the United States Constitution and section 2237 of Title 18 of the United States Code are set forth in the Appendix (App. 50a-53a).

INTRODUCTION

Under the Eleventh Circuit's interpretation of the Felonies Clause, Congress has unlimited criminal jurisdiction over all conduct occurring on the high seas. It can criminalize the conduct of foreign nationals when they are aboard foreign-flagged vessels, are not traveling to or from the United States, and lack any other connection to the United States. Such extraordinary reach is contrary to the original understanding of the Clause, which respected the well-established limits on sovereign authority in place at the time of the Founding, and required a nexus to the United States before Congress could make the conduct a felony.

Petitioners are Jamaican nationals. They were traveling the high seas between Jamaica and Haiti aboard a foreign-flagged vessel. They were not on their way to or from the United States and their conduct had no effect in or on the United States. U.S. Coast Guard officials nonetheless forcibly stopped and boarded their vessel at gunpoint. Petitioners were convicted of violating 18 U.S.C. § 2237(a)(2)(B), for making false statements to the U.S. Coast Guard about their vessel's destination. The gravamen of the offense was that they said they were destined for Jamaica, not Haiti. Even though their conduct had no connection to the United States, the Eleventh Circuit upheld their convictions. It reasoned that the Felonies Clause requires no U.S. nexus, and therefore authorizes Congress to make it a crime for foreign nationals on a foreign-flagged vessel traveling on the high seas to lie to a U.S. official about their intended destination. In the court of appeals' view, there is literally no limit to Congress's power to regulate any conduct

anywhere on the high seas, irrespective of whether the individual, the boat, or the conduct has any connection to the United States.

The Eleventh Circuit's interpretation of Congress's power to define and punish felonies is contrary to the text, history, and original understanding of the Clause. The original understanding reflected the well-established principle of international law that a state may not subject conduct on the high seas to criminal regulation absent any connection to the sovereign. Statements of the Framers, early decisions of this Court, and founding era practice all confirm that understanding, which the Eleventh Circuit nonetheless rejected.

The Eleventh Circuit's interpretation of the Felonies Clause also renders Congress's separate power under the Piracy Clause—to define and punish piracies on the high seas—entirely redundant. At the time of the Founding, international law treated acts of piracy, as defined under international law, as an exception to the general requirement that states could criminalize only conduct with a nexus to the sovereign. Acts of piracy were subject to "universal jurisdiction," and could be punished by all nations, regardless of nexus. Thus, under the original understanding, the Felonies Clause permitted criminalization only of conduct with a nexus to the United States, while the Piracy Clause authorized criminal punishment of a narrowly defined set of acts without such a nexus. But the Eleventh Circuit reads the Felonies Clause to extend such "universal jurisdiction" to all crimes, including lying about where one is heading on a boat, thereby depriving the Piracy Clause of any independent meaning.

Certiorari is warranted to restore meaningful limits on Congress's power to police the high seas.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are Jamaican citizens. Doc. 4-1 [A-37].[1] On September 14, 2017, while they were on board a Jamaican-flagged vessel on the high seas, U.S. Coast Guard officers observed petitioners traveling from Jamaica towards Haiti. Doc. 4-4 [A-61]. The officers forcibly stopped petitioners' vessel at gunpoint while the vessel was in international waters. Petitioners informed the officers that the vessel was Jamaican. *Id.* The Coast Guard confirmed that the vessel was, in fact, registered in Jamaica, and Jamaica authorized the United States to board and search the vessel. *Id.* During the ensuing boarding, a Coast Guard officer "asked about the destination of the vessel," and petitioners responded that the vessel was destined for Jamaica. Doc. 4-4 [A-61-A-62]. Thereafter, Coast Guard officers took petitioners into their custody and destroyed petitioners' Jamaican-flagged fishing boat. The officers then held petitioners at sea for more than thirty days, without charging them with a crime, chained to the decks of four Coast Guard cutters before delivering them to the custody of U.S. Drug Enforcement Agents in Miami.

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1. "Doc." citations refer to electronic docket entries from No. 19-cv-23420-UU in the Southern District of Florida. "A-__" citations refer to pages in the Appendix of Petitioners-Appellants, *Weir v. United States*, No. 20-11188 (11th Cir. May 5, 2020).

On October 9, 2017, while petitioners were still at sea in U.S. Coast Guard custody, Jamaica "waived jurisdiction over [petitioners' already destroyed] vessel." Doc. 4-4 [A-61]; *see also* Doc. 15-1 [A-158]. Jamaica's waiver occurred twenty-five days *after* petitioners made their statements about their destination. When their statements were made, they were aboard a Jamaican-flagged vessel that was still subject to Jamaican jurisdiction.

The United States initially charged petitioners with drug-trafficking offenses, Doc. 4-4 [A-61]; Doc. 4-1 [A-37], but ultimately abandoned those charges, admitting to the district court during petitioners' sentencing hearing that it "would have required a miracle" to prove those charges, one that it "could not have pulled off . . . in front of a jury," Doc. 4-11 [A-125].

Instead, the Government charged petitioners with violating 18 U.S.C. § 2237(a)(2)(B). Doc. 4-2 [A-40-41]. That statute makes it a crime "for any person on board . . . a vessel subject to the jurisdiction of the United States, to . . . provide materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination." 18 U.S.C. § 2237(a)(2)(B). The statute does not require proof of any other crime. It is a freestanding false-statement statute. According to the factual proffers petitioners and the Government agreed to, petitioners told the officers "that the vessel's destination was the waters near the coast of Jamaica, where they intended to fish," even though they "then and there well knew, the vessel's true destination was Haiti." Doc. 4-4 [A-61-62]. Petitioners each pled guilty, and the district court sentenced them each to ten-months imprisonment. Doc. 4-3 to 4-10 [A-53-100].

After petitioners served their sentences, the Department of Homeland Security held them in immigration detention for two more months and then removed them from the United States to Jamaica. Doc. 16-2 [A-173]. Under the terms of their removal, petitioners are permanently barred from re-entering the United States because falsely stating they were going to Jamaica rather than Haiti was deemed an "aggravated felony." *Id.*

II. District Court Proceedings

After their removal to Jamaica, petitioners moved to vacate their convictions by filing a petition for issuance of writs of error coram nobis. Petitioners argued that their convictions violated the Felonies Clause because it afforded Congress no authority to criminalize conduct of foreign nationals aboard foreign-flagged vessels on the high seas absent a nexus to the United States. Doc. 1 [A-21-26]. Petitioners also argued that their convictions violated the Due Process Clause because Congress cannot criminalize the extraterritorial conduct of foreign nationals unless the proscribed conduct is contrary to the laws of all reasonably developed legal systems. Doc. 1 [A-26]. Petitioners further maintained that their claims were jurisdictional and not subject to procedural default. Doc. 1 [A-13].

The Government opposed the petition on jurisdictional and substantive grounds. Doc. 15 [A-137-155]. On jurisdiction, the district court ruled in petitioners' favor, holding that "Petitioners' constitutional challenges to § 2237(a)(2)(B) are jurisdictional and not waivable." App. 26a. But on the merits, the district court ruled against petitioners. The district court did not address petitioners'

nexus-argument under the Felonies Clause because the argument was foreclosed by binding Eleventh Circuit precedent. App. 31a. The district court also held that petitioners' prosecutions satisfied due process. App. 43a-46a.

III. Court of Appeals Proceedings

On appeal, the Government did not challenge the district court's holding that it had jurisdiction to consider petitioners' claims. The Eleventh Circuit agreed that the district court had jurisdiction over petitioners' Felonies Clause claim. App. 7a n.2. But it concluded that the court lacked jurisdiction over petitioners' Due Process Clause claim. Accordingly, the court did not address petitioners' due process claims on the merits, and simply vacated that portion of the district court's decision. App. 6a-7a. Relying on its existing precedent, the court rejected on the merits petitioners' argument that the Felonies Clause requires a U.S. nexus and that their convictions therefore violated the Constitution. App. 8a (citing *United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011)).[2]

Petitioners filed a petition for rehearing and rehearing *en banc*, asking the Eleventh Circuit to revisit its decision in *Saac* and to interpret the Felonies Clause as requiring a U.S. nexus to criminalize felonies on the high seas. Petition for Panel Rehearing or Rehearing *En Banc* at 6-15 (11th Cir. Sept. 13, 2021). The Eleventh Circuit denied the petition. App. 48a-49a.

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2. Petitioners raised a separate Felonies Clause claim, which the Eleventh Circuit rejected. App. 8a-18a. Petitioners do not seek certiorari of that claim, or of their due process claim.

REASONS FOR GRANTING THE PETITION

This Court long ago recognized that Article I, section 8, clause 10, of the Constitution provides three distinct grants of power, two of which are relevant here: the power to define and punish piracy committed on the high seas; and the power to define and punish felonies committed on the high seas. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820). The Eleventh Circuit's interpretation of the latter authority to be without any limits contravenes the original understanding of the Felonies Clause and renders the Piracy Clause entirely redundant. On its view that Congress can criminalize any conduct on the high seas under the Felonies Clause, the Piracy Clause does no independent work.

Under the decision below, Congress has unlimited jurisdiction to define and punish as felonies any conduct committed on the high seas, even when committed by a foreign national aboard a foreign-flagged vessel, without any connection to the United States. That decision is contrary to authorities from the Founding era showing that sovereign authority over non-piracy felonies on the high seas required a nexus to the sovereign. The nexus would be satisfied if the offender was a U.S. citizen, was aboard a U.S.-flagged vessel, or was engaged in conduct directed at, or causing injury in, the United States. As John Marshall himself argued, "no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself." 6 Annals of Congress 598 (1800). Because "the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation[,] . . . in framing a Government for themselves, they cannot have passed this jurisdiction to that Government." *Id.* at 607.

The Eleventh Circuit decision obliterates the nexus requirement and turns the Felonies Clause into a roving authority to regulate any conduct by anyone on the high seas. Because this issue concerns the authority of the United States to exercise criminal jurisdiction beyond its territory, over the entire expanse of the high seas, it is an exceedingly important question, which the Eleventh Circuit answered erroneously, and in conflict with decisions of this Court. The Court should grant certiorari and reverse.

I. Certiorari is warranted because the Eleventh Circuit's interpretation of the Felonies Clause is contrary to the text and original understanding of the Clause.

The Eleventh Circuit's interpretation of the Felonies Clause to authorize an unlimited and roving criminal jurisdiction over all conduct on the high seas is contrary to the text and original understanding of the Constitution. In distinct clauses, the Framers authorized Congress to define and punish felonies and piracy on the high seas. They did so in two separate clauses because the power to penalize piracy was understood as distinct from, and an exception to, the general rule that nations could only criminalize conduct on the high seas that had a nexus to that nation. Piracy alone could be criminalized without such a nexus. But under the Eleventh Circuit's reading, the Felonies Clause gives Congress unlimited authority to criminalize *all conduct* on the high seas, irrespective of any connection to the United States. This is directly contrary to the original understanding of Congress's power, and renders the Piracy Clause redundant. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("it cannot be presumed that any clause in the constitution is intended to be without effect").

Properly construed, the Felonies Clause and the Piracy Clause are not redundant. The Piracy Clause authorizes Congress to penalize piracy regardless of any nexus to the United States. The Felonies Clause, by contrast, requires such a nexus. Under that reading, which reflected the law of nations at the time of the Founding, both provisions do independent work. And under that reading, Congress has no authority to make it a crime for a Jamaican national to lie about where he is going on a Jamaican-flagged vessel that is not even arguably headed to the United States.

A. At the Founding, felonies on the high seas could be punished only by those nations to whom the offense had a specific nexus, while international acts of piracy could be punished by all nations regardless of any nexus.

At the time of the Founding, the law of nations drew a sharp distinction between piracy and other felonies, with direct consequences for a nation's jurisdiction to criminalize conduct on the high seas. Piracy was the exception; all other felonies were subject to the general rule. And the general rule provided that nations could penalize conduct on the high seas *only* when the conduct had a connection to the sovereign. Nations could punish such conduct only when committed by their own nationals, by a foreign national on a vessel flying the nation's flag, or where the conduct was directed at or had an effect on the nation in question. Absent such a specific nexus, nations lacked roving authority to police the actions of foreign nationals on foreign-flagged vessels on the high seas. Wheaton's Elements of International Law § 124 (8th ed. 1866) (one nation's criminal laws "can only be

tried by that State . . . on board of whose vessels . . . the offence thus created was committed"). As detailed below, that general rule was expressly acknowledged by, among others, James Madison, Thomas Jefferson, John Marshall, and this Court. *See infra* Point II.

Piracy was a narrow exception to this background rule, but was strictly limited to acts recognized as "piracy" under the law of nations, namely "robbery upon the sea." *Smith*, 18 U.S. at 162. Blackstone and other influential scholars had long recognized piracy as an "offence[] against the law of nations." 4 W. Blackstone, Commentaries on the Laws of England, Ch. 5, at 66 (1770); *see also Smith*, 18 U.S. at 160-61. Because of its special status, piracy was, at the time of the Founding, considered "an offence within the criminal jurisdiction of all nations," meaning "[i]t is against all, and punished by all." *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820); *see also Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-60 (1795) ("[A]ll piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation."); *Smith*, 18 U.S. at 162 (recognizing the "general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [the] offense [of piracy] against any persons whatsoever"). Thus, a nation could punish an internationally-recognized act of piracy even if that act had no nexus to the punishing nation.

This exception to the general rule that nations could not penalize acts on the high seas without a connection to the sovereign was strictly circumscribed. Thus, although under the law of nations, all nations had the right to punish pirates because they are "deemed an enemy of the human

race," *Smith*, 18 U.S. at 161, such "universal jurisdiction" was strictly limited to acts of piracy as defined by the law of nations. As Blackstone wrote: "as none of the states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest." Blackstone, *supra* at 66. Piracy "is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment." *Smith*, 18 U.S. at 162.

If individual nations wanted to criminalize conduct on the high seas not recognized as piracy under the law of nations, therefore, they could do so only if the conduct satisfied the general rule; that is, if it had a nexus to the nation in question. Thus, in England, foreigners travelling aboard foreign-flagged vessels on the high seas could not be punished for local crimes because, since 1363, England could exercise its criminal jurisdiction only "over British subjects, over the crew of a British ship whether subjects or not, over any one in cases of piracy at common law. It could be exercised over *no other persons*." 1 W.S. Holdsworth, A History of English Law, at 318 (1903) (emphasis added); I Wooddeson, A Systematical View of the Laws of England, at 140 (1792) (offense of piracy "must still depend on the law of nations, except where, *in the case of British subjects*, express acts of parliament have declared, that the crimes therein specified shall be adjudged piracy") (emphasis added).

Under this general rule and its narrowly circumscribed exception for piracy, conduct "declared to be piracy" by an act of Congress, but "not so by the Law of Nations" was not "punishable in the Courts of the United States" when "committed by a person not a citizen of the United States, on board of a vessel belonging exclusively to subjects of a

foreign State." William Alexander Duer, Outlines of the Constitutional Jurisprudence of the United States, at 149 (1833); *see also* Eugene Kontorovich, The "Define and Punish" Clause and the Limits of Universal Jurisdiction, 103 Nw. U. L. Rev. 149, 190-91 (Winter 2009) (Congress's universal jurisdiction over the high seas is limited to acts of piracy recognized by the law of nations, a limit that "is inherent and nonderogable").

B. The Framers adopted this distinction in the Felonies Clause and therefore, as originally understood, that Clause reaches only conduct that has a connection to the United States.

The Framers drafted the Piracy and Felonies Clauses against the backdrop provided by the law of nations described above, and the two clauses track the distinction. *See Ware v. Hylton*, 3 Dall. 199, 281 (1796) (Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."). Under the law of nations, the Framers understood that they could generally criminalize only those felonies on the high seas that had a specific connection to the United States. Internationally-recognized acts of piracy, by contrast, constituted an exception to this general rule. They were subject to universal jurisdiction and could be punished by any nation, regardless of any specific connection or nexus.

Indeed, the Framers explicitly debated whether to deviate from this principle, and declined. When drafting the Felonies Clause, the Framers considered the option of granting Congress the prospective power to define felonies in the first instance, and, alternatively, adopting England's existing definitions and making them applicable

as a matter of U.S. law. Madison spoke forcibly against acceding to another nation's definitions. He maintained that it would be "dishonorable and illegitimate" to adopt England's definition of felonies unless they were "previously made [the United States'] own by legislative adoption." The Federalist No. 42 (Madison). Echoing the words of Blackstone, Madison argued that "no foreign law should be a standard farther than is expressly adopted"—i.e., that the law of one sovereign should not apply of its own force to citizens of another just because they travel on the high seas. 2 Farrand, The Records of the Federal Convention of 1787, at 316 (statement of James Madison).

Madison's view prevailed. The Framers therefore preserved the recognized distinction between piracy and felonies. They gave Congress the power to define and punish piracy and a separate power to define and punish felonies. Under the accepted principles of the time, Congress could define and punish all acts of internationally-recognized piracy consistent with the law of nations, even those acts that lack any nexus to the United States. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (United States can "punish[] pirates, although they may be foreigners, and may have committed no particular offence against the United States"). And Congress could also define and punish felonies, but only if those acts had a connection to the United States. *See Furlong*, 18 U.S. at 197-98 (the United States cannot punish felonies when committed "in the vessel of another nation" because, in those circumstances, Congress has "no right to interfere").

Only this distinction gives both the Piracy Clause and the Felonies Clause independent, non-redundant

meanings. Piracy is subject to punishment under the Piracy Clause, "is created by international consensus," and is therefore "restricted in substance to those offenses that the international community agrees constitute piracy." *United States v. Dire*, 680 F.3d 446, 455 (4th Cir. 2012). The power granted to Congress under the Felonies Clause, conversely, "is necessarily restricted to those acts that have a jurisdictional nexus with the United States." *Id.*; *see also* Kontorovich, 103 Nw. U. L. Rev. at 190 ("Congress cannot expand its jurisdiction by calling crimes 'piracies' when they do not have such a status in international law.").

II. Evidence from the Founding era, including this Court's decisions, confirms that Congress's authority under the Felonies Clause reaches only conduct with a connection to the United States.

Early decisions from this Court and Founding-era practices of the executive and legislative branches confirm that the Framers understood Congress's jurisdiction under the Felonies Clause to be limited to defining and punishing only conduct that had a U.S. nexus. This "postfounding practice is entitled to 'great weight'" in interpreting the Constitution. *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014); *Mistretta v. United States*, 488 U.S. 361, 401 (1989).

A. Early decisions from this Court recognized the limits of Congress's authority to define and punish felonies other than piracy on the high seas.

Early nineteenth century decisions from this Court recognized the limited jurisdiction the United States could exercise over foreigners aboard foreign-flagged vessels on the high seas. The decision below conflicts with those decisions.

In *United States v. Furlong*, for example, this Court considered whether Congress could criminalize murder "committed at sea . . . [on] a foreign vessel, by a foreigner upon a foreigner." 18 U.S. at 194. Section 8 of the Crimes Act of 1790 made it a crime for "any person or persons [to] commit [murder] upon the high seas." 1 Stat. 113 (1790). The Court acknowledged that the broad text of the Act did not, by its terms, exclude the exercise of jurisdiction over the murder of a foreigner by a foreigner while aboard a foreign-flagged vessel because it applied to "any person or persons." But the Court refused to infer "that Congress . . . intended to punish murder in cases with which they had no right to interfere" – i.e., "punishing it when committed . . . in the vessel of another nation." *Furlong*, 18 U.S. at 197-98. Had Congress attempted to do so, the Court explained, it would have impermissibly been trying to "[extend] the acknowledged scope of its *legitimate power*." *Id.* at 198 (emphasis added).

The Court determined that the crime charged was outside the intended scope of the Act because to hold otherwise would have required the Court to strike down that portion of the statute as an unconstitutional exercise

of Congress's limited jurisdiction over the high seas. *See id.*; *see also United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820) (recognizing "that the general words of the [Crimes Act of 1790] applying to all persons whatsoever . . . ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State"). This Court in *Furlong* treated "[t]he notion that Congress could generally legislate as to crimes on foreign vessels [as] self-evidently impossible" because Congress's "special [universal] jurisdiction only extends to piracy and not to other crimes that Congress is authorized to punish." Kontorovich, 103 Nw. U. L. Rev. at 191. As the *Furlong* Court asked rhetorically, "[i]f by calling murder *piracy*, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?" *Furlong*, 18 U.S. at 198.

The Eleventh Circuit's decision cannot be reconciled with *Furlong*. The court of appeals sought to avoid *Furlong*'s clear teaching by contending that it was "a statutory interpretation case" and "therefore [did] not resolve the parties' debate over the scope of Congress's constitutional authority." *Saac*, 632 F.3d at 1210. But that ignores the Court's express rationale in *Furlong*, namely, that a broader reading would go beyond the "acknowledged scope of [Congress's] *legitimate power*" over the high seas. *Furlong*, 18 U.S. at 198 (emphasis added).

B. Executive and legislative pronouncements demonstrate the limits of Congress's authority to define and punish non-piratical felonies on the high seas.

Executive and legislative post-Founding practices also demonstrate the limits of Congress's authority to define and punish felonies other than piracy on the high seas. Most notably, Britain's application of its own laws to U.S. citizens on U.S.-flagged ships on the high seas was one of the United States' main justifications for the War of 1812. Addressing Congress, President Madison emphasized that:

> British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and of seizing and carrying off persons sailing under it, not in the exercise of a belligerent right founded on the law of nations against an enemy, but of a *municipal prerogative* over British subjects.

Madison, Special Message to Congress on the Foreign Policy Crisis – War Message (June 1, 1812) (emphasis added). According to Madison, "British jurisdiction is thus extended to neutral vessels in a situation where no laws can operate but the law of nations and the laws of the country to which the vessels belong." *Id.* Madison reiterated the principle he had expounded in Federalist No. 42 and during debates over the Felonies Clause itself—that a nation has no authority to apply its own laws to foreign nationals traveling on foreign-flagged vessels on the high seas absent a nexus to that nation. But that is precisely the power the Eleventh Circuit has granted Congress.

Thomas Jefferson, while serving as Secretary of State, expressed the same views as Madison on behalf of the nascent federal government. In a 1793 letter to the Ambassador of France, Jefferson described nations as having "personal jurisdiction" on the high seas over "their own citizens only." Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793). Jefferson, like Madison, understood that a nation's authority to criminalize conduct on the high seas did not extend to foreign nationals on foreign-flagged vessels who lacked any connection to the United States. And he acknowledged that this limiting principle was part of United States law: "So say our laws as we understand them ourselves." *Id.* The limitation recognized by Madison and Jefferson—one imposed on all nations—necessarily determines the scope of the Felonies Clause, and limits it to felonies with a nexus to the United States.

Legislators who previously served as delegates to the Constitutional Convention also shared Madison and Jefferson's views. In 1800, then-Congressman (and later Chief Justice) John Marshall delivered a speech in the House about the United States' authority to criminalize the acts of a foreign national on a foreign-flagged vessel on the high seas. Marshall repeated the principle that "no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself." 6 Annals of Congress 598 (1800). The Felonies Clause, he explained, embodied that limitation: "that clause can never be construed to make to the Government a grant of power, which the people making it do not themselves possess." *Id.* at 607. Because "the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation[,] . . . in framing a Government for themselves, they cannot have passed this jurisdiction to that Government." *Id.*

III. The Eleventh Circuit ignored this history when it refused to recognize the nexus requirement in the Felonies Clause and instead rendered the Piracy Clause redundant.

In *Saac*, the Eleventh Circuit relied on the absence of an express requirement in the Felonies Clause to support its holding that Congress has the power to criminalize conduct on the high seas without a U.S. nexus, a decision it refused to revisit below. According to the court, the Felonies Clause should not be read to contain any limit on Congress's jurisdiction to criminalize conduct on the high seas because "the text of the clause makes no mention of such a jurisdictional nexus requirement." *Saac*, 632 F.3d at 1209.[3]

But the silence that the court below interpreted to authorize an unlimited roving jurisdiction to criminalize conduct on the high seas in fact has the opposite effect. Because the Framers well understood that nations could criminalize non-piracy offenses *only* where there was a direct connection to the sovereign, the Felonies Clause cannot be read to extend more sweeping jurisdiction unless it expressly so provided.

As shown above, international law at the time, and this Court in *Furlong*, clearly distinguished the universal jurisdiction crime of piracy, which any nation could punish

3. In the only other case to directly address the issue, the First Circuit reached the same result as the Eleventh, for the same misguided reason, finding that the Felonies Clause lacks a nexus requirement because it "does not explicitly require a nexus between the unlawful conduct committed on the high seas and the United States before Congress can punish that conduct." *United States v. Nueci-Pena*, 711 F.3d 191, 198 (1st Cir. 2013).

regardless of a specific nexus, from local or municipal crimes, like felonies, which the sovereign could reach only if an appropriate nexus existed. The Piracy and Felonies Clauses track that distinction. Under these provisions, as under international law, the sovereign authority to reach conduct on the high seas requires a nexus to the nation, *except* for the universal jurisdiction crime of piracy. As Madison wrote in the Federalist Papers, it would have been "dishonorable and illegitimate" for *any* sovereign to apply its own felonies to foreigners traveling aboard foreign-flagged vessels. The Federalist No. 42. Given this well-established limitation on jurisdiction to criminalize non-piracy conduct on the high seas, the Framers would have had to expressly override that rule had they intended to give Congress such unprecedented authority. They did not.

The Eleventh Circuit all but ignored the post-Founding history detailed above. The court did not even address the statements made by Madison, Jefferson, and Marshall, all of which rejected the limitless authority the Eleventh Circuit has now granted Congress. By reading the Felonies Clause to reach conduct with no connection to the United States whatsoever, the Eleventh Circuit also permitted precisely what this Court refused to allow in *Furlong*.

Nor did the court address the redundancy its interpretation created in the Piracy Clause. Congress could not have enacted 18 U.S.C. § 2237(a)(2)(B) under that clause because the crime of making a false statement about a vessel's destination during a boarding is not an internationally-recognized act of piracy. Now, however, Congress never needs to resort to its Piracy Clause power. It can define and punish any conduct as if it is an

internationally-recognized act of piracy even though it isn't. Left undisturbed, the Eleventh Circuit's decision renders the Piracy Clause a dead letter.

IV. This case is an appropriate vehicle to review Congress's authority under the Felonies Clause.

This case is an appropriate vehicle for this Court to review the scope of Congress's authority under the Felonies Clause. There is no dispute that neither petitioners nor their conduct had any connection to the United States. Petitioners are Jamaican nationals. When the Coast Guard stopped them, they were aboard a Jamaican-flagged vessel on the high seas traveling from Jamaica towards Haiti. Doc. 4-1 [A-37]; Doc. 4-4 [A-61-62]. They were not engaged in any conduct directed at the United States or that would have any effect in or on the United States. Their only crime was telling U.S. Coast Guard officials they were destined for Jamaica at a time when they were in fact traveling in the direction of Haiti.

Under the original understanding of the Felonies Clause, Congress could not criminalize such statements because petitioners' conduct had no nexus to the United States. The district court therefore lacked jurisdiction to enter judgments of conviction against them. Their convictions and sentences should be vacated.[4]

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4. The fact that Jamaica "waived jurisdiction over the vessel" on October 9, 2017, does not alter the constitutional question. First, Jamaica's "waiver" came more than three weeks *after* petitioners made their statements to the Coast Guard officers, and therefore has no bearing on whether Congress's authority existed at the time the alleged offenses were committed. Doc. 4-4 [A-61]; *see also* Doc. 15-1 [A-157-A-158]. Second, the nexus requirement is a structural limitation on Congress's legislative authority

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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over the high seas, and cannot be overcome by the consent of another sovereign. *Cf. United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1262 (11th Cir. 2012) (Barkett, J., concurring) ("The government's argument that . . . authority [to proscribe conduct under the Offences Clause in Article I, Section 8, Clause 10 of the Constitution] can be supplied by another nation's consent to United States jurisdiction is without merit."); *New York v. United States*, 505 U.S. 144, 182 (1992) ("State officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution"). Jamaica's act of waiving jurisdiction may have implications for relations between Jamaica and the United States, but it has no implications for the constitutional question posed here.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 29, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11188

D.C. Docket Nos. 1:19-cv-23420-UU,
1:17-cr-90877-UU-1

ROBERT DEXTER WEIR, *et al.*,

Petitioners-Appellants,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 29, 2021)

Before MARTIN, ROSENBAUM, and LUCK, Circuit Judges.

Appendix A

PER CURIAM:

Robert Dexter Weir, David Roderick Williams, and Luther Fian Patterson ("Petitioners"), Jamaican nationals, appeal the denial of their petition for a writ of error coram nobis. Petitioners were convicted of providing materially false information to the Coast Guard about their destination in violation of 18 U.S.C. § 2237(a)(2)(B). They argue that their convictions violate the Due Process Clause and the High Seas Clause of the U.S. Constitution. After careful consideration, and with the benefit of oral argument, we affirm in part and reverse in part. The district court lacked jurisdiction to deny Petitioners' Due Process Clause claim on the merits, so we reverse that ruling and remand the case with instructions to dismiss that claim for lack of jurisdiction. However, the district court had jurisdiction to consider Petitioners' High Seas Clause claims and correctly denied those claims, so we affirm that ruling.

I. BACKGROUND

On September 14, 2017, the U.S. Coast Guard spotted a vessel, later identified as the *Jossette*, speeding towards Haiti from the direction of Jamaica. The Coast Guard launched a small boat to investigate and intercept the *Jossette*. The Coast Guard approached and attempted to stop the *Jossette*, but the vessel quickly began to flee. As the Coast Guard pursued the *Jossette*, the Coast Guard watched its crew toss approximately 20 to 25 bales of suspected contraband into the water. The Coast Guard officers eventually drew their weapons, and the *Jossette* ended the chase, stopping in international waters near Haiti.

Weir, the *Jossette*'s captain, told the Coast Guard that the vessel was registered in Jamaica. The Coast Guard contacted Jamaica, which confirmed registration of the *Jossette* and authorized the Coast Guard to board and search the vessel. When asked about the destination of the *Jossette*, each member of the crew, including Petitioners, told the Coast Guard that the vessel's destination was the waters near the coast of Jamaica, where they were going to fish. However, that statement was false, as the *Jossette*'s actual destination was Haiti.

On October 18, 2017, Petitioners were named in a criminal complaint alleging a violation of the Maritime Drug Law Enforcement Act ("MDLEA"). *See* 46 U.S.C. §§ 70503(a)(1), 70506(b). An affidavit in support of the criminal complaint stated that the Coast Guard retrieved several bales in nearby waters matching the description of the bales tossed overboard by the *Jossette*'s crew, which tested positive for marijuana. But later, the government admitted that the Coast Guard did not find any drugs on board the *Jossette* and that ion scans used to test for illicit substances showed no indication that marijuana had been on board. As such, the government was not sure it could have shown beyond a reasonable doubt that the marijuana was connected to the *Jossette*.

On December 13, 2017, the government filed an information charging each Petitioner solely with "knowingly and intentionally provid[ing] materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination," in violation of 18 U.S.C. § 2237(a)(2)(B). The information stated that Petitioners "represented to a Coast Guard

officer that the vessel's destination was the waters near Jamaica, when in truth and in fact, . . . the vessel's destination was Haiti." Petitioners agreed to plead guilty to this single-count information.

The district court sentenced each Petitioner to ten months of imprisonment and one year of supervised release. They were later released from custody and subsequently removed from the United States to Jamaica. As a result of their convictions, Petitioners are prohibited from reentering the United States without permission.

On August 15, 2019, Petitioners filed a petition for a writ of error coram nobis. Coram nobis is a "remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002) (per curiam). Petitioners challenged their convictions under section 2237(a)(2)(B) on three constitutional grounds: one challenge under the Due Process Clause and two challenges under the High Seas Clause. Petitioners argued that under those clauses Congress lacked the authority to criminalize their extraterritorial conduct and the district court lacked jurisdiction to convict them. The government opposed the petition. As part of its opposition, the government included a declaration from an officer with the Coast Guard, as designee of the Secretary of State, which was dated November 3, 2017 (the "Secretary of State Declaration" or the "Declaration"). The Declaration stated, "[o]n September 14, 2017, the Government of Jamaica . . . authorized United States law enforcement to board and search" the *Jossette*. The Declaration also

stated, "[o]n October 9, 2017, the Government of Jamaica consented to the exercise of jurisdiction by the United States." The district court denied the coram nobis petition, finding that Petitioners did not procedurally default their claims and that Petitioners' convictions did not violate the Due Process Clause or the High Seas Clause. This is Petitioners' appeal.

II. DISCUSSION

We review jurisdictional questions *de novo*. *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). We review for abuse of discretion a district court's denial of a coram nobis petition. *Gonzalez v. United States*, 981 F.3d 845, 850 (11th Cir. 2020). A district court abuses its discretion if it makes an error of law or makes a finding of fact that is clearly erroneous. *Id.* On appeal, Petitioners argue that the district court erred in denying their coram nobis petition and continue to challenge their convictions under 18 U.S.C. § 2237(a)(2)(B) on three grounds: one challenge under the Due Process Clause and two challenges under the High Seas Clause.[1] We address these challenges in turn.

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1. As the District Court observed, "Petitioners do not clearly state whether they are mounting a facial or an as-applied challenge to 18 U.S.C. § 2237(a)(2)(B)." Because Petitioners' briefing in our Court appears to address the constitutionality of their convictions specifically, as opposed to the constitutionality of section 2237(a)(2)(B) more broadly, we treat their claims as as-applied challenges. *See, e.g.*, Appellants' Br. at 14 ("Petitioners' convictions violate the Due Process Clause."); *id.* at 26 ("Petitioners' convictions also separately violate the High Seas Clause for two distinct reasons.").

A. Due Process Clause Challenge

We do not reach the merits of Petitioners' Due Process Clause claim because we conclude the district court lacked jurisdiction over this claim. A court has jurisdiction over a coram nobis petition "only when the error alleged is of the most fundamental character and when no statutory remedy is available or adequate." *Lowery v. United States*, 956 F.2d 227, 228-29 (11th Cir. 1992) (per curiam) (citation and quotation marks omitted). As such, when a petitioner "fail[s] to pursue" a claim through a "remedy that is both available and adequate," the court cannot review the claim because a procedural default is a jurisdictional barrier to coram nobis relief. *See id.* at 229. However, this "doctrine of procedural default does not apply" to claims of jurisdictional error. *Peter*, 310 F.3d at 712-13. This is because a "jurisdictional error implicates a court's power to adjudicate the matter before it, [and] such error can never be waived by parties to litigation." *Id.* at 712; *see also id.* at 715-16 ("When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception[.] . . . Accordingly, a writ of error coram nobis must issue to correct the judgment that the court never had power to enter.").

Here, Petitioners could have raised their Due Process Clause claim earlier in the criminal proceeding itself or in a 28 U.S.C. § 2255 petition. And they never provided "sound reasons for failing to seek relief earlier." *United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000). Because they failed to pursue these available and adequate remedies, they procedurally defaulted this claim.

And although the doctrine of procedural default does not apply to a claim of jurisdictional error, this claim does not raise such an error. To be sure, Petitioners broadly assert that the district court "lacked jurisdiction to accept [their] guilty pleas" and note that such jurisdictional arguments are "not waivable or subject to procedural default." Even so, Petitioners' specific Due Process Clause arguments are rooted in whether *their* due process rights were violated, not whether the district court had jurisdiction. *See, e.g.*, Appellants' Br. at 3 ("Section 2237(a)(2)(B) did not provide the constitutionally required notice to Petitioners."); *id.* at 14 ("Petitioners' convictions violate the Due Process Clause."); *cf. id.* at 15 (arguing the government "lacked jurisdiction to prosecute Petitioners" based on their High Seas Clause challenge).

Petitioners therefore procedurally defaulted their as-applied Due Process Clause challenge, and thus the district court lacked jurisdiction to consider it. Because the district court reached the merits of this claim, we must reverse that ruling and remand the case with instructions to dismiss the claim for lack of jurisdiction.

B. High Seas Clause Challenges

We now consider Petitioners' two High Seas Clause claims.[2] The Define and Punish Clause of the Constitution

2. The doctrine of procedural default does not apply to Petitioners' High Seas Clause claims. If Congress did not validly enact section 2237(a)(2)(B) under the High Seas Clause, then the District Court lacked jurisdiction to convict Petitioners of that offense. *See United States v. Saac*, 632 F.3d 1203, 1208-09 (11th Cir.

authorizes Congress to (1) define and punish piracies, (2) define and punish felonies committed on the high seas, and (3) define and punish offenses against the law of nations. *United States v. Campbell*, 743 F.3d 802, 805 (11th Cir. 2014); *see* U.S. Const. Art. I, § 8, cl. 10. The second grant of power is often called the High Seas Clause (or the Felonies Clause), which is the clause at issue here. Petitioners raise two challenges under the High Seas Clause.

First, Petitioners argue the "power conferred by the High Seas Clause can only be exercised when the proscribed conduct has a nexus to the United States," and they say "there was no such nexus here." Petitioners admit this argument is "contrary to binding precedent" in this Circuit. Indeed, this Court has "rejected the same argument that defendants make here—that Congress exceeded its constitutional authority under the High Seas Clause in passing a statute that punishes conduct without a nexus to the United States." *Saac*, 632 F.3d at 1210. Our precedent therefore requires us to reject Petitioners' first challenge.

Second, Petitioners say that under the High Seas Clause, this Court "has consistently held that the extraterritorial application of United States law still must be supported by a principle of extraterritorial jurisdiction

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2011) (addressing an "argument that Congress lacked the authority to enact" a statute under the High Seas Clause and holding "[t]he constitutionality of . . . the statute under which defendants were convicted[] is a jurisdictional issue"). And "the doctrine of procedural default does not apply" to a claim of jurisdictional error. *Peter*, 310 F.3d at 712-13.

recognized by customary international law." Petitioners argue the extraterritorial application of section 2237(a)(2)(B) violates the High Seas Clause because it is not supported by international law. The district court rejected this claim because it found the application of section 2237(a)(2)(B) satisfied various principles of international law.

In response to Petitioners' position, the government argues that Petitioners conflate the question of whether Congress had the authority to enact section 2237(a)(2)(B) under its enumerated powers with the separate question of whether that authority must be supported by a principle of international law. In any event, the government says the extraterritorial application of section 2237(a)(2)(B) here is "fully consistent with international law," so "this Court need not resolve whether the High Seas Clause is constrained by international law." Instead, the government says this Court can "assume that it is and conclude that such limits are satisfied" on these facts.

Thus, Petitioners' and the government's arguments present two issues. First, we consider whether the extraterritorial application of section 2237(a)(2)(B) here satisfied a principle of international law. Second, we address whether Congress had the constitutional authority to enact section 2237(a)(2)(B) under its enumerated powers. We discuss each issue in turn.

1. Principles of International Law

Again, Petitioners argue that the extraterritorial application of section 2237(a)(2)(B) violated the High

Seas Clause because it did not comply with a principle of international law. We recognize that this Court has addressed principles of international law together with Congress's authority under the High Seas Clause. *See, e.g., Saac*, 632 F.3d at 1210 ("We now conclude that the [Drug Trafficking Vessel Interdiction Act] is also justified under the universal principle [of international law] and thus a constitutional exercise of Congress's power under the High Seas Clause."). As such, we consider here whether the extraterritorial application of section 2237(a)(2)(B) satisfied a principle of international law. "The law of nations permits the exercise of extraterritorial criminal jurisdiction by a nation under five general principles. They are the territorial, national, protective, universality and passive personality principles." *United States v. Romero-Galue*, 757 F.2d 1147, 1154 n.20 (11th Cir. 1985) (alteration adopted and quotation marks omitted).

We start with the territorial principle, which was one of the principles relied on by the district court. Under that principle, a nation has jurisdiction to apply its law in another nation's territory to the extent provided by international agreement with that other nation. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 & n.6 (11th Cir. 2011). The district court found the extraterritorial application of section 2237(a)(2)(B) satisfied the territorial principle because Jamaica, the *Jossette*'s flag nation, consented to the Coast Guard's interference with the *Jossette* as well as to U.S. jurisdiction. For support, the district court cited decisions by our sister circuits holding that the extraterritorial application of U.S. law to a foreign vessel in international waters satisfies the territorial

principle when the vessel's flag nation consents. *See United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) ("In this case, the Venezuelan government authorized the United States to apply United States law to the persons on board [a Venezuelan vessel]. Therefore, jurisdiction in this case is consistent with the territorial principle of international law."); *United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988) (Breyer, J.) (holding that the vessel's flag nation's consent satisfied the territorial principle, a "perfectly adequate basis in international law for the assertion of American jurisdiction"); *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) ("Malta, under whose flag Suerte's vessel was registered, consented to the boarding and search of his vessel, as well as to the application of United States law. A flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's rights under international law.").

We agree with the district court's and our sister circuits' application of the territorial principle. Again, the territorial principle says the United States has jurisdiction to apply its law in another nation's territory to the extent provided by international agreement with that other nation. *See Ibarguen-Mosquera*, 634 F.3d at 1379 & n.6. Similarly, although a foreign-flagged private vessel is usually "not subject to interference on the high seas" by other nations, as it is subject to the flag nation's "exclusive" jurisdiction, "interference with a ship that would otherwise be unlawful under international law is permissible *if the flag state has consented*." Restatement (Third) of the Foreign Relations Law of the United States §§ 502(2) & cmt. d, 522(2) & cmt. e (emphasis added)

[hereinafter "Restatement"].[3] In other words, when a flag nation consents to the United States interfering with its vessel in international waters or to U.S. jurisdiction over the vessel, that is the "international agreement" under the territorial principle that allows the United States to apply its law extraterritorially to that vessel. *See Ibarguen-Mosquera*, 634 F.3d at 1379 n.6. And the flag nation's consent can be given through a formalized agreement, such as a treaty, or through informal means. *See Robinson*, 843 F.2d at 4 (stating "nations may agree through informal, as well as formal, means" under the territorial principle); *Suerte*, 291 F.3d at 376 (citing Restatement § 301 & cmt. b) (stating that such agreements "may be made informally" because "international agreements need not be formalized"). Therefore, consistent with the territorial principle of international law, the United States may interfere with and exercise jurisdiction over a foreign vessel in international waters to the extent provided by consent of the vessel's flag nation.[4]

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3. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733-34, 737, 124 S. Ct. 2739, 2766-68, 159 L. Ed. 2d 718 (2004) (citing the Restatement as a "recognized" source of "the current state of international law" because it is "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat").

4. Petitioners argue that consent of a foreign nation is insufficient to support the extraterritorial application of U.S. law. For support, they cite *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012). In *Bellaizac-Hurtado*, while noting that Panama consented to U.S. prosecution of the defendants, this Court held that "drug trafficking is not an 'Offence[] against the Law of Nations,'" and thus Congress could not "constitutionally proscribe the defendants' conduct under the Offences Clause." *Id.* at 1247-48.

Applying this principle here, the record shows the extraterritorial application of section 2237(a)(2)(B) to Petitioners satisfied the territorial principle because Jamaica, the *Jossette*'s flag nation, consented to U.S. interference with the *Jossette* and to U.S. jurisdiction. As an initial matter, the Secretary of State Declaration says Jamaica "authorized United States law enforcement to board and search" the *Jossette* on September 14, 2017, which means Jamaica consented to U.S. interference with the vessel the very same day the Coast Guard boarded the *Jossette* and Petitioners provided the false information. Even so, Petitioners note the Declaration says Jamaica did not consent to U.S. jurisdiction until October 9, 2017, whereas Petitioners provided the false information about three weeks prior on September 14. Based on this chronology, Petitioners argue the United States lacked jurisdiction over them. But while the Declaration says Jamaica consented to U.S. jurisdiction on October 9, 2017, this date preceded the criminal complaint against

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Under the Offences Clause, Congress only has authority to punish conduct that violates the law of nations. *Id.* at 1249. Petitioners argue that a foreign nation's consent must be insufficient to support the extraterritorial application of U.S. law because otherwise "Panama's consent would have ended the inquiry and resort to the authority conferred by the Offences Clause would have been unnecessary." *Bellaizac-Hurtado* is inapplicable. In that case, this Court only decided that Congress lacked authority to proscribe the defendants' conduct under the Offences Clause because it was not a violation of the law of nations. The Court never addressed the separate question at issue here—whether Congress's exercise of its authority under its enumerated powers satisfied a principle of international law, such as the territorial principle. *Bellaizac-Hurtado* therefore does not foreclose our holding here.

Petitioners, which was filed on October 18, 2017; this date preceded the information charging Petitioners with violating section 2237(a)(2)(B), which was filed in December 2017; and this date was before the district court entered judgment in January 2018. The Declaration thus shows that Jamaica consented to U.S. jurisdiction over Petitioners before the criminal case began.[5]

Petitioners say the Declaration should not be considered because it was not part of the record in their criminal case. Rather, the government included the Declaration as part of its opposition to the coram nobis petition. We reject Petitioners' assertion. Petitioners never challenged the United States' jurisdiction until they filed their coram nobis petition. The government therefore had no need to proffer the Declaration until it filed its opposition to the petition. We have allowed the government to "submit evidence in support of its assertion

5. The United States and Jamaica also have an agreement under which one nation can consent to the extraterritorial application of the other nation's law. *See* Agreement Between the Government of the United States and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, State Dep't No. 98-57, 1998 WL 190434 (Mar. 10, 1998). For instance, under the agreement, one nation can "waive its right to exercise jurisdiction" over its vessel and "authorize the other [nation] to enforce its law against the vessel, its cargo and persons on board." *Id.* at Art. 3(5). Although this agreement is geared towards "combatting illicit maritime drug traffic," *id.* at Art. 1, the record here shows that the Coast Guard suspected Petitioners of trafficking drugs and that the government originally intended to charge Petitioners for trafficking drugs. As such, this agreement also demonstrates Jamaica's consent under the territorial principle.

that [an individual's] vessel was subject to the jurisdiction of the United States" when the individual's "failure to challenge the district court's jurisdiction [was] at least partially responsible for the lack of a developed record." *United States v. Iguaran*, 821 F.3d 1335, 1338 (11th Cir. 2016) (per curiam) (quotation marks omitted). And it's not as if the Declaration was cobbled together in an attempt to gin up U.S. jurisdiction once Petitioners challenged it in their petition. To the contrary, the Declaration was dated November 3, 2017, which was two months before the district court entered judgment in the criminal case and almost two years before Petitioners sought coram nobis relief.

This record thus demonstrates that Jamaica, the *Jossette*'s flag nation, consented to U.S. interference with the *Jossette* and to U.S. jurisdiction. Therefore, the extraterritorial application of section 2237(a)(2)(B) to Petitioners satisfied the territorial principle of international law.[6]

2. Congress's Authority to Enact Section 2237(a)(2)(B)

We now consider whether section 2237(a)(2)(B) was a valid enactment under Congress's enumerated powers. Among other powers, the government argues that section 2237(a)(2)(B) was a valid enactment under Congress's

6. Because we hold that the extraterritorial application of section 2237(a)(2)(B) to Petitioners satisfied the territorial principle of international law, we need not consider the government's arguments on other principles of international law.

powers in the High Seas Clause and the Necessary and Proper Clause. In its view, Congress has authority to criminalize designated felonies in international waters under the High Seas Clause, and section 2237(a)(2)(B), which prohibits providing materially false information to federal law enforcement, is "necessary" to "enforce United States laws criminalizing designated felonies on the high seas."

The Necessary and Proper Clause grants Congress "broad authority to enact federal legislation," as the 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) (quotation marks omitted). In considering whether the Necessary and Proper Clause authorizes Congress to enact a particular federal statute, we "look to see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power." *Id.* (quotation marks omitted).

This Court has held that the MDLEA was a valid enactment under the High Seas Clause. *See United States v. Estupinan*, 453 F.3d 1336, 1338-39 (11th Cir. 2006) (per curiam). The MDLEA makes it unlawful for a person to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance" while on board "a vessel subject to the jurisdiction of the United States." 46 U.S.C. § 70503(a)(1), (e)(1). This Court has also held that the Drug Trafficking

Vessel Interdiction Act ("DTVIA") was a valid enactment under the High Seas Clause. *See Saac*, 632 F.3d at 1210. The DTVIA prohibits the operation of a submersible or semi-submersible vessel without nationality in territorial waters with the intent to evade detection. *See* 18 U.S.C. § 2285(a). Because we've established that the MDLEA and the DTVIA were valid enactments under the High Seas Clause, we next consider whether section 2237(a)(2)(B) was "convenient, . . . useful[,] or conducive" or "rationally related" to Congress's implementation of its enumerated power under the High Seas Clause in the MDLEA and the DTVIA. *See Belfast*, 611 F.3d at 804 (emphasis and quotation marks omitted).

When the Coast Guard or other federal law enforcement seeks to enforce the MDLEA or the DTVIA in international waters, materially false information can hamper that enforcement. Section 2237(a)(2)(B) therefore helps deter such false information by imposing criminal sanctions, including a fine and/or imprisonment for up to five years. *See* 18 U.S.C. § 2237(b)(1). Indeed, section 2237(a)(2)(B) was enacted to support "law enforcement at sea." H.R. Rep. No. 109-333, at 103 (2005) (Conf. Rep.). As such, section 2237(a)(2)(B) was rationally related to Congress's implementation of its enumerated power under the High Seas Clause in the MDLEA and the DTVIA.[7] *Belfast*, 611 F.3d at 804. And even though Petitioners were

7. The government argues section 2237(a)(2)(B) was also a valid enactment under other enumerated powers. Because we hold that it was a valid enactment under the High Seas Clause and the Necessary and Proper Clause, we need not consider the government's other arguments.

not convicted of violating the MDLEA or the DTVIA, the record shows the Coast Guard suspected Petitioners of trafficking drugs when it asked about their destination. Also, the government originally intended to charge Petitioners under the MDLEA for trafficking drugs. On these facts, section 2237(a)(2)(B) was rationally related to the implementation of the MDLEA and is therefore a valid enactment under the High Seas Clause and the Necessary and Proper Clause.

III. CONCLUSION

In sum, the district court lacked jurisdiction to deny Petitioners' Due Process Clause claim on the merits, so we reverse that ruling and remand the case with instructions to dismiss that claim for lack of jurisdiction. However, the district court had jurisdiction to consider Petitioners' High Seas Clause claims and correctly denied those claims, so we affirm that ruling.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JANUARY 3, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:19-cv-23420-UU
Criminal Case No.: 1:17-cr-20877-UU

ROBERT DEXTER WEIR, DAVID RODERICK WILLIAMS, AND LUTHER FIAN PATERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

January 30, 2020, Decided
January 30, 2020, Filed

ORDER

THIS CAUSE is before the Court on Petitioners' counseled Petition for Issuance of Writs of Error Coram Nobis Vacating Convictions (D.E. 1) (the "Petition").

THE COURT has reviewed the Petition, the pertinent portions of the record, and is otherwise fully advised in the premises. For the reasons stated herein, the Petition is DENIED.

Appendix B

I. Factual Background

On September 14, 2017, a United States Coast Guard cutter spotted a vessel later identified as the *Jossette* WH 478 speeding towards Haiti from the direction of Jamaica. CR-DE 1 (criminal complaint); CR-DE 59, CR-DE 63 (factual proffers). The U.S. Coast Guard then launched an "over the horizon" small boat to investigate and intercept the *Jossette*. CR-DE 1 ¶ 5. The small boat reached within several yards of the *Jossette* and attempted to get it to stop. *Id.* However, the *Jossette* began to flee at a high rate of speed and the small boat gave pursuit. *Id.* While following the *Jossette*, Coast Guard personnel observed crew on the *Jossette* "jettison approximately 20-25 bales of suspected contraband that had been on deck." *Id.* The *Jossette* ultimately came to a stop—in international waters approximately 13 nautical miles off the coast of Navassa Island. *Id.*

Once alongside the *Jossette*, U.S. Coast Guard personnel observed five crewmembers, including Petitioners.[1] *Id.* ¶ 6. The U.S. Coast Guard personnel questioned the crewmembers, one of whom, Petitioner Weir, the captain of the *Jossette*, claimed that the *Jossette* was a Jamaican fishing vessel and registered in Jamaica. *Id.* ¶ 7. The U.S. Coast Guard then contacted the Jamaican government, which confirmed registration of the *Jossette*

1. The five crewmembers are the five co-defendants in the underlying criminal case. One co-defendant, Patrick W. Ferguson, has a pending 28 U.S.C. § 2255 motion before this Court, with substantively identical legal arguments to those in this Petition. *See* 1:19-cv-22901-UU.

and authorized the U.S. Coast Guard to board and search the *Jossette*. *Id.* "Jamaica also later waived jurisdiction over the vessel." *Id.*; CR-DE 59.

After receiving permission to board, the U.S. Coast Guard found neither fishing gear nor evidence of controlled substances on the *Jossette*. CR-DE 1 ¶ 8; CR-DE 93 at 23-24. However, the U.S. Coast Guard found "several jettisoned bales in the surrounding waters that matched the appearance and size of the bales seen thrown from the *Jossette*, which tested positive for marijuana. The total weight of the marijuana discovered during this interdiction was at least 613 pounds." CR-DE 1 ¶ 8.

The five crewmembers were transferred to the U.S. Coast Guard small vessel and then to the cutter. *Id.* ¶ 9. On October 16, 2017, the crewmembers were taken to the federal detention center in Miami, Florida. *Id.* ¶ 10.

II. Procedural Background

On October 18, 2017, the United States filed a criminal complaint against Petitioners, setting forth facts with the intent of charging Petitioners with one count of conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, in violation of the Maritime Drug Law Enforcement Act (the "MDLEA"), 46 U.S.C. §§ 70503(a)(1), 70506(b). CR-DE 1 at 2. However, Petitioners later waived indictment and were charged by information with knowingly providing materially information to a federal law enforcement officer during a boarding while on a vessel subject to the jurisdiction of the United States, in violation of 18 U.S.C. § 2237(a)(2)(B). CR-DE 43.

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The information charged the following with regard to the false statement: "[D]efendants represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica when in truth and in fact . . . the vessel's destination was Haiti." CR-DE 43. In their proffers Petitioners stipulated:

> When asked about the destination of the vessel, each of the members of the crew, including the defendant[s], told the 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. As the crew members, including the defendant[s], then and there well knew, the vessel's true destination was Haiti.

CR-DE 59, 63.

On January 3, 2018, Petitioners appeared in Court for consolidated plea and sentencing proceedings.[2] Each Petitioner pled guilty to the information pursuant to a written plea agreement. CR-DE 58; CR-DE 62; CR-DE 66. The prosecutor explained during the sentencings of Petitioners Weir and Williams his decision to charge Petitioners with making a false statement in violation of 18 U.S.C. § 2237(a)(2)(B), stating "the Government was not convinced it could prevail at trial to prove that those items, [hundreds of pounds of] marijuana, was in fact

2. Petitioner Paterson appeared in Court for consolidated plea and sentencing on January 5, 2018. CR-DE 66, 67.

connected to this boat" because the marijuana was found "a mile" away from the *Jossette*. CR-DE 93 at 23.

The Court sentenced each Petitioner to 10 months imprisonment and one year of supervised release. CR-DE 67; CR-DE 68; CR-DE 70. Petitioners "were released from custody on July 13, 2018 and subsequently removed to Jamaica on August 30, 2018." CV-DE 1 at 8. Each Petitioner is subject to a ten-year ban on reentry that expires in 2028. *Id.*

On August 15, 2019, Petitioners filed the instant Petition, in which they argue their convictions must be vacated because 18 U.S.C. § 2237(a)(2)(B) is unconstitutional in that Congress lacks the constitutional authority to criminalize the making of a false statement by a foreign national while aboard a foreign flagged vessel located in international waters. They also argue that their convictions violated due process because they did not have adequate notice that their conduct would place them in criminal jeopardy under United States law. The Government responds that the Petition is untimely, Petitioners fail to show that their convictions are causing them a present harm, § 2237(a)(2)(B) is constitutional, and that Petitioners' convictions did not violate due process. The Petition is ripe for disposition.

III. Legal Standard

"A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255." *United*

States v. Peter, 310 F.3d 709, 712 (11th Cir. 2002) (per curiam). "[T]he law recognizes that there must be a vehicle to correct errors 'of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid.'" *Id.* (quoting *United States v. Morgan*, 346 U.S. 502, 509 n.15, 74 S. Ct. 247, 98 L. Ed. 248 (1954)).

The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to grant coram nobis relief. *See, e.g.*, *United States v. Denedo*, 556 U.S. 904, 911, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009). "The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice." *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). "[I]t is difficult to conceive of a situation in a federal criminal case today where coram nobis relief would be necessary or appropriate." *Carlisle v. United States*, 517 U.S. 416, 429, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4, 67 S. Ct. 1330, 91 L. Ed. 1610 (1947)).

"The bar for coram nobis relief is high. First, the writ is appropriate only when there is and was no other available avenue of relief. Second, the writ may issue only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam) (internal quotation marks omitted) (citing *Morgan*, 346 U.S. at 512; *Moody v. United States*, 874 F.2d 1575, 1576-78 (11th Cir. 1989)). Jurisdictional errors have long been recognized as

fundamental errors "since jurisdictional error implicates a court's power to adjudicate the matter before it." *Peter*, 310 F.3d at 712.

IV. Analysis

A. Timeliness and Procedural Default

"A claim is not facially cognizable on coram nobis review if the defendant could have, but failed to, pursue the claim through other available avenues." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam). "Furthermore, district courts may consider *coram nobis* petitions only when the petitioner presents sound reasons for failing to seek relief earlier." *Maye v. United States*, 769 F. App'x 882, 883 (11th Cir. 2019) (citing *United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000)). "But claims of jurisdictional error have historically been recognized as fundamental, so the doctrine of procedural default does not apply to such claims . . . . Thus, a genuine claim that the district court lacked jurisdiction may be a proper ground for coram nobis relief as a matter of law." *Id.* (citing *Peter*, 310 F.3d at 712-13; *Alikhani*, 200 F.3d at 734). "When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force." *Peter*, 310 F.3d at 715.

The Government argues that Petitioners' claims are untimely because: allowing them to proceed would undermine the one-year statute of limitations in 28 U.S.C. § 2255(f)(1); the statute of conviction has not

been declared unconstitutional since the completion of Petitioners' sentences, as in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) (per curiam) (granting coram nobis relief where petitioner argued that the district court lacked jurisdiction over his charged offense in light of a U.S. Supreme Court case decided six months after he completed his term of supervised release); and they have failed to demonstrate sound reasons for not challenging their convictions earlier. CV-DE 15 at 4-8.

The Petition is timely and the claims are cognizable. The Court will not read § 2255's statute of limitations into Petitioners' claim for coram nobis relief. Nor is *Peter* the only conceivable fact pattern that would merit coram nobis relief. While it is true that Petitioners have not previously challenged their convictions on the grounds raised in this Petition, Petitioners' constitutional challenges to § 2237(a)(2)(B) are jurisdictional and not waivable. "A defendant's claim that the indictment failed to charge a legitimate offense is jurisdictional and is not waived upon pleading guilty." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011) ("The constitutionality of [a federal statute] . . . is a jurisdictional issue that defendants did not waive upon pleading guilty."); *see also Peter*, 310 F.3d at 713-15 (distinguishing claims where a defendant had been charged with alleged conduct that was non-criminal—a jurisdictional defect—from claims involving indictments with omissions, such as a missing element, which are not jurisdictional defects) (citing *United States v. Tomeny*, 144 F.3d 749, 751 (11th Cir. 1998) ("In arguing that 16 U.S.C. § 1857(1)(I) preempts 18 U.S.C. § 1001 as applied to the facts of this case, appellants effectively claim that

the indictment failed to charge a legitimate offense. We hold that this claim is jurisdictional and that appellants did not waive it upon pleading guilty."); *United States v. Caperell*, 938 F.2d 975, 977-78 (9th Cir. 1991) (holding that defendant's claim that the indictment failed to state an offense because methamphetamine was unlawfully included on the schedules of controlled substances was jurisdictional and not waivable)).

Here, Petitioners challenge the constitutionality of the federal statute 18 U.S.C. § 2237(a)(2)(B) that served as the basis for their convictions. Thus, Petitioners' 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. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (dismissing five of six claims in the coram nobis petition because petitioner failed to raise them on direct appeal, but addressing the merits of the sixth claim because it was arguably jurisdictional and "[a] genuine claim that the district court lacked jurisdiction to adjudicate the petition guilty may well be a proper ground for coram nobis relief as a matter of law").[3]

B. Present Harm

As the Supreme Court explained in *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954), coram nobis relief is available after a sentence has been

3. Whether Petitioners waived their due process claim based on jurisdictional defect is a closer call. Even if Petitioners' due process claim is procedurally barred, the Court denies the claim on the merits for the reasons explained herein.

served because "the results of the conviction may persist." *Id.* at 512-13. Accordingly, "[o]ne of the requirements for coram nobis relief is that the petitioner show that the challenged conviction is 'causing a present harm' that is 'more than incidental.'" *United States v. Smith*, 644 F. App'x 927, 928 (11th Cir. 2016) (per curiam) (quoting *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007)). While this Circuit's caselaw interpreting the "present harm" or "continuing collateral consequence" requirement is slight, in holding that the petitioner was entitled to coram nobis relief in *Peter*, the Court asserted that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Peter*, 310 F.3d at 715-16 (quoting *Spencer v. Kemna*, 523 U.S. 1, 12, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)).[4]

The Government contends that Petitioners do not sufficiently allege they are suffering from serious collateral consequences. CV-DE 15 at 9. While they are each subject to a ten-year ban on reentry, the Government argues, "no Petitioner asserts, let alone establishes, that he would be able to legally travel to the United States in the absence of any such ban." *Id.* The Government puts forth the argument that "'something more than the stain of conviction is needed to show'" collateral consequences

4. In *United States v. Smith*, 757 F. App'x 838 (11th Cir. 2018) (per curiam), the Eleventh Circuit held that the petitioner was not suffering a present harm because vacating his 1971 conviction for wearing military medals without authorization (a crime he argued was invalidated under a 2012 U.S. Supreme Court case) would not impact his presumptive parole release date for the sentence he was serving in an unrelated first-degree murder case. *Id.* at 839-40.

and that a petitioner "'must show that he or she is under a substantial legal disability in order to obtain a writ of error coram nobis.'" *Id.* at 8-9 (quoting *United States v. George*, 676 F.3d 249, 255-56 (1st Cir. 2012) (declining to hold that petitioner's loss of his monthly pension benefits was a continuing collateral consequence because even if it was, "he has failed to persuade [the court] that the circumstances of his case demand coram nobis relief"); *Howard v. United States*, 962 F.2d 651, 653 (7th Cir. 1992)). Petitioners respond that they continue to suffer the adverse effects of their convictions because "putting aside any restrictions imposed on them by the U.S. Department of Homeland Security, [they] are not permitted to reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security." CV-DE 16 at 11. Further, under their orders of removal, Petitioners are prohibited from entering the United States "at any time" because they "have been convicted of a crime designated as an aggravated felony." *Id.* (citing CV-DE 16 Ex. 13).

The immigration effects of Petitioners' convictions are more than incidental. *Peter*, 310 F.3d at 715-16. Courts recognize that deportation and bars on reentry are serious collateral consequences of pleading guilty. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 365-66, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014) (asserting that petitioner, an Australian national who was prohibited from reentering the United States, was entitled to coram nobis relief and continued to suffer harm from his conviction because his "likely ineligibility to reenter the United States

constitutes a continuing consequence of his conviction"). Absent their convictions, Petitioners would not need the Undersecretary's prior written permission to enter the United States, nor would they be de facto barred from reentry.

C. Constitutional Challenges to 18 U.S.C. § 2237(a)(2)(B)

Petitioners ask this Court to be the first in the nation to declare 18 U.S.C. § 2237(a)(2)(B) an unconstitutional exercise of congressional authority under the High Seas Clause of the United States Constitution.[5] In so doing, Petitioners advance two arguments. First, that the United States' exercise of extraterritorial jurisdiction under the High Seas Clause is unsupported by a principle of extraterritorial jurisdiction recognized by customary international law. CV-DE 1 at 10. Second, that Congress' authority to define and punish felonies on the high seas is limited to instances where the conduct subject to punishment has a nexus to the United States (the "nexus claim"). *Id.* at 11.

5. Petitioners do not clearly state whether they are mounting a facial or an as-applied challenge to 18 U.S.C. § 2237(a)(2)(B). However, they state their challenges to § 2237(a)(2)(B) are "as applied to the facts set forth in the charging documents and otherwise before the Court when they entered their guilty pleas." CV-DE 1 at 8. Elsewhere in their briefings they suggest the statute can never be applied constitutionally to occupants of foreign flagged vessels in international waters. *See id.* at 10.

The Government argues that Petitioners' first claim fails because the exercise of extraterritorial jurisdiction is supported by principles of international law. CV-DE 15 at 10-11. The Government further maintains that Petitioners' second claim—the nexus claim—is foreclosed by binding Eleventh Circuit precedent, which Petitioners concede. CV-DE 1 at 5, 9, 10 ("The Eleventh Circuit's prior interpretation of the High Seas Clause rejecting [the nexus requirement for defining and punishing felonies] is incorrect and should be overruled. Defendants advance this argument which provides a separate basis for vacating their convictions, to preserve it for appellate review."). This Court will not delve into Petitioners' nexus claim because binding Eleventh Circuit precedent expressly rejects it. *United States v. Campbell*, 743 F.3d 802, 809-10 (11th Cir. 2014) (collecting cases and recognizing that Congress' authority to define and punish felonies on the high seas under the MDLEA exists even where the criminal conduct lacks a nexus to the United States); *Saac*, 632 F.3d at 1209 ("While there is a dearth of authority interpreting the scope of Congress's power under the High Seas Clause, early Supreme Court opinions intimate that statutes passed under the High Seas Clause may properly criminalize conduct that lacks a connection to the United States."); *id.* at 1210 ("This Court, and our sister circuits, have refused to read a jurisdictional nexus requirement into the [High Seas] Clause."); *see also United States v. Hernandez*, 864 F.3d 1292, 1303 (11th Cir. 2017) ("[T]he MDLEA [i]s a constitutional exercise of Congressional authority under the Felonies [High Seas] Clause, and . . . the conduct proscribed by the MDLEA need not have a nexus to the United States."), *cert. denied*, 138 S. Ct. 1025, 200 L. Ed. 2d 279 (2018).

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i. 18 U.S.C. § 2237(a)(2)(B) Comports with Principles of International Law and Does Not Violate the High Seas Clause

The Define and Punish Clause empowers Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. 1, § 8, cl. 10. "The Supreme Court has interpreted the [Define and Punish] Clause to contain three distinct grants of power: to define and punish piracies, to define and punish felonies committed on the high seas, and to define and punish offenses against the law of nations." *Campbell*, 743 F.3d at 805 (citing *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2002)). The second grant of power—the High Seas Clause—is at issue in this case. Petitioners argue that Congress lacked the constitutional authority under the High Seas Clause to criminalize Petitioners' false statements to the U.S. Coast Guard on a foreign flag vessel in international waters; thus, the Court lacked jurisdiction to convict Petitioners of violating 18 U.S.C. § 2237(a)(2)(B).

Section 2237(a)(2)(B) provides: "It shall be unlawful for any person on board a vessel of the United States, *or a vessel subject to the jurisdiction of the United States*, 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)(2)(B) (emphasis added).

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Section 2237(e)(3) defines "vessel subject to the jurisdiction of the United States" as "ha[ving] the meaning given [to it] in section 70502 of title 46." Section 70502, the definition section of the MDLEA, defines "vessel subject to the jurisdiction of the United States" to include "a vessel registered to 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); *see also United States v. Devila*, 216 F.3d 1009, 1017 (11th Cir. 2000) (per curiam), *vacated in part on other grounds*, 242 F.3d 995 (11th Cir.), *cert. denied*, 534 U.S. 843, 122 S. Ct. 103, 151 L. Ed. 2d 62 (2001) (noting that the jurisdictional requirement that a foreign nation "consent to or waive objection" to United States enforcement under the MDLEA was inserted into the statute "to protect the interest of the flag nation and international comity, not the interest of the individuals aboard the vessel"). Section 2237(a)(2)(B) therefore incorporates the MDLEA's assertion of extraterritorial jurisdiction.

The parties agree that although the High Seas Clause gives Congress the authority to define and punish felonies committed on the high seas outside the jurisdiction of the United States, "international law generally prohibits any country from asserting jurisdiction over foreign vessels on the high seas . . . . subject to recognized exceptions." CV-DE 1 at 12; CV DE 15 at 11 (both quoting *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982)). Petitioners focus on three of these "recognized exceptions": (1) the protective principle of jurisdiction; (2) the objective principle of jurisdiction; and (3) universal jurisdiction. CV-DE 1 at 12-16. Petitioners assert that the

"only conceivable basis for the United States to criminalize Defendants' alleged statements to the Coast Guard is through application of the 'protective' principle." *Id.* at 10. The Government contends that a fourth exception, the territorial principle of jurisdiction, which Petitioners do not address in their Petition, is the most relevant. CV-DE 15 at 11.

1. The Territorial Principle

Pursuant to the territorial principle, the Government maintains, the United States could properly exercise jurisdiction over the vessel and its occupants with the consent of the flag nation, Jamaica. CV-DE 15 at 10. "Under the territorial principle, '[a] state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state.'" *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 n.6 (11th Cir. 2011) (quoting *United States v. Cardales*, 168 F.3d 548, 554 (1st Cir. 1999); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 25 (AM. LAW INST. 1965)); *see also United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988); *United States v. Suerte*, 291 F.3d 366, 370-71 (5th Cir. 2002). The international agreement does not require a treaty and can be reached "through informal, as well as formal means." *Robinson*, 843 F.2d at 4 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115).

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Section 2237(a)(2)(B) adopts the definition of "vessel subject to the jurisdiction of the United States" as provided in the MDLEA, which in turn defines a "vessel subject to the jurisdiction of the United States" to include "a vessel registered to 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) (emphasis added). The MDLEA's definition "codifies the . . . generally accepted principle of international law: a flag nation may consent to another's jurisdiction." *Suerte*, 291 F.3d at 375-76 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 reporter's note 8 (AM. LAW. INST. 1987); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-12 n.41 (3d ed. 2001)). Here, Petitioners stipulated that: (1) the *Jossette* was a Jamaican-registered vessel; (2) Jamaica authorized the United States to board and search the vessel; (3) Jamaica waived jurisdiction over the vessel; and (4) the vessel was subject to the jurisdiction of the United States. Factual Proffers (CR-DE 61, 63); Plea Agreements (CR-DE 58, 62, 66). Additionally, the record contains the certification of U.S. Coast Guard Commander Francis J. DelRusso that Jamaica consented to the exercise of jurisdiction by the United States pursuant to the bilateral 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, 1997 U.S.T. LEXIS 21, 1998 WL 190434 (Mar. 10, 1998). CV-DE 15-1.

In their reply, Petitioners argue that the record before the Court when it accepted their guilty pleas contradicts the Government's current claims that Jamaica consented or waived objection to the enforcement of United States law by the United States, and that the United States prosecuted Petitioners under the Jamaica Bilateral Agreement. CV-DE 16 at 1-3. Although Petitioners readily admit they pled guilty to the fact that they were "on board a vessel subject to the jurisdiction of the United States" and that "Jamaica waived jurisdiction over the vessel," they argue that they did *not* expressly admit that Jamaica consented to the application of United States law or that the United States was proceeding under the Jamaica Bilateral Agreement.[6] *Id.* at 3 (citing Jamaica Bilateral Agreement,

6. Petitioners seek to constrain the Court's resolution of the issues by stating that they are challenging the constitutionality of § 2237(a)(2)(B) "as applied to the facts set forth in the charging documents and otherwise before the Court *at the time of their guilty pleas*." CV-DE 16 at 2 (emphasis added). Accordingly, Petitioners suggest that the Court should not consider the certification of Commander DelRusso on which the United States relies to demonstrate that Jamaica waived jurisdiction over the vessel and consented to the exercise of jurisdiction by the United States pursuant to the Jamaica Bilateral Agreement.

The undersigned acknowledges that the certification was not part of the record when Petitioners entered their guilty pleas. However, the certification is not necessary to a resolution of the Petition since the charging documents included the allegation that the "vessel [was] subject to the jurisdiction of the United States" and that Jamaica waived jurisdiction of the vessel. CR-DE 1; CR-DE 43. Petitioners also stipulated in their factual proffers that the *Jossette* was "subject to the jurisdiction of the United States." *See* CR-DE 59 at 1. These "facts" are sufficient to establish subject matter jurisdiction, and the specific means by which the United states

art. 3, cl. 5) (for the Jamaica Bilateral Agreement to apply, Jamaica must "waive its right to exercise jurisdiction and authorize the [United States] to enforce its laws against the . . . persons on board"). In making this argument, Petitioners rely on two cases: *Peter*, 310 F.3d at 715, and *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2002). Their reliance is misplaced.

In *Peter*, the petitioner pled guilty to violating the Racketeer Influenced and Corrupt Organization Act (RICO). 310 F.3d at 710. The plea agreement expressly provided that mail fraud based on misrepresentations in license applications the petitioner mailed to a state agency was the sole predicate crime supporting the RICO conspiracy conviction. *Id.* at 711. Six months after Peter's sentence expired, the Supreme Court decided *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed.

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acquired jurisdiction—*i.e.*, whether Jamaica waived jurisdiction or consented pursuant to the Jamaica Bilateral Agreement—is not a "jurisdictional fact." *See Alikhani v. United States*, 200 F.3d 732, 735 (11th Cir. 2000) (per curiam) ("'Once a defendant pleads guilty in a court which has jurisdiction of the subject matter and of the defendant . . . the court's judgment cannot be assailed on grounds that the government has not met its burden of proving so-called jurisdictional facts.' By analogy, even if the Government had to prove that Alikhani was a U.S. person [a jurisdictional fact], and even if the Government had failed to allege sufficient facts in the indictment to support an assertion was Alikhani was a U.S. person, the district court would still have had subject-matter jurisdiction over the case.") (quoting *United States v. Martin*, 147 F.3d 529, 532 (7th Cir. 1998)) (internal citation omitted). Nonetheless, the certification serves to demonstrate and reinforce the fact that the Court had subject matter jurisdiction when it sentenced Petitioners.

2d 221 (2000), which held that the offense of mail fraud requires that the object of the fraud be property in the hands of the victim and that state and municipal licenses in general do not rank as property for purposes of the statute. *Id.* Therefore, the Eleventh Circuit found that "the facts to which Peter pled guilty did not constitute a crime under *Cleveland*." *Id.* (explaining that "[d]ecisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect") (citation omitted). The Court held that a "writ of coram nobis must issue to correct the judgment that the court never had the power to enter." *Id.* at 716.

Here, unlike *Peter*, there has been no subsequent Supreme Court decision holding that the offense conduct does not constitute a crime. Further, Petitioners stand convicted after having admitted in their proffers and plea agreements to making a false statement to law enforcement while onboard a "vessel subject to the jurisdiction of the United States," which the MDLEA defines, *inter alia*, as "a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by United States citizens." 46 U.S.C. § 70502(c)(1)(C).

Bellaizac-Hurtado is also inapposite. The petitioners in *Bellaizac-Hurtado* were arrested for MDLEA violations in the territorial waters of Panama and argued that their convictions violated the Offences Clause of the Define and Punish Clause; the case did not involve the High Seas Clause. 700 F.3d at 1247. The Eleventh Circuit addressed whether Congress has the power under the

Offences Clause "to proscribe drug trafficking in the territorial waters of another nation." *Id.* 1249. The Court held that Congress did not: "[t]he power to 'define' offenses against the law of nations does not grant Congress the authority to punish conduct that is not a violation of the law of nations." *Id.* By contrast, the High Seas Clause is not limited to "offenses against the laws of nations." The Court in *Bellaizac-Hurtado* acknowledged that "Congress possesses additional constitutional authority to restrict conduct on the high seas, including the Piracies Clause, the Felonies [High Seas] Clause, and the admiralty power. And we have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause." *Id.* at 1257 (citations omitted). Unlike *Bellaizac-Hurtado*, Petitioners' offense conduct occurred on the high seas, in international waters, not within the territorial waters of another nation.

Accordingly, the Court finds no impediment to application of the territorial principle in *Peters* and *Bellaizac-Hurtado*. Pursuant to the territorial principle, the United States is empowered to criminalize conduct on the high seas even if such conduct occurs on a foreign flag vessel, so long as the country in which the vessel is registered "consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. § 70502(c)(1)(C). Thus, § 2237(a)(2)(B) is constitutional and the United States validly exercised jurisdiction in this case.

2. The Protective and Universal Principles

Although the Court finds the territorial principle to be the most relevant international law principle, the protective and universal principles also support the United States' exercise of extraterritorial jurisdiction in this case. "Congress, under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that 'has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'" *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (quoting *United States v. Tinoco*, 304 F.3d 1088, 1108 (11th Cir. 2002)); *see also Saac*, 632 F.3d at 1211. "We also have recognized 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." *Campbell*, 743 F.3d at 810. Under the universal principle, Congress may criminalize conduct, such as drug trafficking on the high seas, that is "condemned universally by law-abiding nations." *See Saac*, 632 F.3d at 1210 (rejecting petitioners' argument that Congress exceeded its power under the High Seas Clause in enacting the Drug Trafficking Vessel Interdiction Act because the Act was justified under the universal and protective principles); *see also United States v. Estupinan*, 453 F.3d 1336, 1338-39 (11th Cir. 2006) (per curiam) (refusing to "embellish" the MDLEA with a nexus requirement on the basis of the universal principle).

Appendix B

In the MDLEA, Congress outlawed certain narcotics offenses on the high seas. In enacting the MDLEA, Congress expressly found and declared "that . . . trafficking in controlled substances aboard 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. Accordingly, the Eleventh Circuit has held that enactment of the MDLEA was a constitutional exercise of authority under both the universal principle and the protective principle. *See Campbell*, 743 F.3d at 810; *Estupinan*, 453 F.3d at 1339.

Notably, the Eleventh Circuit has found that the universal principle and the protective principle not only justify the criminalization of high seas narcotics trafficking itself, but also the criminalization of the means of *facilitating* that trafficking. *Saac*, 632 F.3d at 1211; *Ibarguen-Mosquera*, 634 F.3d at 1381. The Drug Trafficking Vessel Interdiction Act of 2008 (the "DTVIA") provides that:

> Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2285(a). In adopting the DTVIA, Congress found and declared:

> [T]hat operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

Pub. L. No. 110–407, § 101, 122 Stat. 4296, 4296 (2008). "Congress's findings show that the DTVIA targets criminal conduct that facilitates drug trafficking, which is 'condemned universally by law-abiding nations.'" *Saac*, 632 F.3d at 1211 ("Given Congress's findings, the 'protective principle' . . . provides an equally compelling reason to uphold the DTVIA. Under that principle, a nation may 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.") (citations omitted). The Eleventh Circuit thus held that the DTVIA was justified by both the universal principle and the protective principle. *Id.*

The fact that § 2237 incorporates the MDLEA's definitions of "vessel subject to the jurisdiction of the United States" and "vessel of the United States" demonstrates that the statute contemplated, at least in part, the criminalization of conduct that can facilitate drug trafficking crimes. Petitioners reply that the "lack

of any connection between drug trafficking and section 2237(a)(2)(B) is readily apparent from the facts of this case." CV-DE 16 at 5. But the relevant the issue here is whether Congress' passage of § 2237(a)(2)(B), like its passage of the DTVIA, was a valid exercise of its authority to target criminal conduct that facilitates drug trafficking. The DTVIA does not require a showing that the outlawed vessel was actually being used in furtherance of a drug trafficking crime in order to be a valid exercise of congressional authority. *See Ibarguen-Mosquera*, 634 F.3d at 1381 ("Even if Appellants proved that they were not trafficking drugs, they would still be guilty of violating the DTVIA if the government proved, beyond a reasonable doubt, all of the elements of the crime."). The same is true of § 2237(a)(2)(B), which, contrary to Petitioners' assertion (CV-DE 16 at 6), does not require proof that the false statement was given in furtherance of a drug trafficking crime but serves to protect the United States from drug trafficking by criminalizing conduct that can restrict or impede a drug trafficking investigation in international waters.

D. Due Process

Petitioners argue their convictions violate the Due Process Clause of the Fifth Amendment because they "had no notice that they would be putting themselves in jeopardy in the United States" when they provided materially false information to the U.S. Coast Guard about the *Jossette*'s destination. CV-DE 1 at 22. The crux of Petitioners' argument is that unlike drug trafficking which is "conduct which is contrary to law of all reasonably

developed legal systems," providing materially false information about a vessel's destination in international waters is not. *Id.* This argument fails.

Petitioners rely on two cases, both of which are inapposite. First, in *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014), the Eleventh Circuit affirmed the defendant's drug trafficking convictions and rejected his due process challenge because the MDLEA "provides clear notice that all nations prohibit and condemn drug trafficking." *Id.* at 812. There, however, the defendant's sole argument in support of his due process claim was that his activities lacked a nexus to the United States, an argument that Eleventh Circuit precedent forecloses. *Id.* Second, in *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985), the Eleventh Circuit affirmed the denial of the defendant's motion to dismiss the indictment where the defendant claimed that his conviction under the Marijuana on the High Seas Act violated due process because the statute was unconstitutionally vague. *Id.* at 938. In finding there was nothing vague about the statute, the Court explained:

> Both the offense and the intent of the United States are clear. Those 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. Due 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. at 941.

Here, Petitioners' due process challenge is based on a lack of notice of being subjected to United States criminal law when they provided materially false information to the U.S. Coast Guard. Unlike *Campbell* and *Gonzalez*, Petitioners are not basing their due process claim on a nexus requirement or vagueness. Neither *Campbell* nor *Gonzalez* support Petitioners' due process challenge that they lacked notice because the offense conduct is not condemned and prohibited by all nations.

As the Government points out, "due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair." *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016). 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). Moreover, "[a] flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's right under international law." *Suerte*, 291 F.3d at 375 (5th Cir. 2002) (citing *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980)). "When [a] foreign flag nation consents to the application of the United States law, jurisdiction attaches under the statutory requirements of the MDLEA

without a 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, 554 (1st Cir. 1999); *see also United States v. Perez-Oviedo*, 281 F.3d 400, 403, 44 V.I. 353 (3d Cir. 2002) ("Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred. The Panamanian government expressly consented to the application of the MDLEA .... Such consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair."). As previously discussed, the MDLEA and § 2237(a)(2)(B) share the definition of "vessel subject to the jurisdiction of the United States."

The Court finds these non-binding decisions persuasive. Where, as here, the flag nation gave consent, there is no due process violation. Jamaica expressly consented to the boarding and searching of the *Jossette* and waived jurisdiction. CR-DE 1 ¶ 7. The Court finds that the exercise of United States jurisdiction over Petitioners was not arbitrary or fundamentally unfair. *Baston*, 818 F.3d at 669.

V. Conclusion

Accordingly, for the reasons stated herein, it is hereby

ORDERED AND ADJUDGED that the Petition, D.E. 1, is DENIED. It is further

ORDERED AND ADJUDGED that the Clerk of Court shall administratively close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of January, 2020.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 8, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11188-HH

ROBERT DEXTER WEIR, DAVID RODERICK WILLIAMS, LUTHER FIAN PATERSON,

Petitioners-Appellants,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM and LUCK, Circuit Judges.*

PER CURIAM:

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* This order is being entered by a quorum pursuant to 28 U.S.C. § 46(d) due to Judge Martin's Retirement on September 30, 2021.

Appendix C

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES

U.S.C.A. Const. Art. I § 8, cl. 10

Section 8, Clause 10. Piracies and Felonies on the High Seas; Offenses Against the Law of Nations

The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

18 U.S.C.A. § 2237

§ 2237. Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information

(a)(1) It shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel.

(2) It shall be unlawful for any person on board a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to--

> **(A)** 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
>
> **(B)** 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.

(b)(1) Except as otherwise provided in this subsection, whoever knowingly violates subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.

(2)(A) If the offense is one under paragraph (1) or (2)(A) of subsection (a) and has an aggravating factor set forth in subparagraph (B) of this paragraph, the offender shall be fined under this title or imprisoned for any term of years or life, or both.

(B) The aggravating factor referred to in subparagraph (A) is that the offense--

(i) results in death; or

(ii) involves--

(I) an attempt to kill;

(II) kidnapping or an attempt to kidnap; or

(III) an offense under section 2241.

(3) If the offense is one under paragraph (1) or (2)(A) of subsection (a) and results in serious bodily injury (as defined in section 1365), the offender shall be fined under this title or imprisoned for not more than 15 years, or both.

(4) If the offense is one under paragraph (1) or (2)(A) of subsection (a), involves knowing transportation under inhumane conditions, and is committed in the course of a violation of section 274 of the Immigration and Nationality Act, or chapter 77 or section 113 (other than under subsection (a)(4) or (a)(5) of such section) or 117 of this title, the offender shall be fined under this title or imprisoned for not more than 15 years, or both.

(c) This section does not limit the authority of a customs officer under section 581 of the Tariff Act of 1930 (19 U.S.C. 1581), or any other provision of law enforced or administered by the Secretary of the Treasury or the Secretary of Homeland Security, or the authority of any Federal law enforcement officer under any law of the United States, to order a vessel to stop or heave to.

(d) A foreign nation may consent or waive objection to the enforcement of United States law by the United States under this section by radio, telephone, or similar oral or electronic means. Consent or waiver may be proven by certification of the Secretary of State or the designee of the Secretary of State.

(e) In this section--

> **(1)** the term "Federal law enforcement officer" has the meaning given the term in section 115(c);
>
> **(2)** the term "heave to" means to cause a vessel to slow, come to a stop, or adjust its course or

speed to account for the weather conditions and sea state to facilitate a law enforcement boarding;

(3) the term "vessel subject to the jurisdiction of the United States" has the meaning given the term in section 70502 of title 46;

(4) the term "vessel of the United States" has the meaning given the term in section 70502 of title 46; and

(5) the term "transportation under inhumane conditions" means--

(A) transportation--

(i) of one or more persons in an engine compartment, storage compartment, or other confined space;

(ii) at an excessive speed; or

(iii) of a number of persons in excess of the rated capacity of the vessel; or

(B) intentional grounding of a vessel in which persons are being transported.