No. _____

In the Supreme Court of the United States

JEFFRI DÁVILA-REYES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the United States' jurisdiction over a vessel under 46 U.S.C. § 70504(a) present a question of subject matter jurisdiction?

II. Do bedrock plea-bargain principles allow an appellate court to evade review of a constitutional jurisdiction question by allowing the Government to assert a fact-dependent basis of jurisdiction beyond the parties' contemplation at the time the plea-bargain was struck? If not, must the court of appeals reinstate the now-vacated panel opinion holding that 46 U.S.C. § 70502(d)(1)(C) exceeds the scope of the Felonies Clause?

PARTIES

Jeffri Dávila-Reyes, Petitioner, was the defendant-appellant below.

The United States of America, Respondent, was the plaintiff-appellee below.

RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

> *United States v. Dávila-Reyes,* No. 16-2089, 84 F.4th 400 (1st Cir. 2023) (en banc) (affirming judgment) (1st Cir.)
>
> *United States v. Dávila-Reyes*, No. 16-2089, 23 F.4th 153 (1st Cir. 2022) (reversing judgment) (reh'g en banc granted, opinion withdrawn, 38 F.4th 288).
>
> *United States v. Dávila-Reyes*, No. 16-2089, 937 F.3d 57, 62-64 (1st Cir. 2019) (affirming judgment) (reh'g granted and opinion vacated)

United States District Court (D.P.R.)

> *United States v. Dávila-Reyes*, No. 3:19-cr-00767-FAB(3) (Aug. 2, 2016) (judgment)

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OPINIONS BELOW

Jeffri Dávila-Reyes respectfully petitions for a writ of certiorari to review the judgment of the First Circuit. App. 1a-82a. It's reported at 84 F.4th 400.

JURISDICTION

The First Circuit entered judgment on October 5, 2023. App. 1a. By orders dated December 28, 2023, and February 7, 2024, this Court extended the time within which to file a petition for a writ of certiorari to March 4, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70501 *et seq.*, are re-produced in the appendix.

Article I, § 8 and Article III, § 2, cl. 1, of the U.S. Constitution are also reproduced in the appendix.

STATEMENT

1. On October 29, 2015, a U.S. Coast Guard Cutter on patrol in Western Caribbean waters detected a small go-fast vessel about thirty nautical miles southeast of San Andrés, a Colombian island-territory located off the east coast of Nicaragua. App. 43a; *United States v. Dávila-Reyes*, 937 F.3d 57, 59 n.1 (1st Cir. 2019) ("*Dávila-Reyes I*"). Three men, including Petitioner Jeffri Dávila-Reyes, were aboard the vessel, all citizens of Costa Rica. Upon spotting the Cutter, the boat's crew began throwing packages and fuel barrels overboard. App. 42a.

Coast Guard officers approached the boat to question the crew. App. 43a. One man, codefendant José Reyes Valdivia, identified himself as the "master" of the Vessel. App. 43a. Reyes-Valdivia made a claim of Costa Rican nationality for the Vessel. While the Vessel had no registration paperwork, *see* App. 43a, the civil ensign of Costa Rica was painted prominently on the ship's bow; a Coast Guard reconnaissance plane identified it from above, App. 49a n.20 (citing *United States v. Dávila-Reyes*, No. 15-cr-721-FAB, ECF 46-1 at 1 (D.P.R. Mar. 25, 2016) ("*D.P.R. Dávila-Reyes*"). The boat's hull had no painted name or hailing port. *Id.*

A Coast Guard team next boarded and searched the Vessel but found no drugs.[1] A chemical scan picked up traces of cocaine, though, so Petitioner and his companions were arrested and brought back to the Cutter. Petitioner, along with the rest of the crew, was then transported to and held at the United States' military base at Guantánamo Bay, Cuba, and eventually shipped to San Juan, Puerto Rico, for processing. App. 5a.

"At some point," United States officials contacted the government of Costa Rica to ascertain the boat's nationality; Costa Rican officials could neither confirm nor deny the vessel's registry. App. 43a-44a. The United States therefore deemed the vessel one "without nationality" under 46 U.S.C. § 70502(d)(1)(C), and thus subject to the jurisdiction of the United States. App. 44a.

2. Petitioner and the others were indicted federally in the United States District Court for the District of Puerto Rico with possessing cocaine with intent to distribute while on board a covered vessel, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70503(a)(1), and conspiring to do so, in violation of 46 U.S.C. § 70506(b).

According to the Affidavit presented in support of the Criminal Complaint, the vessel Petitioner was found on was "determined to be one without nationality" after the master

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[1] The boarding team did so under an agreement between the United States and Costa Rica "Concerning Cooperation to Suppress Illicit Traffic." *See* Dep't of State Certification, *D.P.R. Dávila-Reyes*, ECF No. 46-2 at 1.

made a claim of Costa Rican nationality and "Costa Rica responded that it could not confirm nor refute the registry of the suspected vessel." App. 29a-30a (Lipez, Thompson, & Montecalvo, JJ., dissenting) (quoting *D.P.R. Dávila-Reyes*, ECF No. 1-1, at 3-4).

Petitioner and his codefendants filed a Motion to Dismiss the Indictment.[2] App. 5a. Like the jurisdictional theory asserted in the Complaint Affidavit, the Motion to Dismiss took aim at a theory of jurisdiction under § 70502(d)(1)(C). *See D.P.R. Dávila-Reyes*, ECF No. 29 at 3 ("*As relevant here*, a 'vessel subject to the jurisdiction of the United States' includes … a vessel [defined in] … § 70502(d)(1)(C)) (emphasis added)). The Motion to Dismiss contended, *inter alia*, that, in enacting the definition of "vessel without nationality" in § 70502(d)(1)(C), Congress exceeded its authority under the Felonies Clause of Article I of the United States Constitution. App. 5a. The Motion explained that the Felonies Clause did not empower Congress to make it a crime for foreigners to engage in drug trafficking outside the territorial jurisdiction of the United States while aboard a foreign vessel. App. 5a. The Motion further asserted that § 70502(d)(1)(C)'s definition of a "vessel without nationality" covered vessels that were not in fact stateless under international law where the claimed nation fails to unequivocally confirm the vessel's registry. App. 5a. The Motion thus argued that § 70502(d)(1)(C) was an

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[2] Codefendant Reyes-Valdivia moved for dismissal of the Indictment; Petitioner then joined his codefendant's Motion to Dismiss. *D.P.R. Dávila-Reyes*, ECF Nos. 29 and 30.

improper exercise of Congress' Article I powers because it extended the reach of the MDLEA to persons aboard vessels on the high seas that are foreign, as opposed to stateless, under international law. App. 5a.

The Government opposed dismissal. The Response in Opposition did not deny that the relevant provision of law was § 70502(d)(1)(C). App. 30a-31a (Lipez, Thomspon & Montecalvo, JJ., dissenting). Nor did the Government attempt to show an alternative jurisdictional basis, statutory or otherwise, over Petitioner's vessel. *Id*. Instead, the Opposition mostly tracked the § 70502(d)(1)(C)-based facts memorialized in the Complaint Affidavit: the master of the vessel made a claim of Costa Rican nationality, and Costa Rican officials could neither confirm nor deny it. *Id*.

The District Court denied the Motion to Dismiss. App. 6a.

Next, the Government filed a Memorandum in Support of Jurisdiction pursuant to 46 U.S.C. § 70504(a).[3] *D.P.R. Dávila-Reyes*, ECF No. 46; *see* App. 30a-31a (dissenting). That Memorandum asked the District Court to find that, as a matter of law, the Vessel Petitioner was found on was "subject to the jurisdiction of the United States, as defined in [46 U.S.C.], Sections 70502(c)(1)(A) and (d)(1)(C)." *D.P.R. Dávila-Reyes*, ECF No. 46 at 4; *see* App. 48a. The Memorandum

[3] Title 46 U.S.C. § 70504(a) provides that "Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."

additionally requested that the District Court, "prior to the beginning of testimony in this case, preliminarily [instruct] the jury pursuant to … Section[s] 70502(c)(1)(A) and (d)(1)(C) that the suspect vessel carrying the [d]efendants was a vessel [w]ithout [n]ationality and therefore subject to the jurisdiction of the United States." *D.P.R. Dávila-Reyes*, ECF No. 46 at 4.

The Memorandum in Support of Jurisdiction appended an Affidavit from the leader of the Coast Guard boarding party. *D.P.R. Dávila-Reyes*, ECF No. 46-1; *see* App. 6a. The Affidavit stated that the master of the Vessel made a claim of Costa Rican nationality. *Id.* at 1. The Affidavit reported that "a Costa Rican flag [was] painted on the bow" of the vessel. App. 6a.

The Government's Memorandum additionally attached a Certification by the United States Department of State. App. 6a. Such certifications, under 46 U.S.C. § 70502(d)(2), provide "conclusive proof" as to the response of the nation that has been claimed by a vessel for purposes of determining whether that vessel is "without nationality" under § 70502(d)(1)(C) of the MDLEA. App. 6a. Executed by a Coast Guard Commander, the Certification in this case observed, *inter alia*, that the Vessel's master "'made a claim of Costa Rican nationality,' that United States officials 'requested that the government of the Republic of Costa Rica confirm the registry or nationality of the suspected vessel,' and that 'Costa Rica replied that it could not confirm the Vessel's registry.'" App. 31a-32a (quoting *D.P.R. Dávila-Reyes*, ECF No. 46-2 at 1) (cleaned up). The Certification then expressly linked those

facts to § 70502(d)(1)(C): "*Accordingly*, the Government of the United States determined the vessel was without nationality in *accordance with 46 U.S.C. 70502(d)(1)(C).*" *D.P.R. Dávila-Reyes*, ECF No. 46-2 at 1 (emphasis in original); App. 32a.

Before Petitioner responded to the Memorandum in Support of Jurisdiction, or the District Court ruled on it, all three codefendants pled guilty pursuant to a Fed. R. Crim. Rule 11(c)(1)(A) & (B) plea agreement. App. 7a.Under the Government's Plea Agreement, Petitioner agreed to plead guilty to the substantive MDLEA count for possessing with intent to distribute five kilograms or more of cocaine aboard a covered vessel. App. 7a. The Plea Agreement conditioned the waiver of Petitioner's appellate rights on his receiving a sentence in accordance with the parties' sentencing recommendation (120 months). App. 11a n.9.

The Plea Agreement's Version of the Facts adopted the following allegations: When Coast Guard officials questioned the occupants of the Vessel, the

> master claimed Costa Rican nationality for the [V]essel but provided no registration paperwork and there was no indicia of nationality on the [V]essel. The government of Costa Rica was approached and responded that it could neither confirm nor refute the registry of the suspect [V]essel. The [V]essel was determined to be one without nationality.

App. 7a.

Petitioner was sentenced to 120 months in prison. App. 7a. Codefendant Reyes-Valdivia received a 70-month prison sentence; his plea agreement's appellate-waiver provision was enforceable only if he was sentenced to 57 months or less. App. 46a-47a.

3. Petitioner and codefendant Reyes-Valdivia appealed, and their appeals were consolidated by the United States Court of Appeals for the First Circuit. App. 7a.

On appeal, Petitioner renewed the Felonies Clause objection to his prosecution under the § 70502(d)(1)(C) of the MDLEA. *Dávila-Reyes I*, 937 F.3d at 62; App. 7a. Petitioner argued that he had not waived the constitutional challenge by entering an unconditional guilty plea in the District Court. App. 8a. Petitioner contended that § 70503(e)(1), in referencing the "jurisdiction of the United States," sets a limitation on the subject-matter jurisdiction of courts. App. 8a. As such, Petitioner asserted that he was entitled to raise his constitutional claim on appeal despite his unconditional guilty plea because the claims implicated the subject-matter jurisdiction of the District Court under Article III. App. 8a. Petitioner further explained that, although his 120-month sentence matched the parties' recommended sentence, the panel should entertain the merits of the appeal "to avoid a miscarriage of justice." *Dávila-Reyes I*, 937 F.3d at 61 (internal quotations omitted).

While the case was pending before the First Circuit Panel, this Court in *Class v. United States*, 138 S. Ct. 798 (2018), held that an unconditional guilty plea does not necessarily

waive a constitutional challenge to the defendant's statute of conviction.

The panel heard oral argument in March 2018. Following oral argument, the panel ordered the parties to submit supplemental briefing to address two questions:

> 1. What is the basis for deeming appellants' vessel "a Vessel without nationality" under 4[6] U.S.C. § 70502(d)(1) given that none of the clauses of 46 U.S.C. § 70502(d)(1) appears to apply by its terms? As background, we note that the statements of fact presented in appellants' plea agreements report that the master of appellants' vessel declared Costa Rican nationality, not Costa Rican registry. That declaration renders § 70502(d)(1)(B) inapplicable, and clauses (A) and (C) refer only to claims of registry.
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> 2. Assuming that the circumstances do not permit deeming appellants' vessel one "without nationality" pursuant to any clause of 46 U.S.C. § 70502(d)(1), what other jurisdictional basis supports this prosecution by United States authorities under United States law against appellants -- citizens of Costa Rica who were detained in international waters on a vessel claimed to be of Costa Rican nationality?

App. 8a.

The Government argued in its supplemental briefing that the MDLEA used the terms "nationality" and "registry" synonymously. Supplemental Brief for Appellee, *United States v. Dávila-Reyes*, No. 16-2089 (1st Cir. Feb. 4, 2019). For the first time since the case's inception, the Government contended that the master of the Vessel had failed to substantiate the claim of Costa Rican nationality for the Vessel and that this rendered deficient the master's claim of nationality and brought the case within the definition of "a vessel without nationality" under § 70502(c)(1)(A) of the MDLEA. *Id.*

In his Supplemental Brief, Petitioner argued that the terms "nationality" and "registry," as used in § 70502(d)(1) and throughout the MDLEA, bear plainly different meanings; thus, the Vessel's master's claim of Costa Rican nationality did not bring the offense within the scope of § 70502(d)(1)(C).[4] Appellant's Supplemental Brief, *United States v. Reyes-Valdivia*, No. 16-2143 (1st Cir. Feb. 22, 2019). On the second question—whether some other jurisdictional basis supported Petitioner's prosecution—Petitioner contended that the Government had asserted a single jurisdictional theory below and that there were no other jurisdictional bases for his prosecution. *Id.*

In September 2019, a First Circuit panel affirmed Petitioner's judgment and conviction. *See Dávila-Reyes I*, 937

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[4] Co-appellant Reyes-Valdivia filed the Supplemental Brief, and Petitioner filed a Motion to Join in or Adopt that Supplemental Brief. *United States v. Reyes-Valdivia*, No. 16-2089,

F.3d at 62-64. The panel relied on *Class* to hold that Petitioner's and co-appellant Reyes-Valdivia's guilty pleas did not "foreclose their right to challenge the constitutionality of the MDLEA." *Id.* at 61. The panel found the appellate waiver in Petitioner's Plea Agreement enforceable; still, it exercised its discretion to disregard the waiver since the issue was one of exceptional importance, and the Government would suffer no prejudice: the panel was already entertaining the challenge to § 70502(d)(1)(C) in the case of co-appellant Reyes-Valdivia, whose appellate waiver was not enforceable. *Id.*

On the merits, the panel ruled that, even if the "challenge to the MDLEA's statelessness definition were successful, [Petitioner] would still confront our precedent holding that the MDLEA is consistent with the 'protective principle' of international law, which permits a nation 'to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security.'" *Id.* at 62 (quoting *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999)). The panel consulted dicta in *Cardales*, noting that the protective principle was triggered in MDLEA cases "because Congress has determined that all drug trafficking aboard vessels threatens our nation's security." *Id.* (quoting *Cardales*, 168 F.3d at 553). In sum, the panel held that, "even if appellants' vessel possessed Costa Rican nationality, as they claim, appellants would nonetheless be subject to U.S. jurisdiction under our circuit's view of the protective principle." *Id.* at 63.

Judge Lipez, the author of the panel opinion, also published a concurring opinion. *Dávila-Reyes I*, 937 F.3d 57 at 64-71 (Lipez, J. concurring). The concurrence explained that, though Petitioner's challenge to § 70502(d)(1)(C) was foreclosed by application of the protective principle as interpreted in *Cardales*, the *en banc* Court should revisit *Cardales* to make clear that protective-principle jurisdiction requires some nexus with the United States. *Dávila-Reyes I*, 937 F.3d 57 at 68-71.

Petitioner and co-appellant Reyes-Valdivia petitioned for rehearing *en banc* from the panel decision. Petition for Rehearing *En Banc*, *United States v. Dávila-Reyes*, No. 16-2089 (1st Cir. Oct. 6, 2019); Petition for Rehearing *En Banc*, *United States v. Reyes-Valdivia*, No. 16-2143 (1st Cir. Oct. 10, 2019). Petitioner asked the *en banc* court to find Congress ran afoul of the Felonies Clause when it enacted § 70502(d)(1)(C)'s definition of a stateless vessel. App. 9a. "On that basis," he argued, *Cardales* "should be overruled." *Id*.

While the petition was pending, the First Circuit, sitting *en banc*, decided *United States v. Aybar-Ulloa*, 987 F.3d 1 (1st Cir. 2021) (*en banc*). There, the First Circuit rejected the defendant's contention that the Felonies Clause did not empower Congress to criminalize his conduct, which involved alleged drug trafficking on the high seas while aboard a vessel without nationality" under § 70502(c)(1)(A). *See id*.

In so holding, *Aybar-Ulloa* did not rely—as *Cardales* and the panel in *Dávila-Reyes I* had—on the United States's assertion of protective principle jurisdiction under inter-

national law. *Aybar-Ulloa* relied instead on the ground that Congress had the power under the Felonies Clause to make it a crime for a foreign national to engage in drug trafficking on the high seas while aboard a vessel that was stateless under international law. *Aybar-Ulloa*, 987 F.3d at 4-5. *Aybar-Ulloa* explained that the MDLEA conviction at issue there did not exceed Congress's Felonies Clause power because the defendant in that case did not dispute that he was a foreign national who was aboard a vessel at the time of his drug trafficking that was both on the high seas and stateless for purposes of international law. *Id.* at 5-6.

In the heels of the *en banc* decision in *Aybar-Ulloa*, the 2019 panel considered the petition for rehearing *en banc* as a petition for panel rehearing, granted the petition, and vacated the panel's September 2019 opinion. Order of Court, *United States v. Dávila-Reyes*, No. 16-2089 (1st Cir. Mar. 17, 2021). The reason: the panel "concluded that the en banc decision in [*Aybar-Ulloa*] ha[d] diminished the force of this circuit's precedent on the protective principle such that the panel … deem[ed] it appropriate to address appellants' contention that the government improperly deemed their vessel stateless." *Id.* at 1.

The panel published a new decision in January 2022. *United States v. Dávila-Reyes*, 23 F.4th 153 (1st Cir. 2022) ("*Dávila-Reyes II*"); *see* App. 42a-82a. The panel first "decline[d] to rely on the protective principle" to uphold Petitioner's conviction because the *Aybar-Ulloa* majority and concurring opinions indicated that "the majority of the judges on [the First Circuit] do not view the protective principle as

supporting U.S. jurisdiction over drug-trafficking activity conducted on the high seas by foreign nationals on foreign vessels." App. 46a.

Before reaching the merits of Petitioner's challenge to § 70502(d)(1)(C)—the jurisdictional provision the government relied on to prosecute Petitioner, which refers to a vessel's master having made a claim of *registry*—the panel considered the claim that because the master of the Vessel in this case claimed Costa Rican nationality, not registry, § 70502(d)(1)(C) was not implicated. *See* App. 51a-54a. The panel rejected that contention, however, ruling that § 70502 treats "nationality" and "registry" synonymously. *Id.*

But, after considering the merits of the constitutional challenge, the panel vacated both Petitioner's and Reyes-Valdivia's convictions and dismissed the charges against them. *Id.* The panel reasoned as follows: Congress lacks the power under the Felonies Clause to criminalize a foreign national's drug trafficking in international waters unless the United States' assertion of regulatory jurisdiction over that foreign national would be permissible under international law. App. 58a-69a. The panel explained that, although *Aybar-Ulloa* held that international law permits the United States to assert such regulatory jurisdiction when the foreign national is aboard a vessel on the high seas that is stateless under international law, a vessel cannot be deemed stateless under international law merely because, as § 70502(d)(1)(C) provides, a foreign nation whose nationality the vessel's master claims for the vessel "fails to supply an affirmative and unequivocal confirmation of

nationality." App. 76a (cleaned up); *see* App. 71a-80a. And, the panel stressed, the Petitioner's charges and conviction necessarily depended on the application of § 70502(d)(1)(C)—and on no other basis—to deem the Vessel that they were aboard at the time of their MDLEA violations to be "without nationality" under § 70502(c)(1)(A). App. 48a-49a.

The panel noted that the Government had attempted to "sidestep" Petitioner's claim that § 70502(d)(1)(C) is unconstitutional by arguing, for the first time in its supplemental briefing, that the Vessel petitioner was found on "could have been deemed without nationality based on … jurisdictional theories" other than application of § 70502(d)(1)(C). App. 49a. These alternative bases included that the vessel's master "fail[ed] to produce registration paperwork or otherwise substantiate his verbal claim of nationality," rendering the vessel subject to the jurisdiction of the United States under 46 U.S.C. § 70502(c)(1)(A), a provision that itself incorporates but is broader than the statutory definition of a vessel without nationality under § 70502(d)(1)(C). App. 49a. Ultimately, the panel ruled that "it [was] now simply too late for the government to proffer alternative bases for jurisdiction" as those were "not the basis on which the government relied to arrest and prosecute appellants, and to obtain their guilty pleas." App. 49a-50a (citing *United States v. Mitchell-Hunter*, 663 F.3d 45, 50 n7. (1st Cir. 2011) (observing that jurisdiction under the MDLEA may be established "any time prior to trial")).

The panel determined that Petitioner's charges and conviction exceeded Congress's power, including under the

Felonies Clause, because a vessel deemed to be "without nationality" under § 70502(c)(1)(A) solely by application of § 70502(d)(1)(C) is not stateless under international law. App. 79a-80a. Petitioner's conviction and sentence were thus vacated and the charges against him dismissed. *Id.*

Then-Chief Judge Howard concurred. App 81a-82a. Like his panel colleagues, Judge Howard was "reluctant" to "unquestioningly rely on the protective principle to affirm" Petitioner's conviction post-*Aybar-Ulloa* based on the "now uncertain status of [the First Circuit's] protective principle precedent." App. 81a. The concurrence would not have "decide[d] these appeals on constitutional grounds." *Id.* Instead, Judge Howard would have "reversed" Petitioner's "conviction[] on the basis that the agreed facts do not support the statelessness claim charged by the government" because § 70502(d)(1)(C) did not cover the Vessel Petitioner was found on: that provision applies only when "the master or individual in charge makes a claim of registry," and in this case the master made a claim of nationality, not registry." *Id.*

Following the January 2022 panel decision, the Government petitioned for rehearing *en banc*. Petition of the United States for Rehearing *En Banc*, *United States v. Dávila-Reyes*, No. 16-2089 (1st Cir. Mar. 18, 2022). The First Circuit granted the Government's *en banc* petition in July 2022, vacated the panel's January 2022 opinion, considered supplemental briefing, and heard oral argument. *See* Order of Court, *United States v. Dávila-Reyes*, No. 16-2089 (1st Cir. July 8, 2022).

In October 2023, the First Circuit held that 46 U.S.C. § 70504(a)—the provision prohibiting drug trafficking committed outside the "territorial jurisdiction" of the United States if the act is committed aboard a "covered vessel," which includes a "vessel without nationality" under § 70502(d)—did not limit the courts' subject matter jurisdiction under Article III, as Petitioner contended, but instead defined the substantive reach of the MDLEA. *United States v. Dávila-Reyes*, 84 F.4th 400, 410-414 (1st Cir. 2023) (*en banc*) (citing *United States v. González*, 311 F.3d 440 (1st Cir. 2022)); *see* App. 11a-15a. Having found that § 70503(e)(1) did not implicate courts' subject matter jurisdiction over MDLEA offenses, the First Circuit determined that Petitioner's guilty plea had waived his Article III-based challenges, both the ability to raise his nationality-registry-mismatch claim and his contention that the applicable standard of review was de novo. App. 12a.

The First Circuit presumed, however, that, in consequence of *Class*, Petitioner's Article I challenge to § 70502(d)(1)(C) had survived his guilty plea. App. 16a. But the court held that Petitioner's Felonies Clause attack on § 70502(d)(1)(C) failed because the Indictment did not rely exclusively on that provision in charging Petitioner with having been aboard a "vessel subject to the jurisdiction of the United States" under § 70502(c)(1)(A). App. 18a. The court stated that dicta in *United States v. Matos-Luchi*, 671 F.3d 1 (1st Cir. 2010), allowed a vessel to be deemed "without nationality" under § 70502(c)(1)(A) not just when the vessel came within the specific categories of boats listed in § 70502(d) but also when

a vessel was not "entitled to fly the flag of a State." App. 17a-18a (citation omitted). The court explained that, under *Matos-Luchi*, "[i]t is not enough that a vessel have a nationality; she must claim it and be in a position to provide the evidence of it." App. 20a-21a (citation omitted). Applying *Matos-Luchi* to the facts of the case, the First Circuit noted that Petitioner's Plea Agreement had stipulated that the master of Petitioner's Vessel made a "wholly uncorroborated" claim of nationality and that the Vessel contained no indicia of nationality. App. 20a. The court thus ruled that, under *Matos-Luchi*'s "no papers, no nationality" rule, Petitioner's Vessel came within § 70502(c)(1)(A). App. 20a-21a. This was even though the Government from the start of the case had relied exclusively on § 70502(d)(1)(C) to establish jurisdiction over the Vessel and did not assert that it was proceeding under alternative jurisdictional theories until nudged by the panel's 2019 request for supplemental briefing.

Three members of the First Circuit—Judges Lipez, Thompson, and Montecalvo—dissented from the *en banc* majority and would have reversed the judgment for the reasons stated in *Dávila-Reyes II*. *See* App. 28a-41a. This petition follows.

REASONS TO GRANT CERTIORARI

The MDLEA provides that, in cases involving "vessels subject to the jurisdiction of the United States," the question whether the vessel qualifies as "subject to the jurisdiction of the United States" is a threshold question of law for the trial court rather than an offense element for the jury: "Jurisdiction of the United States with respect to a vessel subject to this chapter are preliminary questions of law to be determined solely by the trial judge." 46 U.S.C. § 70504(a).

This Petition presents an opportunity for the Court to decide whether § 70504(a) imposes a limit on courts' subject matter jurisdiction or if it simply describes the reach and application of the MDLEA.

The issue divides the courts of appeals. Three circuits—the Fifth circuit, D.C. Circuit, and Eleventh Circuit—hold that United States' jurisdiction over a vessel under § 70504(a) presents a congressionally imposed limit on courts' subject matter jurisdiction. The First Circuit and the Second Circuit disagree, interpreting § 70504(a) as non-jurisdictional and thus subject to forfeiture.

The questions presented are outcome-determinative, constitutionally important, and critical for U.S. international relations.

First, if the "preliminary question" whether a § 70504(a) vessel is "subject to the jurisdiction of the United States" implicates a court's subject matter jurisdiction, then the question whether Petitioner's Vessel is "subject to the

jurisdiction of the United States" is immune from waiver. If, however, § 70504(a) describes the substantive sweep of the MDLEA, then Petitioner's guilty plea forfeited any challenge his Vessel being "subject to the jurisdiction of the United States," making this claim subject to plain error review.

Second, the challenged *en banc* opinion supplanted a panel majority's holding 46 U.S.C. § 70502(d)(1)(C) unconstitutional. Principals of plea bargaining—now bedrock American jurisprudence in a system that depends on plea bargain—would be eroded if this Court does not step in to correct the present error.

I. Reasons to Grant Certiorari on the § 70504(a) Subject Matter Question

A. The circuits are split over whether the United States' jurisdiction over a vessel under 46 U.S.C. § 70504(a) presents a question of subject matter jurisdiction.

The courts of appeals are split over whether 46 U.S.C. § 70504(a) is a prerequisite to courts' subject matter jurisdiction. In the Eleventh Circuit, the answer is "yes": "We have interpreted the "on board a vessel subject to the jurisdiction of the United States' portion of the MDLEA as a congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement contained in 28 U.S.C. § 1332." *United States v. De la Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008); *see also United States v. Tinoco*, 304 F.3d 1088, 1107 (11th Cir. 2002). The Fifth Circuit has reached the same conclusion. *United States v. Bustos-*

Useche, 273 F.3d 622, 625-626 (5th Cir. 2021). As has the D.C. Circuit: "We agree with the Fifth and Eleventh Circuits and conclude that, under § 70504(a), the question whether a vessel is 'subject to the jurisdiction of the United States' is a matter of subject-matter jurisdiction." *United States v. Miranda*, 780 F.3d 1185, 1192 (D.C. Cir. 2015).

In the First Circuit and Second Circuit, however, the answer is "no," § 70504(a) is non-jurisdictional; it describes the substantive reach of the MDLEA and is therefore subject to forfeiture. *United States v. González*, 311 F.3d 440 (1st Cir. 2002); *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019). In the decision below, the First Circuit reaffirmed the holding of *González*. There, a divided panel held, in tension with most circuit courts, that § 70504(a)'s "Jurisdiction of the United States" condition was not actually jurisdictional; its purpose, the majority decided, was not to confer jurisdiction on courts but to describe the MDLEA's extraterritorial reach. The panel thus concluded that González's unconditional guilty plea had waived his appellate claim that, because U.S. officials never demanded that he voice his vessel's nationality, the boat was not a "vessel without nationality" under 46 U.S.C. § 70502(d)(1)(B). *González*, 311 F.3d at 444.

The split is clear. The First Circuit recognized it. App. 12a It involves five circuits. And, as the majority opinion below recognized, the issue stands to control the outcome of the case: Because § 70504(a) "does not impose a limitation on a court's subject matter jurisdiction," "we reject" Petitioner's "Article III-based arguments as to both whether their guilty pleas

waived their challenges and why the standard of review that applies to those challenges is de novo…." App. 12a.

B. The First Circuit decided the issue incorrectly: § 70504(a) is a jurisdictional provision.

The First Circuit erred in holding that that 46 U.S.C. § 70504(a) does not impose a limit on courts' subject matter jurisdiction but instead defines the scope of conduct prohibited by the MDLEA. That provision's language and features, as well as its surrounding context, cement its jurisdictional character.

First, in enacting § 70504(a), Congress used the word "jurisdictional." That designation is as good indication as any that Congress intended the jurisdictional component of § 70504(a) to confer subject matter jurisdiction: To determine whether statutory language imposes a limit on federal courts' subject-matter jurisdiction, the court will first determine whether that language "clearly states" that the limitation at issue is "jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163 (2010) (internal quotation marks omitted); *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435-436 (2011) ("[W]e look to see if there is any clear indication that Congress wanted the rule to be jurisdictional." (internal quotation marks omitted)).

"If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 546

U.S. 500, 515-16 (2006) (footnote omitted). "But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516. In determining whether a limitation "is one that is properly ranked as jurisdictional," a court need not find "an express designation" to find a clear statement. *Reed Elsevier*, 559 U.S. at 168; *see also Henderson*, 562 U.S. at 436.

By labeling the heading "Jurisdiction and Venue" in § 70504(a), Congress "provide[d] some indication of [its] intent." *See Henderson*, 562 U.S. at 440; *see also Miranda*, 780 F.3d at 1196 ("In other instances in which Congress uses the term 'jurisdiction and venue,' the statute indisputably pertains to the jurisdiction of the courts.") By making "[j]urisdictional issues …. preliminary questions of law to be determined solely by the trial judge," 46 U.S.C. § 70504(a), the MDLEA provides another strong indication that Congress meant to place a "threshold limitation on [the] statute's scope" that we should "count as jurisdictional." *Arbaugh*, 546 U.S. at 515. "The 'preliminary question' set out in § 70504(a) … operates precisely in the nature of a condition on subject-matter jurisdiction: subject-matter jurisdiction presents a question of law for resolution by the court…." *Miranda*, 780 F.3d at 1193.

As Judge Pooler observed in his concurring opinion in *United States v. Prado*, "Generally, when Congress is concerned with its own legislative power, it delineates the limits of that power in the definition of the crime it creates in what has become known as a "jurisdictional element." 933

F.3d 121 (2d Cir. 2019). That is because Congress "may enact only those criminal laws that are connected to one of its constitutionally enumerated powers." *Torres v. Lynch*, 578 U.S. 452, 457 (2016). "As a result, most federal offenses include, in addition to substantive elements, a jurisdictional one…." *Id.* Jurisdictional elements include, for instance, requirements that a crime took place on "federal land," *see, e.g.*, *United States v. Davis*, 726 F.3d 357, 362-367 (2d Cir. 2014), involved a "federally insured bank," *see, e.g.*, *United States v. Schermerhorn*, 906 F.2d 66, 69-70 (2d Cir. 1990), or had an "effect on interstate commerce," *see, e.g.*, *United States v. Farrish*, 122 F.3d 146, 148-149 (2d Cir. 1997). So while substantive elements of a crime "relate to the harm or evil the law seeks to prevent," jurisdictional elements "tie[] the substantive offense … to one of Congress's constitutional powers … , thus spelling out the warrant for Congress to legislate." *Torres*, 578 U.S. at 457 (internal quotation marks omitted).

The *Dávila-Reyes* majority points to 18 U.S.C. § 3231 as granting district courts "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Thus, concluded the court, Petitioner "need[ed] to show" that § 70504(a), "by referring to the "jurisdiction of the United States, limits the otherwise operative grant of subject matter jurisdiction to federal courts over federal criminal prosecutions that 18 U.S.C. § 3231 sets forth." App. 12a.

Despite the seemingly blanket grant of subject matter jurisdiction of 18 U.S.C. § 3231, Congress could still write into

the MDLEA additional jurisdictional requirements beyond those imposed by § 3231. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (observing that it is "a commonplace of statutory construction that the specific governs the general"). Indeed, while subject matter jurisdiction in federal cases comes from § 3231, Congress can "create additional statutory hurdles to a court's subject matter jurisdiction through separate jurisdictional provisions found in the jurisdictional statute itself under which a case is being prosecuted. *Tinoco*, 304 F.3d at n.18. As an example, the Eleventh Circuit in *Tinoco* pointed to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq., where "in addition to the substantive elements of the claim, the plaintiff must demonstrate that the defendant fits within the Act's definition of 'employer,' as defined in § 2000e(b)." *Tinoco*, 304 F.3d at n.18. Like § 70504(a), which presents a threshold question for the District Court, Title VII's definition of "employer" is not an element of the offense but a "threshold issue of subject matter jurisdiction for the court to decide." *Tinoco*, 304 F.3d at n.18 (citation omitted).

Second, and relatedly, § 70504(a) is a question for the court and not an offense element; as such, it "operates precisely" as a jurisdictional condition." *Miranda*, 780 F.3d at 1193.

Third, the context of § 70504(a) "strongly suggests a requirement of subject-matter jurisdiction." *Miranda*, 780 F.3d at 1193; *González v. Thaler*, 565 U.S. 134, 159 (2012) (Scalia, J., dissenting) ("[C]ontext … is relevant to whether a statute ranks a requirement as jurisdictional.") (quoting *Reed*

Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010)). The statutory context here indicates Congress intended to reduce "friction with foreign nations." *Miranda*, 780 F.3d at 1193. Construing § 70504(a) as a non-waivable condition promotes these comity concerns by ensuring jurisdiction is verified independently by the court in each case, regardless of whether the parties detect the issue. *Id.* In construing § 70504(a) as non-jurisdictional, the *González* majority did not account for the potential for "foreign relations concerns in the application of the MDLEA." *Miranda*, 780 F.3d at 114-1195. Nor did the decision below factor Congress' intent of passing § 70504(a) to reduce friction with other nations, other than to say that the statutory text was to the contrary, which as argued above is mistaken.

II. Reasons to Grant Certiorari on the Question of Whether a Court of Appeals Could Avoid Reaching the Merits of a Constitutional Question by Allowing the Government to Assert a Fact-Dependent Jurisdictional Claim it Chose to Relinquish in District Court When the Parties Negotiated a Plea Bargain Following Denial of a Motion to Dismiss

A. The First Circuit's contested majority *en banc* opinion worked a miscarriage of justice that can only be corrected by this Court.

As *Dávila-Reyes II* held, the Government relied on an unconstitutional statute, *see* 46 U.S.C. § 70502(d)(1)(C), to

establish jurisdiction over petitioner. *See* App. 71a-81a. The *en banc* circuit decision that replaced *Dávila-Reyes* affirmed the District Court's judgment in a process that violates due process.

Critically, Congress crafted the MDLEA carefully to avoid friction with foreign nations. *See United States v. Miranda*, 780 F.3d 1185, 1193-94 (D.C. Cir. 2015); *United States v. Tinoco*, 304 F.3d 1088, 1109 (11th Cir. 2002). And as *Dávila-Reyes II* correctly concluded, "the Framers' invocation of international law terminology in the Define and Punish Clause was deliberate." App. 71a. As such, the "Framers' goal of incorporating respect for international norms into the federal system thus makes clear that, under the Felonies Clause, Congress's authority to set the boundaries of domestic law on the high seas must be consistent with international law principles." *Id.*

So where § 70502(d)(1)(C) purports to extend a category of "covered" vessels to a definition of stateless vessels that conflicts with international law, *id.* at 71a-80a, the Government's reliance on that provision violated constitutional limits and required reversal, *id.* at 80a-81a.

The *Dávila-Reyes II* majority correctly summed up the application of Felonies Clause to international law on high seas' nationality determinations.

> What the United States cannot do consistently with the Constitution, however, is arrest and prosecute foreigners on foreign vessels by relying on a concept of statelessness that conflicts with in-

> ternational law. And that is what § 70502(d)(1)(C) allows. It overrides international law by treating a country's failure to supply an "affirmative[ ] and unequivocal[ ]" confirmation of nationality — including a failure to respond at all — as evidence sufficient to invalidate an oral claim of foreign nationality even when there are no mixed signals that would call the claim into doubt.

App. 80a (alteration in *Dávila-Reyes II*). Ultimately, the majority in the *en banc* opinion—issued over seven years after Petitioner's motion to dismiss was denied—violates due process by, as the dissent correctly argues, "adopt[ing] a view of the record inappropriately favorable to the Government and justif[ing] the analysis with an indefensible application of the plain-error doctrine." App. 28a.

B. Basic principles of plea bargaining and contract law do not allow the Government to post-hoc assert fact-dependent theories of jurisdiction that require alteration of the assumption underlying a plea agreement.

Put simply, the *Dávila-Reyes III* majority succumbed to an erroneous view that the conviction-by-plea-agreement process by upholding Petitioner's conviction even where his motion to dismiss properly attacked the sole jurisdictional basis relied on by the Government at all pertinent times. *See Garza v. Idaho*, 139 S.Ct. 738, 744 (2019); App. 37a (arguing the majority, in light of the "government's singular reliance on § 70502(d)(1)(C)," breached the court's "obligation to hold

prosecutors to the most meticulous standards of both promise and performance in effectuating a plea agreement") (citations and quotation marks omitted).

This Court should grant certiorari to uphold the integrity of the plea-bargaining process. For "when the government reduces the broad terms of an indictment to a specific theory of prosecution and relies on that theory to obtain guilty pleas, the government cannot later justify those convictions with a different rationale when it discovers that its chosen theory is flawed." App. 28a.

1. The Government exclusively invoked § 70502(d)(1)(C) as its basis for jurisdiction at every critical moment. As the dissent illustrates, the "government never changed course in its theory of the prosecution from the time of the criminal complaint through the entry of appellants' guilty pleas." App. 29a.

The language used to assert and determine that Petitioner had been apprehended on a boat without nationality tracked, without deviation, the language of § 70502(d)(1)(C). As the Government's pleadings maintained: "The government of Costa Rica was approached to either confirm or deny vessel registry. Costa Rica responded that it could not confirm nor refute the registry of the suspect vessel." App. 29a (citation omitted).

This left no room for the judges in the *Dávila-Reyes III* majority to shirk their "absolute duty to hear and decide cases within their jurisdiction." *United States v. Will*, 449 U.S. 200, 215 (1980).

2. The majority's flawed unwinding of the case's "litigation history and appellants' reasonable understanding of their plea agreements," App. 29a, ultimately determined the adverse, due-process-undermining outcome here because it procured a ruling that affirmed Petitioner's conviction "without addressing" his "constitutional challenge to § 70502(d)(1)(C)." App. 29a.

For it is only dicta from a single case that backs the proposition that foreign navigators cannot make a prima facie showing of their vessel's nationality through an oral nationality claim. *See* App. 29a-30a. And such a view defies context, which diverges from the record of the Government's actual reliance on § 70502(d)(1)(C): instead of taking that position when the matter was disputed in District Court, "the government chose to rely on the government of Costa Rica's statement that it could neither confirm nor refute" the vessel master's "claim of nationality—a straightforward method under the MDLEA for deeming a vessel stateless." App. 30a. This is the theory that requires reversal under *Dávila-Reyes II*'s correct analysis of the Felonies Clause and international law. While "[i]nternational law does, in general, promote a system of registration," App. 76a (footnote omitted), such documentary norms are not required for small vessels, and "the master's oral declaration constitutes prima facie proof of nationality." App. 77a.

3. Permitting the Government's post-conviction search for additional fact-dependent jurisdictional theories violates the due process and contractual rule that "ambiguities in plea agreements must be construed in favor of defendants." App.

30a. Were there any ambiguity that the Government sought to extend U.S. jurisdiction to Petitioner, the Government dispelled it in motion-to-dismiss proceedings and pretrial filings before the plea agreement was filed. "The connection between the government's consistently reported facts and § 70502(d)(1)(C) was drawn explicitly in the Department of State Certification that was submitted as an attachment to the government's motion" in support of jurisdiction. App. 31a; *see also id.* at 31a-39a.

The record unmistakably exposed an unrelenting Government "choice to rely on § 70502(d)(1)(C) when it obtained" Petitioner's "acquiescence to facts the Government had consistently invoked to deem his "vessel 'without nationality' under that specific provision." App. 37a-38a. This meant that when Petitioner was induced to plead guilty under the Government's version of facts, it was not relying on the Government's *now* counterfactual "contention that [his] vessel bore" no "indicia of nationality when [he] signed" a "plea agreement[] that included the fact that the vessel lacked any such display." App. 37a. To allow such a fact—which at the time was inconsequential to the plea bargain—to now determine the outcome on appeal amounts to nothing less that the "unilateral revision of a contractual agreement when the result … disfavor[s] the party who gave up 'a panoply of constitutional rights'" under Government inducement. App. 37a. Had the Government wished to rely on multiple jurisdictional theories here, Petitioner was "entitled to explicit notice of such other theory or theories before agreeing

to give up competing facts and arguments, and ultimately pleading guilty." App. 37a.

C. The *Dávila-Reyes III* majority ruling conflicts with *Class*.

As the dissent indicated Petitioner is "entitled to challenge" his conviction "on the ground that Congress exceeded its constitutional authority when it enacted § 70502(d)(1)(C) as a basis for designating a vessel "without nationality."' App. 40a. Yet, the majority ultimately "avoid[ed] seriously engaging with any aspect of the merits of [Petitioner's] claim." *Id.* Allowing the Government to evade review—by obtaining *en banc* review and shifting to a theory outside the pre-plea agreement record—undermines this "Court's decision in *Class* to forgo the usual finality of unconditional guilty pleas to protect criminal defendants from prosecutions—and, perhaps most importantly, imprisonments—that the United States lacks authority to pursue." App. 41a (citing *Class*, 138 S.Ct. at 805).

Here, the lack of serious engagement with the merits of Petitioner's claim is all the more damaging to due process given the federal court mandate to hear and decide controversies. After all, *Dávila-Reyes II*'s exhaustive treatment of both the reach of the Article I Felonies Clause and the current state of international law on prima facie showing of nationality warrant reversal of Petitioner's § 70502(d)(1)(C)-dependent conviction. *See* App. 41a-81a; *see also* Alexandra Lyons, *The Maritime Drug Law Enforcement Act (Mdlea): One of the Deadliest Weapons in America's*

Arsenal in the Ongoing War on Drugs, 47 TUL. MAR. L.J. 133, 162 (2023) (*Dávila-Reyes II* "was correct to conclude that the Felonies Clause incorporates contemporary international law as a limit to Congress's power, and by doing so, it revealed that the previous approach to § 70502 of the MDLEA rested on shaky footing and assumptions--an approach often justified by international comity that actually conflicts with international law.").

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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