No. 23-6910

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Authorities

U.S. Appellate Court Authorities

U.S. Constitutional Provisions

U.S. Code Sections

Research Articles

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Dávila-Reyes II reversed Mr. Dávila's conviction, holding 46 U.S.C. § 70502(d)(1)(C) violates the Felonies Clause. A concurrence also concluded the "facts do not support the statelessness claim" under § 70502(d)(1)(C), which attaches jurisdiction based on registry–not nationality—claims. *Dávila-Reyes III*, heard *en banc*, rejected both grounds, 5-3. *See* App. 3a-28a. The five-judge majority left an unconstitutional statute on the books. And it rejected the concurrence's statutory mismatch claim as non-jurisdictional. The majority perpetuates improper prosecutions of foreign nationals and undermines respect for the law. The Government provides no good reason to deny review and no persuasive defense of the majority opinion. Its arguments misapprehend the objections of the *Dávila-Reyes III* dissent regarding the impropriety of the maj-

ority's allowance of the Government to sandbag Petitioner on appeal with a new jurisdictional theory based on "facts" in the plea agreement that were previously non-material and had not been litigated. And the Government's arguments misunderstand the role of the real circuit split present here, which prevented evaluation of the statutory mismatch claim, an alternate ground for reversal. The Court should grant this petition for a writ of certiorari and reverse.

A. The First Circuit's En Banc Majority Opinion Warrants Review

The Government attempts to rebrand the *Dávila-Reyes* dissent's approach to the majority opinion as a "fact-bound assertion that the constitutionality of Section 70502(d)(1)(C) was the only permissible ground for affirming his conviction." Oppo. 19. The Government's brief in opposition portrays the dispute between the five-judge *Dávila-Reyes III* majority and three-judge dissent as one that "boils down to a disagreement" over the "reading of the plea agreement and the government's other filings in the district court." Oppo. 20.

But the brief's authors must lack familiarity with the *Dávila-Reyes III* opinions and the record below. The disagreement has never been about the facts themselves but over whether the Government can use previously immaterial, unlitigated facts after conviction to argue an alternative jurisdictional theory that was never previously argued. Pet. 28-33. The *Dávila-Reyes III* dissent explained that the Government's new-on-appeal theory of jurisdiction should not have been permitted when the Government had exclusively invoked

§ 70502(d)(1)(C) as its basis for jurisdiction at every critical moment. 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.

It was this approach that Petitioner relied on when he pleaded guilty after his motion to dismiss attacked jurisdiction under § 70502(d)(1)(C) and the Government placed all its eggs in a single jurisdictional basket. Hence, *Dávila-Reyes II* was able to hold that 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.

And this holding followed district court proceedings where Petitioner's motion to dismiss properly attacked the sole jurisdictional basis relied on by the Government at all pertinent times. *See Garza v. Idaho*, 586 U.S. 232, 241 (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).

So, far from a "fact-bound" ruling outside the scope of review, the ruling below—to stretch the record and allow the Government to make new, beyond-the-permissible-record jurisdictional claims on appeal—is no different from a due process claim associated with a plea agreement. In that respect, the Government's position against review conflicts with the Court's tendency to address due process issue arising in the

plea-bargaining process. *See, e.g.*, *Santobello v. New York,* 404 U.S. 257 (1971).

Taking a contrary approach to the one it presses here, the Government agreed Supreme Court "intervention [was] warranted" in *Puckett v. United States* where issues related to Government plea breaches "arise repeatedly in the federal courts …." Br. in Resp. to Pet. for Cert., *Puckett v. United States of America*, 2008 WL 5052755, at *21 (U.S. Aug. 1, 2008). Nothing less is warranted here where 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 leaves a question of law as to whether due process permits the Government to later present a 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.

Any reasonable person in Petitioner's position would have understood the operative factual background in the plea agreement did not materially depend on the "facts" the Gov-

ernment relied on later. This new version should not have been allowed to infect the record in such a way as to withhold on-the-merits review of the grounds that three of three *Dávila-Reyes II* panel judges agreed called for reversal.

The above argument dovetails with Petitioner's now-unrebutted argument that the five-judge majority opinion below conflicts with *Class v. United States*, 583 U.S. 174 (2018). *See* Pet. 32-33; App. 40a-41a; 47a-49a, 56a. Thus, the Government lacks any basis to downplay the majority's overly permissive approach to previously unraised fact-based jurisdictional claims the Government generated during a lengthy appeal to avoid a constitutional question.

If anything, the Court should look to its body of jurisprudence favoring review when a court of appeals invalidates an Act of Congress on its face. When that happens, the Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County v. López-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay). Even in the absence of a circuit conflict, this Court's "usual" approach is to grant review "when a lower court has invalidated a federal statute." *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019); *see, e.g.*, *Vidal v. Elster*, cert. granted, No. 22-704 (June 5, 2023); *United States v. Rahimi*, cert. granted, No. 22-915 (June 30, 2023). Since that "usual" practice appropriately reflects the respect due to Congress as a coequal branch of the federal government, it should as a corollary, extend to the situation here where *Dávila-Reyes II* held that § 70502(d)(1)(C) unconstitu-

tionally exceeded the scope of the Felonies Clause. *See* U.S. Const. Art. I § 8, cl. 10. After all, three judges out of eight in the First Circuit would have facially invalidated § 70502(d)(1)(C), and it was only left in place by the novel acceptance of a new-on-appeal fact-dependent jurisdictional theory that—if the dissent is correct—should have never impeded review on the merits.

B. Respondent's Defense of the First Circuit's En Banc Majority Opinion Lack Merit

The Government does not deny there is a real split of authority. Nor can it. In at least the Fifth and D.C. Circuits, the question of whether an offense occurs "on board a vessel subject to the jurisdiction of the United States" is a question of subject matter jurisdiction. *See United States v. Bustos-Useche*, 273 F.3d 622, 625-626 (5th Cir. 2021); *United States v. Miranda*, 780 F.3d 1185, 1192 (D.C. Cir. 2015). *See* Oppo. 16 (arguing the Eleventh Circuit has not yet decided the issue).

The Government, however, argues this split shouldn't be resolved here because "the answer to the question presented would not affect the outcome." Oppo. 10. This is incorrect, and hinges on the Government's opinion that the sole substantive claim presented is Congress's authority under the Felonies Clause. Oppo. 17. Indeed, the question of subject matter jurisdiction has been disputed by the parties for more than five years since the MDLEA's reference to "claims of registry" at § 70502(d)(1)(C) provides an alternate ground to reverse Petitioner's conviction. Pet. 17; App. 81a-82a.

The Government acknowledged as much throughout years of this litigation. In March 2019, the Government's supplemental briefing looked to *United States v. González*, 311 F.3d 440 (1st Cir. 2002), to allege that Petitioner's guilty plea was *not* a stipulation to the district court's subject matter jurisdiction. Gov't Supp. Reply Br. 8, No. 16-2143 (1st Cir. Mar. 14, 2019) (["I]n admitting to the district court that their vessel was subject to our jurisdiction, the appellants were conceding the fact that their vessel properly fell within the MDLEA's 'enforcement reach.'") (citation omitted)).

Nor does the Government challenge the fact that, were the subject issue raised in the Fifth Circuit or the Eleventh Circuit, it would have been addressed on the merits. And had a court similarly interpreted § 70502(d)(1)(C) as the *Dávila-Reyes II* concurrence, reversal would have been warranted but for the First Circuit's subject matter determination. This difference in application is particularly grave given the fact that the U.S. Department of Justice has absolute discretion to prosecute MDLEA offense in whatever venue they choose. *See* 46 U.S.C. § 70504(b)(2) ("[I]f the offense was … committed upon the high seas, or elsewhere outside the jurisdiction of any particular State or district, may be tried in any district."). So the Government may simply continue to forum shop, prosecuting cases with similar jurisdictional vulnerabilities in districts with Government-favorable law like the First Circuit.

Finally, since the trial penalty[1] in MDLEA cases is astoundingly grave, and plea agreement language is crafted by the government, it is difficult to conceive of a better a vehicle than this to address the present claim. *See, e.g.*, Lauren R. Robertson, *Blood in the Water: Why the First Step Act of 2018 Fails Those Sentenced Under the Maritime Drug Law Enforcement Act Sentenced Under the Maritime Drug Law Enforcement Act*, 78 WASH. & LEE L. REV. 1613, 1656 n.334 (2021) (collecting various MDLEA sentences of close to 20 years' imprisonment). So this case presents a good vehicle to answer the important questions presented.

* * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[1] The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, National Assoc. of Criminal Defense Lawyers (July 10, 2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.