[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13982

D.C. Docket No. 4:16-cr-10051-CMA-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ALEXANDER GUERRO,
ALDAIR PENA-VALOIS,
SIRRBIO BEUTES-VALENCIA,

Defendants - Appellants.

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

(October 1, 2019)

Before TJOFLAT, MARTIN, and PARKER,[*] Circuit Judges.

MARTIN, Circuit Judge:

The Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70501–70508, is a sweeping federal criminal statute. The Act establishes the framework for the United States to prosecute citizens of any country for drug crimes committed in international waters. And these prosecutions occur without regard for whether the drug trafficking activity will have any impact on the United States. Congress's grant of authority under the MDLEA is not, however, without limit. Written into the statute are strict requirements for establishing jurisdiction over the vessels and people the government seeks to prosecute. When the government fails to follow these requirements, the MDLEA provides courts no jurisdiction over prosecutions under its terms.

Alexander Guerro, Aldair Pena-Valois, and Sirrbio Beutes-Valencia appeal their convictions and sentences for various drug-related charges under the MDLEA. At issue is whether the government met its burden of proving the defendants' vessel was stateless and therefore subject to United States jurisdiction. Because the government failed to meet all of the MDLEA's jurisdictional

[*] Honorable Barrington D. Parker, United States Circuit Judge for the Second Circuit, sitting by designation.

requirements, we vacate the defendants' convictions and sentences for lack of jurisdiction.

I.

In the late evening hours of November 23, 2016, a United States Coast Guard cutter named Dependable identified two targets of interest off the coast of Costa Rica in international waters. The Coast Guard dispatched officers in two smaller pursuit boats, Able 1 and Able 2, to investigate the unknown vessels for possible drug-trafficking activity.

It was a dark, moonless night, and the twin pursuit boats took advantage of the overcast conditions to maintain the element of surprise as they approached their first target of interest. After successfully closing in on their target, officers aboard Able 1 and Able 2 together activated their blue law enforcement lights, announced themselves over a loudspeaker system as members of the United States Coast Guard, and ordered the target vessel to stop. The unknown vessel responded by turning on its own blue law enforcement lights and identifying itself as a Costa Rican Coast Guard vessel.

The blue lights and commotion caught the attention of the second target of interest, which had until then been calmly idling in the waters about 300 yards

away. That target, an unidentified go-fast vessel,[1] picked up speed once it saw what was happening and began to swiftly sail away from the scene. Officers aboard Able 1 and Able 2 immediately gave chase. Shortly before Able 1 caught up to the go-fast vessel, a technician aboard the Dependable observed two people on the go-fast vessel move to the back of the boat and hunch over. An officer aboard Able 1 then realized that the plug in the back of the boat had been removed and that the go-fast vessel was taking on water and about to sink.

The Coast Guard officers quickly abandoned their original plans to board the go-fast vessel, opting instead to move all three men on board to one of the Able boats so no one would drown. These three men were Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia. Less than five minutes later, the go-fast vessel sank. The only debris found floating in the area afterwards were 55-gallon barrels of fuel.

Able 1 and Able 2 parted ways. Able 1 was tasked with calculating the direction and speed of the current to find potential debris fields in case the three men aboard the go-fast vessel had tossed anything overboard before the ship sank. Meanwhile, Officer Maldonado, who was part of Able 2's crew and spoke Spanish, asked the three men for the master of the vessel. When the men remained silent,

[1] One of the Coast Guard officers testified at trial that a go-fast vessel is a "low-profile vessel that has a big open design made for transporting packages, fuel."

Officer Maldonado asked each of them whether he was the master. Faced with silence again, Officer Maldonado asked the men where the vessel had come from. One of the men piped up and responded "Colombia." Officer Maldonado stopped his questioning and brought the three men back to the Dependable so they could be further questioned.

On board the Dependable, Ensign Cruz, whose official job was to translate between Spanish and English, asked Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia for their nationality, last port of call, next port of call, date of departure, and date of arrival as part of the standard "right of approach" routine. In response, the men identified themselves as Colombian; their last and next port of call as Jurado, Colombia; their departure date as November 22, 2016; and their arrival date as November 24, 2016. When asked for the master of the vessel, one of the men told Ensign Cruz that the master "went into the water."

The Coast Guard never found a fourth person, master or not. But what the Coast Guard did find, based on Able 1's set and drift calculations, were sixteen bales containing 640 kilograms of cocaine floating in the water. Based on the bales' heat signatures, the officers ascertained that the bales had been in the water for just two to three hours. Beyond that, the bales were found almost in a line, indicating they had been tossed overboard one by one.

On December 16, 2016, Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia were indicted and charged with one count of conspiring to possess with intent to distribute five kilograms or more of cocaine and one count of possessing five kilograms or more of cocaine with the intent to distribute, all in violation of the MDLEA. few months later, Mr. Pena-Valois filed a motion to dismiss the indictment for lack of jurisdiction. Mr. Guerro and Mr. Beutes-Valencia adopted his motion to dismiss.

The government opposed the motion to dismiss, arguing that the defendants' go-fast vessel was stateless pursuant to 46 U.S.C. § 70502(d)(1)(B) and therefore subject to the jurisdiction of the United States. The government specifically quoted § 70502(d)(1)(B) in bold font and then explained that because "none of the three defendants identified himself as the master or made a claim of nationality for the vessel," § 70502(d)(1)(B)'s requirements for establishing statelessness had been met. The magistrate judge issued a report and recommendation recommending that the defendants' motion to dismiss the indictment be denied. The District Court adopted the report and recommendation and denied the defendants' motion on May 31, 2017.

The case proceeded to trial. At the close of the government's case-in-chief, the defendants moved for a judgment of acquittal based in part on jurisdictional grounds. The defendants argued that because there was some evidence that

someone made a claim of Colombian registry for the vessel, the government was required under a different subsection of the MDLEA to procure certification regarding the Colombian government's response. The government responded, however, that because no one identified himself as the master of the vessel, there was no need to pursue certification in this particular case. The government added that the evidence was clear no one ever made a claim of nationality or registry for the vessel. After acknowledging the defendants' ability to raise jurisdiction at any time, the District Court denied the motion for a judgment of acquittal.

The jury convicted all three defendants on both counts. Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia then filed a joint post-trial motion for judgments of acquittal based again on jurisdictional grounds. They argued the government had not, and could not, satisfy the requirements of § 70502(d)(1)(B). The government reiterated its belief that because "none of the Defendants identified themselves as the master of the vessel, nor made a claim of nationality for the vessel," § 70502(d)(1)(B) applied and the vessel was therefore stateless and subject to United States jurisdiction.

The District Court denied the defendants' joint post-trial motion for judgments of acquittal. The District Court agreed with the defendants that § 70502(d)(1)(B) clearly "requires a request from a United States Officer to be made to the master/individual in charge" with respect to registry and that "[n]o

U.S. officer asked the master/individual in charge to make a claim of nationality or registry for the [go-fast vessel]." Nonetheless, the District Court found the government proved the existence of jurisdiction by a preponderance of the evidence because "there was no master/individual in charge to make a claim of nationality" for the boat and therefore no need for the Coast Guard to have made the request.

In the District Court's view, § 70502(d)(1) offered a nonexclusive list of ways the government could prove a vessel was without nationality for purposes of jurisdiction under § 70502(c)(1)(A). Thus, for the District Court, it was of no moment that the government could not meet any of the jurisdictional criteria set out in subsection (d)(1). As long as the government could show there was neither a master nor individual in charge capable of making a claim of nationality or registry for the vessel, the District Court was satisfied the government had proven jurisdiction.

The defendants were each sentenced to 188-months imprisonment followed by five years of supervised release. This is their appeal.

II.

Although the defendants raise a host of arguments on appeal, we address only one: whether there was subject-matter jurisdiction to prosecute them under the MDLEA. Because we conclude there was not, we do not reach the other issues.

See Brown v. Wainwright, 785 F.2d 1457, 1467 (11th Cir. 1986). "We review a district court's interpretation and application of a statute concerning its subject-matter jurisdiction de novo, but we review factual findings with respect to jurisdiction for clear error." United States v. Cruickshank, 837 F.3d 1182, 1187 (11th Cir. 2016).

III.

The MDLEA recognizes six broad categories of vessels subject to the jurisdiction of the United States for purposes of criminal prosecution. 46 U.S.C. § 70502(c)(1). Only one of the six categories is at issue here: stateless vessels, also known as vessels without nationality. Id. § 70502(c)(1)(A); see also Cruickshank, 837 F.3d at 1187. The MDLEA defines a vessel without nationality to include any of the following: (1) "a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed"; (2) "a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel"; and (3) "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." 46 U.S.C. § 70502(d)(1).

The government has consistently maintained throughout these proceedings that jurisdiction is appropriate because the defendants' vessel falls under the second of these recognized kinds of stateless vessels, § 70502(d)(1)(B). This makes a great deal of sense because the government's position is that none of the defendants ever made a claim of registry for the boat, which eliminates the other two definitions for stateless vessels. See 46 U.S.C. § 70502(d)(1)(A), (C). After all, unlike § 70502(d)(1)(B), subsections (A) and (C) require that, before the government can deem a vessel stateless, the master or individual in charge of the vessel must make a claim of registry that is either rejected or unverified by the claimed nation. See id.

In the alternative, it appears the District Court found jurisdiction on the theory that § 70502(d)(1) does not create an exhaustive list of methods to prove jurisdiction. Relying on United States v. Rosero, 42 F.3d 166, 170 (3d Cir. 1994) (Alito, J.), the District Court reasoned the government could also prove jurisdiction by showing the vessel lacked both a master and an individual in charge empowered to make a claim of nationality or registry for the vessel. See 46 U.S.C. § 70502(e)(3) ("A claim of nationality or registry under this section includes only . . . a verbal claim of nationality or registry by the master or individual in charge of the vessel."). The District Court found that the government had made such a showing and exercised jurisdiction over this case.

Now the dissenting opinion offers a third theory of jurisdiction that would allow jurisdiction based on the specific facts presented here.

We address each theory in turn.

A.

To begin, the government's consistent reliance on § 70502(d)(1)(B) as the source of jurisdiction in this case is misplaced. Section 70502(d)(1)(B) provides that the government must prove[2] the "master or individual in charge fail[ed], on request of an officer of the United States . . . , to make a claim of nationality or registry" for the defendants' vessel. Id. (emphasis added).

The statute could not be clearer: an officer of the United States must request a claim of registry and the master or individual in charge must fail to answer that request before a vessel can be deemed stateless under § 70502(d)(1)(B). See United States v. Prado, 933 F.3d 121, 130 (2d Cir. 2019) ("It is only if 'on request' of a duly authorized officer, the master 'fails to make a claim of nationality or registry,' that statelessness is established." (alteration adopted)); cf. United States v. Obando, 891 F.3d 929, 931 (11th Cir. 2018) ("Indeed, when asked, [the master] told the guardsmen that 'he did not know' the vessel's nationality."). Here,

[2] We leave open for another day whether "the government must establish the jurisdictional requirement beyond a reasonable doubt or by a preponderance of the evidence," because the government has failed to meet either standard of proof here. United States v. Tinoco, 304 F.3d 1088, 1114 n.25 (11th Cir. 2002).

however, the District Court expressly found that "[n]o U.S. officer asked the master/individual in charge to make a claim of nationality or registry for the [go-fast vessel]." And the government does not contest this finding on appeal. See Oral Arg. at 17:18–17:25 (agreeing no request for a claim of registry was ever made), 18:03–18:07 ("At no point did the Coast Guard ask the master to make a nationality claim.").

Under these circumstances, no jurisdiction exists under § 70502(d)(1)(B).

B.

Neither are we persuaded by the District Court's alternative theory of jurisdiction.

The MDLEA provides three exclusive ways to make a claim of nationality or registry for a vessel. 46 U.S.C. § 70502(e); see also Obando, 891 F.3d at 933 ("[T]he Act provides three exclusive methods for the master or individual in charge to make a 'claim.'"). The District Court reasoned that because § 70502(d), in contrast to § 70502(e), uses the word "includes" rather than "includes only," there could be other, unenumerated ways of demonstrating statelessness under the MDLEA. See 46 U.S.C. § 70502(c)(1)(A). The District Court then proposed that a vessel could be stateless if there was no master or individual in charge empowered to make a claim of registry aboard the ship.

Even accepting the District Court's reasoning as correct, we conclude the government nonetheless failed to prove jurisdiction in this case. The District Court determined that "[n]o U.S. officer asked the master/individual in charge to make a claim of nationality or registry for the [vessel], as there was no such person." It appears the District Court believed the Coast Guard asked for both the master and the individual charge and found the defendants' failure to respond sufficient proof that the vessel lacked both a master and an individual in charge. While logical, this chain of reasoning suffers from one fatal flaw: the Coast Guard never asked for the individual in charge. The government conceded as much at oral argument. Oral Arg. at 20:19–20:20 ("They did not use the word 'individual in charge.'"). And it is well-settled that "a finding of fact is clearly erroneous when it finds no support in the record." Jones v. Beto, 459 F.2d 979, 980 (5th Cir. 1972) (per curiam).[3]

It is true the Coast Guard asked the defendants for the master of the vessel. But that was not enough. The District Court's theory for deciding otherwise relied on there being no one on board the vessel with the power to make a claim of nationality or registry. However, the MDLEA plainly recognizes that both a master and an individual in charge possess the authority to make a claim of

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981. Id. at 1207.

nationality or registry for the vessel.[4] See 46 U.S.C. § 70502(e). Because the Coast Guard failed to ask for the individual in charge,[5] it is equally possible one of the three defendants possessed the authority as the individual in charge to make a claim of registry or nationality for the vessel. That possibility means, in turn, that the government failed to prove there was no one on board the vessel who could make a claim of registry or nationality.

The dissenting opinion faults us for discussing § 70502(e) because it says the provision is irrelevant to the jurisdictional inquiry. Dissenting Op. at 20–21. But we discuss § 70502(e) because it identifies all the individuals empowered to make a claim of nationality or registry for a vessel. The District Court believed a vessel can be deemed stateless under the MDLEA when there is no one on board

[4] At oral argument, the government suggested the MDLEA's reference to "individual in charge" must mean "master." Oral Arg. at 20:12–20:14 ("The term for [individual in charge] is master."). The government has not, however, provided the Court with any supporting authority for its position. At any rate, "[i]t is a cardinal principle of statutory construction that a statute, ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." In re Read, 692 F.3d 1185, 1191 (11th Cir. 2012) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001)). And at least one other Circuit has suggested "individual in charge" means something different than "master" in the context of maritime law. See Gaffney v. Riverboat Servs. of Ind., Inc., 451 F.3d 424, 455–56 (7th Cir. 2006).

[5] After oral argument, the government acknowledged to this Court that "the Coast Guard is required to ask detained crew members who the master of their vessel is" and cannot "simply remain silent and wait for the crew to speak." We see no reason why the Coast Guard's obligations to the individual in charge would be any different from its obligations to the master. See, e.g., United States v. Matos-Luchi, 627 F.3d 1, 2 (1st Cir. 2010) (recounting a Coast Guard Petty Officer's testimony that he "asked . . . who was the captain of the vessel [the defendants] were on or the senior person in charge of the boat" (emphasis added)).

who is authorized to speak on the vessel's behalf. Under these circumstances, we would be remiss if we did not look to § 70502(e), which identifies those who are empowered to make a claim of nationality of registry.

C.

The government's, the District Court's, and the dissent's separate theories of jurisdiction fail on the facts. For the government, § 70502(d)(1)(B) offers no path forward because the statute requires that the Coast Guard affirmatively request a claim of registry or nationality for the vessel and it is undisputed that no such request was ever made. As for the District Court's theory, it was mistaken in thinking the Coast Guard's request for the master necessarily included a request for the individual in charge. The master and the individual in charge are not one and the same. The dissenting opinion appears to recognize the shortcomings of the theory of jurisdiction offered by the government as well as that offered by the District Court because it offers yet a third theory for jurisdiction. Dissenting Op. at 25–9. This third theory fares little better than the others.

The dissenting opinion posits that where, as here, "(1) the vessel flew no flag; (2) the vessel did not bear the insignia of any nation; (3) the vessel did not carry the papers of any nation; and (4) neither the master nor any of the crew made an affirmative and sustainable claim of nationality when given an opportunity to do so," we may "deem" the vessel to be stateless for purposes of the MDLEA.

Dissenting Op. at 27–28. But this approach is inconsistent with principles of international law.

"The 'right of approach' is a doctrine of international maritime common law that bestows a nation's warship with the authority to hail and board an unidentified vessel to ascertain its nationality." United States v. Romero-Galue, 757 F.2d 1147, 1149 n.3 (11th Cir. 1985) (quotation marks omitted). Using the right of approach, the crew of a "man-of-war" can make demands upon a flag-less vessel to ascertain nationality. 1 L. Oppenheim, International Law: A Treatise §§ 267–69, at 430–31 (3d ed. 2005). For instance, an officer may be sent "on board for the purpose of inspecting [the vessel's] papers" or ordering the vessel's master "to bring his ship's papers for inspection." Id. § 268. None of this suggests the master or individual in charge of the unidentified vessel has the affirmative obligation to offer information without prompting.

To the contrary, it seems to us that, as the party challenging the identification of a vessel, the Coast Guard bears the burden of asking questions, including whether anyone is the master or individual in charge. Indeed, the government admits as much, acknowledging the Coast Guard cannot "simply remain silent and wait for the crew to speak." One need look no further than the MDLEA itself to see that Congress has placed the burden of questioning on the Coast Guard. See 46 U.S.C. § 70502(d)(1)(B) (establishing that a vessel is

"without nationality" if "the master or individual in charge fails on request of an officer of the United States . . . , to make a claim of nationality or registry for that vessel"). The approach called for in the dissenting opinion would create a broad category of cases where "neither the master nor any of the crew made an affirmative and sustainable claim of nationality when given an opportunity to do so." Dissenting Op. at 27–28. The dissent's proposed category would include those vessels whose commanders do not claim a nationality upon a direct request and those whose commanders do not claim a nationality without a direct request. This new category of stateless vessels would encompass all vessels deemed stateless by § 70502(d)(1)(B), as well as those as to which its requirements are not satisfied. This approach would read the direct request requirement out of the statute. We decline to adopt a reading that eliminates the language employed by Congress.

The dissenting opinion relies heavily on United States v. Matos-Luchi, 627 F.3d 1 (1st Cir. 2010), for the proposition that the defendants had an affirmative obligation to make a claim of nationality. Dissenting Op. at 24, 26. But Matos-Luchi does not bear the weight the dissent puts on it. There, the First Circuit explained that a vessel may be deemed stateless "if a 'ship' repeatedly refuses, without reasonable excuse, to reveal its allocation of nationality." 627 F.3d at 7 (emphasis added, alteration adopted, and quotation marks omitted). Failing to

offer information, however, is not the same as refusing to give it. See Refusal, Black's Law Dictionary (11th ed. 2019) (defining refusal as "[t]he denial or rejection of something offered or demanded" (emphasis added)). And in Matos-Luchi, the defendants specifically refused to answer the Coast Guard's questions. 627 F.3d at 2, 6.

The question, as we see it, is not whether anything "stopped" the defendants from claiming to be the individual in charge. Dissenting Op. at 26. It is instead whether the Coast Guard bore the burden of asking for the individual in charge. We read the statute to give the Coast Guard that burden. On this record, the government has not met its burden of proving jurisdiction. See Prado, 933 F.3d at 131 ("[M]ere silence in the absence of a request for information supports no inference at all.").

IV.

The government acknowledges the Coast Guard never asked for the individual in charge and never requested the defendants to make a claim of nationality or registry for the vessel. These failures to comply with the MDLEA's jurisdictional requirements mean we must vacate the convictions and sentences of Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia. On remand, the District Court is directed to dismiss the indictment for lack of jurisdiction and vacate the judgments of conviction.

The dissenting opinion protests that our decision today "incentivizes unscrupulous crew members with criminal agendas to evade law enforcement based on technicalities" because criminals just need to hope "the officers accidentally fail to exhaust the laundry list of specific requests" required by the MDLEA. Dissenting Op. at 29–30. We doubt things will be so dire. Aside from this case, we have identified no others in which the Coast Guard failed to follow the mandate of the statute to ask for both the individual in charge and a claim of nationality or registry. According to the testimony at trial, these are standard right-of-approach questions that the Coast Guard is trained to ask. All the Coast Guard had to do here to establish statelessness, and thus jurisdiction, was to ask whether any of the defendants wished to make a claim of nationality or registry for the vessel. See Prado, 933 F.3d at 130. Alternatively, they could have established that none of the defendants were authorized to make such a claim for the vessel. They did neither. We do not think the interests of justice are better served by affirming convictions obtained in contravention of the statute.

VACATED AND REMANDED.

TJOFLAT, Circuit Judge, dissenting:

Today's majority opinion contains an error that has potentially far-reaching consequences for criminal law enforcement on the high seas. The majority concludes that 46 U.S.C. § 70502(e) requires law enforcement to prove that there was no "individual in charge" aboard a vessel before they treat it as stateless under 46 U.S.C. § 70502(d)(1), even when no "master" is present and none of the crew makes a claim of nationality when given the opportunity to do so. *See* Maj. Op. 12–13. But the government does not have to prove that there was no one on board who could make a claim of nationality under section (e) in order to establish that a vessel was stateless under section (d)(1). Section (e) merely defines how someone can *make* a "claim of nationality"—it is irrelevant for determining whether a vessel is stateless when no one aboard the vessel makes a claim of nationality when given the opportunity to do so.

Here, defendants claimed that the master was not present at the scene and none of the defendants made a claim of nationality. Therefore, because no claim of nationality was made, section (e) is irrelevant, regardless of whether the Coast

Guard specifically asked for the individual in charge after the defendants responded that the master was not present. The only relevant inquiry is whether the vessel was stateless under section (d)(1), and the record is clear that it was.

I would find that the District Court properly exercised jurisdiction in this case because, using any evidentiary standard,[1] the vessel was stateless under international law, and section (d)(1) incorporates international law's well-developed meaning of a stateless vessel. Consequently, the majority erred in reversing the judgment below due to a lack of jurisdiction.

I.

Section (e), upon which the majority relies, is irrelevant to the jurisdictional issue of whether the go-fast vessel in this case was stateless. Section (e) governs the making of a claim of nationality,[2] whereas section (d)(1) governs determining the nationality of a vessel,[3] which is the jurisdictional issue here. When no claim

[1] As the majority opinion establishes, the question whether this initial jurisdictional issue requires proof beyond a reasonable doubt or by a preponderance of the evidence remains open. *See* Maj. Op. at 11 n.2 (quoting *United States v. Tinoco*, 304 F.3d 1088, 1114 n.25 (11th Cir. 2002)).

[2] Section (e) provides: "A claim of nationality or registry under this section includes only--(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas; (2) flying its nation's ensign or flag; or (3) a verbal claim of nationality or registry by the master or individual in charge of the vessel." § 70502(e).

[3] Section (d)(1) provides: "the term 'vessel without nationality' includes--(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed; (B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of

is made, section (e) does not factor into the analysis at all. If the crew chooses to be silent instead of making a claim of nationality, they bear the risk of being classified as stateless under section (d)(1). *See United States v. Matos-Luchi*, 627 F.3d 1, 6 (1st Cir. 2010) (finding that "[i]t is not enough that a vessel have a nationality; she must claim it and be in a position to provide evidence of it" (quoting Andrew W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. Mar. L. & Com. 323, 341 (1982))).

Here, the defendants had ample opportunity to make a claim of nationality for the seemingly stateless vessel, but none of them made such a claim. The burden fell on the defendants to assert the nationality of the vessel, regardless of whether the Coast Guard specifically asked for the individual in charge after being told no master was present. Moreover, all circumstances present at the scene indicated that the vessel had any legitimate claim of nationality. The defendants purposely sank their boat after fleeing from law enforcement and then denied that the master was present. In such circumstances, section (e) does not have any bearing on whether the vessel was stateless because no claim of nationality was

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United States law, to make a claim of nationality or registry for that vessel; and (C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality." § 70502(d)(1).

made when the crew had an opportunity to do so. As such, provided that the vessel was stateless under section (d)(1), the District Court properly exercised jurisdiction.

II.

Section (d)(1) of the MDLEA provides three ways to establish that a vessel is stateless.[4] The District Court found, and I agree, that Congress did not intend these three avenues to be exclusive. *See Matos-Luchi*, 627 F.3d at 4 ("[T]he listed examples do not exhaust the scope of section 70502(d) . . . ."); *United States v. Rosero*, 42 F.3d 166, 170 (3d Cir. 1994) (same conclusion based on previous codification of the MDLEA); *see also, e.g., Stansell v. Rev. Armed Forces of Colombia*, 704 F.3d 910, 915 (11th Cir. 2013) (finding that a statutory definition which declares what a term "includes" is "merely illustrative"—not exhaustive).

Although Congress's intent for section (d)(1) to be non-exclusive is apparent, the bounds of what Congress intended to incorporate into the definition of a stateless vessel is not entirely clear from the text and legislative history of the MDLEA. *See Rosero*, 42 F.3d at 170.

"Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meanings of these

[4] *See supra* n.3.

terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). This principle applies with equal force when Congress uses a term which has a settled meaning under international law. *See Rosero*, 42 F.3d at 171. Fortunately, customary international law has a reasonably well-developed meaning of a stateless vessel. *See id.* at 170–71. Therefore, by incorporation of the established meaning of the term under international law, a vessel is stateless under the MDLEA if international law would deem it stateless.

Under international law, a ship possesses the nationality of the "State whose flag they are entitled to fly." *Id.* at 171 (quoting Convention on the High Seas of 1958, 13 U.S.T. 3212, T.I.A.S. No. 5200, art. 5(1)); *accord Restatement (Third) of the Foreign Relations Law of the United States* § 501 (Am. Law. Inst. 1987) ("A ship has the nationality of the state that registered it and authorized it to fly the state's flag . . . ."). Therefore, if no state authorizes a vessel to fly that state's flag, the vessel is stateless under international law. *See Rosero*, 42 F.3d at 171.

A vessel is likewise stateless if it lacks the "insignia or papers of a national vessel" or its master and crew do not make an "affirmative and sustainable claim of nationality." *See Matos-Luchi*, 627 F.3d at 6–7. Otherwise, a master and crew could evade law enforcement merely by failing to carry identifying documents and refusing to make a claim of nationality for the vessel. *See id.* at 6–7 (explaining the prudential design of the statute and concluding that repeated refusal by the

master and crew to identify the nationality of the vessel is sufficient to render a vessel stateless under section (d)(1)); H. Meyers, *The Nationality of Ships* 322 (1967) ("[A] 'ship' which obscures cognoscibility of its allocation [of nationality] repeatedly, deliberately, and successfully may be treated as stateless.").

As discussed below, the go-fast vessel in this case falls squarely within international law's definition of a stateless vessel. As such, the vessel was stateless under the MDLEA, and the District Court properly exercised jurisdiction here.

III.

The facts presented to the District Court unquestionably establish that the go-fast vessel was stateless under international law. When the Coast Guard officers approached the boat, it bore "no significant markings indicating nationality." After the officers apprehended Mr. Guerro, Mr. Pena-Valois, and Mr. Beutes-Valencia, Officer Maldonado asked the three men to identify the master of the vessel. When the men refused to respond, Officer Maldonado asked each of them if he was the master. When the men again refused to respond, Officer Maldonado asked the three men where the go-fast vessel had come from, and one of the men answered "Colombia." When questioning resumed on board the Dependable by Ensign Cruz, the men claimed to be Colombian, provided their last and next port of call as Colombia, and provided their departure and arrival dates. Upon Ensign Cruz's further request for the master of the vessel, one of the men

claimed that the master "went into the water." The defendants provided no other information.

The Coast Guard questioned the crew regarding the identity of the master and other pertinent information about the vessel. The defendants denied that the master was present, and therefore the burden fell on the them, as the crew, to make an affirmative and sustainable claim of nationality if such a claim could have been made. *See Matos-Luchi*, 627 F.3d at 6 (finding that a vessel must claim nationality and be able to provide evidence of it). If one of the defendants was, in fact, the individual in charge, nothing stopped him from making such a claim.[5] However, instead of making a claim, which if legitimate could have freed the defendants from the Coast Guard's jurisdiction, the defendants provided only minimal information. The only inference to be drawn from this behavior, along with their purposeful sinking of the vessel and their flight from the law enforcement officers, is that the defendants were operating with no affiliation to any nation.

[5] The majority reads this dissenting opinion to suggest that the crew "has the affirmative obligation to offer information *without prompting*." Maj. Op. at 16 (second emphasis added). I make no such contention. I merely believe that the MDLEA permits courts to deem a vessel stateless when the ship flies no flag, bears no insignia of any nation, intentionally sinks itself after fleeing from law enforcement officers, and its crew does not make a claim of nationality for the vessel after telling the Coast Guard no master was present. I do not suggest, therefore, that a court can deem a vessel stateless in the absence of *any* questioning or action by the Coast Guard. While the burden might initially be on the Coast Guard to ask the crew for the master or individual in charge, the burden to claim a nationality for the vessel shifts to the crew once they claim no master is present and all evidence indicates that the vessel is stateless.

From the record before the District Court, therefore, the following is clear: (1) the vessel flew no flag; (2) the vessel did not bear the insignia of any nation; (3) the vessel did not carry the papers of any nation; and (4) neither the master nor any of the crew made an affirmative and sustainable claim of nationality when given an opportunity to do so. As such, under international law and using any evidentiary standard, the vessel was stateless.

The majority concludes that my approach creates a new category of stateless vessels and "eliminates the language employed by Congress." Maj. Op. at 17. But my approach does neither.

The majority essentially rejects my approach because there is no set of facts in which a vessel is stateless under § 70502(d)(1)(B), but not under international law. Maj. Op. at 17. This is just another way of arguing that the provisions of § 70502(d)(1) are exclusive. As discussed *supra* part II, that argument lacks merit.

Moreover, while § 70502(d)(1)(B) and international law will often reach the same conclusion, there are instances in which § 70502(d)(1)(B) does not apply. For example, if the Coast Guard apprehends a ship aboard which no one claims to be the master *and* no one claims to be the individual in charge, the vessel cannot be considered stateless under § 70502(d)(1)(B). Therefore, my approach does not "eliminate" any language in the statute because international law applies in some situations in which the explicit statutory provisions do not apply. Because the

majority rejects my approach, it creates a category of vessels which are completely beyond the jurisdiction of the Coast Guard.[6]

Further, contrary to the majority's contention, my approach does not create a new, broad category of stateless vessels. Instead, I believe it adheres to the governing statutory and international law. The majority would put the burden on law enforcement to specifically ask for the master *and* the individual in charge, even once the crew claims there is no master aboard the vessel and they do not claim a nationality for the vessel. In contrast, consistently with international law, my approach would put the burden on the crew to identify the nationality—if any—of the vessel once law enforcement asks for the master *or* the individual in charge and the crew claims that no such person exists. *See supra* n.5.

Ultimately, the majority's conclusion today that section (e) requires the Coast Guard to ask for both the master and the individual in charge before a vessel can be considered stateless ignores the prudential design of the statute and fails to account for the prophylactic nature of the questioning required by the MDLEA. The questioning protects nations from association with illegitimate claims of their nationality and, conversely, guarantees that they retain jurisdiction over vessels

[6] It is also worth noting that the majority's reasoning ignores the relationship between §§ 70502(d)(1)(A) and (C). There is no set of facts where a vessel is stateless under (A), but not under (C), because a nation which denies a claim or registry necessarily does not "affirmatively and unequivocally assert" that the vessel is its own. However, no one would argue that, therefore, applying § 70502(d)(1)(C) would "eliminate" § 70502(d)(1)(A) from the statute.

actually registered to their nation. It does not, and was not meant to, protect wily pirates seeking to evade legitimate law enforcement activities. As such, I believe that the majority's insistence on an inquiry into the identities of both the master and the individual in charge protects parties not intended to be protected by the MDLEA and, simultaneously, thwarts legitimate law enforcement activity.

IV.

Because the vessel was stateless under international law, the vessel was stateless under the MDLEA, and federal courts possess jurisdiction over such vessels. Therefore, the District Court properly exercised jurisdiction in this case.

Faced with defendants' statements that no master was present and defendants' silence regarding the nationality of the vessel, the burden was not on the Coast Guard to specifically request the individual in charge. Jurisdiction surely does not hinge on such a specific request when the entire crew is given a chance to identify the nationality of the vessel after claiming the vessel was without a master.

The majority's conclusion on this issue incentivizes unscrupulous crew members with criminal agendas to evade law enforcement based on technicalities. All criminals must do is indicate, through silence or other conduct, that no one is in charge and hope that the officers accidentally fail to exhaust the laundry list of specific requests that they must make on the scene, even though the officers gave

the crew an adequate opportunity to make a claim of nationality.[7] Such an outcome is inconsistent with the practical needs of every-day law enforcement and the prudential design of the MDLEA.

Respectfully, I dissent.

[7] The majority does not believe that its opinion today imposes any additional requirements on law enforcement. I disagree. The majority claims that "[a]ll the Coast Guard had to do here to establish statelessness . . . was to ask whether any of the defendants wished to make a claim of nationality or registry for the vessel" or "establish[] that none of the defendants were authorized to make such a claim for the vessel." Maj. Op. at 19. The majority views imposing these requirements as insignificant because it believes that testimony at trial established that the Coast Guard is trained "to ask for both the individual in charge and a claim of nationality" as part of their "standard right-of-approach questions." Maj. Op. at 19. However, the majority's premise is incorrect. The testimony merely established that asking "for their nationality, their last port of call, their next port of call, the date of departure and date of arrival" was standard procedure. But that is exactly the procedure the Coast Guard followed in this case. Therefore, the majority is incorrect in asserting that its approach does not impose additional requirements on the Coast Guard. Maj. Op. at 19 ("[A]sk[ing] for both the individual in charge and a claim of nationality or registry" are "standard right-of-approach questions that the Coast Guard is trained to ask"). As such, I must disagree that imposing the majority's burden on law enforcement to speak certain magic words serves the interests of justice. Such a post hoc requirement penalizes law enforcement for failing to conform to procedures of which they were not aware. Moreover, it ignores the reality of the circumstances present here because the vessel was clearly stateless. *See supra* n.5.