

18-671(L)
United States v. Alarcon Sanchez

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2019
6

7 (Argued: August 27, 2019)

Decided: August 27, 2020)

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9 Docket Nos. 18-671, 18-1231
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13 UNITED STATES OF AMERICA,
14

15 *Appellee,*
16

17 v.
18

19 DANIEL GERMAN ALARCON SANCHEZ,
20 AKA RUTILLO, CARLOS ALBERTO SALINAS
21 DIAZ
22

23 *Defendants-Appellants.*¹
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25
26
27 Before: WINTER, POOLER, and RAGGI, *Circuit Judges.*
28

29 Appeal from the United States District Court for the Southern District of
30 New York (Paul G. Gardephe, *J.*), convicting defendants, after a plea of guilty, of

¹ The Clerk of Court is directed to amend the caption as above.

1 conspiring to engage in drug trafficking activity in violation of the Maritime
2 Drug Law Enforcement Act (the “MDLEA”), 46 U.S.C. § 70501 *et seq.*

3 Defendants challenge the adequacy of their unconditional guilty pleas on
4 the basis that the government has failed to establish as a factual matter that it
5 complied with the MDLEA’s jurisdictional provision requiring that the
6 interdicted vessel in this case be “stateless.” Despite having entered
7 unconditional guilty pleas, defendants may assert what is concededly an unusual
8 sufficiency challenge on appeal because we have previously held that the
9 government’s failure to establish statelessness renders a defendant’s underlying
10 plea to MDLEA charges defective under Rule 11. *See United States v. Prado*, 933
11 F.3d 121, 153 (2d Cir. 2019) (vacating convictions and guilty pleas where “the
12 government was unable to demonstrate” statelessness and “there was no
13 mention of . . . statelessness during the plea proceedings”). Defendants
14 additionally advance various constitutional challenges to the MDLEA and to its
15 application to land-based conspirators who have never set foot on the vessel
16 during the scope of the conspiracy.

17 We hold that the government has met its evidentiary burden in
18 establishing that defendants’ boat, the *El Vacan*, was a stateless vessel and thus

1 subject to the jurisdiction of the United States. We also hold that Section 70506(b)
2 of the MDLEA encompasses land-based conspiratorial conduct, which Congress
3 is authorized to proscribe under the Necessary and Proper Clause. Although due
4 process requires a sufficient nexus with the United States for those not on board
5 a stateless vessel to be prosecuted under the MDLEA, we conclude that in this
6 instance, defendants' prosecutions satisfy due process. Finally, we hold that
7 Congress did not exceed its legislative authority in enacting the MDLEA
8 pursuant to the Define and Punish Clause.

9 Affirmed.

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11
12 IAN WEINSTEIN, Lincoln Sq. Legal Services, Inc.,
13 (Michael W. Martin, Bronwyn Roantree, *on the brief*),
14 New York, NY, *for Defendant-Appellant Daniel German*
15 *Alarcon Sanchez*.

16
17 MARLON G. KIRTON, New York, NY, *for Defendant-*
18 *Appellant Carlos Alberto Salinas Diaz*.

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24 *District of New York, New York, NY, for Appellee*.

25

1 POOLER, *Circuit Judge*:

2 Appeal from the United States District Court for the Southern District of
3 New York (Paul G. Gardephe, J.), convicting defendants, after a plea of guilty, of
4 conspiring to engage in drug trafficking activity in violation of the Maritime
5 Drug Law Enforcement Act (the “MDLEA”), 46 U.S.C. § 70501 *et seq.*

6 Defendants challenge the adequacy of their unconditional guilty pleas on
7 the basis that the government has failed to establish as a factual matter that it
8 complied with the MDLEA’s jurisdictional provision requiring that the
9 interdicted vessel in this case be “stateless.” Despite having entered
10 unconditional guilty pleas, defendants may assert what is concededly an unusual
11 sufficiency challenge on appeal because we have previously held that the
12 government’s failure to establish statelessness renders a defendant’s underlying
13 plea to MDLEA charges defective under Rule 11. *See United States v. Prado*, 933
14 F.3d 121, 153 (2d Cir. 2019) (vacating convictions and guilty pleas where “the
15 government was unable to demonstrate” statelessness and “there was no
16 mention of . . . statelessness during the plea proceedings”). Defendants
17 additionally advance various constitutional challenges to the MDLEA and to its

1 application to land-based conspirators who have never set foot on the vessel
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5 subject to the jurisdiction of the United States. We also hold that Section 70506(b)
6 of the MDLEA encompasses land-based conspiratorial conduct, which Congress
7 is authorized to proscribe under the Necessary and Proper Clause. Although due
8 process requires a sufficient nexus with the United States for those not on board
9 a stateless vessel to be prosecuted under the MDLEA, we conclude that in this
10 instance, defendants' prosecutions satisfy due process. Finally, we hold that
11 Congress did not exceed its legislative authority in enacting the MDLEA
12 pursuant to the Define and Punish Clause.

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14

BACKGROUND

I. Factual Background

15 In early 2015, special agents from the Department of Homeland Security
16 undertook an investigation of a suspicious money transfer from a Colombian
17 drug cartel to a bank account in New York City. That investigation eventually
18

1 turned up information about a planned shipment of cocaine from Colombia to
2 Australia scheduled for April 14, 2015.

3 The investigation also revealed that defendants-appellants Carlos Alberto
4 Salinas Diaz and Daniel German Alarcon Sanchez, along with Luis Fernando
5 Uribe Franco, were working with the cartel and a cooperating source to
6 coordinate the shipment. The cooperating source was introduced to Salinas Diaz
7 and Alarcon Sanchez through a Colombian informant who told Salinas Diaz that
8 the source could help launder cartel money. In February 2015, at a restaurant in
9 Bogota, Colombia, the source met with Salinas Diaz and Alarcon Sanchez where
10 they formally asked for his help. The source told them he had connections with a
11 shipping company that could provide the necessary logistical assistance for the
12 narcotics transport.

13 At the direction of Homeland Security, the cooperating source agreed to
14 arrange for a vessel. Salinas Diaz and Alarcon Sanchez gave him three passports
15 of cartel associates who would accompany the drugs at sea. On February 13,
16 2015, the source told Salinas Diaz that he had secured the use of a U.S.-registered
17 vessel. The men agreed that, on April 14, Salinas Diaz would bring the cocaine
18 on two speedboats to an agreed-upon location in the Pacific Ocean where it

1 would be loaded onto the cooperating source's vessel for shipment to Australia.
2 Unbeknownst to Salinas Diaz and Alarcon Sanchez, the two operators of the
3 U.S.-registered vessel were undercover agents. On April 6, Salinas Diaz
4 discussed the time, date, and location of the planned cocaine transfer with the
5 undercover agents.

6 On April 7, Salinas Diaz and the cooperating source discussed having
7 Uribe Franco meet the source in New York City to deliver \$3,000 in exchange for
8 Australian visas. Uribe Franco sent his son to make the payment in person.

9 On April 14, a U.S. Navy helicopter assigned to the frigate U.S.S.
10 Kaufmann was patrolling an area approximately 135 nautical miles off the coast
11 of Costa Rica. Navy personnel in the helicopter eventually spotted one of the two
12 speedboats—the *El Vacan*—a vessel colloquially known as a “go-fast.” They
13 observed bales on the vessel's deck, some of which the crew members began
14 throwing overboard. The helicopter ordered the *El Vacan* to halt. The go-fast
15 ignored the order. Naval personnel then fired warning shots, and the *El Vacan*
16 stopped. The frigate dispatched a small boat of U.S. Navy and U.S. Coast Guard
17 personnel to fetch the jettisoned packages and prepared a boarding team. In all,
18 nearly 550 kilograms of cocaine were recovered from the water and the vessel.

1 Meanwhile, the boarding team wrested control of the vessel where they found
2 four crewmembers: Alexander Catano Aragon, Biojo Torres Robinson Gabriel,
3 Jorge Caveza Valencia, and Jhon Carlos Hurtado Rendon.

4 The boarding team reported that there was no visible registration number
5 on the vessel, but there was a small Ecuadorian flag—either painted or a decal—
6 by the engine. The crewmembers claimed to be Colombian citizens. At the Navy
7 personnel’s request, Rendon, the self-identified captain, told the boarding team
8 that the *El Vacan* was an Ecuadorian vessel with a home port of Puerto Manta,
9 Ecuador.

10 Pursuant to a treaty between the United States and Ecuador, the U.S. Coast
11 Guard contacted Ecuadorian authorities and requested confirmation or denial as
12 to the nationality of the *El Vacan*. The United States told Ecuadorian officials, in
13 relevant part: (1) the vessel was named the *El Vacan*; (2) the vessel lacked
14 registration markings; (3) that the *El Vacan* was spotted by helicopter; (4) that the
15 master claimed it was of Ecuadorian nationality with a home port of Puerto
16 Manta, Ecuador; (5) that it was a 9.6 meters-long “panga,” the local word for a
17 go-fast; (6) its coordinates; (7) its color and that it was made of fiberglass; (8) that
18 it was on a route consistent with drug smuggling operations; (9) information

1 about the vessel's master, Rendon, including his nationality (Colombian), date of
2 birth, and passport number; (10) the number of people on board as well as their
3 nationality (Colombian); (11) that the crewmembers claimed that the purpose of
4 their voyage was a search and rescue of a friend at sea; (12) that the master had
5 little knowledge of fishing; (13) that the vessel was on an erratic course when
6 approached; (14) that crewmembers were seen jettisoning bales that testified
7 positive for cocaine; (15) that the crewmembers were the subject of an ongoing
8 criminal investigation by the United States; and (16) that the crewmembers
9 claimed they departed from Puerto Esmeraldas, Ecuador, on April 12, 2015, and
10 planned to return on April 14, 2015.

11 The Ecuadorian Coast Guard acknowledged receipt of the request, stating
12 that it would provide a Form 3² within thirty minutes. The Ecuadorian
13 authorities requested photographs of the *El Vacan* and the names and
14 identification documents of its crew because there were other boats registered
15 with the same name. The United States did not send the requested information.

² A "Form 3" is a "Response to Action Request." Country officials use the form to confirm or deny whether a vessel suspected of narcotics trafficking is registered to that country or is of that country's nationality. See *United States v. Aragon*, No. 15-Cr-292, 2017 WL 2889499, at *3 (S.D.N.Y. July 5, 2017).

1 About an hour after the United States made its request, the Ecuadorian Coast
2 Guard sent Form 3, indicating that the *El Vacan*'s claim to Ecuadorian nationality
3 could neither be confirmed nor denied and asking again for photographs.

4 Based on that response, the U.S. government concluded that the vessel was
5 without nationality, subjecting it to the jurisdiction of the United States pursuant
6 to the MDLEA. The U.S. boarding team arrested the four men who were on
7 board and sank the *El Vacan* as a navigational hazard.

8 **II. Procedural History**

9 On May 18, 2016, Alarcon Sanchez and Salinas Diaz were charged with
10 violating and conspiring to violate the narcotics trafficking provisions of the
11 MDLEA. Alarcon Sanchez and Salinas Diaz were subsequently extradited to the
12 United States from Colombia on July 11, 2016, and September 1, 2016,
13 respectively. Alarcon Sanchez, Salinas Diaz, and several other defendants moved
14 to dismiss the superseding indictment, principally on the grounds that the
15 MDLEA's jurisdiction over land-based conspirators violated the U.S.
16 Constitution and the MDLEA's text and, in any event, the *El Vacan* was not a
17 stateless vessel under the statute. The district court denied the motions. *United*
18 *States v. Aragon*, No. 15-Cr-292, 2017 WL 2889499 (S.D.N.Y. July 5, 2017).

1 Salinas Diaz argues that the district court erred in failing to dismiss the
2 superseding indictment because (1) Congress exceeded its legislative authority
3 under the Define and Punish Clause in enacting the MDLEA and (2) the *El Vacan*
4 was not on the high seas when the U.S. Navy interdicted it.

5 In reviewing the denial of a motion to dismiss an indictment, we review
6 the district court's findings of fact for clear error and its conclusions of law de
7 novo. *United States v. Bout*, 731 F.3d 233, 238 (2d Cir. 2013). Where, as here,
8 defendants challenge convictions based on unconditional guilty pleas, we
9 understand them to have "admit[ted] all of the elements" of their claims and to
10 have "waive[d] all challenges to the prosecution except those going to the court's
11 jurisdiction." *United States v. Yousef*, 750 F.3d 254, 258 (2d Cir. 2014) (internal
12 quotation marks omitted).

13 **I. Evidence of Statelessness**

14 Defendants attack the adequacy of their guilty pleas on the basis that the
15 government failed to establish that the *El Vacan* was a stateless vessel subject to
16 the jurisdiction of the United States.

1 **A. The MDLEA's Requirements**

2 The MDLEA prohibits specified drug trafficking activity “[w]hile on board
3 a covered vessel.” 46 U.S.C. § 70503(a). A “covered vessel” means, as relevant
4 here, “a vessel subject to the jurisdiction of the United States.” *Id.* § 70503(e)(1). A
5 vessel may be subject to the jurisdiction of the United States if it is “a vessel
6 without nationality.” *Id.* § 70502(c)(1)(A). A vessel is considered without
7 nationality if “the master or individual in charge makes a claim of registry that is
8 denied by the nation whose registry is claimed,” *id.* § 70502(d)(1)(A), or “the
9 claimed nation of registry does not affirmatively and unequivocally assert that
10 the vessel is of its nationality,” *id.* § 70502(d)(1)(C). A claim of registry may be
11 made in one of three ways: “(1) possession on board the vessel and production of
12 documents evidencing the vessel’s nationality . . . ; (2) flying its nation’s ensign
13 or flag; or (3) a verbal claim of nationality or registry by the master or individual
14 in charge of the vessel.” *Id.* § 70502(e). “The response of a foreign nation to a
15 claim of registry . . . is proved conclusively by certification of the Secretary of
16 State or the Secretary’s designee.” *Id.* § 70502(d)(2).

17 “Jurisdiction of the United States with respect to a vessel subject to [the
18 MDLEA] is not an element of an offense.” *Id.* § 70504(a). Rather, “[j]urisdictional

1 issues” that arise under the MDLEA “are preliminary questions of law to be
2 determined solely by the trial judge.” *Id.* We recently held that the MDLEA’s
3 jurisdictional language functions “not to confer subject matter jurisdiction on the
4 federal courts, but rather to specify the reach of the statute beyond the customary
5 borders of the United States.” *Prado*, 933 F.3d at 132. In *United States v. Van Der*
6 *End*, 943 F.3d 98 (2019), this Court observed that,

7 where there is no factual basis to find that the vessel on
8 which a defendant was apprehended was a vessel subject
9 to the jurisdiction of the United States, the defendant
10 may still be permitted to raise that issue on appeal even
11 after pleading guilty. That is because “a defective guilty
12 plea will not necessarily be deemed to waive all
13 objections to a conviction.”

14
15 *Id.* at 103 (quoting *Prado*, 933 F.3d at 151). This Court went on to explain, “when
16 the government’s proof that a vessel was subject to the jurisdiction of the United
17 States is lacking,” the defendant’s guilty plea is invalid. *Id.* at 103 (internal
18 quotation marks omitted).

19 Here, defendants did not challenge the validity of their guilty pleas in their
20 initial appellate briefs, although they did so in supplemental briefing following
21 our decision in *Van Der End*. The challenge fails because the government
22 satisfactorily proved United States jurisdiction over the *El Vacan*.

1 **B. Vessel without nationality**

2 The district court found that the government established that the *El Vacan*
3 was a vessel without nationality because (1) there were insufficient markings and
4 other identifying information on the vessel to put a reasonable official on notice
5 that Ecuador’s interests might be affected by the vessel’s interdiction, and (2)
6 Ecuadorian authorities responded that they could neither confirm nor deny the
7 vessel’s nationality.

8 The first ground, by itself, would not support a statelessness finding
9 because, in *Prado*, this Court held that in “the absence of indicia of registration
10 such as flying a nation’s flag, presenting registration papers, or a volunteered
11 assertion of national registration by the master,” the burden is on the boarding
12 party to inquire as to the vessel’s nationality. *Prado*, 933 F.3d at 131. But here the
13 boarding party made the required inquiry and, upon observing a small flag decal
14 or painting near the engine and being told by the purported captain that the *El*
15 *Vacan* was of Ecuadorian nationality with its home port in Puerto Manta,
16 Ecuador, U.S. officials sought verification from authorities in Ecuador, the
17 “claimed nation of registry.” 46 U.S.C. § 70502(d)(1)(C). This comported with
18 MDLEA statutory procedures. *Cf. Prado*, 933 F.3d at 132 (warning that boarding

1 party's inattention to MDLEA's statutory procedures can "virtually doom[] the
2 prosecution to failure at the investigation stage"). Those procedures also state
3 that the claimed nation of registry, in delivering its response, must communicate
4 to U.S. officials "by radio, telephone, or similar oral or electronic means," *see id.* §
5 70502(d)(2), and its failure to "affirmatively and unequivocally assert" that the
6 vessel is registered conclusively establishes statelessness under the statute, *see id.*
7 § 70502(d)(1)(C).

8 Alarcon Sanchez argues, as did the defendant in *Prado*, that the
9 government failed to adhere to the prescribed procedures. He argues that the
10 government presented insufficient evidence to demonstrate statelessness because
11 the United States cut off the process prematurely, depriving Ecuadorian officials
12 the chance to affirmatively and unequivocally assert anything about the *El Vacan*
13 without considering the additional information it requested—namely,
14 photographs of the vessel taken by U.S. officials.

15 The government argues that defendants lack standing to challenge the
16 adequacy of the interchange between the United States and Ecuador because the
17 relevant procedures, though now codified in United States law, derive from an
18 international treaty between sovereign nations.

1 We need not conclusively decide this question any more than we need
2 decide the exact quantum of information that U.S. officials must provide to the
3 claimed nation of registry, or whether they have an obligation to act in good faith
4 in seeking verification. We are satisfied that the information the government
5 provided Ecuadorian authorities about the *El Vacan* was sufficient to satisfy the
6 MDLEA and, specifically, 46 U.S.C. § 70502(d)(1)(C). Indeed, the U.S. Coast
7 Guard furnished all of the information that would have otherwise been captured
8 in a photograph of the *El Vacan*, *see supra*, a point all but conceded by Alarcon
9 Sanchez during oral argument.

10 The Ecuadorian Coast Guard responded to the verification request by
11 indicating that it could neither confirm nor deny the *El Vacan*'s claim to
12 Ecuadorian nationality. And, under the MDLEA, that response patently does not
13 qualify as an affirmative and unequivocal assertion that the *El Vacan* was of
14 Ecuadorian nationality. On this record, we conclude that the government
15 satisfied its burden to prove that the *El Vacan* was a "vessel without nationality"
16 as defined in 46 U.S.C. § 70502(d)(1)(C).

1 **II. MDLEA and land-based conspirators**

2 Alarcon Sanchez argues that the application of the MDLEA to his foreign
3 land-based conspiratorial conduct violates the Constitution’s Define and Punish
4 Clause and Due Process Clause. Before reaching these constitutional issues, we
5 briefly explain why the MDLEA’s text, structure, and purpose supports such
6 extraterritorial application.

7 The MDLEA prohibits specified drug trafficking activity by individuals
8 “[w]hile on board a covered vessel.” 46 U.S.C. § 70503(a). The MDLEA explicitly
9 provides that this substantive prohibition applies extraterritorially. *See id.*
10 § 70503(b). The MDLEA also imposes criminal liability on those “attempting or
11 conspiring to violate section 70503” — that is, attempting to engage in prohibited
12 drug trafficking activity on board a covered vessel or conspiring with others to
13 do so—and makes such persons “subject to the same penalties as provided for
14 violating section 70503.” *Id.* § 70506(b) (the “attempt-and-conspiracy provision”).

15 Alarcon Sanchez argues that when read together, these provisions allow a
16 person to be convicted of MDLEA conspiracy only when the person himself is
17 found on board a covered vessel, and not when his conduct is entirely land-

1 based. In support, he cites both the presumption against extraterritoriality and
2 the statutory text. Neither supports his argument.

3 The presumption against extraterritoriality is a canon of construction
4 instructing that “[w]hen a statute gives no clear indication of an extraterritorial
5 application, it has none.” *Morrison v. Nat’l Aust. Bank Ltd.*, 561 U.S. 247, 255
6 (2010). Even “when a statute provides for some extraterritorial application, the
7 presumption against extraterritoriality operates to limit that provision to its
8 terms.” *Id.* at 265. But in the context of ancillary crimes such as aiding and
9 abetting and conspiracy, it is “generally” recognized that “the extraterritorial
10 reach of [the] ancillary offense . . . is coterminous with that of the underlying
11 criminal statute.” *United States v. Ballestas*, 795 F.3d 138, 144 (D.C. Cir. 2015)
12 (internal quotation marks omitted) (alterations in original); *cf. United States v.*
13 *Hoskins*, 902 F.3d 69, 96–97 (2d Cir. 2018) (stating general rule but concluding it
14 did not apply to certain conspiracies in violation of Foreign Corrupt Practices Act
15 given specific statutory limitations).

16 Thus, Alarcon Sanchez concedes, as he must, that the extraterritorial
17 application of the MDLEA’s substantive provision extends to its conspiracy
18 provision. Nevertheless, he argues that the extraterritorial reach of both

1 provisions is somehow restricted by the locational limitation of “on board a
2 covered vessel” found in the substantive provision. Because the statement of
3 extraterritorial application is limited to the substantive offense, he argues, “[t]he
4 text and structure are most easily and naturally read as limiting the reach of the
5 statute to crimes,” whether substantive or conspiratorial, committed by
6 individuals “while on board covered vessels.” Appellant’s Br. at 14. In his view,
7 “Section 70506(b) merely fills a gap that would be left if someone on board a
8 vessel conspired with others on board but committed no substantive narcotics
9 crime,” Appellant’s Br. at 17, rather than sweep up “ordinary drug smugglers
10 who never left home and never compassed any harm to Americans or American
11 interests.” Appellant’s Br. at 8.

12 We do not read the MDLEA so narrowly. Most obviously, the attempt-
13 and-conspiracy provision does not mention covered vessels at all. It requires
14 only that the object of the conspiracy encapsulate conduct that violates one of the
15 specified narcotics trafficking prohibitions on a covered vessel. Persons who
16 knowingly and intentionally join in such a conspiracy need not themselves be on
17 board the covered vessel to be guilty under Section 70506. This construction is
18 supported by the D.C. Circuit’s decision *United States v. Ballestas*, 795 F.3d 138, on

1 which the district court relied. In *Ballestas*, the court rejected the same
2 interpretation here urged by Alarcon Sanchez because it would make the
3 MDLEA’s conspiracy-and-attempt provision merely redundant of its substantive
4 provision. *Id.* at 146. The court explained that if a person on a covered vessel
5 possessed the requisite intent to violate Section 70503, he would likely be guilty
6 of the underlying substantive offense—either through constructive possession,
7 *see United States v. Tinoco*, 304 F.3d 1088, 1123 (11th Cir. 2002), or aiding and
8 abetting, *see* 18 U.S.C. § 2(a). A court will not construe a statutory provision to
9 render it “insignificant, if not wholly superfluous.” *Duncan v. Walker*, 533 U.S.
10 167, 174 (2001); *see generally United States v. Epskamp*, 832 F.3d 154, 164 (2d Cir.
11 2016) (rejecting narrow construction of extraterritoriality provision in 21 U.S.C. §
12 959 because it would cause “redundancy within the federal statutory
13 framework”).

14 And, as the government points out, construing the MDLEA’s attempt-and-
15 conspiracy provision to reach conspirators who remain onshore is consistent
16 with traditional notions of conspirator liability. It is a well-settled rule “in the
17 law of conspiracy [that] the overt act of one partner in crime is attributable to
18 all.” *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). So, even if the MDLEA

1 does require an overt act of the conspiracy to take place on board a covered
2 vessel, the acts of the on-board co-conspirator are nonetheless attributable to the
3 land-based co-conspirator. It is not necessary that all conspirators be on board a
4 covered vessel for each to be guilty of conspiring to violate Section 70503. *See*
5 *Ballestas*, 795 F.3d at 146.

6 Our construction also comports with the MDLEA's underlying purpose.
7 Congress specifically recognized that "trafficking in controlled substances
8 aboard vessels is a serious international problem, is universally condemned, and
9 presents a specific threat to the security and societal well-being of the United
10 States." 46 U.S.C. § 70501. In 1980, Congress enacted the MDLEA's predecessor
11 statute to close a loophole that had hampered the prosecution of drug smugglers
12 apprehended on the high seas absent difficult-to-obtain evidence that the drugs
13 were destined for the United States. S. Rep. No. 96-855, at 1-2 (1980). As the
14 Senate Report explains:

15 In most cases, evidence to prove importation or
16 conspiracy beyond a reasonable doubt is impossible to
17 obtain. Thus, in most cases the Coast Guard is able to
18 seize and confiscate the ship and the illegal drugs, but the
19 government is not able to prosecute the crew *or others*
20 *involved in the smuggling operation*. Such actions have little
21 deterrent effect on the crews or *the trafficking*

1 *organizations*. In the highly lucrative trade in illegal
2 drugs, such occasional seizures are considered a part of
3 the cost of doing business.

4
5 *Id.* (emphasis added).

6 Alarcon Sanchez’s reading of the attempt-and-conspiracy provision would
7 immunize many persons “involved” in MDLEA-precluded smuggling
8 operations, among them, those decisionmakers who are central to the conspiracy
9 but who never physically step foot on a vessel. He posits that Congress added
10 the MDLEA’s inchoate violations to reach the vessel “engineer that was
11 responsible for maintaining the tanks containing cocaine,” Appellant’s Br. at 17,
12 rather than the higher-ups that engineered the shipment in the first place. This
13 undercuts Congress’s findings on the scope and gravity of the threat posed by
14 drug trafficking aboard vessels. *See e.g., United States v. Ali*, 718 F.3d 929, 940
15 (D.C. Cir. 2013) (“[I]t is self-defeating to prosecute those [persons] desperate
16 enough to do the dirty work but immunize the planners, organizers, and
17 negotiators who remain ashore.”). Like the D.C. Circuit, we decline to construe
18 Section 70506 so narrowly as to allow “[d]rug kingpins and other conspirators
19 who facilitate and assist in carrying out [MDLEA] trafficking schemes [to] fall

1 beyond the reach of the statute, compromising the overriding intent of Congress
2 in enacting it.” *Ballestas*, 795 F.3d at 145.

3 In sum, based on the MDLEA’s purpose, Congress’s decision to apply the
4 MDLEA’s substantive provisions “outside the territorial jurisdiction of the
5 United States,” and the nature of a MDLEA conspiracy offense relative to its
6 substantive objective, we hold that Section 70506(b) encompasses conspiratorial
7 conduct on shore in a foreign country.

8 **III. Define and Punish Clause**

9 Alarcon Sanchez also argues that the MDLEA is unconstitutional as
10 applied to his conduct because he never set foot on the *El Vacan* during the
11 charged conspiracy.³ Article I, section 8, clause 10 of the U.S. Constitution states:
12 “The Congress shall have Power . . . To define and punish Piracies and *Felonies*
13 *committed on the high Seas*, and Offences against the Law of Nations.” U.S. Const.
14 art I, § 8, cl. 10 (emphasis added). Alarcon Sanchez does not dispute that the

³ In *Class v. United States*, 138 S. Ct. 798, 805 (2018), the Supreme Court held that a criminal defendant who enters an unconditional guilty plea may still appeal his conviction on the ground that the statute of conviction is unconstitutional. Pursuant to the holding in *Class*, defendants have a right to raise on appeal both as-applied and facial constitutional challenges to the MDLEA.

1 “Felonies” part of the Define and Punish Clause supports Congress’s enactment
2 of the MDLEA. *See United States v. Matos-Luchi*, 627 F.3d 1, 3 (1st Cir. 2010)
3 (recognizing Congress to have invoked its constitutional power under Define
4 and Punish Clause to enact MDLEA). Instead, he argues that, like the MDLEA,
5 the Define and Punish Clause contains locational language: the high seas.
6 Because Alarcon Sanchez was never on the high seas in connection with the
7 charged conspiracy, he argues that the MDLEA cannot constitutionally be
8 construed to reach his conduct.

9 The government offers two arguments in response. First, it contends that
10 “settled principles of conspiracy law” impute the conduct of the four
11 conspirators on the high seas to the other conspirators on land. Appellee’s Br. at
12 29–30. Second, it argues that the Constitution’s Necessary and Proper Clause
13 supports the MDLEA’s application to Alarcon Sanchez because Congress’s
14 regulation of drug trafficking on the high seas would be undermined if it could
15 not reach conspiratorial conduct in a foreign territory that is integral to that
16 trafficking. Because we agree with the government’s second argument, we do not
17 address its first.

1 The Necessary and Proper Clause provides that “Congress shall have
2 Power . . . To make all Laws which shall be necessary and proper for carrying
3 into Execution the foregoing Powers, and all other Powers vested by this
4 Constitution in the Government of the United States, or in any Department or
5 Officer thereof.” U.S. Const. art. I, § 8, cl. 18. “[T]he Necessary and Proper Clause
6 makes clear that the Constitution’s grants of specific federal legislative authority
7 are accompanied by broad power to enact laws that are convenient, or useful or
8 conducive to the authority’s beneficial exercise.” *United States v. Comstock*, 560
9 U.S. 126, 133-34 (2010) (internal quotation marks and citations omitted). “[T]he
10 word necessary does not mean absolutely necessary.” *Id.* at 134 (internal
11 quotation marks and citation omitted). Rather, “in determining whether the
12 Necessary and Proper Clause grants Congress the legislative authority to enact a
13 particular federal statute, we look to see whether the statute constitutes a means
14 that is rationally related to the implementation of a constitutionally enumerated
15 power.” *Id.* “The relevant question is simply whether the means chosen are
16 reasonably adapted to the attainment of a legitimate end under the [relevant
17 enumerated power].” *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, *J.*, concurring
18 in the judgment) (internal quotation marks omitted).

1 We agree with the government that prosecuting MDLEA conspirators who
2 are not on the high seas is a means that is rationally related to the legitimate end
3 of prosecuting MDLEA conspirators who are on the high seas. *See* 46 U.S.C.
4 § 70501 (congressional findings that “trafficking in controlled substances aboard
5 vessels is a serious international problem, [and] is universally condemned”). Our
6 conclusion is reinforced by recognition that the conspirators most likely to
7 control, direct, finance, and profit from such drug trafficking are more apt to
8 remain on land than to venture on the seas. *See Ballestas*, 795 F.3d at 145; *cf. Ali*,
9 718 F.3d at 940. In order reasonably to address the serious problem of drug
10 trafficking on the high seas, it is, therefore, necessary and proper for Congress to
11 confer federal jurisdiction over all conspirators, both those who go on the seas
12 and those who remain on land.

13 In any event, our task is not to decide whether punishing on-land
14 conspirators actually advances Congress’s legitimate objective of punishing drug
15 traffickers on the high seas, because “the choice of means to that end presents a
16 question primarily addressed to the judgment of Congress.” *See Burroughs v.*
17 *United States*, 290 U.S. 534, 547 (1934). “If it can be seen that the means adopted
18 are really calculated to attain the end, the degree of their necessity, the extent to

1 which they conduce to the end, the closeness of the relationship between the
2 means adopted, and the end to be attained, are matters for congressional
3 determination alone.” *Id.* at 547–48. In light of this deference, we are satisfied that
4 Congress has not exceeded its authority under the Necessary and Proper Clause
5 in extending the MDLEA to cover the conduct of land-based conspirators.

6 **IV. Due Process**

7 Alarcon Sanchez argues that the Due Process Clause requires some nexus
8 or connection between the defendant and the United States in order for the
9 MDLEA to cover land-based conspirators.⁴ As a general rule the extraterritorial
10 application of federal criminal law requires such a nexus so that a statute’s
11 application is not arbitrary or fundamentally unfair. *See Epskamp*, 832 F.3d at 168.
12 However, we also held in *Van Der End* that no such nexus is required when
13 MDLEA violations occur on stateless vessels because “MDLEA prosecutions
14 involving stateless vessels do not present the same concerns that are present in

⁴ We noted in *Van Der End* that this type of Due Process challenge to MDLEA prosecutions “is a purely legal question on which the government’s constitutional power to prosecute [the defendant] turns,” 943 F.3d at 105, and therefore, we may consider the argument in spite of a defendant’s unconditional guilty plea.

1 the extraterritorial application of typical criminal statutes.” 943 F.3d at 105. As

2 we further explained:

3 That is because stateless vessels are international pariahs that
4 subject themselves to the jurisdiction of all nations *solely* as a
5 consequence of the vessel’s status as stateless. Because stateless
6 vessels do not fall within the veil of another sovereign’s
7 territorial protection, all nations can treat them as their own
8 territory and subject them to their laws. Thus, when a vessel is
9 subject to the jurisdiction of another nation, a person trafficking
10 drugs on board would have a legitimate expectation that
11 because he has subjected himself to the laws of one nation,
12 other nations will not be entitled to exercise jurisdiction
13 without some nexus. The same is not true when a defendant
14 attempts to avoid the law of *all* nations by travelling on a
15 stateless vessel.

16
17 *Id.* at 105-06 (internal quotation marks and citations omitted).

18
19 In reaching this conclusion, we held that United States prosecution of
20 persons on stateless vessels was neither arbitrary nor unfair. Not arbitrary,
21 because any nation can exercise jurisdiction over such vessels. And not unfair,
22 because persons who traffic drugs do so with the imputed knowledge that they
23 are risking prosecution— “somewhere.” *Id.* at 106.

24 The government maintains that *Van Der End* controls, and no nexus to the
25 United States is required because the *El Vacan* was a stateless vessel. But this case
26 is not on all fours with *Van Der End*. First, in *Van Der End* we specifically

1 declined to decide “what the Due Process Clause may require before persons *who*
2 *are not on board a vessel without nationality*” can be prosecuted under the MDLEA.
3 *Id.* at 105 n.4 (emphasis added). Second, in *Van Der End* we said that a nexus was
4 not required for those on stateless vessels because the seafaring defendants had
5 forfeited their protections under international law and were therefore fair game
6 for any nation to “subject them to their laws.” *Id.* at 105 (internal quotation marks
7 and citation omitted). The same cannot be said about these defendants, who were
8 obviously subject to Colombia’s jurisdiction and laws—indeed, the United States
9 relied on the Colombian government in their apprehension and extradition. But
10 even if we assume that land-based conspirators who are not physically on board
11 a stateless vessel can raise a nexus challenge to a MDLEA prosecution, that does
12 not help defendants here.

13 Our precedent stresses that it is a heavy burden for defendants to
14 demonstrate a due process violation in the application of a statute like the
15 MDLEA, which indisputably applies extraterritorially. *Epskamp*, 832 F.3d at 168.
16 Defendants cannot carry that heavy burden here. The due process requirement
17 that there be a nexus between the defendant and the United States ensures that
18 application of any such statute to that defendant “would not be arbitrary or

1 fundamentally unfair.” *Id.*; see *United States v. Al Kassar*, 660 F.3d 108, 118–19 (2d
2 Cir. 2011). “For non-citizens acting entirely abroad, a jurisdictional nexus exists
3 when the aim of that activity is to cause harm inside the United States or to U.S.
4 citizens or interests.” *Epskamp*, 832 F.3d at 168 (internal quotation marks
5 omitted). And, as we noted in *Van Der End*, “[f]air warning does not require that
6 the defendants understand that they could be subject to criminal prosecution in
7 *the United States* so long as they would reasonably understand that their conduct
8 was criminal and would subject them to prosecution somewhere.” *Van Der End*,
9 943 F.3d at 106 (internal quotation marks and citation omitted).

10 Applying these principles to the facts here, we conclude that Alarcon
11 Sanchez’s MDLEA prosecution was neither arbitrary nor fundamentally unfair.
12 By conspiring with an international drug-trafficking organization to ship over
13 500 kilograms of cocaine on the high seas, using a U.S.-registered vessel and
14 procuring false visas in the United States, Alarcon Sanchez “cause[d] harm” to
15 the very U.S. interests animating the MDLEA: curtailing international drug
16 trafficking on the high seas, which Congress found to be “a specific threat to the
17 security and societal well-being of the United States.” 46 U.S.C. § 70501. There
18 can be no doubt that Alarcon Sanchez and his co-conspirators were aware that

1 their scheme to transport cocaine on the high seas was illegal and could result in
2 their criminal prosecution “somewhere.” *Al Kassar*, 660 F.3d at 119 (“The
3 defendants were not ensnared by a trap laid for the unwary.”). Accordingly, in
4 light of the conspiracy’s nexus to United States interests in eliminating drug
5 trafficking on the high seas, and the fair warning we ascribe to those that
6 participate in such conspiracies, we conclude that due process was not offended
7 by defendants’ MDLEA prosecutions.

8 **V. Remaining arguments**

9 Salinas Diaz argues that the MDLEA is facially unconstitutional because
10 Congress exceeded its legislative authority in its enactment and that the statute is
11 unconstitutional as applied to defendants because the *El Vacan* was not on the
12 high seas when the U.S. Navy interdicted it.

13 **A. Congress’s authority to enact the MDLEA**

14 Congress has the authority “[t]o define and punish Piracies and Felonies
15 committed on the high Seas.” U.S. Const. art, I, § 8, cl. 10. “The clause
16 encompasses three distinct powers: (i) to define and punish piracy; (ii) to define
17 and punish felonies committed on the high seas; and (iii) to define and punish
18 offenses against the Law of Nations.” *Ballestas*, 795 F.3d at 146-47. Salinas Diaz

1 argues that the MDLEA is unconstitutional on its face because Congress lacked
2 the constitutional power to enact it. But he has failed to specify any authority
3 supporting his position. In the MDLEA, Congress punishes specified drug-
4 trafficking activity on the high seas, which falls squarely within its constitutional
5 power to punish felonies on the high seas. *See, e.g., United States v. Estupinan*, 453
6 F.3d 1336, 1338–39 (11th Cir. 2006); *United States v. Moreno-Morillo*, 334 F.3d 819,
7 824 (9th Cir. 2003); *United States v. Ledesma-Cuesta*, 347 F.3d 527, 531-32 (3d Cir.
8 2003). Salinas Diaz’s facial challenge is meritless.

9 **B. High Seas**

10 Finally, Salinas Diaz argues, in substance, that applying the MDLEA to a
11 prosecution in connection with the *El Vacan* is unconstitutional because the
12 vessel was not on the “high seas” when the U.S. Navy stopped it. We have
13 previously considered that term as it appears in the Death on the High Seas Act,
14 now codified at 46 U.S.C. § 30301 *et seq.* *See In re Air Crash Off Long Island, N.Y., on*
15 *July 17, 1996*, 209 F.3d 200, 205-15 (2d Cir. 2000). We concluded then that “high
16 seas” means those beyond a nation’s territorial waters. *Id.* at 205. Under current
17 international law, a nation’s territorial waters may extend “up to a limit not
18 exceeding 12 nautical miles.” U.N. Convention on the Law of the Sea art. 3,

1 *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397. At the founding, the United
2 States's territorial waters extended "roughly three miles." *In re Air Crash*, 209
3 F.3d at 205. Here, the *El Vacan* was 132 nautical miles off the coast of Costa Rica.
4 That distance is comfortably beyond Costa Rica's territorial waters as the framers
5 would have understood the term and under current international law.
6 Accordingly, Salinas Diaz's argument fails.

7 CONCLUSION

8 For the foregoing reasons, we AFFIRM the judgment of the district court.