No. 15-1204

**IN THE**
# Supreme Court of the United States

DAVID JENNINGS, *et al.*,

*Petitioners*,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF OF PROFESSORS OF CONSTITUTIONAL, IMMIGRATION, AND ADMINISTRATIVE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Dennis B. Auerbach
*Counsel of Record*
David M. Zionts
Philip J. Levitz
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
dauerbach@cov.com
(202) 662-6000

*Counsel for Amici Curiae*

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are ten leading professors of constitutional law, immigration law, and administrative law. *Amici* have substantial expertise related to the due process rights of noncitizens. Several *amici* have published articles and submitted briefs in prior cases in this Court on that topic. *Amici* have a professional interest in ensuring that the Court is fully informed of the jurisprudence and history relevant to this case, which addresses fundamental questions related to the due process rights of noncitizens.

Specifically, *amici curiae* submit this brief to address the Government's reading of this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Government relies on *Mezei* to argue that arriving noncitizens have no due process rights with respect to their prolonged detention. This brief shows that such an overly broad reading of *Mezei* is not justified: it is inconsistent with the history of constitutional and immigration law before *Mezei*; it is undermined by the development of these bodies of law since *Mezei* was decided; and it is not compelled by the *Mezei* opinion itself.

*Amici* are:

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed with the Clerk letters granting blanket consent to the filing of amicus briefs.

- Erwin Chemerinsky, Dean and Distinguished Professor of Law, University of California, Irvine School of Law;
- Adam Cox, Robert A. Kindler Professor of Law, New York University School of Law;
- Jonathan Hafetz, Professor of Law, Seton Hall University School of Law;
- Aziz Huq, Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School;
- Jerry Mashaw, Sterling Professor of Law Emeritus and Professorial Lecturer, Yale University;
- Hiroshi Motomura, Susan Westerberg Prager Professor of Law, University of California, Los Angeles School of Law;
- Gerald Neuman, J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School;
- David Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School;
- Stephen Vladeck, Professor of Law, The University of Texas at Austin School of Law; and
- Cristina Rodríguez, Leighton Homer Surbeck Professor of Law, Yale Law School.[2]

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[2] Institutional affiliations are provided for identification purposes only.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Government relies on *Mezei* to support its position that arriving noncitizens may be held in prolonged — and indefinite — detention, without the right to a bond hearing. In particular, the Government cites *Mezei*'s statement that, for noncitizens "on the threshold of initial entry," "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); Pet. Br. 19.

While *Mezei* — a case decided amid the national security concerns of the early Cold War — is often cited with *Knauff* for the proposition that entering noncitizens have no due process rights with respect to their detention — or perhaps at all — that reading paints with far too broad a brush. Read in its historical context, *Mezei* (like *Knauff*) holds only that the Government is owed great deference in the decision *to admit or exclude* noncitizens. It should not be construed to hold that entrants have no due process right to be free from prolonged confinement, let alone that such individuals have no due process rights at all. Such individuals cannot be treated in a manner that violates this nation's basic constitutional norms.

The position that due process does not apply to arriving noncitizens had little or no precedent in the law before *Mezei*. Indeed, a number of pre-*Mezei* cases specifically held that due process entitles noncitizens in exclusion proceedings to a fair hearing, while other pre-*Mezei* decisions held that the Due Process Clause imposed constitutional limits on

the detention of excludable noncitizens. In these cases, the Court did not recognize sharp distinctions between noncitizens already admitted to the country and those who had not yet entered. Rather, the Court treated these groups as essentially the same for due process purposes and held that *both* groups must be afforded basic procedural fairness.

The overly broad reading of *Mezei* that the Government advances is also inconsistent with the Court's evolving jurisprudence after that case was decided. In subsequent decades, the Court has applied a flexible, functional approach to the extraterritorial reach of the Constitution, which counsels against a bright-line rule that arriving noncitizens are completely outside the protections of the Constitution. The Court has also consistently recognized strict limits on prolonged detention in a variety of civil contexts, including immigration, based on substantive due process. Further, the Court has expanded procedural due process protections under its flexible, balancing approach, encompassing individual interests far less weighty than freedom from prolonged or indefinite detention. These precedents all strongly support the proposition that, while arriving noncitizens may not be entitled to *all* of the process that citizens enjoy, they still are entitled to some, including to procedural protections against indefinite confinement.

Moreover, the Court's recent cases underscore that there is a critical analytical distinction between the Government's power to *exclude* and its power to *detain*. *Mezei* must be construed in the context of these later decisions, which emphasize the serious constitutional problems that prolonged civil deten-

tion presents, both in the immigration context and elsewhere. Even if arriving noncitizens were deemed entirely to lack due process rights with respect to the Government's decision to admit or exclude them, it does not follow that such individuals can be *detained* without basic procedural safeguards. Where, as here, a fundamental liberty interest like freedom from prolonged detention is at stake, entering noncitizens must be afforded some process to contest their continuing confinement.

For these reasons, the Court should reject a reading of *Mezei* that would leave arriving noncitizens either without rights with respect to their detention or wholly beyond the Constitution's reach. The Court should affirm that arriving noncitizens, like the Respondent class members seeking asylum based on a demonstrated credible fear of persecution, cannot be deprived of their liberty for a prolonged period without a meaningful opportunity to be heard.

## ARGUMENT

### I. Pre-*Mezei*, Noncitizens Seeking Admission Were Entitled To Due Process.

The Court's pre-*Mezei* jurisprudence militates against the broad reading of the case advanced by the Government here. In the years leading up to *Mezei* and *Knauff*, this Court treated arriving noncitizens and noncitizens inside the United States similarly for due process purposes. For *all* noncitizens, the Government's "power to lay down general rules" governing entry to the United States, even if "plenary," was not understood to include the "power to be arbitrary or to authorize administrative officials to be arbitrary." Henry M. Hart, *The Power of Congress*

*to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390-91 (1953). Neither did it prevent the federal courts from ensuring observance of the basic "constitutional guarantee of due process." *Id.*

The relevant history of this Court's due process jurisprudence begins with two decisions from the 1890s, both cited in *Mezei*: *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *Nishimura Ekiu* upheld an executive decision to exclude a Japanese noncitizen, and *Fong Yue Ting* upheld a decision without judicial process to expel a Chinese noncitizen. In each case, the Court rejected the noncitizen's claim that the exclusion and expulsion procedures violated due process. The Court concluded that, "although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet congress might intrust the final determination of those facts to an executive officer; and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency." *Fong Yue Ting*, 149 U.S. at 713 (citing *Nishimura Ekiu*, 142 U.S. at 660).

The Court's conclusion in the early 1890s that exclusion and expulsion decisions could be entrusted solely to executive branch officials was not based on a conclusion that arriving noncitizens lack due process rights. Nor did it reflect something exceptional about the treatment of immigration decisions made by federal officials. Instead, the holdings in *Nishi-*

*mura Ekiu* and *Fong Yue Ting* were the product of prevailing administrative law and separation of powers principles of their era.

When *Nishimura Ekiu* was decided in 1892, the requirements of due process were intimately linked to nineteenth century separation-of-powers thinking. Characteristic of its era, the decision was based on formal notions about the separation of judicial and executive functions in the constitutional order. As explained in an important article regarding the development of modern administrative law, "a framework that was used throughout the nineteenth century . . . separate[d] matters that required 'judicial' involvement from matters that the political branches could conclusively adjudicate on their own." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 564 (2007); *see also* Jerry L. Mashaw, *Due Process in the Administrative State* (1985). In other words, some matters were considered judicial, and others executive. The former had to conform to strict procedural rules regarding the presentation and appropriate consideration of evidence — requiring, in essence, a common law trial. But the latter could be entrusted to executive discretion without any particular requirement of procedural fairness.

In line with this understanding, the Court in *Nishimura Ekiu* held that "the final determination of those facts [governing exclusion] may be entrusted by congress to executive officers," 142 U.S. at 660, because it concluded that exclusion and expulsion decisions should not be considered judicial questions. This separation-of-functions reasoning is made clear by the cases on which the Court relied in rejecting

the claim that due process required judicial process.[3] None of the cases on which the Court relied are immigration cases. Instead, they are cases on issues ranging from patents to customs, in which the Court was required to decide whether a claim involved a private right that must be heard by an Article III tribunal or, instead, a public right that could be entrusted to executive officials. *See id.* at 660.[4]

Thus, the due process claims rejected in *Nishimura Ekiu* and *Fong Yue Ting* failed because of then-prevailing views about the separation of judicial

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[3] Thus, as an influential 1940 study of administrative procedures in immigration law recognized: "The only standards of procedure familiar to courts and lawyers of the [1890s] were standards of judicial procedure. The inappropriateness of shackling administrative action — particularly in the fluid exclusionary process — with all the restraints of a civil lawsuit was manifest. . . . The alternative to holding inapplicable the only standards which were familiar, however, seemed at first to be a holding that no standards were applicable." U.S. Dep't of Labor, Sec'y of Labor's Comm. on Admin. Procedure, Report: The Immigration & Naturalization Service 46 (May 17, 1940).

[4] The cases *Nishimura Ekiu* cites are *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (replevin); *Phila. & Trenton R.R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448 (1840) (patent); *Benson v. McMahon*, 127 U.S. 457 (1888) (extradition); *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890) (extradition); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (customs); and *Hilton v. Merritt*, 110 U.S. 97 (1884) (customs). That said, the decision in *Nishimura Ekiu* to treat exclusion decisions as executive rather than judicial matters is related to the Court's earlier holding, in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), that a noncitizen's right to reside would not be treated as analogous to traditional common law property rights. *See id.* at 602-03 (starkly contrasting treaties regulating noncitizens' rights in real property with treaties regulating noncitizens' rights of residence).

and executive functions in the nascent administrative state — not because the Court concluded that noncitizens in the exclusion or expulsion context had no due process rights, or no constitutional rights at all. In fact, *Nishimura Ekiu* itself held that noncitizens, even those stopped at the border, possessed constitutional rights: it concluded that a noncitizen "prevented from landing by [an] officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Id.* at 660.[5]

Just a few years after *Nishimura Ekiu* and *Fong Yue Ting*, the Court specifically emphasized that noncitizens were entitled to due process, even within the immigration enforcement context. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court struck down a federal immigration statute requiring that some unlawful immigrants be put to hard labor prior to their deportation. The Court held that the Bill of Rights protected noncitizens — even those unlawfully present in the United States — from punishment by the federal government without process consistent with the Fifth and Sixth Amendments. *See id.* at 237 ("[T]o declare unlawful resi-

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[5] As the Court has explained, habeas review conducted during this period was required by the Constitution, because Congress had enacted finality provisions whose effect was to preclude review "*except insofar as it was required by the Constitution*." *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953) (emphasis added); *see also INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001) (confirming that review during the so-called "finality period" described in *Heikkila* reflected the minimum review required by the Suspension Clause).

dence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.").

Within a decade of its decision in *Nishimura Ekiu*, the Court began to retreat from its earlier categorical conclusion that exclusion and deportation decisions could be made without any judicial process, and perhaps without any particular kind of hearing. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Court explained that it "has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *Id.* at 100. The *Yamataya* Court expressly recognized that the Due Process Clause demands some kind of hearing for noncitizens facing removal, even when they had reached the United States just four days earlier. According to the Court, the due process required for such individuals must, at a minimum, include notice of the charges against them and an opportunity to be heard. *Id.* at 94, 100-01.

The approach taken by the *Yamataya* Court reflected changing attitudes regarding administrative law in the early twentieth century. At the time *Yamataya* was decided, the nineteenth century views of administrative law on which *Nishimura Ekiu* was based were under pressure. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*,

11 Colum. L. Rev. 939, 942 (2011) ("Not until the early decades of the twentieth century did courts embrace the salient features of the appellate review model [of administrative law], which allowed decisional authority to be shared between agencies and courts."); *see also* Jerry L. Mashaw, *Creating the Administrative Constitution* 65-78 (2012) ("[I]t would take more than a century for the [John] Marshallian idea of 'discretion' as 'political' and outside judicial jurisdiction to give way to a more modern understanding of the reach of judicial review of administrative action."). Reflecting these changing perspectives, the *Yamataya* Court departed from the approach typified by *Nishimura Ekiu* of categorically separating judicial decisions that are subject to procedural protections from executive decisions that are not. Instead, the Court explained that the due process owed in executive decisions should be calibrated to the interests at stake. The process due must "be appropriate to the nature of the case upon which . . . officers are required to act." *Yamataya*, 189 U.S. at 101. Once the Court had discarded the categorical separation of judicial and executive decision-making spheres, it made clear that deporting a noncitizen, even one present for just four days, implicates sufficiently important interests to require basic due process protections.

Critically for present purposes, in the years following *Yamataya*, the Court applied the same reasoning to exclusion statutes, construing them to require a fair hearing and to prohibit arbitrary administrative action. For example, in *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), the Court granted relief in an exclusion case on the ground that "the

hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law." *Id.* at 459. Similarly, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court reversed a decision excluding noncitizens because an administrative official had exceeded the scope of his authority, which the Court held was "no better than a decision without a fair hearing." *Id.* at 9-10. Likewise, in *Tang Tun v. Edsell*, 223 U.S. 673 (1912), the Court reviewed an exclusion decision to ensure that the authority of the officers rendering the determination was "fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." *Id.* at 681-82. And in *Chin Yow v. United States*, 208 U.S. 8 (1908), the Court granted habeas relief from an exclusion order because the Government could not satisfy the "presupposition that the [exclusion] decision was after a hearing in good faith." *Id.* at 12; *cf. Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912) ("A series of decisions in this court has settled that such [exclusion and deportation] hearings before executive officers may be made conclusive *when fairly conducted*." (emphasis added)).

While some of these early fair-hearing cases involved claims by arriving passengers that they were citizens, neither the Court's logic nor its language was limited to U.S. citizenship. *Low Wah Suey*, for example, explained that the executive officials were prohibited from "depriv[ing] the *alien* of a fair, though summary, hearing." 225 U.S. at 472 (emphasis added). Moreover, in subsequent cases the Court treated the fair-hearing principles as ap-

plicable in immigration proceedings not involving citizenship claims. *See, e.g.*, *United States ex rel. Tisi v. Tod*, 264 U.S. 131 (1924). Lower courts did likewise. *See, e.g.*, *Hughes v. United States ex rel. Licata*, 295 F. 800, 802 (3d Cir. 1924) (holding, in an exclusion case involving a noncitizen, that under *Chin Yow* "[f]ederal courts have jurisdiction to determine . . . whether, in the circumstances, the alien has been denied a proper hearing and a fair trial"); *Louie Poy Hok v. Nagle*, 48 F.2d 753 (9th Cir. 1931) (granting relief from an exclusion order challenged on the ground that "the [noncitizen] was not accorded a fair hearing (and that the findings and excluding decision were not supported by substantial evidence)").

As the pre-*Mezei* cases suggest, the Court did not recognize sharp distinctions between noncitizens already admitted to the country and those who had not yet entered. To the contrary, the Court treated these groups as largely interchangeable for due process purposes and held that *both* groups are entitled to basic procedural fairness. This is best illustrated by *Low Wah Suey*, *supra*, where the Court applied the same due process analysis to "laws forbidding aliens or classes of aliens *from coming within the United States*," and those "provid[ing] for the *expulsion* of aliens or classes of aliens from its territory." 225 U.S. at 467-68 (emphasis added); *see also Chin Yow*, 208 U.S. at 12 (subjecting "statutes purport[ing] to exclude aliens" to due process-type review).

Leading commentators at the time of these decisions recognized that they established a general principle that noncitizens, whether entering the United States for the first time or not, are entitled to the basic guarantees of due process. A respected ear-

ly twentieth century immigration treatise explained that "[t]he [due process] principles" applicable to noncitizens "are equally applicable to aliens, who, *not having been admitted to the United States* are detained for deportation by executive officers." Clement L. Bouvé, *A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States* 139-41 (1912) (emphasis added).

A major government report on immigration prepared in 1940 as part of a larger project examining principles of administrative procedure echoed this conclusion. *See* U.S. Dep't of Labor, Sec'y of Labor's Comm. on Admin. Procedure, Report: The Immigration & Naturalization Service (May 17, 1940). The report documented the rise during the first decades of the twentieth century of a general principle — applicable in both exclusion and expulsion proceedings — that immigration procedures must be fair and reasonable. *See id.* at 45. Moreover, it characterized that requirement as "nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu*, *Fong Yue Ting* and immediately succeeding cases." *Id.* In the time period leading up to *Knauff* and *Mezei*, therefore, courts and commentators widely recognized that exclusion and deportation decisions required administrative hearings consistent with fundamental fairness (as well as judicial oversight) to satisfy due process.[6]

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[6] Moreover, as the Court held in *Wong Wing*, lower courts continued to understand the Due Process Clause to protect more than just a noncitizen's right to a hearing on the question whether she would be excluded or deported. In a number of (continued…)

## II. Post-*Mezei* Developments In The Law Confirm That Detention Of Entering Noncitizens Must Comport With Due Process.

This Court's decisions since *Mezei* have only made clearer that due process should apply to noncitizens on the threshold of entry, especially when deprivation of physical liberty is at issue. *First*, the Court has extended the Constitution's protections to noncitizens well beyond the nation's borders, an approach at odds with holding that arriving noncitizens are unprotected by the Due Process Clause. *Second*, the Court has developed important limits on civil confinement — including in the immigration context — reinforcing its longstanding view that a person's physical confinement at the hands of the Government implicates fundamental liberty interests protected by the Due Process Clause. *Third*, the Court has completed the due process revolution sparked by

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cases, for example, lower courts specifically limited the length of arriving noncitizens' detention on due process grounds. *See, e.g.*, *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) (power to exclude and deport does not include power to detain indefinitely); *Staniszewski v. Watkins*, 80 F. Supp. 132, 135 (S.D.N.Y. 1948) (ordering release of noncitizen seaman detained at Ellis Island for almost seven months); *In re Krajcirovic*, 87 F. Supp. 379, 382 (D. Mass. 1949) (limiting immigration detention of noncitizen seized at the border to two months from date of court's exclusion decision on ground that "wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law"); *United States ex rel. Chu Leung v. Shaughnessy*, 88 F. Supp. 91, 92 (S.D.N.Y. 1950) (suggesting reasonable limit on time noncitizen may be detained even where exclusion not possible to effectuate).

the growth of the administrative state in the early twentieth-century, cementing procedural due process protections for legal interests far less compelling than the fundamental liberty interest in being free from prolonged detention.

### A. This Court's Modern Approach To Extraterritoriality Counsels Against Withholding Protection From Detained Entrants.

Recent decisions regarding the Constitution's extraterritorial scope make clear that noncitizens on the threshold of entry cannot, consistent with this Court's case law, be deemed wholly outside the protection of the Due Process Clause.

Since *Mezei*, the Court has repeatedly rejected any bright-line rule making constitutional protections categorically inapplicable to persons outside the nation's borders. Instead, the Court assesses questions of extraterritorial application in a functional manner, an approach that cannot be squared with a blanket rule that inadmissible noncitizens are at the unfettered whim of executive officials.

Shortly after *Mezei*, the Court expressly rejected the theory that constitutional protections stop at the water's edge. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court recognized that the constitutional right to jury trial encompassed those abroad. *See, e.g.*, *id.* at 8 (plurality opinion) ("This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States.").

In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the majority held that the Fourth

Amendment did not apply to the seizure of a noncitizen's property occurring entirely abroad. The Court, however, expressly contrasted the Fourth Amendment, which it held applies only to "the people" who are part of the national community, with the Fifth Amendment, which applies more broadly to all "persons." *Id.* at 265-66. Justice Kennedy's controlling opinion embraced a functional test, asking whether it would be "impracticable and anomalous" for the Fourth Amendment's requirements to apply in the relevant circumstances. *Id.* at 278 (Kennedy, J., concurring).

More recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), Justice Kennedy, now writing for the majority, expanded upon the "impractical and anomalous" test. In holding that the Constitution's Suspension Clause, Art. I, § 9, cl. 2, applies to noncitizens held at Guantanamo Bay, Cuba, the Court explained that "extraterritoriality questions turn on objective factors and practical concerns, not formalism." *Id.* at 727. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). Whether the Constitution applies outside the United States does not depend on formalistically determining whether the U.S. Government exercises *de jure* sovereignty over the territory in question. The issue rather is whether there exist "practical barriers" to affording a particular constitutional protection to individuals subject to Government control who are outside the nation's borders. *Id.* at 770. Absent such

"practical barriers," the Government's extraterritorial conduct is subject to constitutional constraint.

With *Boumediene*, the Court thus clarified that a functional approach determines the extraterritorial application of the Constitution. This functional approach requires that noncitizens on the threshold of entry be afforded due process protection against prolonged detention. Since this Court no longer views the *reality* of extraterritorial detention as preventing the Constitution from applying, the legal fiction of an alien standing "at the threshold of entry" necessarily cannot have that result. Noncitizens held at the border by U.S. authorities are subject to the Government's control, and there are no "practical barriers" to affording them due process rights with respect to their prolonged detention. Accordingly, there is no basis for allowing their prolonged detention without any due process protection.

### B. Since *Mezei*, This Court Has Recognized Strict Limits On Indefinite Civil Detention, Including In The Immigration Context.

This Court's modern substantive due process cases expressly recognize the importance of an individual's interest in being free from prolonged detention, underscoring that it is not a mere "privilege" outside the scope of the Due Process Clause. These cases hold that civil detention must be limited to a narrow class of individuals and must be subject to rigorous procedural safeguards.

As the Court explained in *Foucha v. Louisiana*, 504 U.S. 71 (1992), "[f]reedom from bodily restraint has always been at the core of the liberty

protected by the Due Process Clause." *Id.* at 80. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Accordingly, this Court has required that the Government meet a heavy burden before subjecting an individual to prolonged civil confinement. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (commitment requires proof not only of "a mere predisposition to violence" but also "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated"). Detention may not last longer than necessary to advance the Government's legitimate purposes. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[T]he nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed."); *Hendricks*, 521 U.S. at 363-64 (sexually violent predators committed because their mental abnormality makes them a threat to others may be incapacitated only for as long as that stated purpose remains); *Salerno*, 481 U.S. at 747 (emphasizing "stringent time limitations" on permissible pretrial detention); *see also Schall v. Martin*, 467 U.S. 253, 269 (1984) (pretrial detention of alleged juvenile delinquents "strictly limited in time").

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court applied the principle that civil confinement must be strictly limited in the immigration context. The Court began by recognizing that due process applies to the detention of noncitizens subject to a final order of removal. While the Court noted that "the nature of that protection may vary upon the status

and circumstance," *id.* at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982)), it held that even a noncitizen subject to a final order of removal could not be detained for more than a reasonable time to effectuate that order, which presumptively should not exceed six months. *Id.* at 701.[7]

In reaching this result, *Zadvydas* separated a noncitizen's due process right to be free from "long-term detention" from any interest in living in the United States under the immigration statutes. *Id.* at 695-96. The Court recognized that noncitizens who lose their removal cases have no right to live at large in the United States, and that the political branches are fully empowered to remove noncitizens. *Id.* The Court explained, however, that the removal power is not the issue when the Government's exercise of its immigration authority results in the prolonged detention of noncitizens. Rather, detention is a constitutional matter that must be considered separately from "the political branches' authority to control entry into the United States," and must be subject to strict due process limits. *Id.* at 695, 699-701.

### C. Modern Procedural Due Process Doctrine Sweeps Far More Broadly Than It Did In The Era Of *Mezei*.

Procedural due process "is a principle basic to our society." *Mathews v. Eldridge,* 424 U.S. 319, 333

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[7] *See also Reno v. Flores*, 507 U.S. 292, 314 (1993) (upholding INS policy of maintaining custody of noncitizen juveniles pending deportation proceedings only where "period of custody [was] inherently limited by the pending deportation hearing" and was expected to last "an average of only 30 days").

(1976) (citation omitted). Since *Mezei*, this Court has significantly broadened the reach of procedural due process protections. Under the modern framework, the Due Process Clause limits the power of the Government in all instances where a Government decision may deprive an individual of his liberty. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment); *In re Gault*, 387 U.S. 1, 31-32 (1967) (juvenile delinquency); *In re Oliver*, 333 U.S. 257, 274-75 (1948) (contempt of court); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole).

Rather than operating on the basis of formal distinctions between executive and judicial functions, modern procedural due process doctrine employs a flexible, functional analysis that extends the approach foreshadowed in *Yamataya*. *See supra* pp. 10-11. First, the Court analyzes whether the Government's decision implicates a liberty or property interest protected by the Due Process Clause. Second, the Court employs a three-part test to determine which procedures are sufficient to protect that interest against erroneous deprivation, weighing the individual's interest and the benefits of additional procedures against the burdens those procedures would impose on the Government. *See Mathews*, 424 U.S. at 334-35. The weightier the liberty or property interest, the more process that is due; thus, for instance, depriving a person of his fundamental interest in freedom from detention would require substantial process. *Cf. id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-30, 533 (2004) (plurality opinion).

The Court's opinion in *Landon v. Plasencia*, 459 U.S. 21 (1982), is an example of that revolution in the immigration context. Plasencia was a returning lawful permanent resident stopped at the border and accused of attempting to smuggle others into the United States. *Id.* at 24-25, 30. Despite her status as a potentially excludable alien standing on the threshold of entry, the Court squarely held that Plasencia had an interest protectable under the Due Process Clause. *See id.* at 32. The Court emphasized that the right to reside in the United States is a "weighty" liberty interest protected by due process, where the returning noncitizen "stands to lose the right 'to stay and live and work in this land of freedom.'" *Id.* at 34 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). Following *Mathews*, the Court explained that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Id.* But it is "[t]he role of the judiciary" to determine whether the administrative hearing used to order Plasencia's exclusion "meet[s] the essential standard of fairness under the Due Process Clause." *Id.* at 34-35.

The Government suggests that *Plasencia* forecloses any due process argument in the present case because the *Plasencia* Court stated in dicta that "'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'" Pet. Br. 19 (quoting 459 U.S. at 32). But this dicta is not a statement that all arriving noncitizens lack rights under the Due Process Clause. Nor is it a conclusion that the prolonged *detention* of an arriving noncitizen implicates no interests protected by the Fifth Amendment. The key

language here is "regarding his application." The Court's dicta means simply that, if one is a noncitizen seeking initial admission, the naked interest in residing in the United States is not alone a "protectable" liberty or property interest under the Due Process Clause. *See* 459 U.S. at 32.

Thus, while it remains an open question whether (or when) the decision to deny admission to a noncitizen abroad or on the threshold of entry might implicate interests protected by the Due Process Clause, *cf. Kerry v. Din*, 135 S. Ct. 2128 (2015), nothing in *Plasencia* supports the Government's view that it need not provide any procedures before depriving an individual on the threshold of entry of her physical liberty for a prolonged period. Where, as here, the issue is the indefinite detention of noncitizens who may have no country to which they may safely return, the liberty interest at stake is indisputably a weighty one. Accordingly, at least some meaningful process is due before a noncitizen can be indefinitely detained.

## III. *Mezei* Should Not Be Construed To Hold That Entering Noncitizens Can Be Detained Indefinitely Without Due Process.

The history of this Court's jurisprudence before *Knauff* and *Mezei*, and the legal developments after *Mezei*, allow the decision itself to be understood in its proper context. *Mezei*'s statement, following *Knauff*, that "[w]hatever the procedure authorized by Congress is" "is due process as far as an alien denied entry is concerned," could seemingly support the position that new entrants have no due process rights — or perhaps no constitutional rights at all. 345

U.S. at 212 (citations omitted). But this sentence should be read and construed within the specific context in which it was made. Understood in light of both what came before it and what came after, *Mezei* and *Knauff* do not stand for the blanket proposition for which they have often been cited by the Government. The cases may recognize broad power for the political branches in regulating *entry* to the United States, particularly amid the heightened security concerns in which those cases arose. But they do not address the analytically distinct problem of civil detention at issue in this case and on which this Court has placed meaningful limits in recent decades.

Significantly, the *Mezei* majority did not view the case to be principally about detention. It thus did not specifically address whether indefinite detention without an opportunity to be heard violates the Due Process Clause. The Court did state that the issue to be decided was "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention." *Id*. at 207. But it found in the Government's favor because it determined that the respondent, Mr. Mezei, was not being detained at all; he was merely being "harbored" at Ellis Island because he could not be repatriated. *Id*. at 213. Apart from its recitation of the decision below, *see id.* at 209, the majority did not even mention the word "liberty." For the majority, respondent's "harborage" did not "transform[] this [case] into something other than an exclusion proceeding." *Id.* at 213.

Because the *Mezei* majority did not view the case to be primarily about detention, its holding should not be construed as deciding whether nonciti-

zens on the threshold of entry may be detained indefinitely without a hearing. Thus, when the Court observed that due process for an "alien on the threshold of initial entry" is "[w]hatever the procedure authorized by Congress," it was addressing the "power to expel or exclude aliens," and not the power to detain them indefinitely. *Mezei*, 345 U.S. at 210-12 (citations omitted).

For this reason, the *Mezei* majority's statement should not be afforded the sweeping scope that the Government suggests. It is not properly construed to mean that entering noncitizens have no due process rights whatsoever. Nor is it properly construed to mean that the prolonged detention of such noncitizens does not implicate a liberty interest protected by the Due Process Clause. *See*, *e.g.*, *id.* at 215 ("we do not think that respondent's *continued exclusion* deprives him of any statutory or constitutional right" (emphasis added)); *id.* at 216 ("respondent's *right to enter* the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate" (emphasis added)).

The opinions of the *Mezei* dissenters underscore that the majority focused on the power to exclude rather than the power to detain. Indeed, the dissenters took issue with the majority on precisely this ground: they argued that the Court *should* have treated the matter before it as involving indefinite detention, and erred by failing to do so.

For Justice Jackson, joined by Justice Frankfurter, the *Mezei* majority wrongly avoided addressing detention based on the "fiction" that Mezei was not in fact detained. *Id.* at 220. According to Justice

Jackson, the Government had "ingeniously argued that Ellis Island is [Mezei's] 'refuge' whence he is free to take leave in any direction exception west." *Id.* But no other country would accept Mezei, with the result that such "freedom" to leave Ellis Island would be meaningful only if Mezei "were an amphibian!" *Id.* In Justice Jackson's view, it "overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound." *Id.* For Justice Jackson, Mezei was plainly "deprived of liberty" and the Court thus should have, but did not, determine whether such deprivation was "a denial of due process of law." *Id.* at 220-21. Justice Black's dissent likewise admonished the majority for ignoring the reality of Mezei's situation, arguing that Mezei was, as a practical matter, being "imprison[ed] without a hearing" in violation of the Due Process Clause. *Id.* at 217-18.[8]

More generally, the notion that noncitizens on the threshold of entry have no due process rights simply cannot be an accurate statement of the law. As Justice Jackson recognized in his *Mezei* dissent, if an arriving noncitizen were entirely outside the protection of the Constitution, then the Government

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[8] It is incorrect to suggest that the *Mezei* Court was "unanimous" that Mr. Mezei could be held as long as needed to effectuate his exclusion. Pet. Br. 20. To the contrary, Justice Jackson recognized the Government's power to exclude, but concluded that "when indefinite confinement becomes the means of enforcing exclusion, . . . due process requires that the alien be informed of its grounds and have a fair chance to overcome them." *Mezei*, 345 U.S. at 227; *see also id.* at 218 (Black, J. dissenting) ("no person . . . native or foreigner . . . can have his . . . liberty . . . taken 'without due process of law'").

could lawfully effectuate the exclusion of such a person by "eject[ing] him bodily into the sea." 345 U.S. at 226. The Court understandably has never embraced a notion so fundamentally at odds with the nation's constitutional norms. Even the dissenters in *Zadvydas*, while taking a more restrictive view of noncitizens' rights than the majority, effectively acknowledged that *all* noncitizens in the custody of immigration authorities have at least *some* due process rights. Justice Scalia was "sure" that even a noncitizen on the threshold of entry "cannot be tortured." 533 U.S. at 704 (Scalia, J., dissenting). And Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious" — i.e., detention beyond what is "necessary to avoid the risk of flight or danger to the community." *Id.* at 721 (Kennedy, J., dissenting). The appropriate question, therefore, is not *whether* noncitizens on the threshold of entry have due process rights, but rather how much process is due when a fundamental liberty interest like freedom from indefinite detention is at issue.

In short, no rigid principle of constitutional law places an individual's potentially lifelong detention by U.S. authorities beyond all guarantees of due process, merely because she is deemed to stand at the border. The Court should put that myth of *Mezei* to rest. It should confirm that *Mezei* does not authorize the detention of entering noncitizens for any purpose (or no purpose), with no limits, and with no opportunity for review. The Government's proposed reading of *Mezei* as mandating such a result contra-

venes more than a century of case law and the nation's most deeply-held values.[9]

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Respondents' brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Dennis B. Auerbach
*Counsel of Record*
David M. Zionts
Philip J. Levitz
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
dauerbach@cov.com
(202) 662-6000

*Counsel for Amici Curiae*

October 24, 2016

[9] For the reasons explained above, it would be sufficient for purposes of this case to clarify that *Mezei* does not have the broad meaning the Government ascribes to it. However, if the Court considered *Mezei* to unequivocally permit the Government to detain all arriving noncitizens indefinitely, without any hearing at all, *amici* submit that it would be appropriate to overrule *Mezei* in light of the subsequent jurisprudence that contradicts the Government's position.