No. 16-1339

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; SECRETARY OF DHS; ATTORNEY GENERAL OF THE UNITED STATES; COMMISSIONER OF CBP; DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; PHILADELPHIA FIELD DIRECTOR, CBP; PHILADELPHIA ASSISTANT FIELD OFFICE DIRECTOR, ICE; DIRECTOR, BERKS COUNTY RESIDENTIAL CENTER,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CASE NO. 5:15-CV-06153 (PSD)

BRIEF FOR *AMICI CURIAE* PROFESSORS OF IMMIGRATION AND CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS AND IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (*cont'd*)

Page(s)

Statutes

Rules

Other Authorities

INTERESTS OF *AMICI CURIAE*

The 53 *amici curiae* are distinguished scholars of the immigration laws of the United States: **Raquel E. Aldana**, Professor of Law at McGeorge School of Law, University of the Pacific; **David Baluarte**, Associate Clinical Professor of Law at Washington and Lee University School of Law; **Jon Bauer**, Clinical Professor of Law and Richard D. Tulisano '69 Scholar in Human Rights at University of Connecticut School of Law; **Kristina M. Campbell**, Professor of Law and Jack and Lovell Olender Director of the Immigration and Human Rights Clinic at University of the District of Columbia David A. Clarke School of Law; **Gabriel J. Chin**, Martin Luther King Jr. Professor of Law at UC Davis School of Law; **Michael J. Churgin**, Raybourne Thompson Centennial Professor in Law at University of Texas at Austin; **Jenny-Brooke Condon**, Associate Professor at Seton Hall Law School; **Bram T.B. Elias**, Clinical Associate Professor at University of Iowa College of Law; **Kate Evans**, Director of the Immigration Clinic and Associate Professor of Law at University of Idaho College of Law; **Niels Frenzen**, Clinical Professor of Law, University of Southern California, Gould School of Law; **Denise Gilman**, Director and Clinical Professor at University of Texas School of Law Immigration Clinic; **Jean C. Han**, Practitioner-In-Residence at American University, Washington College of Law; **Lindsay M. Harris**, Assistant Professor of Law at the University of the District of Columbia David A. Clarke School of Law; **Dina Francesca**

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As some of the nation's leading legal scholars on immigration, *amici* are interested in the proper interpretation and application of U.S. immigration laws and the protection of constitutional rights. Institutional affiliations are provided for identification purposes only.

Petitioners have consented to the filing of this *amicus* brief. Respondents have indicated that the Government takes no position on the motion by *amici* for leave to file a brief but asked that it be noted that Rule 29.1 does not appear to Government-Respondents to permit such motions absent an actual order granting rehearing.

This brief was prepared in whole by counsel in consultation with *amici curiae*, but neither counsel nor any other person contributed money intended to fund preparing or submitting this brief.

PRELIMINARY STATEMENT

Amici curiae respectfully urge this Court to grant the petition for rehearing of this case. The panel held that *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), applies to persons who have entered the United States and deprives them of any rights in habeas corpus. Petitioners and Habeas Scholar *Amici* make clear that even if *Mezei* applies to assimilate Petitioners to the constitutional status of arriving noncitizens, Petitioners would still be constitutionally entitled to habeas rights. *Amici* Immigration Scholars submit this separate brief to address the threshold question of whether *Mezei* applies to persons who have already entered the country. It does not.

In holding that *Mezei* applies here, the panel decision marks a dramatic break with precedents of the Supreme Court, this Court, and the other federal courts of appeals. In light of the unprecedented nature of the panel's decision, 47 additional immigration scholars have joined in this brief with *amici* who submitted argument to the panel.[1] *Amici* submit with respect, but firm conviction, that this is an extreme

[1] This brief, focusing on the inapplicability of *Mezei* and its progeny to this case, supplements the different discussion of the attachment of constitutional rights upon entry in Brief for *Amici Curiae* Gabriel J. Chin, Nancy Morawetz, Hiroshi Motomura, David Thronson, Leti Volpp, and Stephen Yale-Loehr in Support of Petitioners and Urging Reversal, *Castro v. Dept. of Homeland Security*, No. 16-1339, Document 003112231771 (3d Cir. Mar. 11, 2016).

step which should not be taken and which, in any case, deserves the careful consideration of the entire Court.

ARGUMENT

The Panel's Unprecedented Application of *Mezei* to Strip Rights from Persons Who Have Entered the Country Is an Extreme Departure from Established Law

Mezei held that, whereas "aliens who have once passed through our gates, even illegally," possess certain constitutional rights, "an alien on the threshold of initial entry stands on a different footing." 345 U.S. at 212. It is bedrock Supreme Court precedent that, "once an alien enters the country, the legal circumstance changes" because our Constitution provides certain protections to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The [Constitution] protects *every one of these persons* . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (emphasis added).

The "entry fiction" doctrine provides the only exception to this bedrock rule. Under the "entry fiction," an alien's arrival at a port of entry (which is geographically within the United States) does not qualify as entering the country. As held in *Mezei*,

"harborage at Ellis Island is not an entry into the United States." 345 U.S. at 213. For constitutional purposes, then, an alien at a port of entry "is treated as if stopped at the border." *Id.* at 215. Similarly, the entry fiction applies when an alien is "paroled" into the country and allowed to enter "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see also Zadvydas*, 422 U.S. at 691. But the *Mezei* entry fiction has never once, before the panel's decision, been held to apply in the interior to aliens who have already entered the country.

The panel in this case examined the law just described but misapplied it in a dramatic and unprecedented way. The panel recognized that petitioners here were arrested ***after*** "entering the country," but nonetheless held that "we think it appropriate to treat them as 'alien[s] seeking initial admission to the United States." *Castro v. Dept. of Homeland Security*, No. 16-1339, — F.3d —, 2016 WL 4501943, at *3, 19. Notably, Judge Hardiman, concurring *dubitante* in the decision, "express[ed] doubt" about resolving the case on this basis, noting that the majority relied on Supreme Court precedent that did not "purport to resolve" the question at issue here. *Id*. at *21. The panel's decision was error; it runs contrary to the Supreme Court's application of *Mezei*, other Supreme Court precedent, and many circuit court decisions.

This Court, like the Supreme Court, has never before applied the entry fiction doctrine to aliens who have already entered the country. As this Circuit has

explained the doctrine, "*Mezei* established the 'entry fiction' whereby an alien intercepted 'on the threshold of initial entry,' though physically present in the United States, stands on a 'different footing' for due process purposes than an alien who has 'passed through our gates.'" *Khouzam v. Attorney Gen. of U.S.*, 549 F.3d 235, 256 (3d Cir. 2008) (quoting *Mezei*, 345 U.S. at 212); *see also Patel v. Zemski,* 275 F.3d 299, 307 (3d Cir. 2001) (observing that, regardless of "whether their presence in this country is lawful or not," "aliens who have entered the country are entitled" to constitutional protection) (citing *Mezei*, 345 U.S. at 212), *abrogated on other grounds by Demore v. Kim*, 538 U.S. 510 (2003); *see also Sierra v. Romaine*, 347 F.3d 559, 571 (3d Cir. 2003) (noting that *Zadvydas* "explained that the distinction between aliens who have gained entry and those stopped at the border 'made all the difference'" with *Mezei* for purposes of the Constitution), *judgment vacated on other grounds*, 543 U.S. 1087 (2005); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 211 n.8 (3d Cir. 2002) (recognizing that "significant differences exist" between noncitizens seeking entry at the border and those who have already entered, who "possess far greater legal rights than those contesting exclusion" (citing *Mezei*, 345 U.S. at 212)).

The other circuit courts of appeals have likewise never applied the *Mezei* entry fiction to aliens detained after effecting entry. *See*, *e.g.*, *United States v. Lopez-Collazo*, 824 F.3d 453, 460-61 (4th Cir. 2016) (recognizing, pursuant to *Zadvydas*,

constitutional rights of "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014) (recognizing constitutional rights of an alien apprehended one day after entry, "[h]eeding, as we must, the Supreme Court's repeated pronouncement that [certain constitutional protections apply] to all who have entered the United States—legally or not—and given the clear fact of [the alien's] entry); *Bayo v. Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010) (*en banc*) (describing the "bright line" between noncitizens who have entered the United States and those who have not, and emphasizing that, a noncitizen who has "crossed the border" is "entitled to certain constitutional rights") (citing *Zadvydas,* 533 U.S. at 693, *Mezei,* 345 U.S. at 212); *Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008) (citing *Mezei* for the proposition that "an alien who has passed through our gates, even illegally, may be expelled only after proceedings conforming" with constitutional protections (internal quotation marks omitted)); *Borrero v. Aljets*, 325 F.3d 1003, 1006-08 (8th Cir. 2003), *abrogated on other grounds by Clark v. Martinez*, 543 U.S. 371, 378-81 (2005) (recognizing "critical difference" between "an alien within the country [who] is entitled" to certain constitutional protections and an alien who has not yet "effected an entry") (citing *Zadvydas,* 533 U.S. at 693, *Mezei,* 345 U.S. at 208-09); *Rosales-Garcia v. Holland*, 322 F.3d 386, 418 (6th Cir. 2003) (*en banc*) (emphasizing "that 'it is well established that certain constitutional

protections available to persons inside the United States are unavailable to persons outside of our geographic borders,' including those who have not formally 'entered' the United States, such as excludable aliens paroled into the United States" (quoting *Zadvydas,* 533 U.S. at 693)); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1109 (9th Cir. 2001) ("[O]ur case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to [constitutional] protections . . . ."); *Jean v. Nelson*, 727 F.2d 957, 967 (11th Cir. 1984) (*en banc*), *aff'd,* 472 U.S. 846 (1985) (emphasizing "the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an 'entry' into the United States, even if their presence here is completely illegal").

Moreover, the Government has consistently acknowledged (until now) that constitutional protections attach to any alien who has crossed the border into the United States, lawfully or otherwise. *See*, *e.g.*, Brief for Respondent (Government) at 28, *Grewal v. Gonzales*, No. 05-3152, 2005 WL 6267100 (3d Cir. Nov. 20, 2006) (recognizing that "[a]liens facing removal are entitled" to certain constitutional rights, including the alien in that case discovered by an immigration inspector immediately upon arrival in the United States); *see also* Brief for Respondent (Government) at 19-20, *Ramirez v. Holder*, No. 09-4122, 2010 WL 8754305 (3d Cir. Feb. 5, 2010) (recognizing that constitutional protections attached in a case

involving an alien who had entered the country unlawfully); Brief for the Appellee (Government) at 13, *United States v. Charleswell*, No. 04-4513, 2005 WL 5519727 (3d Cir. Nov. 17, 2005) (recognizing that constitutional protections apply in removal proceedings for an alien who entered the country unlawfully); Brief for Respondent (Government) at 13, *Hernandez-Mancilla v. Gonzales*, No. 06-73086, 2007 WL 916653 (9th Cir. Jan. 30, 2007) (recognizing that the Constitution "does provide some measure of . . . protection to aliens present in the United States, even if illegally so"); Brief for Respondent (Government) at 39, *Hussain v. Gonzales*, Nos. 04-1865, 04-3068, 2004 WL 3760866 (7th Cir. Dec. 2004) (agreeing, in the case of an alien who had entered the country unlawfully, that "[a]liens in the United States are entitled" to certain constitutional rights).

As the foregoing authorities and Government submissions reflect, the Supreme Court has been abundantly clear that "once an alien enters the country," constitutional protections apply. *Zadvydas*, 533 U.S. at 693. The panel's application of *Mezei* to Petitioners, who were arrested after "entering the country," abandons the established state of the law. This is an extraordinary step that this Court should not take without the careful consideration of all of its members.

CONCLUSION

Amici respectfully request that this Court grant the rehearing petition.

Date: September 19, 2016

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1(e) that the attorney whose name appears on the foregoing brief, Ethan D. Dettmer, has been admitted to the bar of this court.

Date: September 19, 2016

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/s/ *Ethan D. Dettmer*
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 1,754 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Third Circuit Local Appellate Rule 29.1(b).

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Date: September 19, 2016

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CERTIFICATE OF SERVICE

I certify that this *amicus* brief was served on the following counsel of record on the 19th day of September, 2016 via the Court's electronic filing system:

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

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