No. 16-812

IN THE

Supreme Court of the United States

ROSA ELIDA CASTRO, *et al.*,
Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF SCHOLARS OF IMMIGRATION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The 90 *amici curiae* are distinguished scholars of the immigration laws of the United States. 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. *Amici* are identified in the Appendix.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge the Court to grant the petition for a writ of certiorari. The panel below broke with decades of uniform precedent, and 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. *Amici* Immigration Scholars submit this separate brief to emphasize for the Court the extreme nature of the Third Circuit's departure from long-established law in holding that *Mezei* applies to persons who have already entered the country. This departure from the law threatens to have dramatic effects on the rights of many aliens currently in the United States and entitled to the protection of the Suspension Clause, the Due Process Clause, and other provisions of the Constitution.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of intent to file this brief, and all parties have consented to the filing of this brief.

The Third Circuit's holding that *Mezei* applies in this case marks a dramatic break with precedents of this Court and other federal courts of appeals. In light of the aberrant nature of the panel's decision, 90 immigration scholars have joined in this brief as *amici*. *Amici* submit with firm conviction that the Third Circuit panel's decision represents an extreme step which deserves this Court's careful consideration.

ARGUMENT

I. The Third Circuit's unprecedented application of *Mezei* to strip rights from persons who have entered the country is an extreme departure from established law.

A. Over one hundred years ago, this Court declared that the Due Process Clause of the Fifth Amendment guarantees constitutional protections to aliens, including in the immigration enforcement context. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guarantied by [the Fifth and Sixth A]mendments, and that even aliens shall not be . . . deprived of life, liberty, or property without due process of law.").

Indeed, it is bedrock precedent of this Court that, "once an alien enters the country, the legal circumstance changes" because our Constitution provides due process 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).

This bright-line rule has but one exception: the "entry fiction" doctrine developed by the Court in *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). *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. Under the limited carve-out created by 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 due process 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 pending determination of admissibility. *See Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958). This doctrine likens the alien in line at immigration at JFK Airport to one standing at the border in Canada; although a port of entry may be physically within the United States, one who has not completely passed through it has no constitutionally protected liberty interest in entering the country. But the *Mezei* entry fiction has never once, before the Third Circuit's decision in this case, been held to apply to aliens who have already entered the country.

B. The panel below examined the law just described but misapplied it in two novel and remarkable ways. 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*, 835 F.3d 422, 427, 445 (3d Cir. 2016). 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 450.

The Third Circuit also took the unprecedented step of extending *Mezei's* limited carve-out—which has thus far applied only to due process rights—to the independent fundamental constitutional right of habeas corpus. The right of habeas corpus has always existed separately from the right to due process; the limitations on arriving aliens to invoke due process protections have never extended to habeas rights. To the contrary, aliens at ports of entry and, in certain circumstances, even aliens *outside* the nation's physical borders have historically been entitled to the protections of habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723, 785 (2008) ("Even if we were to assume that [statutory procedures] satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to 'cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings . . . .'") (citation

omitted); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (exercising jurisdiction over excluded noncitizen's habeas petition, and emphasizing that "[a]n alien immigrant, prevented from landing . . . is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful").

Despite the fact that the Supreme Court's adoption of the "entry fiction" has always been limited to the context of due process rights, the Third Circuit applied this doctrine to the Suspension Clause context. Conflating these two separate analyses, it cited several Supreme Court cases addressing only the application of the entry fiction to due process rights, then concluded that "as recent surreptitious entrants deemed to be 'alien[s] seeking initial admission to the United States,' Petitioners are unable to invoke the Suspension Clause . . . ." 835 F.3d at 448.

C. Not only does the panel's decision run contrary to this Court's application of *Mezei* and to other Supreme Court precedent, it also contradicts the Third Circuit's own jurisprudence as well as the decisions of each one of the other circuit courts that has addressed this issue. As the Third Circuit (before its about-face in this litigation) has repeatedly 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'" for purposes of constitutional rights), *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 Third Circuit's decision also breaks with its sister circuits, none of which has ever 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"); *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); *Zheng v. Mukasey*, 22 F.2d 277, 279, 286 (2d Cir. 2009) (concluding that due process had been denied in removal proceedings of respondent apprehended one week after entering the United States and noting that "an alien who has 'passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness'") (citing *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 the "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); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 688 (6th Cir. 2002) ("As old as the first immigration laws of this country is the recognition that non-citizens, even if illegally present in the United States, are 'persons' entitled to the Fifth Amendment right of due process in deportation proceedings."); *Rodriguez-Silva v. I.N.S.*,

242 F.3d 243, 247 (5th Cir. 2001) ("The language of the due process clause refers to 'persons,' not 'citizens,' and it is well established that aliens within the territory of the United States may invoke its protections."); *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 . . . ."); *Maldonado-Perez v. INS*, 865 F.2d 328, 329-30, 332 (D.C. Cir. 1989) (concluding noncitizen apprehended one day after unlawful entry was entitled to protection of the Fifth Amendment's Due Process Clause); *Amanullah v. Nelson*, 811 F.2d 1, 10 (1st Cir. 1987) ("It is well established . . . that *deportable* aliens are properly accorded greater rights than *excludable* aliens" for constitutional purposes.); *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"); *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975) (finding Fifth Amendment due process applicable to noncitizen who applied for asylum one day after unlawful entry).

Moreover, the Government (until now) has consistently acknowledged in this Court that constitutional protections attach to any alien who has crossed the border into the United States, lawfully or otherwise. *See*, *e.g.*, Brief for the Petitioners (Government) at 36, *Clark v. Martinez*, No. 03-878, 2004 WL 1080689 (May 7, 2004)

("Indeed, *Zadvydas* itself found the distinction between excluded aliens and those who have entered to be 'critical' and to 'ma[k]e all the difference' on the constitutional front.") (citation omitted); Reply Brief for Petitioners (Government) at 6-7, *Clark v. Martinez*, No. 03-878, 2004 WL 2006590 (May 7, 2004) (emphasizing "the continuing vitality of the distinction between aliens stopped at the border and those who have entered"); Brief for the Respondent (Government) at 2, *Benitez v. Mata*, No. 03-7434, 2004 WL 2363184 (May 7, 2004) ("[A]liens who have entered illegally and who, therefore, have no statutory claim to remain, nonetheless enjoy some constitutional rights, including a right to due process in any removal proceedings."); Petition for a Writ of Certiorari (Government) at 15, *McNary v. Haitian Ctrs. Council, Inc.*, No. 92-528, 1992 WL 12073959 (Sept. 22, 1992) ("Although aliens who have entered the United States are entitled to constitutional protections in a deportation proceedings, 'an alien on the threshold of initial entry stands on a different footing . . . .'") (citing *Mezei*, 345 U.S. at 212); Reply Brief for the Petitioners (Government) at 14-15, *McNary v. Haitian Ctrs. Council, Inc.*, No. 92-344, 1993 WL 290141 (Jan. 21, 1993) ("The Court [] explained [] that our immigration laws have long distinguished between those aliens who have come to our shores seeking admission and those who have entered and are within the United States."); Brief for the Petitioners (Government) at 24, *Landon v. Plasencia*, No. 81-129, 1981 U.S. S. Ct. Briefs LEXIS 1223 (Mar. 24, 1982) ("[O]ur immigration laws have long made a distinction between aliens who arrive at the border seeking admission and aliens who are

within the United States after an entry, regardless of its legality.").

Likewise, the Government has consistently recognized this same principle—even in cases involving aliens apprehended immediately upon arrival—in various lower courts. *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 due process[,]" including the alien in that case who was 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 due process 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 due process").

This Court has been abundantly clear, and the foregoing authorities and Government submissions have faithfully and consistently agreed, 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 law. This is an extraordinary step that should not be taken without the careful consideration of this Court.

II. The Third Circuit's decision threatens to disrupt fundamental rights and legal precepts far beyond the instant case.

This decision calls into question the application of bedrock constitutional rights for a large swath of people in the interior of the country. Until this decision, aliens in the country could rest assured that just as their presence in the United States subjects them to the obligations of our legal system, it also entitles them to its protections. On precisely this point, James Madison wrote that "[a]liens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage." *Madison's Report on the Virginia Resolutions*, *in* IV *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 546, 556 (Jonathan Elliot ed., 1836).

Yet the Third Circuit's decision threatens to eliminate fundamental constitutional rights for many aliens in this country. The Third Circuit creates uncertainty for its lower courts by

substituting the clear bright-line rule of the *Mezei* entry fiction for an amorphous, unadministrable standard that takes into account a number of oft-disputed factors, without providing guidance as to their weight or significance.

Further, the Third Circuit partially based its denial of Suspension Clause rights in this case on a provision of the Immigration and Nationality Act which can, at the discretion of the Attorney General, apply to aliens for up to two years after illegally entering the country. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II). A court in the future could apply this panel's holding to strip constitutional rights from a large class of aliens who have been living in the United States for up to twenty-four months. And of course Congress could enlarge the time period for application of the statute. In effect, the Third Circuit here proposes to grant the political branches discretion to decide when constitutional rights attach to aliens who have effected an illegal entry.

Finally, the Third Circuit subjected the separate right of habeas corpus—a right intended to hold the executive branch accountable for its detentions—to the same amorphous standard. In doing so, the Third Circuit has held that aliens within the United States are less entitled to the protections of the Suspension Clause than the enemy combatants detained outside the country in the case of *Boumediene v. Bush*, 553 U.S. 723 (2008).

CONCLUSION

Amici respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted.

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