No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,
Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

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

BRIEF OF *AMICI CURIAE* IMMIGRATION SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are 79 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

Respondent Vijayakumar Thuraissigiam was taken into custody by immigration agents after he crossed from Mexico into the United States. Even though Respondent was arrested inside the United States, the Government argues—in a change of position that defies more than a century of constitutional law—that Respondent was entitled to no due process whatsoever in proceedings concerning his proposed removal. The Government then asserts that Respondent's lack of due process rights means he also lacks any rights under the Suspension Clause.

Amici agree with the court of appeals that Respondent is entitled to protection under the Suspension Clause regardless of whether he has due process rights. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); Pet. App. 36a. Nevertheless, because the

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this *amici curiae* brief in accord with Supreme Court Rule 37.3.

Government is incorrectly attempting to link habeas corpus rights with due process, *amici* submit this brief to show that Respondent is entitled to due process protections. Under this Court's longstanding jurisprudence, once an individual enters the country, whether legally or illegally, the U.S. Constitution affords him due process rights. The Government's departure from this foundational principle of constitutional law threatens to have devastating effects on the rights of countless individuals currently in the United States.

To be clear, *amici* do not opine on the specifics of the process to which Respondent is entitled. But if the Court chooses to accept the Government's contention that habeas corpus rights and due process are linked, then the process must be sufficient to ensure Suspension Clause protection.

Amici respectfully urge this Court to affirm the decision of the court of appeals.

ARGUMENT

I. As has been well-established for over a century, all persons within the United States are protected by the Due Process Clause.

Over one hundred years ago, the Supreme Court declared that the Due Process Clause of the Fifth Amendment guarantees constitutional protections to noncitizens. *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."). The Court's conclusion in *Wong Wing* did not depend on the unique context of immigration. Nor did it make distinctions between lawful and unlawful immigrants; indeed, Wong Wing himself had been found to be unlawfully present in the country. Instead, the rule of *Wong Wing* was one of general applicability.

This Court has since repeatedly declared, in no uncertain terms, 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 Fifth Amendment . . . 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; citations omitted).

A. It is bedrock precedent that the Due Process Clause protects all persons within the national territory. As this Court recognized in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), "[t]he fourteenth amendment to the constitution is not confined to the protection of citizens." Rather, "[t]hese provisions are universal in their application, to all persons within the *territorial jurisdiction*, without regard to any differences of race, of color, or of nationality." *Id.* (emphasis added).

It did not take long for the Court to recognize the same territoriality principle under the Fifth Amendment's Due Process Clause. "Applying [*Yick Wo*'s] reasoning to the fifth and sixth amendments," this Court stated, "it must be concluded that all persons within the *territory* of the United States are entitled to the protection guarantied by those amendments, and that even aliens shall not be . . . deprived of life, liberty, or property without due process of law." *Wong Wing*, 163 U.S. at 238 (emphasis added). Notably, in *Wong Wing*, neither the immigration status of the individual nor the immigration context of the case affected the Court's understanding of due process. In particular, the Court observed that the Chinese exclusion acts operated "upon two classes,–one consisting of those who came into the country with its consent, the other of those who have come into the United States without their consent, and in disregard of the law." *Id.* at 234–35. Its pronouncement that the Due Process Clause protected all noncitizens, so long as they had "come into the United States," *id.*, made no distinction between these two groups.

In reaching this understanding, members of the Court have also explained why a faithful reading of Constitution's plain text necessitates such adherence to the territorial rule. In *Wong Wing*, Justice Field, concurring in part and dissenting in part,[2] was the

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[2] It is unclear whether Justice Field actually dissented to anything stated in the majority opinion. He opens his concurrence accepting the conclusion of the majority, but then "dissent[s] entirely from what seemed to [him] to be harsh and illegal assertions, made by counsel of the government, on the

first to articulate the textual requirement for a categorical territorial rule. 163 U.S. at 238 (Field, J., concurring in part and dissenting in part). He noted, "[t]he term 'person,' used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic." *Id.* at 242. Accordingly, "the contention that persons within the *territorial* jurisdiction of this republic might be beyond the protection of the law was heard with pain," and roundly rejected. *Id.* at 242–43 (emphasis added).

B. As the Court continued to deliberate over the reach of various parts of the Constitution, it remained steadfast in affirming that the Due Process Clause protected every person present in the United States. This fundamental rule has been respected even when the Court has limited the breadth of other constitutional protections.

In *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901), while the Court denied the reach of certain constitutional provisions to unincorporated territories, it emphasized that due process protection fell within a category of "immunities . . . indispensable to a free government" that hence could not be denied to the people of these territories. Citing *Yick Wo* and *Wong Wing*, the Court reasoned that "[e]ven if regarded as *aliens*," and hence bereft of certain "political rights," persons within these "territories" must be "entitled under the principles of the Constitution to be protected in life, liberty, and property." *Id.* at 283 (emphasis added). Underlying

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argument of the case." 163 U.S. at 239. Thus, it appears that Justice Field was not dissenting to any part of the majority opinion, at least not in the way we understand the term today.

this constitutional baseline was the fundamental nature of due process which bars an "unrestrained power on the part of Congress" to deal with the people within these territories "upon the theory that they have no rights which it is bound to respect." *Id.*

The same reasoning was consistent throughout the Insular Cases of this period, based on "'inherent, although unexpressed, principles which are the basis of all free government, . . . restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.'" *Dorr v. United States*, 195 U.S. 138, 147 (1904) (quoting *Downes*, 182 U.S. at 291 (White, J., concurring)); *see also Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (holding that "guaranties of certain fundamental personal rights" like due process of law must be "in force" in Puerto Rico).

Later, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the Fourth Amendment did not apply to a search and seizure of property that was located in a foreign country and owned by a nonresident alien, even if the nonresident alien was within the United States at the time of the search. *Id.* at 261. Yet, in limiting the Fourth Amendment to those with a "sufficient connection with this country," the principal opinion of the Court focused on how the Fourth Amendment "extends its reach only to 'the people.'" *Id.* at 265. To the Court, this phrase was a term of art that "refers to a class of persons who are part of the national community." *Id.* Most importantly, echoing the textual reasoning of Justice Field in *Wong Wing*, the opinion directly contrasted this term with the "words 'person' and 'accused' used in the Fifth and Sixth Amendments,"

language that is plainly broad enough to extend to all "person[s]" within the territorial jurisdiction. *Id.* at 265–66.

The Court spoke with greatest specificity in *Zadvydas* when it affirmed that due process protections apply to all "persons" within the United States, "whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. at 693. But this principled approach to ensuring access to due process, one that makes no distinction between "persons," is rooted in more than a century of jurisprudence and dictated by textual command in the Constitution.

II. The entry fiction doctrine is a narrow exception that has rightly been limited by the Court.

A. This bright-line rule of territoriality has but one narrow caveat: the "entry fiction" doctrine canonically set out by the Supreme Court in *Shaughnessy v. United States ex rel. 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[.]" *Id.* at 212. Under the limited carve-out created by the entry fiction, a noncitizen'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." *Id*. at 213 (citations omitted). For due process purposes, then, a noncitizen at a port of entry "is treated as if stopped at the border." *Id.* at 215 (citations omitted).

Similarly, the entry fiction applies when a noncitizen stopped at port is "paroled" into the country pending determination of admissibility. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

Notably, the *Mezei* Court emphasized the narrowness of this exception, stating that "aliens who have once passed through our gates, even illegally," remain protected by the Due Process Clause. 345 U.S. at 212. Similarly, *Mezei*'s specific instruction was for noncitizens at ports of entry to be treated "as if stopped *at the border*." *Id.* at 215 (emphasis added). To use *Mezei* as a basis for denying due process protections to persons who are clearly and unquestionably within our territorial jurisdiction would directly contravene *Mezei* itself.

A proper understanding of the rationale for the entry fiction doctrine strongly militates against expanding the doctrine's reach beyond the narrow scope it has retained for more than a half century. The entry fiction was designed to deal with circumstances in which immigration authorities could not conclusively resolve an immigrant's right to enter the United States immediately upon arrival, while the immigrant remained aboard the ship on which he had arrived. Detaining the immigrant aboard the ship during the pendency of his case was often considered both inhumane and unrealistic. So almost immediately after the United States first adopted laws excluding certain classes of immigrants, immigration authorities adopted a practice in some cases of permitting immigrants to land temporarily while their right to enter was being resolved.

Under such circumstances, a fiction of non-entry was necessary to prevent an immigrant's provisional landing from altering her legal case.[3] This was the posture in *Mezei*: Mezei was harbored on Ellis Island "[p]ending disposition of his case" after he had been "temporarily excluded" upon arrival at a port in New York. 345 U.S. at 208. On these facts, the *Mezei* Court analogized his situation to that of "temporary refuge on land," *id.* at 213 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892)), or "remain[ing] continuously aboard ship," *id.* And in deciding that "harborage at Ellis Island is not an entry into the United States," the Court cited the cases of *Kaplan v. Tod*, 267 U.S. 228, 240 (1925), and *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

These citations by the Court in *Mezei* underscore the specific and limited rationale behind the entry fiction doctrine. All three of those cases—*Nishumura Ekiu*, *Kaplan*, and *Ju Toy*—deal with circumstances that required immigration authorities to allow an individual ashore pending determination of his or her case. Take *Nishimura*. There, an immigration official boarded a steam-ship to examine its passengers upon its arrival in the port of San Francisco. 142 U.S. at 661. The inspector detained one passenger, Nishimura, but allowed her on land and "[p]ut[] her in the mission-house as a more suitable place than the

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[3] This was especially true under some of the earliest immigration statutes under which a person's entry into the country would have placed them beyond the reach of the immigration authorities because there was no power to deport, only a power to exclude. *See*, *e.g.*, Immigration Act of 1882, ch. 376, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–1574 (2012)).

steam-ship, pending the decision of the question of her right to land." *Id.* On these facts, and with specific regard to the inspector's affirmative and official act of allowing Nishimura ashore, the Court held that Nishimura was "left . . . in the same position . . . as if she never had been removed from the steam-ship." *Id.*

Ju Toy presented a similarly limited set of facts. 198 U.S. at 258. There, Ju Toy had arrived by ship at San Francisco from China, whereupon he was "detained by the master of the steamship Doric for return to China" after his legal entry was denied. *Id.* Because this detention subsequent to his arrival was a necessary consequence of administering the relevant immigration statutes, the Court held that Ju Toy, "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate." *Id.* at 263.

Finally, the case of *Kaplan* tells a similar story. In 1914, Esther Kaplan was a girl of about thirteen who "was certified to be feeble minded, and was ordered to be excluded" but was "kept at Ellis Island" when her deportation was delayed by the outbreak of World War I. 267 U.S. at 229. The Court stated that "while she was at Ellis Island she was to be regarded as stopped at the boundary line" based on "theory of law," and this status continued "[w]hen her prison bounds were enlarged" by her transfer to the custody of an aid society. *Id.* at 230. Accordingly, like Nishimura's and Ju Toy's, Kaplan's physical presence in the country's interior was a result of the immigration authorities' detainment of her.

A common fact among *Mezei* and the three cases cited to support it gave rise to the entry fiction doctrine: the need for immigration authorities, in the course of their duties, to affirmatively allow an individual ashore pending legal proceedings or superseding events. Seen in its true light, the entry fiction doctrine does not reflect a broad "functional" approach to due process, as the Government now asserts. Pet. Br. 26. Instead, as Justice Kennedy recognized in *Zadvydas*, it was a specific response to an actual administrative "line-drawing problem." 533 U.S. at 719 (Kennedy, J., dissenting). In each case, the Court sought to ensure that the steps immigration officers took after a person arrived at the border did not have the unintended consequence of conferring greater protection than she would otherwise receive. It was, in other words, a doctrine about treating an individual as if she were still where she was when first halted by immigration authorities, namely, at the border. It does not apply where, as here, immigration authorities stop a person only after the person has entered the country.

Outside of the narrowly tailored entry fiction recognized in *Mezei*, this Court has never once disturbed the clarity and strength of the territorial rule for due process protections. Instead, the Court has further limited the *Mezei* exception, while otherwise holding firm on the bright-line territoriality principle.

B. The Government places heavy reliance on *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), but that decision gives it no support. There, the Court addressed a habeas challenge, brought by an individual who was apprehended soon after entering,

challenging her removal from the country. Yamataya asserted that the relevant immigration statutes allowed the Executive to order her removed without notice or an opportunity to be heard, and argued that such removal powers violated the Due Process Clause. *Id.* at 99–100. In response, the Court held that the Government could not "arbitrarily [] cause an alien who has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard" regarding his right to "remain in the United States." *Id.* at 101. In light of that fundamental constitutional principle, the Court construed the then-applicable immigration statute to permit "the immigrant to be heard, when such opportunity is of right." *Id.* at 100.

The Government now seeks to twist this foundational case into one that undermines due process rights for "clandestine" entrants. Such a reading, however, would distort *Yamataya*'s vindication of the principle that noncitizens within the territory of the United States are protected by the Due Process Clause. The most the Government's cited passage says is that the decision "leav[es] on one side" the rights of clandestine entrants.

In any event, it is far from clear what significance the Court attached to its reference to a noncitizen who "has entered the country clandestinely." The Government itself alleged that Kaoru Yamataya was a "clandestine" entrant. In its brief, the Government recited the finding of the immigration inspector in Yamataya's case that she had "clandestinely and unlawfully entered the United States." Tr. of Record

at 39, *Yamataya v. Fisher*, 189 U.S. 86 (Oct. 2, 1901) (No. 171). The Government argued further that her case was controlled by existing lower court case law dealing with the rights of "an alien landing surreptitiously." *Id.* at 46. Whatever the Court meant to "leav[e] on one side," that opaque phrase cannot bear the weight the Government now seeks to place on it.

C. Nor do any of this Court's other decisions support the Government's request for a new "functional analysis," Pet. Br. 26. In fact, apart from assuring the integrity of the territorial approach to due process, the cases cited by the Government are examples of how the Court has placed additional limitations on the *Mezei* exception to territorial due process.

In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court addressed the due process rights of a permanent resident who had left the United States for a few days in Mexico. The individual was detained at a port of entry along the border on suspicion of aiding in the cross-border transport of undocumented migrants. Under an extension of *Mezei*'s logic, this individual at a port of entry could have been treated as outside the protective scope of due process. Yet, deciding in favor of the plaintiff, the Court reasoned that while "an alien seeking initial admission to the United States . . . has no constitutional rights regarding his application, . . . once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes immediately." *Id.* at 32 (citations omitted).

Seizing on this language, the Government has attempted to argue that *Landon* is support for the rule that the "develop[ment of] ties" is a necessary condition for due process protection. A closer read of *Landon* shows that the Government's reliance on the case is misplaced.

Answering the specific question before it, the Court held that a "resident alien returning from a brief trip abroad" ought to be assimilated to those *within the border*, not within the scope of the entry fiction doctrine. 459 U.S. at 33–34. The Court was expanding protections for certain aliens *outside the border*, as opposed to curtailing the protections for those *within it*. The Court emphasized the respondent's substantial ties, developed through residence, as a *sufficient* condition for due process protection, not a *necessary* condition as now asserted by the Government.

The case of *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), also cited by the Government, must similarly be understood as a retraction from, and not an expansion of, *Mezei*'s entry fiction doctrine. There, the Court was assessing the due process protections due to a permanent resident noncitizen who traveled on an American merchant vessel and was ordered "temporarily excluded" by an immigration inspector at a port of entry. *Id.* at 592–95. Like the Court in *Landon*, the *Chew* Court reasoned that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Id.* at 596 n.5. Accordingly, the Court held that "the constitutional status which petitioner indisputably

enjoyed prior to his voyage" was not "terminated by that voyage." *Id.* at 600.

The Government again grasps at the language of "reside[nce]." But like the Court in *Landon*, the *Chew* Court was relying on the individual's residence to expand the protections of those landing at ports of entry, and not constricting or in any way altering the undisputed rights of "all people within our borders." 344 U.S. at 596 n.5. As in *Landon*, the Court was merely treating residence as a sufficient, as opposed to necessary, condition for due process protection. The Government ought not to be allowed to turn these decisions on their head in order to establish a rule never before pronounced by this Court.

Ultimately, a thorough reading of this Court's opinions demonstrates that the Court has held firm to the simple, fundamental principle that the Due Process Clause protects every person within our territorial jurisdiction. While the entry fiction doctrine functions as a strictly limited exception to this absolute rule, *Mezei* and other Supreme Court decisions demonstrate that the doctrine cannot be expanded to undermine the territorial reach of due process.

III. Both the Government and the courts have long relied on the strength and clarity of the territorial rule.

Prior to its current attempt to upend the bright-line approach to Due Process, the Government has repeatedly acknowledged that process is due to any noncitizen who has entered the United States, lawfully or otherwise. *See*, *e.g.*, U.S. Br. at 13, *Hernandez-Mancilla v. Gonzales*, No. 06-73086, 2007

WL 916653 (9th Cir. Jan. 30, 2007) (recognizing that the Constitution "provide[s] some measure of due process protection to aliens present in the United States, even if illegally so"); U.S. Br. at 36, *Crawford v. Martinez*, No. 03-878, 2004 WL 1080689 (U.S. 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.") (alteration in original; citation omitted); U.S. Br. at 39, *Hussain v. Ashcroft*, 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"); U.S. Br. at 39–40, *Bauta-Varona v. INS*, No. 01-15404, 2001 WL 34354607 (9th Cir. Oct. 17, 2001) (noting that in *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001), the companion case to *Zadvydas*, the Ninth Circuit "carefully preserved the distinction between aliens who have entered and those who have not"); U.S. Amicus Br. at 24, *In re Alien Children* (*Plyler v. Doe*), Nos. 80-1539, 80-1934, 1981 WL 390001 (U.S. Sept. 1981) ("An alien, whatever his status under the immigration laws, surely is a 'person' in any ordinary usage of the term. And this Court has made clear that all aliens, even those whose presence in the country is unlawful, are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

Moreover, prior to its sudden reversal, the Government has long recognized that due process cannot be denied to those who, just like the Petitioner, have entered the country *recently*. For example, at oral argument in the Supreme Court in *Clark v. Martinez*, the Court specifically asked the Deputy

Solicitor General for the position of the United States on the procedural due process rights of unlawful entrants apprehended shortly after crossing the border:

> JUSTICE BREYER: A person who runs in illegally, a person who crosses the border illegally, say, from Mexico is entitled to these rights when you catch him.
>
> [GOVERNMENT COUNSEL]: He's entitled to procedural due process rights.

Tr. of Oral Arg. at *25, *Clark v. Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-7434), 2004 WL 2396844; *see also* U.S. Br. at 10, *United States v. Barragan-Camarillo*, No. 10-50429, 2011 WL 2130623 (9th Cir. May 23, 2011) (noncitizen apprehended seven miles from port of entry "had due process rights; he thus has some right to have his order of removal judicially reviewed.") (footnote omitted); U.S. Br. at 32, *Chen v. Mukasey*, No. 08-0045, 2008 WL 8052950 (2d Cir. Aug. 22, 2008) (acknowledging that noncitizen apprehended on the same day she illegally entered the United States could be deprived of due process if denied "a full and fair opportunity to present her claim."); U.S. Br. at 14, *Ramirez-Vasquez v. Ashcroft*, No. 03-71249, 2003 WL 23350845 (9th Cir. Feb. 12, 2003) (stating that due process requires that noncitizen apprehended the same day she illegally entered the United States be afforded notice of proceedings).

Relying on the same clear territorial rule, the vast majority of the courts of appeals have consistently held that noncitizens detained after effecting entry are entitled to rights under the Fifth Amendment's

Due Process Clause. *See*, *e.g.*, *United States v. Lopez-Collazo*, 824 F.3d 453, 460–61 (4th Cir. 2016) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") (alteration in original) (quoting *Zadvydas*, 533 U.S. at 693); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citation and quotation marks omitted); *Bayo v. Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010) (en banc) ("Once he crossed the border, Bayo became entitled to certain constitutional rights, including the right to due process."); *Zheng v. Mukasey*, 552 F.3d 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'") (quoting *Mezei*, 345 U.S. at 212); *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."); *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 the protections of the Fifth Amendment."); *Rodriguez-Silva v. INS*, 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.") (quoting *Zadvydas v. Underdown*, 185 F.3d 279, 289 (5th Cir. 1999)); *Padilla-Agustin v. INS*, 21 F.3d 970, 978 (9th Cir. 1994) (holding that due process required agency to afford procedural rights to recent entrant), *abrogated on other grounds by Stone v. INS*, 514 U.S. 386 (1995); *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); *Reyes-Palacios v. U.S. INS*, 836 F.2d 1154, 1155 (9th Cir. 1988) (holding that an individual arrested by INS the same day that he entered the United States was denied procedural due process); *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.); *Barthold v. U.S. 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).[4]

The Supreme Court, the vast majority of the circuits, and the foregoing Government submissions have faithfully and consistently agreed that "once an alien enters the country," the due process protections of the Fifth Amendment apply. *Zadvydas*, 533 U.S. at 693. Leading immigration textbooks reflect the same rule that due process protects noncitizens who have entered the country. *See*, *e.g.*, T. Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, Maryellen Fullerton & Juliet Stumpf, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 613 (6th ed. 2008) ("[I]t is the traditional understanding of *Mezei*: that a noncitizen's entitlement to constitutional due process depends on whether he stands at the border trying to get in . . . or instead has already made an entry and

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[4] Only one circuit court has ever held that the *Mezei* entry fiction applies to a noncitizen who has already entered the United States. In *Castro v. U.S. Department of Homeland Security*, 835 F.3d 422 (3d Cir. 2016), the Third Circuit examined the entry fiction doctrine and misapplied it in a novel and remarkable way. Specifically, the court acknowledged that the petitioners there were arrested after "entering the country," but nonetheless held "it appropriate to treat them as 'alien[s] seeking initial admission to the United States'" who had not yet entered the country. *Id.* at 427, 445 (alteration in original). To its credit, the *Castro* panel expressly acknowledged that a "potential criticism of our position . . . is that it appears to ignore the Supreme Court's precedents" recognizing the due process guarantee for all aliens present in the United States. *Id.* at 447. Quite so. Moreover, the *Castro* decision erroneously relies on *Yamataya*. Our discussion above already demonstrates that *Yamataya* provides no such support for denying recent entrants access to due process protections.

must be removed."); Stephen H. Legomsky, IMMIGRATION AND REFUGEE LAW AND POLICY 69 (3d ed. 2003) ("Today the law is clear that all individuals who face expulsion are protected by due process, whether they entered the United States lawfully or clandestinely and whether they arrived long ago or recently.").

The Government's argument that Respondent, apprehended after entering the country, "cannot lay . . . claim to constitutional protections" related to his attempted admission, Pet. Br. 24, is an unfounded change of position by the Government and an attempt to circumvent decades of established law.

IV. The Government's position, if adopted by this Court, would disrupt legal precepts and fundamental rights far beyond this case.

Under the long-established test, there is no question that Respondent is entitled to due process of law. In arguing that he should be afforded no due process at all, the Government seeks to eliminate a bedrock, bright-line rule and provides only vague hints at what new rule might replace it.

For one, the Government's position suggests that due process protection can only attach after a noncitizen undergoes inspection and is admitted by the immigration authorities. This change would be radical. Taken to its logical conclusion, this new rule would bind the *constitutional* due process line to a *statutory* line of admission, allowing Congress to dictate the reach of a constitutional provision that should instead restrict unfettered power. *Cf. Downes*, 182 U.S. at 283 (observing that due process serves as a fundamental protection to prevent an "unrestrained

power on the part of Congress" to deal with people within the territory "upon the theory that they have no rights which it is bound to respect.")

But, unwilling to commit entirely to that extreme position, the Government alternatively proposes that entitlement to due process should depend on a "functional analysis" that could include factors such as the length of time a person has been in the country, the distance one has traveled from the border, and the ties that one has developed here. Pet. Br. 26. Those have never been grounds for deciding whether due process applies. The question has not been time or distance but whether one is *present* within the country's borders. *See Wong Wing*, 163 U.S. at 238. And while "ties" to the country have led the Court to extend due process protections to noncitizens outside the territory, they have never been necessary to the guarantee of due process for those inside the territory. *See Mathews*, 426 U.S. at 77 ("Even [an alien] whose presence in this country is unlawful, involuntary, or *transitory* is entitled to th[e] constitutional protection

[of due process under the Fifth and Fourteenth Amendments].") (emphasis added).[5, 6]

Apart from being foreign to clearly established jurisprudence, the Government's proposed factors are incapable of establishing a workable standard to govern the reach of the Constitution. The Government does not explain what length of time, what distance, and what sort of "ties" are sufficient to trigger due process rights for one who has entered the United States unlawfully. Instead, the proposed approach would force courts to apply an ambiguous

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[5] As explained above, the Government errs in suggesting that *Landon v. Placensia* supports the notion that a noncitizen must live in the United States for a meaningful period for due process to attach. Similarly, the extraterritoriality cases the Government cites for the "substantial connections" test are inapposite. *See*, *e.g.*, Pet. Br. 25 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). The Court relied on an individual's substantial connections in those cases to determine the reach of the Constitution outside our borders. But here, over a century of precedent already provides the Court with a bright-line rule for the application of the Due Process Clause within our borders.

[6] The government also cites decisions penalizing people for aiding and abetting unlawful entry when the relevant conduct occurred "within U.S. territory after the border crossing," Pet. Br. 26, to support their proposed functional approach. Putting aside the fact that the criminal context of these cases is completely divorced from the constitutional line at stake, the Government has long insisted on strict territorial lines when charging noncitizens with unlawful entry itself. *See*, *e.g.*, *United States v. Martin-Plascencia*, 532 F.2d 1316, 1317–18 (9th Cir. 1976) (unlawful entry where noncitizen ran fifty yards into the country); *United States ex rel. Giacone v. Corsi*, 64 F.2d 18, 19 (2d Cir. 1933) (unlawful entry when, inter alia, noncitizen was arrested "about one half mile beyond the customs and immigration office").

and ill-defined test in every case, merely to decide whether a person in the United States can claim the basic protection of the Due Process Clause. Abandoning the territorial rule for the Government's proposed standard would be an inappropriate punt to lower courts to "balance" these suggested factors, at the expense of fairness, consistency, and predictability. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989) (noting that the "establishment of broadly applicable general principles is an essential component of the judicial process," criticizing the adoption of a "'totality of the circumstances' test" as an abandonment of the "important objective" of uniformity, and describing predictability as a "needful characteristic of any law worthy of the name").

In the present case, the need for an administrable rule is further heightened for at least two reasons. First, where the question is one of mere access to a basic constitutional protection, not the scope of such protection, an absolute, bright-line rule is singularly important to offer protection against governmental excess. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–78 (1960) (arguing that constitutional balancing risks allowing the Court to be swayed by the government in times of crisis to curtail individual liberties).[7] Second, the need for consistent

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[7] In this respect, the Government is not helped by its reference to *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). *See* Pet. Br. 26. In that case, the Court examined only whether suspicionless checkpoints were "reasonable" under the Fourth Amendment (i.e., the scope of the Amendment's protection), not whether the Fourth Amendment applied at all. *Id.* at 557–58,

and clear rules is sharpened in the immigration context, where they touch on one of the most fundamental aspects of life: the country in which a person lives, or from which a person is exiled. These interests are heightened in the asylum process which determines whether a person may find refuge in this country, or be forced back to face persecution in an unsafe land. *Cf. Jordan v. De George*, 341 U.S. 223, 231 (1951) (applying "void for vagueness" doctrine to immigration statute "in view of the grave nature of deportation[,] . . . a drastic measure and at times the equivalent of banishment or exile") (quotation marks omitted).

For the foregoing reasons, the Government's "functional" analysis would be unworkable. Instead of submitting to this amorphous standard, the Court should adhere to the bright-line territorial rule grounded in the text of the Constitution and solidified through decades of jurisprudence.

CONCLUSION

Until recently, noncitizens in this country could rest assured that, just as their presence here subjected them to the obligations of our legal system, it also entitled them to the protections of our laws. 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

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562–63. The Court expressly "agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.* at 556.

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).

For more than a century, this Court, lower courts, and, until recently, the Government have uniformly acknowledged that *all* noncitizens inside the United States are entitled to due process protection. That rule is predictable, logical, manageable, and correct. The Government now proposes to deprive noncitizens who have *entered* the United States of the protections of the U.S. Constitution—at least until the Government is satisfied that the individual has traveled far enough, spent enough time, and/or made enough friends. This Court should not make such an unwarranted and unconstitutional change.

Respectfully submitted.

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