No. 00-38

IN THE SUPREME COURT OF THE UNITED STATES

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.

KIM HO MA
Respondents.

BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT KIM HO MA

Filed December 26th, 2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Lawyers Committee for Human Rights (the "Lawyers Committee") submits this brief *amicus curiae* in support of respondent Kim Ho Ma.[1] Since 1978, the Lawyers Committee has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection in the international standards of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. The Lawyers Committee operates one of the largest and most successful pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of indigent asylum applicants each year. The Lawyers Committee and its volunteer attorneys currently represent some 900 clients from more than 60 countries. The Lawyers Committee is committed to ensuring that the remedy of asylum remains available to victims of persecution. It is particularly concerned that all eligible aliens have the opportunity to apply for asylum and to have their claims adjudicated through a fair and humane process.

This case raises an issue of particular importance to the Lawyers Committee and to its clients, who, under a ruling

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the Lawyers Committee, made a monetary contribution to the preparation and submission of this brief.

contrary to that reached by the Ninth Circuit here, might face indefinite and prolonged incarceration pending the resolution of their asylum applications or in circumstances in which the INS seeks to deport them to countries that will not accept them. Indeed, this question raises special concerns in cases in which a refugee's home country refuses to accept him or her back for reasons relating to the refugee's claimed need for asylum. In such cases, a rule permitting the INS to indefinitely detain such refugees may, in effect, permit the home country to inflict political persecution upon the refugee, using the INS as a proxy.

For these reasons, the Lawyers Committee for Human Rights has a profound interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case, as with the companion case of *Zadvydas v. Underdown*, No. 99-7791, concerns the right of a resident alien to be free from arbitrary and indefinite imprisonment where that alien, for whatever reason, cannot be removed to his or her country of origin. Under this Court's well-established precedents, such resident aliens – who have "passed through our gates, even illegally," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) – are afforded full protections under the Due Process Clauses of the Fifth and Fourteenth Amendments. As this Court has held, "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). *See also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.").

In the decision below, the Ninth Circuit applied this principle in a straightforward manner to hold that the Immigration and Nationality Act could not constitutionally be construed to permit the indefinite detention of a resident alien unable to be returned to his or her native land. Avoiding the serious constitutional questions presented by a contrary interpretation, the court ruled that 8 U.S.C. § 1231(a)(6) simply could not be construed to grant the INS "so sweeping a power with regard to persons who are generally subject to the protections of the Constitution." *Ma v. Reno*, 208 F.3d 815, 827-28 (9th Cir. 2000). This holding is correct, and should unquestionably be affirmed by the Court.

The Lawyers Committee writes separately, however, to address one aspect of the Ninth Circuit's reasoning warranting special treatment here. In reaching its ruling, the Ninth Circuit distinguished the situation presented by Kim Ho Ma's case with those of so-called "excludable" aliens – *i.e.*, those who have not legally "entered" the United States, such as undocumented refugees seeking asylum. *See Ma*, 208 F.3d at 823-25. In *Mezei*, this Court held that such excludable aliens, who are "on the threshold of initial entry," stand "on a different footing" from those aliens "who have once passed through our gates." *Mezei*, 345 U.S. at 212. Indeed, the Court remarked bluntly: "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). Applying this minimal standard of procedural due process, the Court thus concluded that Mr. Mezei – an excludable alien deemed a risk to national security by the Government – could be detained indefinitely on Ellis Island, despite the Government's inability to return him to his country of origin. *Id.* at 215-16.

The Ninth Circuit's contrary holding with regard to the *deportable* alien at issue here obviously rests upon *Mezei*'s determination that resident aliens possess greater rights under the Due Process Clause than excludable aliens such as Mr.

Mezei. Indeed, this is aptly reflected in prior Ninth Circuit precedent following *Mezei* and concluding that refugees and other excludable aliens *could* be detained indefinitely in analogous circumstances (*i.e.*, where the country of origin – in that case, Cuba – refuses to take them back) – even where the incarceration has lasted upwards of 10 years and occurred in maximum security federal penitentiaries. *See Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc).

This *amicus* brief addresses the continuing viability of this sharp distinction between the constitutional rights of deportable versus excludable aliens with regard to prolonged, indefinite detention. To be sure, this Court need not reach this issue to affirm the Ninth Circuit's ruling here. But the Lawyers Committee submits that this case provides an appropriate and rare vehicle for the Court to reconsider the wisdom of the 50-year old *Mezei* precedent and its subsequent progeny holding that, for all intents and purposes, the INS has unlimited discretion to incarcerate excludable aliens for prolonged and indefinite periods, outside the glare of fundamental constitutional protections. And indeed, a reconsideration of *Mezei* is especially necessary given the subsequent development of international standards against arbitrary and indefinite detention, as well as this Court's more recent constitutional jurisprudence.

The Lawyers Committee for Human Rights, therefore, submits this Brief *Amicus Curiae* to encourage the Court not only to affirm the Ninth Circuit's ruling in this case, but also to reevaluate the constitutional protections afforded aliens generally with regard to prolonged indefinite detention.

ARGUMENT

The Ninth Circuit's decision should, without question, be affirmed by this Court. But in the process, the Court should revisit its McCarthy Era *Mezei* precedent and emphasize that the indefinite and prolonged imprisonment of *any* alien – whether excludable or resident – flatly contravenes international human rights guarantees against arbitrary detention and conflicts with evolving standards of constitutional jurisprudence.

I. Tracing The History Of *Mezei* And The Minimal Constitutional Protection Of Excludable Aliens Against Prolonged, Indefinite Detention

A. The Plenary Power Doctrine

The Court's decision in *Mezei* has its roots in the so-called "plenary power" doctrine, first applied by this Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the "*Chinese Exclusion Case*"). In that case, the Court ruled that a Chinese laborer who, in 1887, had obtained a certificate permitting him to re-enter the United States, could not challenge his subsequent exclusion from the country as a result of an 1888 statute voiding previously obtained certificates. As stated by Justice Field, Congress's ability to pass legislation to exclude aliens "is a proposition which we do not think open to controversy." *Id.* at 603. Thus, the Court concluded that the federal power to *exclude* aliens was an inherent attribute of sovereignty, essentially unchallengeable by the courts. *Id.* at 604, 609.

The Court reached a similar conclusion in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), again affirming the federal government's plenary power to exclude aliens, essentially without judicial intervention. As stated by Justice Gray, "[i]t is not within the province of the judiciary" to order the entry of foreigners who are not residents of the United States. For such people, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660.

Since *Nishimura Ekiu*, the Court has adhered to this rule – courts will generally decline to intervene in cases involving the determination of whether a particular alien will be admitted or excluded from the country, except in specific instances authorized by statute or regulations. *See also Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("the right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance"); *see also generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 947-51 (1995) (discussing development of the plenary power doctrine).

Pointedly, however, the Court has not adhered to the extreme plenary power doctrine in cases involving resident or *deportable* aliens. Indeed, in *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (the "*Japanese Immigrant Case*"), the Court expressly recognized that resident aliens are entitled to procedural due process before being deported or expelled from the country. *Accord Kwong Hai Chew*, 344 U.S. at 596-97 (recognizing a resident alien's constitutional right to due process in deportation proceedings).

B. The "Entry Fiction"

In some sense, practical reality has blurred the distinction between deportable and excludable aliens. As discussed by Professor Weisselberg, "[b]y the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels. Congress therefore passed several immigration laws to permit inspectors to order the 'temporary removal' of an alien from a vessel for inspection[.]" Weisselberg, *The Exclusion and Detention of Aliens*, 143 U. PA. L. REV. at 951. But these statutes explicitly specified that such a removal to land would not be deemed "a landing." *Id.* This was the beginning of the so-called "entry fiction," whereby "an alien on United States

soil pending admission would be treated as if she was still at the border, and not within the United States." *Id.*

Of course, in certain instances, such "removals" could extend for prolonged periods of time, especially where – as here – the alien could not be returned to his or her country of origin. The Court, however, determined that this prolonged removal did not change the excludable alien's constitutional status. In *Kaplan v. Tod*, 267 U.S. 228 (1925), for example, the Court ruled that an alien ordered excluded in 1914, but unable to be returned home because of World War I and then placed with local charities in the United States, could not challenge her subsequent exclusion in 1923. As stated by the Court in rejecting her claim that she had effected an entry into the United States, "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.* at 230 (citing *Nishimura Ekiu*, 142 U.S. at 661).

Thus, in effect, the Court – and subsequently Congress[2] – determined that, regardless of an excludable alien's physical presence in the United States, such an excludable alien would still be deemed "at the boundary line" and not as having "entered" the United States. *Id. See also Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) (holding that even though alien is physically "within the United States," there has not been an "entry" for the purposes of determining rights and protections under the law).

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[2] In 1952, Congress effectively codified the entry fiction expressly providing for immigration parole of aliens, and by providing that that such parole "shall not be regarded as an admission" into the United States. *See* Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at then 8 U.S.C. § 1182(d)(5)).

C. *Mezei*: The Cold War Culmination Of Plenary Power And The Entry Fiction

The immigration / national security cases decided during the McCarthy Era of the early 1950s – including *Mezei*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) – represent the "modern zenith" of the plenary power doctrine and the "entry fiction." Weisselberg, 143 U. PA. L. REV. at 954.

In *Knauff*, the Court affirmed the exclusion, on national security grounds, of the non-citizen wife of a naturalized citizen. The Court did so despite the fact that the Attorney General's decision to exclude the alien was based on secret evidence and without any opportunity for a hearing. *Knauff*, 338 U.S. at 544. Rejecting the alien's effort at admission, the Court stated emphatically that "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543. The Court further stated that, given that the "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government[,]" the Executive Branch's determination to exclude a particular alien is "final and conclusive." *Id.* at 542-43. Justice Jackson (joined by Justices Black and Frankfurter) dissented, specifically condemning the Government's use of secret evidence to exclude Ms. Knauff. As stated by Justice Jackson, "the plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." *Id.* at 551 (Jackson, J., dissenting). Nevertheless, and regardless of Justice Jackson's concerns about secret evidence, the Court deferred entirely to the Attorney General, affirming the exclusion of Ms. Knauff. In short, "[t]he rule of *Knauff* is that the government has absolute power to exclude. When an official claims that the

exclusion concerns the country's security, no court may examine the government's claim." Weisselberg, 143 U. PA. L. REV. at 957.[3]

Although it concerns *deportable* aliens (as opposed to the *excludable* aliens at issue here), *Harisiades v. Shaughnessy* stands as a further extreme example of the operation of the plenary power doctrine. In that case, the Court affirmed the deportation of the petitioners under the Alien Registration Act (8 U.S.C. § 137), on the sole grounds of former membership in the Communist Party. Rejecting the petitioners' due process challenge (as well as challenges under the First Amendment and the *Ex Post Facto* Clause), the Court concluded that the Government had broad authority to deport aliens for whatever reason, especially given the intense state of the Cold War. As stated by the Court, "[w]e think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation." *Id.* at 591. *See also Galvan v. Press*, 347 U.S. 522 (1954) (upholding congressional power to deport an alien who had lived in the United States for 30 years, but had briefly been a member of the Communist Party).

Mezei stands as the culmination and most extreme example of the Court's McCarthy Era jurisprudence of withdrawing judicial scrutiny from even the most egregious violations of basic rights. The alien in question, Ignatz Mezei, was a long-term resident who came to the United

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[3] As described by Professor Weisselberg, the Court's decision in *Knauff* "did not play in Peoria or on Capitol Hill." Weisselberg, 143 U. PA. L. REV. at 958. After numerous congressional hearings and condemnatory newspaper articles, the Attorney General consented to the reopening of Ms. Knauff's case and a full hearing, revealing all previously secret evidence. The Board of Immigration Appeals ultimately ordered Knauff to be admitted to the United States. *See generally id.* at 958-63.

States in 1923 and married an American citizen. In 1948, Mezei attempted to travel to Romania to visit his dying mother and, after being denied permission to enter Romania, lived in Hungary for nineteen months. *Mezei*, 345 U.S. at 207. In 1950, Mezei attempted to return to the United States, but was intercepted and temporarily excluded by an immigration inspector. Subsequently, the Attorney General determined that Mezei should be permanently excluded "on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.'" *Id.* at 208. In other words, the Government determined that Mezei should be excluded for unspecified "security reasons." *Id.* The Government then attempted to deport Mezei to Hungary, which refused readmission. *Id.* at 208-09. France and Great Britain also refused, as did a number of Latin American countries. *Id.*

Throughout this period, Mezei was held in detention at Ellis Island. In short, the Government would not admit or parole him into the United States, and no country would take him back. Thus, Mezei's detention on Ellis Island was utterly indefinite and, conceivably, permanent.

Mezei filed a petition for writ of habeas corpus, challenging his indefinite detention. The district judge granted Mezei's petition, holding that Mezei's 21-month detention on Ellis Island was "excessive and justifiable only by affirmative proof of [Mezei's] danger to the public safety." *Id.* at 209. The Second Circuit affirmed this ruling.

This Court, however, reversed. Determining Mezei to be an excludable alien, the Court emphasized that, with regard to exclusion decisions, an executive officer's authority is "final and conclusive." *Id.* at 212. Contrasting the situation involved with a resident alien, the Court noted that "[a]n exclusion proceeding grounded on danger to the national security . . . presents different considerations," such that the Government's continued, indefinite detention on Ellis Island was permissible and did not run afoul of due process.

Justices Black, Frankfurter, Jackson, and Douglas all dissented from the Court's ruling. Justice Black, joined by Justice Douglas, condemned the Court's decision as "holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General." *Id.* at 217 (Black, J., dissenting). As stated by Justice Black:

> No society is free where government makes one person's liberty depend upon the arbitrary will of another. . . . The Founders abhorred arbitrary one-man imprisonments. Their belief was – our constitutional principles are – that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.' This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.

Id. at 217-18.

Justice Jackson, joined by Justice Frankfurter, was even more explicit in his condemnation of the Court's ruling. Justice Jackson found it "startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial." *Id.* at 218 (Jackson, J., dissenting).

Nevertheless, and over these strong dissents, the Court – by a 5-4 vote – determined that Mr. Mezei's indefinite detention by the INS did not violate the Constitution.[4]

D. Application Of *Mezei* By The Lower Courts To Sanction Indefinite, Arbitrary, And Prolonged Incarceration Of Aliens

With some exceptions, the lower courts have generally applied *Mezei* to reject claims that the indefinite detention of excludable aliens or refugees violates the Constitution or exceeds the INS's power under the Immigration and Nationality Act, even outside the *Mezei* Court's original national security context. This has been true, regardless of the length of detention, the conditions of confinement, or the rationale for exclusion.

The most extreme example of this may be the Ninth Circuit's decision in *Barrera*. In that case, the petitioner had arrived in the United States in 1980 as part of the Mariel Cuban boatlift, during which approximately 125,000 Cubans came to the United States. From 1981-1983, Barrera was convicted of several crimes, and in 1985, after Barrera finished serving his state criminal sentences, the INS revoked Barrera's immigration parole and transferred him to the federal prison in Atlanta, where a number of Mariel Cubans were being detained at the time. Subsequently, the INS ordered that Barrera be denied admission and excluded from the country. Unfortunately, however, the Cuban government refused to take him back. Thus, Barrera became "an excluded alien whose deportation [was] not practicable." *Barrera*, 44 F.3d at 1443.

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[4] Mr. Mezei's detention ended up lasting approximately four years, before he was ultimately paroled into the United States under a special clemency measure. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 558 (1990).

The INS, however, did not restore Barrera's immigration parole status. On the contrary, and with the exception of a very brief period in 1992, the INS has held Barrera continuously from 1985 up through the present. And, throughout most of this period, Barrera has been held in maximum security federal penitentiaries at Lompoc and Leavenworth, and housed in the general population with hard-core criminals convicted of violent crimes, despite the fact that Barrera is not serving any criminal sentence.

In 1989, Barrera filed a petition for writ of habeas corpus, asserting that the Attorney General lacked the statutory authority to detain him indefinitely, given that his deportation would not be effected within the foreseeable future, and that this indefinite detention also violated the Constitution and international law. After the district court granted Barrera's petition, a panel of the Ninth Circuit affirmed. In an opinion by Judge Noonan, the court emphasized that "'[i]n our society no person may be imprisoned for many years without prospect of termination. The rights of the human person must be vindicated as part of the common good of our society.'" *Barrera*, 44 F.3d at 1452 (Pregerson, J., dissenting) (quoting Judge Noonan's majority opinion in the original panel decision).

An *en banc* panel of the Ninth Circuit reversed, however. Relying primarily upon *Mezei*, the court concluded that Barrera, as an excludable alien, had "no constitutional right to immigration parole and, therefore, no right to be free from detention pending his deportation." *Id.* at 1448. "Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows." *Id.* at 1450. The court also determined that Barrera's prolonged incarceration did not violate international law principles. *Id.* at 1450-51. Thus, in that case, the INS was deemed free to incarcerate an immigrant – conceivably for the rest of his life – in maximum security federal penitentiaries housed with violent criminals, for the simple reason that the INS was unable to deport him.

Other courts – primarily in the context of claims by Mariel Cuban detainees – have similarly concluded that, under *Mezei* (applying the plenary power doctrine and the entry fiction), excludable aliens have no right to be free from indefinite and prolonged incarceration pending deportation, even where the deportation is not feasible. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993) (relying on *Mezei* to reject claim by Mariel Cuban that indefinite detention violated substantive and procedural due process, as well as international law); *Fernandez-Roque v. Smith*, 734 F.2d 576, 580 (11th Cir. 1984) (finding that the government has implicit authority to detain excludable aliens indefinitely until deportation).

The lower courts' application of *Mezei* to permit indefinite incarceration of excludable aliens has not been unanimous, however. In *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the Tenth Circuit ruled that such indefinite incarceration of a Mariel Cuban in federal penitentiaries violated the Constitution, as well as fundamental principles of international human rights law. As stated by the court, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Id.* at 1388 (citing Universal Declaration of Human Rights, Arts. 3 and 9, U.N. Doc. A/801 (1948)). *But see Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000) (distinguishing *Rodriguez-Fernandez* and concluding that indefinite detention of deportable alien did not violate the Constitution).

Nevertheless, and regardless of *Rodriquez-Fernandez*, most lower courts to consider the applicability of the *Mezei* principle to the indefinite and prolonged incarceration of excludable aliens have determined that, given the entry fiction and the plenary power doctrine, such indefinite detention does not violate the Constitution or international law.

II. The Court Should Reconsider The Viability Of *Mezei* In Light Of Evolving Standards Of International Law Proscribing Arbitrary Detention

As discussed in *Rodriguez-Fernandez*, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." 634 F.2d at 1388. In simple, unequivocal terms, the Universal Declaration of Human Rights states: "No one shall be arbitrarily arrested, detained, or exiled." Universal Declaration of Human Rights, Dec. 10, 1948, art. 9, U.N.G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The American Convention on Human Rights (July 18, 1978, art. 7, 1144 U.N.T.S. 123 ("American Convention")) further provides that "[e]very person has the right to personal liberty and security . . . . No one shall be subject to arbitrary arrest or imprisonment." *See also* Restatement (Third) of Foreign Relations Law § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention").

This Court has consistently held that international law must be considered part of United States federal common law. As stated by the Court: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also The Nereide*, 13 U.S. (9 Cranch.) 388, 422 (1815) (holding that U.S. courts are "bound by the law of nations which is part of the law of the land"); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (it is a "settled proposition that federal common law incorporates international law"). Thus, it is beyond question that the international precepts against arbitrary detention are binding on the United States.

These evolving and yet fundamental principles strongly suggest the need to reconsider the *Mezei* line of authority, which apparently permits the indefinite detention of immigrants without charge or crime, conceivably for the rest

of their lives if they are unable to be sent home. Such untrammeled and absolute discretion to imprison human beings is the essence of arbitrary imprisonment.

The United Nations has defined "arbitrary" detention as detention that is "(a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* 7 (1964). Thus, it is clear that even if the indefinite detention of a particular alien is allegedly consistent with domestic statutory or regulatory authority, this purported "legality" does not, in and of itself, make such indefinite detention permissible under international law. *See* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993) ("It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.").

Indeed, the Human Rights Committee, established to monitor compliance with the Covenant on Civil and Political Rights (ratified by the United States in 1992), has found "arbitrary" detention in violation of the Covenant and the Universal Declaration of Human Rights, even where such detention is purportedly pursuant to law. *See, e.g., Ana Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977 (3 April 1980), U.N. Doc. CCPR/C/OP/1 at 45 (1984) (finding violation of Article 9(1) of the Universal Declaration where two individuals were detained for several months after their sentences of imprisonment had been fully served). Moreover, the U.N. Working Group on Arbitrary Detention has noted that "arbitrary" detention occurs where, as in the case of many INS detainees, the person is "kept in detention after the completion of his sentence." *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4./1998/44 (1997).

The European Court of Human Rights has also analyzed the analogous circumstance of an individual held pending extradition. In *Quinn v. France*, 21 E.H.R.R. 529 (1996), for example, the European Court ruled that detention pending extradition cannot exceed a *reasonable* time:

> It is clear from the wording of both the French and the English versions of Article 5(1)(f) [of the European Convention for the Protection of Human Rights and Fundamental Freedoms] that deprivation of liberty under this subparagraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1).

Id. at 550 (finding 18 month detention to be a violation of the European Convention and its prohibition against arbitrary detention).

The United Nations High Commissioner for Refugees ("UNHCR") has recognized the serious human rights questions raised by the indefinite detention of asylum seekers, refugees, and other aliens who are stateless or cannot be returned to their countries of origin. As stated by the UNHCR:

> The inability of stateless persons who have left their country of habitual residence to return to their countries has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Refugees* (Feb. 10, 1999).

Thus, evolving international human rights law principles require a reconsideration of *Mezei*. As discussed by Justice Black in his dissent in *Mezei*, condemning the practice of indefinitely detaining immigrants who are unable to be returned home: "No society is free where government makes one person's liberty depend upon the arbitrary will of another." *Mezei*, 345 U.S. at 217 (Black, J., dissenting). Justice Black, joined by Justice Douglas, emphasized that under these fundamental principles, excludable aliens such as Mr. Mezei "should not be deprived of [their] liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor." *Id.* at 218.

The detention at issue is made all the more arbitrary and abusive by the practical reality that refugees and other excludable aliens are often held in prisons, housed in the general population with violent criminals. As discussed recently by Professor Michele A. Pistone, asylum seekers, for example, are often held in "state, local, and county jails, in which the INS rents bed space as needed." Michele A. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 204 (1999). As demonstrated in *Barrera* and other cases, some excludable detainees are even held in notorious maximum security federal penitentiaries, such as Lompoc or Leavenworth, together with our nation's most violent felons. *See Barrera*, 44 F.3d at 1443 (discussing Barrera's decade-long incarceration in USP Lompoc and other prisons). Furthermore, as discussed by Professor Pistone with regard to asylum seekers:

> Where asylum seekers are detained in centers that also house criminal inmates, the asylum seekers are typically not treated differently from the general prison population. Guards receive no special training about asylum seekers. Indeed, prison staff in many detention centers do not know which of the inmates under their guard are criminals and which are asylum seekers. With no way of distinguishing between the two subgroups of inmates, members of the two groups are often treated the same way – as criminals. They are subject to frequent strip searches, pat downs, and prolonged isolation in solitary confinement as punishment for minor infractions.

Pistone, 12 HARV. HUM. RTS. J. at 204-05.

In short, the detention of aliens at issue here and in other instances is indistinguishable from the incarceration of ordinary criminals. The only difference, of course, is the fact that the aliens in question are *not* serving a criminal sentence and, therefore, have no defined end-point for their imprisonment. And, with regard to excludable aliens, the *Mezei* doctrine arguably sheds them of most protections under the United States Constitution and, through the plenary power doctrine, of meaningful judicial review of their imprisonment.

Such elimination of meaningful human rights protections and judicial review over indefinite and unchallengeable detention – the inevitable product of the *Mezei* regime – virtually guarantees arbitrary and standardless detention of aliens, in violation of international human rights standards. For this reason, the Court should not only affirm the Ninth Circuit's ruling in this case, but also reconsider the validity of *Mezei*'s sanction of indefinite and prolonged incarceration of excludable aliens.

III. Recent Due Process And Equal Protection Jurisprudence Also Mandates A Reconsideration Of *Mezei*

The *Mezei* doctrine also squarely conflicts with modern and well-established principles of constitutional jurisprudence. Indeed, recognizing that the Fifth and Fourteenth Amendments refer to all "persons," and not just "citizens," this Court has traditionally emphasized that aliens – and, in some instances, excludable aliens – must be

afforded due process protection. Indeed, as far back as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court has emphasized that "the Constitution protects all individuals inside the United States, including aliens, from invidious discrimination at state hands." Motomura, 100 YALE L.J. at 565. As stated by the Court, the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality[.]" *Yick Wo*, 118 U.S. at 369.

Thus, in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court invalidated a statute providing that any Chinese national whom executive officials found to be in the United States illegally "shall be imprisoned at hard labor." *Id.* at 233. Distinguishing the question of whether the government has plenary power to exclude a particular alien, the Court deemed the question of whether it could impose punishment without judicial trial an entirely different matter. As stated by the Court:

> No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence 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.

Id. at 237. In other words, therefore, even an excludable alien has a Fifth, Sixth, and/or Fourteenth Amendment right not to be punished without due process of law. In short, these provisions are "universal in their application," applying to all "persons" in the territorial jurisdiction of the United States. *Id.* at 238 (citing *Yick Wo*, 118 U.S. at 369). And, given that *Wong Wing* applied to an excludable alien, the

principle against arbitrary punishment stands *regardless* of the entry fiction identified and applied in *Mezei*.

More recent authorities describing and further establishing the "punishment doctrine," considered in conjunction with *Wong Wing*'s extension of its protections to excludable aliens, bring into stark relief the Court's need to reconsider the *Mezei* regime. The first of these precedents is *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), in which the Court invalidated a law permitting immigration officials to divest an American of citizenship for leaving the country to avoid the draft. Deeming this sanction punitive, the Court concluded that this punishment could not be imposed "without providing the safeguards which must attend a criminal prosecution." *Id.* at 184. In so doing, the Court identified a multitude of factors for determining whether and when a purportedly civil sanction must be deemed *punitive* and thus, unconstitutional to impose absent the protections of a criminal trial.

More recent decisions – including *United States v. Salerno*, 481 U.S. 739, 747 (1987), *Schall v. Martin*, 467 U.S. 253, 269 (1984), and *Bell v. Wolfish*, 441 U.S. 520, 537-39 (1979) – have focused on the key element of the *Mendoza-Martinez* analysis – *i.e.*, "whether there is a rational alternative purpose for the sanction and whether the sanction is excessive in relation to that alternative purpose." Weisselberg, 143 U. PA. L. REV. at 993. In other words, under the *Mendoza-Martinez* test (as further explained in *Salerno*, *Schall*, and *Bell*), a regulatory sanction – such as the detention at issue here – is constitutional only if it is reasonable and not excessive in relation to the non-punitive purpose for the sanction.

Given that *Wong Wing* established that the punishment doctrine applies equally to excludable aliens, *Mezei* simply cannot be read to permit regulatory detention of such excludable aliens that is "excessive" in relation to its purportedly non-punitive purpose. *Salerno*, 481 U.S. at 747. It goes without saying that indefinite incarceration in a prison, housed together with violent criminals, conceivably

for an alien's entire life, is "excessive" in relation to any regulatory goal – especially one that has no reasonable possibility of being achieved, as is the case where an alien's home country refuses to take him or her back.

This last point is most clearly illustrated by *Jackson v. Indiana*, 406 U.S. 715 (1972), in which the Court ruled that a criminal defendant may not be placed in custody as incompetent to stand trial for more than the reasonable period necessary to determine whether he or she will become competent in the foreseeable future. *Id.* at 738. In short, if the defendant is not likely to become competent in the foreseeable future, the detention has become excessive and unreasonable, and a state must institute commitment proceedings consistent with due process in order for it to continue.

The same principle must apply here, and mandates a reconsideration – or, at least, a recalibration – of the *Mezei* regime. Indeed, in many cases – as in *Barrera*, for instance – excludable aliens have spent over ten years in federal penitentiaries, living among violent criminals, waiting for the INS to be able to deport them. Where it becomes clear that the INS *cannot* deport them, because they are stateless or because their home countries will not take them back, the *Jackson* / *Mendoza-Martinez* punishment doctrine mandates a finding that continued incarceration is unreasonable and excessive, amounting to unconstitutional punishment under *Wong Wing*. Because *Mezei*'s tolerance of indefinite detention – as well as the lower courts' application of *Mezei* to permit its most extreme forms – flatly conflicts with the punishment doctrine, the Court must reconsider *Mezei*'s viability as a constitutional precedent.

Other precedents further call into question the continuing validity of *Mezei*'s withdrawal of constitutional protections from excludable aliens. In other contexts, the Court has emphasized that the Fifth and Fourteenth Amendments apply to all persons, not simply citizens or resident aliens. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court invalidated a Texas statute that withheld state funds from

local school districts for the education of children not "legally admitted" into the United States and further authorized local school districts to deny enrollment into their public schools to such children. *Id.* at 205. Striking down the statute as violating the Equal Protection Clause, the Court emphasized – as in *Yick Wo* and *Wong Wing* – that the Fourteenth Amendment applies to all *persons*, not merely citizens. *Id.* at 210. Moreover, the Court struck down the statute, despite the fact that the undocumented alien children did not have any "right" to public education – in the same way that, in *Wong Wing*, the Court struck down the statute, despite the fact that the excludable aliens in question had no "right" to be in the country. *Id.* at 221. *See also* Motomura, 100 YALE L.J. at 584 ("*Plyler* recognized a radically broader view of the constitutionally protected community than that implicit in the plenary power doctrine").

In short, *Mezei*, at least as it has been interpreted and applied by the lower courts in such cases as *Barrera* and *Gisbert* (and by the Fifth Circuit in *Zadvydas*), does not take into account these additional precedents or the evolution of the *Wong Wing* punishment doctrine. As such, the case must be viewed as a McCarthy Era relic involving national security issues, demanding reconsideration and rejection in favor of modern principles of constitutional jurisprudence.

CONCLUSION

The decision of the Court of Appeals should be affirmed. In addition, however, the Court should revisit its *Mezei* ruling in light of fundamental precepts of international law barring arbitrary detention, as well as the evolution of constitutional jurisprudence concerning punishment and regulatory sanctions.

Respectfully submitted.

ELISA C. MASSIMINO
LAWYERS COMMITTEE FOR HUMAN RIGHTS
100 Maryland Avenue, N.E.
Ste. 500
Washington, D.C. 20002
(202) 547-5692

SETH M.M. STODDER
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amicus Curiae

December 26, 2000