
First Amendment — Freedom of Speech — Extraterritoriality —
Agency for International Development v. Alliance for
Open Society International, Inc.

Whether constitutional rights apply beyond the physical borders of the United States has been a contested issue for over a century in Supreme Court jurisprudence.¹ Last Term, in *Agency for International Development v. Alliance for Open Society International, Inc.*² (*AOSI II*), the Court articulated a hard-line view and declared it settled law that foreign citizens abroad do not have any rights under the Constitution, thus defining the reach of the Constitution in solely geographic terms.³ In doing so, it ignored the important role that ties to the United States have played in determining the scope of noncitizens' constitutional rights and the Court's previous hesitancy to make sweeping pronouncements on the Constitution's extraterritorial application. Accordingly, *AOSI II* should not be read to foreclose all extraterritorial constitutional protections for noncitizens with substantial ties to the United States, particularly for permanent residents.

In response to the global HIV/AIDS epidemic, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003⁴ (Leadership Act).⁵ The Act authorized the appropriation of funds to the President to be distributed to both domestic and foreign nongovernmental organizations (NGOs) for use in addressing the HIV/AIDS crisis.⁶ Notably, two conditions for receiving Leadership Act funds address prostitution and sex trafficking. First, recipients cannot use funds "to promote or advocate the legalization or practice of prostitution or sex trafficking."⁷ Second, recipients must "have a policy explicitly opposing prostitution and sex trafficking."⁸ The latter restriction is commonly referred to as the "Policy Requirement."⁹

¹ See *Boumediene v. Bush*, 553 U.S. 723, 756 (2008); see also Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 974–75, 975 n.4 (2009).

² 140 S. Ct. 2082 (2020).

³ See *id.* at 2086–87. The Court acknowledged that noncitizens in technically foreign territories that are nonetheless "under the . . . 'complete and total control' . . . of the United States . . . may possess certain constitutional rights." *Id.* at 2086 (quoting *Boumediene*, 553 U.S. at 771).

⁴ Pub. L. No. 108-25, 117 Stat. 711 (codified as amended in scattered sections of 22 and 42 U.S.C.).

⁵ See *AOSI II*, 140 S. Ct. at 2085.

⁶ See 22 U.S.C. § 7671; *AOSI II*, 140 S. Ct. at 2085. The Department of Health and Human Services and the U.S. Agency for International Development are "primarily responsible for overseeing implementation of the Leadership Act," including the provision of funding to recipient organizations. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (AOSI I)*, 570 U.S. 205, 210 (2013).

⁷ 22 U.S.C. § 7631(e).

⁸ *Id.* § 7631(f).

⁹ *AOSI II*, 140 S. Ct. at 2085. In its list of findings motivating the Act's passage, Congress noted that the "sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23).

The Alliance for Open Society International, Inc. (AOSI) is a U.S.-based recipient of Leadership Act funds that carries out aid work alongside affiliate organizations in other countries.¹⁰ In 2005, AOSI and peer U.S.-based organizations challenged the Policy Requirement on First Amendment grounds.¹¹ In 2013, the Court ruled in *Agency for International Development v. Alliance for Open Society International, Inc.*¹² (*AOSI I*) that the provision constituted an unconstitutional condition under the Spending Clause because it compelled the domestic NGOs to “adopt a particular belief as a condition of funding” and thereby affected conduct beyond the program’s scope.¹³ The Court also rejected the possibility that a domestic NGO could avoid the speech restriction by establishing affiliates either to espouse “contrary views on prostitution” or to accept funds in lieu of the parent organization.¹⁴ If the affiliate was “clearly identified” with the NGO, the domestic recipient would be expressing its own beliefs “at the price of evident hypocrisy,” given the contrary views expressed by its clearly identified affiliate.¹⁵ If not, the domestic recipient would still be unable to express its own beliefs through the affiliate because the affiliate’s views would not be attributed to the parent.¹⁶ Thus, the Court affirmed an injunction preventing the government from enforcing the Policy Requirement against domestic organizations.¹⁷ However, the government continued to enforce the requirement against the foreign affiliates of domestic NGOs.¹⁸

In 2014, the plaintiff NGOs returned to court to argue, among other things, that the Supreme Court’s holding in *AOSI I* prevented the government from enforcing the Policy Requirement against the NGOs’ foreign affiliates.¹⁹ Siding with the plaintiffs, the District Court for the Southern District of New York ruled that the status of an affiliate — either domestic or foreign — was irrelevant to the Supreme Court’s ruling in *AOSI I*, since a domestic NGO’s First Amendment rights are

¹⁰ See *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 911 F.3d 104, 107–08 (2d Cir. 2018).

¹¹ *AOSI I*, 570 U.S. at 211.

¹² 570 U.S. 205.

¹³ *Id.* at 218. Chief Justice Roberts wrote for the majority and was joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justice Scalia wrote a dissenting opinion, which Justice Thomas joined. Justice Kagan did not take part in the consideration or decision of the case.

¹⁴ *Id.* at 219.

¹⁵ *Id.*

¹⁶ See *id.*

¹⁷ See *id.* at 211–12, 221; see also *AOSI II*, 140 S. Ct. at 2086 (describing injunction).

¹⁸ See *AOSI II*, 140 S. Ct. at 2086.

¹⁹ See *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 106 F. Supp. 3d 355, 358, 360 (S.D.N.Y. 2015). The plaintiffs also asked the court to determine whether the Policy Requirement was unconstitutional on its face, whether the language of the exemption that the government created in order to implement the *AOSI I* injunction was so confusing that it chilled free speech, and whether the exemption applied to other official communications beyond requests for proposals and requests for applications. See *id.*

violated when the Government forces it to “express[] contrary positions on the same matter through its different organizational components.”²⁰ Thus, the court held that *AOSI I* barred the federal government from requiring domestic NGOs, their domestic affiliates, and their foreign affiliates to comply with the Policy Requirement.²¹

The Second Circuit affirmed.²² Writing for the panel, Judge Parker²³ held that *AOSI I* recognized that domestic NGOs “exercise their First Amendment rights through their affiliates,”²⁴ and that forcing their “clearly identified”²⁵ affiliates to speak a government message impairs those NGOs’ ability to speak to the contrary without creating “evident hypocrisy.”²⁶ In response to the government’s argument that foreign organizations do not have First Amendment rights, the panel noted that *AOSI I* referred only to the First Amendment rights of the domestic plaintiffs and that whether an affiliate is incorporated abroad was immaterial to the Court’s holding.²⁷ The panel also acknowledged that the Supreme Court had been “keenly aware” of the indistinguishable nature of the ties between the NGOs and their foreign counterparts.²⁸ In dissent, Judge Straub argued that the panel improperly expanded the *AOSI I* holding for domestic NGOs to cover “foreign organizations operating outside the United States,” which have no First Amendment rights.²⁹

The Supreme Court reversed.³⁰ With Justice Kavanaugh writing for the majority,³¹ the Court disagreed that *AOSI I* also exempted foreign affiliates from the Policy Requirement under the First Amendment.³² The majority argued that this interpretation of the First Amendment ran afoul of “two bedrock principles of American law” that the Court

²⁰ *Id.* at 361.

²¹ *Id.* In 2017, the district court rejected the government’s request for reconsideration. *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 258 F. Supp. 3d 391, 395, 397 (S.D.N.Y. 2017).

²² *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 911 F.3d 104, 107 (2d Cir. 2018).

²³ Judge Parker was joined by Judge Pooler.

²⁴ *All. for Open Soc’y Int’l, Inc.*, 911 F.3d at 109.

²⁵ *Id.* (quoting *AOSI I*, 570 U.S. 205, 219 (2013)).

²⁶ *Id.* (quoting *AOSI I*, 570 U.S. at 219).

²⁷ *See id.* at 110.

²⁸ *Id.* at 109 n.3; *see id.* at 109 n.3, 110. Judge Parker distinguished this case from Second Circuit cases “up[holding] funding conditions [that] requir[ed] foreign organizations to agree not to promote abortion,” noting that the foreign affiliates here were more than “mere potential partners of the plaintiffs.” *Id.* at 111.

²⁹ *Id.* at 122 (Straub, J., dissenting); *see id.* at 112, 122. Judge Straub also did not find the “clearly identified” test for affiliates to be a practicable standard to distinguish between foreign organizations with sufficient versus insufficient U.S. ties. *See id.* at 112–13.

³⁰ *AOSI II*, 140 S. Ct. at 2089.

³¹ Justice Kavanaugh was joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. Justice Kagan did not take part in the consideration or decision of the case.

³² *AOSI II*, 140 S. Ct. at 2089 (“The [*AOSI I*] Court did not hold or suggest that the First Amendment requires the Government to exempt plaintiffs’ foreign affiliates or other foreign organizations from the Policy Requirement.”).

had not overridden in its 2013 decision.³³ First, it was “long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.”³⁴ Second, American corporate law treats “separately incorporated organizations [as] separate legal units with distinct legal rights and obligations.”³⁵

With respect to the first principle, the Court recognized that foreign citizens may enjoy certain constitutional rights when they are within the United States, the U.S. territories, or territories under effective U.S. control.³⁶ By contrast, when foreign citizens are outside of those defined bounds, they enjoy no constitutional protections.³⁷ The abandonment of the first principle, the Court held, would constrain “actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries.”³⁸ Thus, the Court ruled that the foreign affiliates, and all other foreign entities operating abroad, had no First Amendment rights, and the Policy Requirement could permissibly be enforced against them.³⁹

With respect to the second principle, the Court held that because the foreign affiliates were legally distinct from the plaintiffs, they could not rely on the First Amendment rights of the domestic NGOs.⁴⁰ The Court also rejected the “closely identified” test accepted by the Second Circuit, finding that granting First Amendment protections to only those foreign organizations with sufficiently close ties to domestic NGOs would create “difficult line-drawing exercises” for the courts.⁴¹ The majority distinguished *AOSI I* from “cases involving speech misattribution between formally distinct speakers,”⁴² explaining that since the Policy Requirement could no longer “be applied to plaintiffs’ American organizations . . . plaintiffs’ current affiliations with foreign organizations were their own choice, not the result of any U.S. government compulsion.”⁴³

³³ *Id.* at 2086; *see id.* at 2089 (indicating that *AOSI I* “did not purport to override” these principles).

³⁴ *Id.* at 2086.

³⁵ *Id.* at 2087.

³⁶ *Id.* at 2086. The Court cited *Boumediene v. Bush*, 553 U.S. 723 (2008), which defined Guantanamo Bay as under the “indefinite,” *id.* at 768, and “complete and total control,” *id.* at 771, and “within the constant jurisdiction of the United States,” *id.* at 769.

³⁷ *AOSI II*, 140 S. Ct. at 2086. The Court noted that Congress could provide “statutory rights or causes of action against misconduct by U.S. Government officials,” but the plaintiffs had not raised statutory claims in this case. *Id.* at 2087.

³⁸ *Id.* at 2086–87.

³⁹ *See id.* at 2089.

⁴⁰ *See id.* at 2087–88.

⁴¹ *Id.* at 2089; *see id.* at 2088–89.

⁴² *Id.* at 2088 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574–75 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15 (1986) (plurality opinion); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)).

⁴³ *Id.* at 2089.

Justice Thomas concurred.⁴⁴ He reiterated his disagreement with the Court's holding in *AOSI I*.⁴⁵ In his view, since organizations are free to accept or reject federal funding, the government can permissibly require foreign or domestic participants in federally funded programs "to support the [g]overnment's objectives with regard to those programs" without compelling anyone to speak.⁴⁶

Justice Breyer dissented.⁴⁷ He argued that *AOSI I* required the Court to rule in favor of the domestic NGOs, as *AOSI I* had held that when domestic entities speak through "legally separate but clearly identified affiliates," the speech is attributable to those domestic entities.⁴⁸ In this case, he found that the NGOs and their affiliates satisfied the "two-entities-one-speaker" principle recognized in the Court's First Amendment jurisprudence, making them "constitutionally the same speaker" with respect to the speech at issue,⁴⁹ and that the Policy Requirement compelled distortion of the plaintiffs' message in violation of the Court's speech misattribution cases.⁵⁰ He also argued that the constitutional rights of foreign entities were irrelevant to this case because only the First Amendment rights of the plaintiff domestic NGOs were at issue, and, in any event, he disagreed that any of the cases cited by the majority proved that noncitizens do not have any constitutional rights abroad.⁵¹ He concluded that no foreign policy interests of the government justified a "bare desire to regulate protected speech," and that the line drawing declined by the majority was exactly what was required by the First Amendment.⁵²

While *AOSI II* was ostensibly a case about the First Amendment rights of U.S.-based NGOs, its ultimate significance may come from the majority's sweeping assertion that foreign citizens categorically lack constitutional rights abroad. History and prior case law suggest that both geography and connections to the United States have been primary determinants of noncitizens' constitutional rights. However, *AOSI II*'s articulation of the rules guiding the extraterritoriality of the Constitution leaned solely upon geography and rejected considerations of U.S. ties. *AOSI II*'s focus on the geographic reach of the Constitution ignored both the important role that ties to the United States should play in determining the scope of constitutional protections for noncitizens abroad and the Court's longstanding cautious approach to questions

⁴⁴ *Id.* at 2090 (Thomas, J., concurring).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg and Sotomayor.

⁴⁸ *Id.* at 2095.

⁴⁹ *Id.* at 2096.

⁵⁰ *See id.* at 2098.

⁵¹ *Id.* at 2099–100; *see also id.* at 2100 (discussing the adverse consequences of the majority's rule for circumstances involving long-term permanent residents, international students, and other foreign citizens coming into contact with American officials abroad).

⁵² *Id.* at 2102; *see id.* at 2102–03.

about the Constitution's extraterritorial application. Despite its sweeping language, *AOSI II* should not be read to foreclose extraterritorial constitutional protections for noncitizens with substantial U.S. ties, such as permanent residency, when they are abroad.

AOSI II's broad, geography-focused language suggests that all foreign citizens lack any constitutional rights while abroad. The Court's reliance on geography is plainly stated: When foreign citizens are within the borders of the United States or some territory under its effective control, they have some subset of the constitutional rights — largely those deemed fundamental — that are enjoyed by U.S. citizens.⁵³ Conversely, whenever noncitizens are outside of such U.S. territory, the Court determined that they have no constitutional rights.⁵⁴

This singular emphasis on the geographic bounds of the Constitution contradicts prior understanding that the scope of noncitizens' constitutional rights depends not only on their geographic locations but also on their connections to the United States. This principle traces back to the Founding. James Madison suggested that the relationship between aliens and the Constitution should mirror the relationship between aliens and the laws of the United States, despite aliens being parties to neither: “[I]t will not be disputed, that as [aliens] owe, on one hand, a temporary obedience [to the Constitution and laws], they are entitled, in return, to their protection and advantage.”⁵⁵ Rather than relying on territorial boundaries to determine the scope of noncitizens' constitutional rights, he proposed that the constitutional rights and benefits enjoyed by noncitizens are the reciprocal of their assumption of the Constitution's obligations and burdens.⁵⁶

More recently, the Supreme Court has suggested that ties to the United States are significant in determining noncitizens' constitutional rights. The *AOSI II* majority cited *United States v. Verdugo-Urquidez*⁵⁷ as one of the cases affirming the principle that foreign citizens have no extraterritorial constitutional rights.⁵⁸ But as Justice Breyer countered, the *Verdugo-Urquidez* majority denied only extending Fourth Amendment rights beyond the U.S. border with respect to the respondent's property in that case and did not establish a broader holding about

⁵³ See *id.* at 2086–87 (majority opinion).

⁵⁴ *Id.*

⁵⁵ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1836); see David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 (2003).

⁵⁶ See Cole, *supra* note 55, at 371–72; see also Karen Nelson Moore, Madison Lecture, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806–08 (2013) (highlighting a view that the Bill of Rights was intended to apply to noncitizens because the text focuses on “persons” and “people” rather than “citizens,” *id.* at 807).

⁵⁷ 494 U.S. 259 (1990).

⁵⁸ See *AOSI II*, 140 S. Ct. at 2086–87.

extraterritorial constitutional rights for noncitizens.⁵⁹ In that case, the Court took special note of the respondent's status as a "citizen and resident of Mexico with no voluntary attachment to the United States . . . and [of the fact that] the place searched was located in Mexico" in its determination that the Fourth Amendment did not apply to him, even though he was in the United States when the search occurred.⁶⁰ More broadly, the Court held that the Bill of Rights' references to "the people" in the First, Second, Fourth, Ninth, and Tenth Amendments address "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."⁶¹ To be sure, substantial connections are not required for foreign citizens to enjoy constitutional rights when they are within U.S. territory,⁶² and *Verdugo-Urquidez* at least left open the possibility that a noncitizen with stronger U.S. ties — one who was part of the "national community," for example — might enjoy some of the constitutional protections abroad that citizens do.⁶³

Permanent residents, for example, have special ties to the United States that may justify extraterritorial constitutional protections. Their status admits them to the country as legal immigrants and empowers them to seek employment, enter into contracts, and acquire property.⁶⁴ Like citizens, they are required to pay taxes and can be subject to the military draft.⁶⁵ And critically, they can eventually be naturalized as citizens after satisfying various requirements.⁶⁶ The Court has previously identified permanent residents as having their own separate "constitutional status" based on their longer-term ties to the United States, its customs, and its institutions by virtue of extended physical presence.⁶⁷ Scholars have argued that just as permanent residents' personal

⁵⁹ See *id.* at 2100 (Breyer, J., dissenting); *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (providing fifth vote against applying constitutional rights extraterritorially because of "conditions and considerations of this case").

⁶⁰ *Verdugo-Urquidez*, 494 U.S. at 274–75; see *id.* at 262.

⁶¹ *Id.* at 265; see also KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 173–74 (2009).

⁶² See RAUSTIALA, *supra* note 61, at 171–72 (noting that a first-time visitor to the United States would "enjoy the full protections of the Fourth Amendment were she subjected to a search by local police," *id.* at 172, even though a substantial connections test would suggest that she would enjoy minimal Fourth Amendment rights).

⁶³ See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 106–07 (1996) (noting that *Verdugo-Urquidez* equivocates on whether resident aliens have constitutional protections against unreasonable searches when traveling abroad).

⁶⁴ David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 93.

⁶⁵ *Id.*

⁶⁶ *Id.* at 93–94.

⁶⁷ *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well established

and financial ties to the United States merit heightened protections when they are in the country, permanent residents should be afforded some constitutional rights when they are abroad because those ties do not simply disappear.⁶⁸

The Court's cases concerning permanent residents' procedural due process rights at the border support the notion that permanent residents enjoy additional constitutional protections based on their U.S. ties even when they are not considered present in the United States. Although ports of entry are actually within U.S. territory, in immigration law, courts treat noncitizens requesting entry from those ports as if they were outside of the United States.⁶⁹ Over time, the Court has weakened this "entry fiction" for permanent residents.⁷⁰ Notably in *Landon v. Plasencia*,⁷¹ the Court held that a permanent resident's ties to the United States and interest in reuniting with her immediate family entitled her to due process in an exclusion hearing after she was detained at the border.⁷² The Court noted that a permanent resident's extended absence from the United States may jeopardize her status compared to that of "an alien continuously residing and physically present in the United States."⁷³ But this qualification underscores the fact that U.S. ties, not mere geography, motivated the Court's ruling.⁷⁴ It also illustrates that permanent residents have liberty interests that are not suddenly forfeited when they leave U.S. territory.⁷⁵

Moreover, because *Plasencia* extended additional due process protections to permanent residents reentering the country without questioning the entry fiction, its logic implies that the Constitution does protect

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.".)

⁶⁸ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 575 (1990) (describing *Kwong Hai Chew v. Colding*, 344 U.S. 590, as recognizing a "phantom constitutional norm" that a resident alien's stake in the United States guides judicial interpretation).

⁶⁹ See DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 10 (1987); RAUSTIALA, *supra* note 61, at 55, 183–84. Many immigration scholars have condemned this "entry fiction" as unduly constraining due process rights at the border. See, e.g., Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023–28 (2007); 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, 985–1004 (1995).

⁷⁰ See Martin, *supra* note 64, at 94 (citing *Plasencia*, 459 U.S. at 34; *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989)); Weisselberg, *supra* note 69, at 988.

⁷¹ 459 U.S. 21.

⁷² See *id.* at 32–34.

⁷³ *Id.* at 33. Because *Plasencia* was outside of the country for only a few days, her due process rights were not eroded to those of a first-time entrant. *Id.* at 34.

⁷⁴ See *Rafeedie*, 880 F.2d at 522 (holding that *Plasencia*'s due process inquiry hinged solely on "whether the alien had been gone so long as to lose her permanent resident status" and thus be divested from her due process rights).

⁷⁵ See Cole, *supra* note 55, at 382–83.

permanent residents extraterritorially.⁷⁶ *Plasencia* did not overrule the Court's principle from *Shaughnessy v. United States ex rel. Mezei*⁷⁷ — that noncitizens at the border are not within the United States⁷⁸ — in order to find that a permanent resident was entitled to additional procedural due process.⁷⁹ Rather, it distinguished *Mezei* on the grounds that the foreign citizen in that case had been absent from the country for too long a period of time.⁸⁰ *Plasencia*'s holding made U.S. ties a mechanism through which to give permanent residents more procedural due process rights at the border than first-time entrants, even though the Court maintains that noncitizens seeking to enter are not within the United States for procedural due process purposes.⁸¹ *AOSI II*'s assertion that noncitizens abroad have no constitutional rights therefore contradicts the logic of *Plasencia*.⁸²

Finally, the unique facts of *AOSI II*, coupled with the Court's traditional hesitancy to rule broadly on the extraterritorial reach of the Constitution, counsel against adoption of *AOSI II*'s articulation of extraterritoriality in future cases. First, none of the litigants were foreign citizens, and the American NGOs invoked only their own First Amendment rights, not those of their foreign affiliates.⁸³ Thus, the Court's assertion that noncitizens abroad enjoy no constitutional rights was unnecessary to resolve the First Amendment claims advanced by the U.S.-based NGOs,

⁷⁶ See Weisberg, *supra* note 69, at 989 (“While still ruling that *Plasencia* was legally outside of the United States, the Court held that *Plasencia*'s connections with the country gave her rights under the Constitution. In both *Knauff v. Shaughnessy*, 338 U.S. 537 (1950),] and *Shaughnessy v. United States ex rel. Mezei*, [345 U.S. 206 (1953),] the Court found that these sorts of ties did not give any rights to an excludable alien.”).

⁷⁷ 345 U.S. 206.

⁷⁸ See *id.* at 215.

⁷⁹ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“We need not now decide the scope of *Mezei* . . .”).

⁸⁰ *Id.* at 33–34 (“[*Mezei*] does not govern this case, for *Plasencia* was absent from the country only a few days, and the United States has conceded that she has a right to due process.” *Id.* at 34.); see also MARTIN, *supra* note 69, at 24 (“*Mezei* was not overruled.”).

⁸¹ See MARTIN, *supra* note 69, at 24 (“After *Plasencia* . . . the courts may undertake a more sensitive inquiry into the alien's community ties in assessing procedural requirements under the Constitution.”); Moore, *supra* note 56, at 849, 854–55 (noting that permanent residents still enjoy their own exception to the “exclusion exception to due process protection,” *id.* at 854).

⁸² One might counter by arguing that *AOSI II* is reconcilable with the *Plasencia* line of cases on the basis that the border could qualify as an area under the “effective control” of the United States, justifying an entitlement to additional constitutional rights for those present there. See *Boumediene v. Bush*, 553 U.S. 723, 755–71 (2008) (finding Suspension Clause fully effective at Guantanamo Bay because area was under effective control of United States). However, emphasizing effective control over the border to reconcile *AOSI II*'s view of extraterritoriality with *Plasencia* would call into question the legal fiction of entry central to *Mezei* and immigration jurisprudence, which the Court has not eliminated despite its detractors. See Dep't of Homeland Sec. v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (citing *Mezei*, 345 U.S. at 215) (relying on the entry fiction); cf. Weisberg, *supra* note 69, at 990 (noting that the Court had the opportunity to determine “how much of *Mezei* survived *Plasencia*” in *Jean v. Nelson*, 472 U.S. 846 (1985), but decided the case on nonconstitutional grounds and avoided the *Mezei* issue entirely).

⁸³ *AOSI II*, 140 S. Ct. at 2099 (Breyer, J., dissenting).

particularly since the Court held that the government had not forced them to affiliate with foreign organizations bound by the terms of the Policy Requirement.⁸⁴ Second, the Court had carefully avoided ruling on the extraterritorial application of the Constitution to noncitizens in a number of prior cases, including several involving permanent residents.⁸⁵ The underdevelopment of the law with respect to this class of noncitizens suggests that a broad pronouncement on the constitutional rights of noncitizens lacked appeal and necessity when compared to case-by-case determinations.⁸⁶

AOSI II's emphasis on the Constitution's geographic reach is inconsistent with the important role that ties to the United States have played in determining the scope of constitutional protections for permanent residents. As Justice Breyer observed in his dissent, *Boumediene v. Bush*⁸⁷ held that "questions of extraterritoriality turn on objective factors and practical concerns" rather than adherence to formalist principles.⁸⁸ The Court's previous cases addressing permanent residents, while not broadly ruling on extraterritoriality themselves, have given much weight to the ties that permanent residents have to the United States.⁸⁹ While it would take much more action, likely legislative, to fully repudiate *AOSI II*'s view of extraterritorial rights for other noncitizens,⁹⁰ the reciprocity principle and case law recognizing the importance of U.S. ties to determinations of noncitizens' rights suggest that *AOSI II* should not be read to interfere with the constitutional rights of permanent residents when they are outside of U.S. borders, lest future decisions erode constitutional checks on the government's power over these populations whenever they travel abroad.⁹¹

⁸⁴ *Id.* at 2088 (majority opinion).

⁸⁵ See Moore, *supra* note 56, at 854 n.242.

⁸⁶ See Cole, *supra* note 55, at 382 (arguing that prior due process cases on admission of initial entrants does not compel a "much more sweeping conclusion that foreign nationals outside our borders have no constitutional rights whatsoever"). Lower courts have already used the more case-by-case approach. See Moore, *supra* note 56, at 844–45 (citing *Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass. 2012)) (noting a federal district court's finding of Second Amendment rights for lawful permanent residents based on *Verdugo-Urquidez*).

⁸⁷ 553 U.S. 723.

⁸⁸ *AOSI II*, 140 S. Ct. at 2100 (Breyer, J., dissenting) (quoting *Boumediene*, 553 U.S. at 764).

⁸⁹ See Martin, *supra* note 64, at 104–05 (describing the normative principles that underlie the Court's creation of constitutional significance for lawful permanent resident status).

⁹⁰ See *AOSI II*, 140 S. Ct. at 2087.

⁹¹ See NEUMAN, *supra* note 63, at 131 (arguing that the government should be subject to constitutional restraints based on fundamental rights to curtail authority over "the alien's exercise of liberty abroad" through regulation of entry upon aliens' return to the United States).