Team 1

Docket No. 1-2017

In the Supreme Court of the United States

LAURA SECORD,
PETITIONER,

v.

WINFIELD SCOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR,
DEPARTMENT OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

and

CITY OF ANGOLA,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Counsel for the Petitioner

March 20, 2017

QUESTIONS PRESENTED

1. A majority of circuit courts hold that the totality of circumstances test for probable cause requires courts and police to evaluate mens rea evidence, exculpatory factors, and only those circumstances known to police at the time of the arrest. Did the Second Circuit utilize the correct probable cause standard when it did not take into account mens rea or any exculpatory information, but did evaluate circumstances not known at arrest?
2. This Court has held that indefinite detention of aliens is a violation of due process rights. The case-by-case standard endorsed by the Second Circuit does not require courts to hear an alien's request for bond within any specified time, but rather forces an individualized evaluation of the length of detention. Does this standard comport with constitutional due process rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Courts of Appeals Cases

United States District Court Cases

Constitutional Provisions

Statutes

Treatises

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York overturning Laura Secord's convictions for criminal trespass in the second degree (N.Y. Penal Law § 140.15(1) (McKinney 2010)) and criminal possession of a weapon in the fourth degree (N.Y. Penal Law § 265.01(1)(McKinney 2010) is unreported. The United States Court of Appeals for the Second Circuit reversed the district court's decision, and its decision is located at *Scott v. Secord*, 123 F.4th 1 (2d Cir. 2016).

The opinion of the United States District Court for the Western District of New York holding that Laura Secord's due process rights were violated and ordering her immediate release from Immigrations and Customs Enforcement custody is unreported. The United States Court of Appeals for the Second Circuit reversed the district court's decision, and its decision is located at *Scott v. Secord*, 123 F.4th 1 (2d Cir. 2016).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Criminal Trespass in the Second Degree, New York Penal Law § 140.15(1)

A person is guilty of criminal trespass in the second degree when:

(1) he or she knowingly enters or remains unlawfully in a dwelling

. . .

Criminal Possession of a Weapon in the Fourth Degree, New York Penal Law § 265.01(1)

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) he or she possesses any . . . metal knuckles

. . .

Apprehension and Detention of Aliens, 8 U.S.C. § 1226(c)

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

. . .

STATEMENT OF THE CASE

Laura Secord

Petitioner Laura Secord ("Secord") is a Canadian citizen who entered the United States by crossing Lake Erie in the winter of 2013. *Scott v. Secord*, 123 F.4th 1, 2 (2d Cir. 2016). Before coming to America, Secord lived with physically and emotionally abusive parents, forcing her to flee her home at age 16 *Id.* at 8. During this time of homelessness in Toronto, Secord acquired a set of brass knuckles to help defend herself from the dangers of living alone on the street. *Id.* Secord found companionship with a group of Dungeons and Dragons players at a local homeless shelter, who introduced her to a larger universe of online players. *Id.* Over the years, Secord grew close with a small group of these online players, including James Fitzgibbon ("Fitzgibbon"), and in the winter of 2013 decided to leave Toronto behind and join her newfound friends. *Id.* Secord found work at a coffee shop near Lake Erie, and regularly joined her friends for games in their homes. *Id.* Until December 21, 2015, Secord had no trouble with the law. *Id.*

The Winter Solstice Game

In December of 2015, the group of friends decided that it would be entertaining to mark the Winter Solstice with a Dungeons and Dragons session somewhere "spooky." *Id.* Fitzgibbon volunteered his uncle's cabin in Angola, New York. *Id.* at 8-9. Fitzgibbon represented to the group that his uncle would not mind them using the cottage, so long as they didn't "mess the place up." *Id.* at 9. To better capture the occult mood of the evening, the group decided to dress in costume. *Id.* On the way to Angola, the group picked up snacks and drinks to enhance their board-gaming experience, though they all planned to be home by midnight so that they could go to work the following morning. *Id.* Fitzgibbon had been asked by his uncle to check on the cottage while the uncle was in Florida, and he let the rest of the group in via a spare key used for

that purpose. *Id.* However, Fitzgibbon could not figure out how to turn on the electricity, so the group retrieved candles and became immersed in their mutual fantasy in the semi-darkness. *Id.*

Police are notified and Pfieff responds

While the group was engrossed in their game, unbeknownst to them a neighbor was making a call to the Erie County Sheriff's office. *Id.* at 2. Deputy Barnard Pfieff ("Pfieff") was dispatched to investigate a report of suspicious activity at a cottage near the lake. *Id.* Upon arrival, he peered in a window and noted several costumed individuals gathered around a table by candlelight. *Id.* Pfieff approached the front door and knocked, causing the group to become frightened and hide in the cottage. *Id.* at 2, 9. Later, Secord testified at her trial that she "jumped out of her skin" when Pfieff knocked on the door, as the group believed that Pfieff was an intruder rather than a Sheriff's deputy. *Id.* at 9. Pfieff entered the cabin and ordered the group to come out of hiding, which they did once they realized that Pfieff meant them no harm. *Id*. The group, save Secord, produced identification, by which time other sheriff's deputies arrived on the scene. *Id.* at 2-3.

Under questioning, the group admitted that they did not live in the cottage, but all represented that Fitzgibbon's uncle was the owner and that Fitzgibbon had told them that they were allowed to use the property. *Id.* at 3 Due to shock, however, Fitzgibbon was unable to immediately provide contact information for the uncle, who was in Florida. *Id.* at 9. Pfieff arrested all six members of the group, and a pair of brass knuckles were found on Secord's person. *Id.* at 3. All six were charged with criminal trespass in the second degree, and Secord was additionally charged with criminal possession of a deadly weapon in the fourth degree. *Id.*

Conviction and habeas proceedings

While the rest of the group was released on their own recognizance, Secord remained in custody due to her immigration status. *Id*. All six members of the group were convicted on the trespass charges, and Secord was also convicted on the weapons charge. *Id*. Secord was sentenced to a year in prison for the two convictions. *Id.* While in prison, Secord contacted the Criminal Defense Legal Clinic at the University of Buffalo School of Law ("the Clinic"). *Id.* Law students from the clinic filed a habeas corpus petition in the United States District Court for the Western District of New York, alleging that Secord's arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure, because Pfieff lacked probable cause to arrest her. *Id*. While that petition was pending, Secord's sentence ended and she was transferred to the custody of the Department of Homeland Security for deportation proceedings. *Id.* at 3-4. Secord remained in custody for six months, at which point the law students filed a second habeas petition, arguing that Secord's detention had gone past the bright line previously set by the Second Circuit regarding detention without a bail hearing. *Id.* at 4. Both of these petitions were ultimately granted by the district court, which ordered Secord's conviction overturned and her immediate release from Immigration and Customs Enforcement ("ICE") custody. *Id*. Both ICE and the City of Angola appealed, and the Second Circuit combined the appeals for judicial economy. *Id*. The Second Circuit reversed the district court on both issues. *Id.* at 7. Secord filed a timely appeal, and this Court granted a writ of certiorari. *Id.* at 11.

SUMMARY OF THE ARGUMENT

The Second Circuit's Probable Cause Standard is Incorrect

This Court's longstanding Fourth Amendment jurisprudence has focused on protecting individuals from state overreach, by ensuring that state actors only engage in searches or seizures where probable cause to search or arrest exists. Whether an officer had probable cause to arrest

hinges on whether the events of the specific case leading up to the arrest, when "viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Ultimately, a court evaluating whether an officer had probable cause to arrest must perform a fact-based inquiry that "depends on the totality of the circumstances." *Id.*

While the Second Circuit used the correct language in laying out the "totality of the circumstances" standard, it failed to craft a test that in fact takes into account all relevant circumstances. Specifically, the Second Circuit's test fails to consider whether the accused had the necessary mental state to commit the offense and does not examine whether the police officer properly accounted for available exculpatory information. If this Court determines that this standard is correct, it will be enshrining in law the previously-rejected and dangerous principle that the fruits of an otherwise illegal arrest can serve to justify that arrest. Properly maintaining the balance between individual rights and the state's ability to investigate crimes requires a rejection of the Second Circuit's standard.

The Second Circuit's Case-by-Case Standard Does Not Protect Due Process Rights

The Due Process Clause of the Fifth Amendment to the Constitution of the United States protects individuals by ensuring that due process of law is extended to every person from whom the State seeks to deprive of life, liberty, or property. The primary function of the Due Process Clause is to ensure procedural fairness by forcing state actors to act "reasonably" at all points of contact with those individuals. One of the primary due process rights afforded to individuals is the right to be free from indefinite or unreasonably lengthy detention. This Court has said that in order for detention during deportation proceedings to be considered "reasonable" it must be "brief." *Demore v. Kim*, 538 U.S. 510, 511 (2003).

The Second Circuit's proposed case-by-case standard for determining the reasonableness fails to uphold the due process rights of individuals facing deportation, both because it runs contrary to this Court's jurisprudence and because it creates unreasonable practical hurdles for both individuals and courts. The case-by-case standard, rather than ensuring procedural uniformity and fairness, allows for vastly different results to arise from similar fact patterns. Due to this volatility, the case-by-case standard results in open-ended, potentially indefinite detention. The only remedy provided by such a standard is a habeas corpus petition, itself an unwieldy and lengthy process that provides individualized results rather than procedural fairness.

The proposed habeas remedy is also practically deficient, both for the individual and the courts. For the individual, a habeas corpus petition is a dauntingly technical legal document that requires great expense and expertise to file correctly. Many individuals detained during deportation proceedings, like Secord, lack access to counsel and financial resources. For the courts, individualized habeas proceedings are unnecessarily duplicative, and waste judicial resources addressing questions that could be more efficiently resolved at a bail hearing. Ultimately, the alternative bright-line rule requiring a bail hearing before six months in detention is both a better guarantor of individual constitutional rights and more practical for the individual and the justice system.

ARGUMENT

I. THE SECOND CIRCUIT ERRED IN UTILIZING A PROBABLE CAUSE STANDARD THAT DOES NOT ACCOUNT FOR MENS REA OR EXCULPATORY EVIDENCE

The Fourth Amendment to the Constitution of the United States provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . ." U.S. Const. amend. IV. In *Florida v. Royer*, this Court defined the seizure of a person as "a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" 460 U.S. 491, 502 (1983) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Opinion of Stewart, J.)). However, not all seizures ripen into arrests that require a probable cause showing. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968). When a seizure does ripen into a warrantless arrest, this Court demands a showing of probable cause that is at least as high as that required to obtain a warrant. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

Probable cause for an arrest means more than a "mere suspicion;" it exists when, ''at the moment the arrest was made[,] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that" the suspect has committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). This standard "depends on the totality of the circumstances." *Pringle*, 540 U.S. at 371. While the Second Circuit's opinion names the test correctly, the standard that the court applied does not consider all of the circumstances known to the officer at the time of arrest, including mens rea and exculpatory evidence.

A. A Proper Probable Cause Analysis Requires the Officer to Possess Some Evidence of the Arrestee's Mental State

The Second Circuit's standard for evaluating probable cause is flawed because it does not require the arresting officer to have a reasonable suspicion that the offender possessed the

requisite mental state for the alleged offense. The Circuit Courts are split as to whether, for probable cause for arrest to exist, the officer must have probable cause for each element of the alleged crime. *See Williams v. City of Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir. 2014) (holding that an officer must have probable cause for all elements); *but see Spiegel v. Cortese*, 196 F.3d 717, n. 1 (7th Cir. 1999) (holding the opposite). While finding that "an officer need not have probable cause for every element," the Ninth Circuit has held that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element . . . ." *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994).

In the present case, Petitioner was charged with criminal trespass in the second degree. *Scott*, 123 F.4th at 3. In the State of New York, a person is guilty of criminal trespass in the second degree when "he or she knowingly enters or remains unlawfully in a dwelling." N.Y. Penal Law § 140.15(1) (McKinney 2010). Accordingly, the requisite probable cause standard in this case requires an evaluation of whether the arresting officer had probable cause to believe that Petitioner (1) knowingly, (2) entered or remained, (3) unlawfully, and (4) in a dwelling. Cf. *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (holding that, for the officer to have probable cause to arrest in a trespass case, she must obtain "information supporting a conclusion that [the arrestee] was not licensed or privileged" to be on the property).

While this Court has never ruled on this issue, requiring officers to have a reasonable belief that the offender had the applicable mens rea for the offense would achieve the goals this Court has set for a proper probable cause standard. First, in *Pringle*, this Court held that the probable cause standard depends on the "totality of the circumstances," which are to be evaluated based on the facts of each individual case. 540 U.S. at 371. Second, in *Florida v. Harris*, this Court noted that probable cause should be a "practical and common-sensical

standard[.]". 133 S.Ct. 1050, 1055 (2013). Finally, this Court also commands that probable cause be "particularized" with regard to the person to be seized. *Pringle*, 540 U.S. at 341. These demands can only be met by requiring officers to have at least some indication that the accused had the mental state required to violate the statute.

1. Requiring mens rea evidence would comport with the "common sense" standard that this Court demands

Requiring that there be a reasonable probability of each element of an offense is the sort of "practical and common-sense standard" that both the Second Circuit and this Court desire. *Scott*, 123 F.4th at 7; *Harris*, 133 S.Ct. at 1055. Certainly, an officer does not "require the same type of specific evidence of each element of the offense as would be needed to support a conviction" in order to demonstrate probable cause. *Adams v. Williams*, 407 U.S. 143, 149 (1972). However, the Fourth Amendment requires "a reasonable ground for belief of guilt. . . ." *Pringle*, 540 U.S. at 371. In order for an individual to be found guilty, the government must prove that he or she had criminal intent while performing a wrongful act. *Morissette v. United States*, 342 U.S. 246, 251 (1952). A reasonably prudent person, aware that criminal statutes contain both mens rea and actus reus elements, would seek at least some evidence of both before forming a belief that a crime had been committed. Requiring that police show some probability of all the elements of a crime before making an arrest would comport with the common sense standard mandated by this Court in *Harris*.

The Second Circuit claims that requiring such a showing prevents lawful arrests in the absence of "direct, affirmative proof of intent" and "radically narrow[s] the ability of officers to use their experience and prudent judgment to assess the credibility of suspects." *Scott*, 123 F.4th at 7. These contentions overstate the stringency of the mens rea requirement. "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not

readily, or even usefully, reduced to a neat set of legal rules." *Pringle*, 540 U.S. 370-71 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Courts must give officers "substantial latitude" in evaluating these probabilities. *United States v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997). These principles have remained consistent throughout Fourth Amendment law since the earliest days of the United States of America, and the mens rea requirement will not change them.

Adding the mens rea requirement would simply require that police consider the mental state of the accused as one of the "factual circumstances" surrounding the arrest. No "direct and affirmative" proof of intent would be required. See *Gasho*, 39 F.3d 1420 at 1429-30 (implying notice of seizure would have been sufficient indirect proof of intent to establish probable cause). Similarly, officers would retain the freedom to evaluate evidence and witness statements on their merits, so long as mens rea was taken into account. In the present case, however, Pfieff had no evidence – direct or indirect – that Secord had the necessary intent to trespass, though he did have evidence that Fitzgibbon may have had such intent. *Scott*, 123 F. 4th at 3, 10.

2. <u>Requiring mens rea evidence is necessary for an officer to form a belief in guilt that is particularized to the arrestee</u>

Requiring some showing of mens rea is also necessary to uphold this Court's command that, to establish probable cause, there must be a belief in guilt that is "particularized with respect to the person to be searched or seized." *Ybarra v. Illinois*, 444 U.S. 85, 90 (1979). When a criminal statute contains an intent element, it is axiomatic that that element refers to the intent of a specific person or persons. Often, separate individuals who have exhibited substantially similar outward behavior may not have all been factually guilty of a crime because they do not possess the requisite mental state. In *Ybarra*, the petitioner was the patron of a bar whose proprietor was searched and arrested subject to a valid warrant for narcotics distribution. *Id.* at 88. While the police served the warrant, they searched Ybarra and found a small amount of heroin. *Id.* at 89.

Overturning his conviction for possession of narcotics, this Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause . . ." *Id.* at 90.

Ybarra can be seen as an analogous opposite to the present case. At the time of the search, Ybarra certainly had the requisite mental state to support a probable cause finding (he knowingly possessed heroin), but as far as the officers knew he had displayed no outward behavior indicating that he was guilty of any crime. In this case, Secord did display outward behavior satisfying the final three elements of trespassing, but all of the information available to Pfieff at the time of the arrest indicated that she lacked the requisite mental state. Specifically, Secord – and every member of the group – indicated to Pfieff that they were there on the invitation of Fitzgibbon, who had represented himself as being able to provide such permission. *Scott*, 123 F.4th at 3. Accordingly, Secord did not knowingly enter a residence unlawfully. In order to avoid innocent parties from being arrested due to "mere propinquity" to wrongdoing in the future, this Court should hold that officers must have a reasonable belief that the mens rea element of the alleged offense has been met.

3. A probable cause standard that demands a mens rea showing does not make the test overly technical

In *Brinegar v. United States*, this Court said of probable cause ". . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." 338 U.S. 160, 175 (1949). The Seventh Circuit cited this language from *Brinegar* in a footnote rejecting the mens rea requirement in *Spiegel*. 196 F.3d at 724, n. 1. However, a mens rea standard is not inherently a technical one. As this Court noted in *United States v. Cortez*, "[t]he evidence thus collected [for a probable cause assessment] must be seen and weighed not in terms of library

analysis by scholars, but as understood by those versed in the field of law enforcement." 449 U.S. 411, 418 (1989). The traditional concern of this Court has been that too-rigid of a probable cause standard will frustrate policing because of the "built in subtleties" of the law that may frustrate "nonlawyers in the midst and haste of a criminal investigation." *Gates*, 462 U.S. at 236.

However, mandating a showing of mens rea would not require more than the type of investigation and evaluation that officers already perform in the field. Probable cause, ultimately, requires a probable belief or suspicion that a crime has been or is being committed. *Hunter*, 502 U.S. at 228. Already, the law requires that an officer show some evidence of a particular actus reus, though affidavits rarely use that term. Requiring a mens rea showing would not require officers to know specific statutes or complex legal terminology; rather, it would simply be an extension of current investigatory practices. An officer would not have to delve into the complexities of what makes conduct, say, "reckless" or "purposeful," but would simply have to provide some indication that the arrestee's conduct was done with such a mindset, which should be uncovered during the course of a normal investigation.

B. A Proper Probable Cause Analysis Requires an Officer to Evaluate the Totality of the Circumstances, Which Necessarily Includes Known Exculpatory Evidence

The standard crafted by the Second Circuit is also insufficient because it does not evaluate, nor require officers to evaluate, exculpatory circumstances that the officer knew or should have known about prior to the arrest. As this Court has said, a valid arrest based on probable cause requires an evaluation of all of the facts known to the officer at the moment of the arrest. *Id.* While this Court has been silent on the matter, the majority of circuit courts have interpreted this command as requiring officers to consider "evidence that tends to negate the possibility that a suspect has committed a crime" in order to establish valid probable cause. *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999). As the *Kuehl* court concluded, the totality of

the circumstances evaluation required by this Court mandates a consideration of both inculpatory and exculpatory information. *Id.* In this case, while the Second Circuit and Pfieff both considered the available inculpatory information, they failed to examine readily-available exculpatory data that would have eliminated any chance at a reasonable finding of probable cause.

An "officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest." *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000). Accordingly, because "the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988). In *Bigford*, the plaintiff was detained and his vehicle seized when police noticed that his secondhand truck was missing a required federal safety sticker and the vehicle identification number (VIN) appeared to have been altered. *Id.* at 1215. However, when officers searched Bigford's license plate and VIN in their computers, they found no reported thefts. *Id.*

In upholding Bigford's subsequent civil rights claim, the Fifth Circuit held that police had no probable cause to seize the vehicle because of available exculpatory evidence, saying that "[a] reasonable police officer would have been placed on notice . . . when the nationwide computer search produced no report that the vehicle . . . had been reported stolen." *Id.* at 1219. *See also Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) ("[I]n the process of determining whether probable cause exists, [officers] cannot simply turn a blind eye toward potentially exculpatory evidence known to them.").

In the present case, Pfieff and the Second Circuit both had sufficient exculpatory information to defeat a probable cause finding. The group all expressed a belief that they were in the cabin with the owner's permission, they were playing a board game with chips and drinks on

the table, and rather than being "hooded figures," they were dressed in costumes. *Scott*, 123 F.4th at 10. While Pfieff's initial impression – costumed figures gathering in a remote cabin by candlelight – may have justified his entry into the cottage, the group's explanations, dress, and the setting of the room should have at the very least triggered a more thorough investigation by Pfieff and the other deputies. *Id.* at 2.

II. THE SECOND CIRCUIT'S ARTICULATION OF THE "REASONABLENESS TEST" IS NOT SUFFICIENT TO PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.

The Fifth Amendment of the Constitution provides that "no person shall be . . . deprived of life liberty, or property, without due process of law[.]" U.S. Const. amend. V. This Court has consistently held that the due process rights of the Fifth Amendment extend to noncitizens. *Demore*, 538 U.S. at 518; *Reno v. Flores*, 507 U.S. 292 (1963). More specifically, it is well-settled that noncitizens are entitled to such due process rights in deportation proceedings. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). One of the most important due process rights is the protection against indefinite detention. *Id.* at 690. The Ninth and Second Circuit have previously determined that a six-month limitation should apply to the length of detention prior to a bail hearing during removal proceedings under 8 U.S.C. § 1226(c). *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), overruled by *Scott v. Secord*, 123 F.4th 1 (2nd Cir. 2016). Placing such a limit on this type of detention protects the due process rights of these individuals and helps provide consistency in removal proceedings.

A. Because This Court Has Already Determined That a Six-Month Period of Time is Presumptively Reasonable in Similar Contexts, It Should Overturn the Second Circuit's Decision to Abandon Its Precedent, and Find That Six Months is the Point at Which Detention Becomes Presumptively Unreasonable

This Court has previously signaled its concerns about the constitutionality of a statutory scheme that seemingly authorizes indefinite detention of noncitizens. *Zadvydas,* 533 U.S. at 693.

In *Zadvyas*, this Court resolved a due process challenge to indefinite detention under 8 U.S.C. § 1231(a)(6), which governs detention beyond the ninety-day removal period. *Id.* at 684-86. In order to avoid serious constitutional concerns, this Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. *Id.* at 682. Further, while the decision in *Zadvydas* distinctly rested on whether a detainee's removal was not reasonably foreseeable, this Court still recognized six months as a "presumptively reasonable period of detention," after which point the detention is presumptively unreasonable. *Id.* at 701.

This Court also considered a due process challenge to the statute at bar in *Demore v. Kim*, 538 U.S. 510 (2003). In *Demore*, this Court upheld mandatory detention under § 1226(c), while stressing that it was distinguishable from *Zadvydas* in that the detention has "a definite termination point," typically lasted 47 days, and would only last up to five months with appeals. *Id.* at 529. However, this Court still held that the period of detention be a "brief period necessary for . . . removal proceedings." *Id.* While this Court did not specifically state a bright-line rule in *Demore*, they did not say that one would be inappropriate. Further, this Court did not make such a determination because the petitioner "argued that his detention was unconstitutional from the outset due to the categorical nature of § 1226(c)'s mandatory detention regime." *Id.* at 510. Therefore, this Court had no reason to address the reasonableness of the petitioner's detention, nor the best method for determining reasonableness. Thus, this Court has remained consistent in that the detention must be "brief," and *Demore* does not deem the bright-line, six- month method for determining the reasonableness of a prolonged detention inappropriate. To the contrary, the focus on the brevity of detention in both *Demore* and *Zadvydas* are consistent in that detention for longer than six months raises serious due process concerns.

B. A Reasonableness Test that Does Not Define "Reasonable" Fails to Uphold Petitioner's Constitutional Due Process Rights

1. As a matter of constitutional avoidance, there is an implicit point at which the government must provide an individualized bail hearing to detained noncitizens whose removal proceedings have become unreasonably prolonged

The canon of constitutional avoidance is a tool "for choosing between competing plausible interpretations of statutory text, which rests on a reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." See e.g., *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The constitutional avoidance canon clearly favors the bright-line approach established in *Rodriguez*, rather than the case-by-case approach that the Second Circuit took in this case. The case-by-case interpretation of § 1226(c) raises serious constitutional doubt because it runs the risk of legalizing open-ended, possibly indefinite detention. 804 F.3d at 613; *Scott*, 123 F.4th at 4.

This Court has never directly addressed whether the government can detain aliens for an unreasonably prolonged period of time under 8 U.S.C. § 1226(c). All six of the circuits to consider the issue have agreed that § 1226(c) "must be read to contain an implicit temporal limitation against unreasonable prolonged detention of a criminal alien without a bond hearing, because without such a limitation, detention under § 1226(c) would raise grave constitutional concerns." *Sopo v. U.S. Attorney General*, 825 F.3d 1199 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3rd Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003). While it is unanimous amongst all circuits that § 1226(c) includes some "reasonable" limit on the amount of time an individual can be detained without a bail hearing, they remain divided on how to determine reasonableness.

2. Circuit Courts have misread precedent in holding that a case-by-case approach to determining reasonableness is sufficient to satisfy the due process rights of the detained.

All circuits to consider pre-bail hearing detention during removal proceedings have determined that such detention should be reasonable. *See, e.g.*, *Ly*, 351 F.3d at 271. However, they remain split on how to best protect the due process interests of the detained. *Id.* (favoring a case-by case approach); *Rodriguez*, 804 F.3d 1060 (favoring a bright-line approach). In *Zadvydas*, this Court was faced with the question of whether an alien could be held indefinitely during her post-removal period of detention. 533 U.S. at 689. This Court determined that "the statute, read in light of the Constitution's demands, limits . . . detention to a period reasonably necessary." *Id.* This Court further determined that detention longer than six months was presumptively unreasonable. *Id.* at 701.

Some Circuits have found that the *Zadvydas* standard is inapplicable to detention under § 1226(c). *See Ly*, 351 F.3d at 273. For instance, in *Sopo*, the Eleventh Circuit found that *Zadvydas* was distinguishable because this Court merely extended the previous statutory standard for reasonableness by ninety days. 825 F.3d at 1216. *See also Ly*, 351 F.3d at 271 (stating that *Zadvydas* "would not be appropriate for the pre-removal period."). However, a case-by-case standard is contrary to this Court's previous jurisprudence.

This Court based its six-month standard on more than the facts before it, stating "[w]e do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months." *Zadvydas*, 533 U.S. at 701. In *Zadvydas*, the six- month determination was based, in part, on *United States v. Witkovich*, which limited the length of time the Attorney General could "supervise" aliens under final deportation to six months, after which they could be held "solely for interrogation relevant to the availability of the alien for deportation." 353 U.S. 194, 203 (1957). This Court also held that a "reasonable period of time is

presumptively six months" in a case involving detaining aliens under § 1231. *Clark*, 543 U.S. at 371. Thus, this Court has established, in various contexts and while interpreting multiple deportation statutes, that six months is the maximum presumptively reasonable period of detention during deportation proceedings. *Id.*; *Zadvydas*, 533 U.S. at 701.

In *Demore*, this Court was faced with the question of whether the Petitioner's detention under § 1226(c) was constitutional at all. 538 U.S. at 526-27. Petitioner argued that detention during his removal proceedings was unconstitutional because he was not a member of a class subject to mandatory detention. *Id.* at 513. In holding that Petitioner's detention was warranted under § 1226(c), this Court made it clear that such detention was to be "brief". *Id.* at 518.

In interpreting the *Demore* decision, the First Circuit stated that it "view[ed] *Demore* as implicitly foreclosing [its] ability to adopt a six-month rule." *Reid*, 819 F.3d at 497. It reasoned that since *Demore* "declined to state any specific time limit," it would be inappropriate to create one. *Id.* However, this Court was not faced with the question of defining reasonableness in *Demore*, which is why it did not speak specifically on the issue. Such omission should not be construed in disfavor of the six-month presumption of reasonableness test. *See Lowden v. Nw. Nat'l Bank & Tr. Co.*, 298 U.S. 160, 162 (1936) (stating that the Supreme Court "will not answer abstract questions unrelated to the pending controversy[.]"). Thus, by declining to speak on the issue, this Court in *Demore* was simply following the inherent rules of jurisprudence.

Therefore, due to the fact that a six-month standard for determining the reasonableness of detention has been used in contexts outside of the scope mentioned in *Zadvydas*, and because *Demore* cannot be construed to be against such a standard, the circuits that have relied on *Zadvydas* and *Demore* to reject such a standard have simply misapplied that precedent. In *Rodriguez*, the Ninth Circuit was correct to conclude that *Zadvydas* and *Demore* were consistent

in holding that six months was the standard for determining the reasonableness of the length of detention in deportation proceedings. *Rodriguez,* 804 F.3d at 1078. This Court should follow the Ninth Circuit in finding *Zadvydas* consistent with *Demore*, and use six months as the standard for determining the reasonableness of detention prior to a bail hearing under § 1226(c).

C. The Second Circuit's Reasonableness Test Fails to Uphold Due Process Rights for Practical Reasons

Contrary to *Demore* and *Zadvydas*, in the present case the Second Circuit determined that "a bail hearing held within a reasonable time given the particular circumstances of the case does not run afoul to the Due Process Clause's protections." *Scott,* 123 F.4th at 6. The court came to this conclusion after looking to the approach followed by the Third and Sixth Circuits. *Id.* at 5. In *Diop*, the Third Circuit stated that such a determination calls for a "fact-dependent inquiry[.]" 656 F.3d at 233. However, the Third Circuit has also suggested that the length of detention is presumed to be unreasonable "sometime after the six-month timeframe . . . and certainly by the time [the alien] has been detained for one year." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3rd Cir. 2015). Thus, the Third Circuit implicitly admits that a case-by-case standard is insufficient and some line must be drawn to defend due process as a practical matter. The First Circuit even admitted that "[f]rom a practical standpoint . . . the approach employed by the Third and Sixth Circuits has little to recommend it." *Reid*, 819 F.3d at 497.

1. Requiring detained aliens to seek habeas relief as a remedy for prolonged detention under § 1226(c) does not effectively protect their rights

All of the circuits holding in favor of the case-by-case standard for determining reasonableness have stated that such a determination will be made through habeas proceedings. *Id.* at 495; *Ly*, 351 F.3d at 272; *Sopo*, 825 F.3d at 1219; *Diop*, 656 F.3d at 229. That approach is not only impractical, but wasteful. While habeas proceedings provide a critical constitutional

safeguard against unlawful detention, immigration courts are more suited for addressing challenges to pre-final-order detention as they are more accessible and efficient.

Solely relying on habeas proceedings to determine reasonableness presents significant accessibility issues, and would strip away the essence of due process for a large percentage of aliens awaiting deportation proceedings. Most individuals detained under § 1226(c) are completely unrepresented, and even those with counsel typically cannot afford the costs associated with filing a habeas petition. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 401 (2014). Without counsel, filing a habeas petition becomes nearly impossible, especially considering the number of written submissions required and the fact that many individuals in such a position will face significant language barriers and lack the research skills to defend themselves. "Simply put, litigation is unlikely to be a viable solution for most immigrants in prolonged detention . . . [because] it is logistically difficult to bring a habeas petition." Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 Harv. C.R.– C.L. L Rev. 601, 603 (2010).

The problem of limited accessibility to habeas petitions is evident in the present case. Here, Secord was held in ICE custody for six months before she was able to file a habeas petition, which was only possible because she was fortunate enough to have the Clinic take her case. *Scott*, 123 F.4th at 3-4. The vast majority of individuals in Secord's position are not so lucky, and will most likely not have their case scooped up on a pro se basis by a law clinic, or have the means to file a habeas petition themselves. Thus, this Court should provide a more accessible avenue for quickly and efficiently handling questions regarding prolonged detention under § 1226(c).

Additionally, requiring detainees to file for habeas relief as their only means of defense against unreasonably prolonged detention presents a problem of institutional competence. In *Ly*, the court noted that "[c]ertainly the INS is best situated to know which criminal aliens should be released, and federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion." 351 F.3d at 272. By contrast, an individual may actually be detained longer pending the resolution of habeas proceedings than she would have been had she not filed a habeas petition at all. *Reid*, 819 F.3d at 498. This uncertainty may discourage detainees from filing habeas petitions altogether, leaving them without any options.

This Court has consistently favored holdings that support "certainty and predictability." *See, e.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 700 (1985) (stating that this Court found more comfort in the "certainty and predictability . . . [of] a simple 'bright-line' rule."). Without a bright-line approach to determining reasonableness, the result will inevitably lead to "wildly inconsistent determinations." *Reid*, 819 F.3d 486; *compare, e.g., Monestime v. Reilly*, 704 F.Supp.2d 453, 458 (S.D.N.Y. 2010) (ordering bond hearing after eight months detention), *with Luna–Aponte v. Holder*, 743 F.Supp.2d 189, 194 (W.D.N.Y. 2010) (nearly three years of detention not unreasonable). These cases demonstrate the problematic inconsistencies that arise when applying a reasonableness test on a case-by-case basis during habeas proceedings, which is detrimental to the administration of justice as a whole. "The bright-line approach does not raise these due process concerns. Instead, it offers predictability in application and consistency in result that the case-by-case approach could never hope to achieve." *Sopo*, 825 F.3d at 1226 (Pryor, J., dissenting).

In addition, "the federal courts' involvement [via habeas proceedings] is wastefully duplicative." *Reid*, 819 F.3d at 498. "[T]he underlying removal proceedings justifying detention

[may] be nearing resolution by the time a federal court of appeals is prepared to consider them." *Id.* (citing *Diop*, 656 F.3d at 227). Also, the "evidence and arguments presented in a reasonableness hearing before a federal court are likely to overlap . . . with the evidence and arguments presented at a bond hearing before an immigration court." *Diop*, 656 F.3d at 227.

In the present case, the court cited a significant backlog of cases on the immigration court dockets as a reason to reject the six-month rule. *Scott*, 123 F.4th at 6. However, the inefficiencies of the courts should have no bearing on Secord's due process protection against indefinite detention, as "due process demands a better answer than 'we haven't gotten around to it yet.'" *Reid*, 819 F.3d at 499. Forcing detainees to seek habeas relief, rather than holding a bond hearing, only further overloads the court system and requires considerable resources to adjudicate. There seems to be "no compelling reason why, when [considering a habeas petition], it is necessary for federal courts to consider factors that could simply be considered at the bond hearing itself." *Sopo*, 825 F.3d at 1227 (Pryor, J., dissenting).

2. The Second Circuit's concerns that a six-month reasonableness test would result in the release of terrorists is unfounded

In the present case, the Second Circuit expressed its concerns that a bright-line approach to determining the reasonableness of prolonged detention under § 1226(c) would increase "the likelihood of ICE being forced to release dangerous aliens into our country." *Scott*, 123 F.4th at 6. This view makes it seem as though courts in favor of the six-month standard for determining reasonableness are advocating for the automatic release of those individuals held in ICE custody for more than six months before being afforded a bail hearing, but that is not the case.

To the contrary, "we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the

community or risk of flight." *Rodriguez*, 804 F.3d at 1090. "Immigration Judges . . . are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk . . . ." *Id*. Therefore, the minds of this Court and of the Second Circuit can be put at ease by following the approach of the Ninth Circuit in *Rodriguez*, and mandating a bond hearing after six months of detention, at which time the most dangerous of individuals will not be afforded bail.

CONCLUSION

The Second Circuit's probable cause standard does not comport with this Court's "totality of the circumstances" test or the circuit courts' interpretations of that test. Additionally, the case-by-case approach to evaluating the reasonableness of the length of detention in conjunction with deportation proceedings prior to a bail hearing fails to uphold the due process rights of those detainees. Accordingly, this Court should reverse the decision of the Second Circuit.