No. 1-2017

In the

Supreme Court of the United States

Laura Secord,

Petitioner,

v.

City of Angola,

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

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BRIEF FOR THE PETITIONER

TEAM 13

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether Deputy Pfieff had sufficient probable cause to arrest Ms. Secord when he failed to consider undisputed facts which would have led a reasonable officer in his position to conclude that a crime had not been committed and the facts failed to show that there was a particularized belief of guilt with respect to Ms. Secord.

II. Whether the "reasonableness test" articulated by the Second Circuit protects the due process rights of undocumented immigrants when it requires every detainee to file a habeas petition to challenge the reasonableness of their own detention, thereby subjecting criminal aliens to mandatory detention for an indeterminate period deemed administratively necessary by the government without an individualized hearing.

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STATEMENT OF FACTS

On December 21, 2015, Laura Secord was arrested while enjoying a game night with friends in a cottage in Angola, New York. *Scott v. Secord*, 123 F.4th 1 (2nd Cir. 2016). Ms. Secord and her friends were invited to play a game of Dungeons and Dragons ("D&D") by James Fitzgibbon ("Fitzgibbon") who regularly spent time with the group. *Id.* at 8-9 (Atkinson, J., dissenting).

Ms. Secord became a D&D enthusiast after running away from a physically and emotionally abusive home at the age of sixteen. *Id*. at 8. While living on the streets of Toronto, Ms. Secord obtained a pair of brass knuckles to protect herself from the potential dangers she faced as a young homeless woman. *Id*. During this time, Ms. Secord found the family support she lacked from her parents from a group of friends who played D&D weekly at a shelter. *Id*.

Over time, she also became close with a group of friends from Buffalo, New York through an online D&D community. *Id*. During the winter of 2013, she decided to move to the United States by hitchhiking to Lake Erie and crossing the frozen lake. *Id*. Once in the United States, Ms. Secord began working a steady job at a Tim Hortons near the lake, found a place to live, and grew close to a local D&D group, whose homes became the setting for their regular games. *Id*.

On the evening of December 21, 2015, Fitzgibbon, a member of the local D&D group, invited Ms. Secord and their friends to play a game of D&D at his uncle's cottage in Angola. *Id.* Fitzgibbon received permission from his uncle to use the cottage, and was expected to check on it every week or so while his uncle was visiting Florida. *Id.* at 9. Fitzgibbon offered to drive his friends to the cottage and informed them that his uncle was "cool with it" as long as they did not

"mess the place up." *Id*. On the way to the cottage, the group stopped at a Party City to buy wizards and dwarves costumes for the event, and stopped at a gas station to pick up soda and snacks. *Id*. When they arrived, Fitzgibbon let everyone in using the same key from the back patio that he would use during his regular visits. *Id*. Fitzgibbon could not figure out how to turn on the electricity, so the group lit candles instead to light the space, dressed up in the purchased costumes and became immersed in their game. *Id*.

While the group of friends were enjoying their evening, an Angola resident called law enforcement to report that there was a light on in one of the summer cottages, as it was unusual for people to be there that time of year. *Id.* at 2. Deputy Pfieff arrived on the scene to investigate the situation, and he too noticed a flickering light in one of the cottages. *Id*. The deputy approached the cottage, knocked on the front door and announced himself as law enforcement. *Id*. The group did not initially hear the deputy announce himself, and thus, scattered and hid, assuming that the stranger was a "diabolical attacker." *Id.* at 9. At trial, Ms. Secord testified that the abrupt pounding "scared [them] out of their wits," and that she "jumped out of her skin." *Id*. The deputy then opened the unlocked door and announced for each individual to come out of hiding. *Id.* at 2. The group emerged from hiding once they recognized that the stranger was a police officer, and were greeted by a demand to face the floor while their persons were searched for weapons. *Id*.

The group was forthcoming about the fact that they did not live in the cottage but explained that Fitzgibbon received permission from the cottage owner, his uncle. *Id.* at 3. Although Fitzgibbon could not immediately recall his uncle's contact information, there were visible pictures of the family throughout the cottage, including photos of Fitzgibbon. *Id.* at 9. Later, when the Sheriff's Department was able to contact Fitzgibbon's uncle, he explained that

he asked Fitzgibbon to check on the property in his absence and only requested that his nephew "not have any parties" while he was out of town. *Id*. The group was arrested and brought to the Erie County Holding Center where Ms. Secord's brass knuckles were found in her backpack. *Id*. at 3. Every one of her friends was released on their own recognizance except Ms. Secord because of her immigration status. *Id*.

Ms. Secord was eventually tried and convicted of criminal trespass and possession of a deadly weapon and subsequently sentenced to prison for a year for both convictions. *Id*. While serving her sentence, a group of law students from the Criminal Defense Legal Clinic at the University at Buffalo School of Law filed a habeas corpus petition on her behalf, on the grounds that her arrest and conviction violated her Fourth Amendment rights for lack of probable cause. *Id*. While that petition was pending, her criminal sentence ended and she was immediately transferred into ICE custody where she remained for six months. *Id*. at 1. Another habeas corpus petition was filed on the basis that her detention exceeded the bright-line rule set forth by the Second Circuit. *Id*. at 4. Both petitions were eventually granted, releasing Ms. Secord from custody. *Id*. However, upon appeal by the City of Angola and the Department of ICE, both petitions were reversed and Ms. Secord was remanded back to ICE custody. *Id*.

SUMMARY OF THE ARGUMENT

The Second Circuit decision should be reversed because probable cause did not exist for Ms. Secord's arrest, and because the "reasonableness test" fails to protect the due process rights of undocumented immigrants.

The Second Circuit's finding that there was sufficient probable cause to arrest Ms. Secord for criminal trespass in the second degree should be reversed because the court improperly evaluated whether probable cause for a warrantless arrest existed. Deputy Pfieff did not have

sufficient probable cause to arrest Ms. Secord because he failed to acknowledge the undisputed facts showing that the group was not engaging in any criminal activity. Moreover, the facts available failed to lead to a showing that Ms. Secord specifically committed the alleged crime. The Second Circuit's use of the totality of the circumstances approach is inappropriate because that approach fails to adequately and fairly balance the interests of both the individual and law enforcement as required by its purported purpose. The particularized facts approach, requiring that all undisputed facts available to the officer at the time of the arrest be considered and that there must be a particular belief of guilt with respect to the alleged criminal specifically, provides a more balanced approach to the probable standard analysis because it does not give an officer undue leeway to use only select facts to support a warrantless arrest.

The Second Circuit's departure from a bright-line rule in favor of the "reasonableness test" should also be reversed because the test fails to protect the due process rights of undocumented immigrants when it requires every detainee subject to mandatory detention to petition a reviewing court to decide whether the duration of their detention is no longer reasonable. This Court has already found that the constitutionality of civil detention under the mandatory detention statute hinges upon its brevity, and must comport with due process. Absent a bright-line rule, detainees will remain subject to prolonged detention for however long the government deems necessary to prepare their case for a bail hearing. Because the bright-line rule properly balances competing interests by allowing the government adequate time to prepare a case for continued detention while also protecting undocumented immigrants from detention without limit, the decision by the lower court should be reversed.

ARGUMENT

I. THE COURT APPLIED AN IMPROPER APPROACH FOR PROBABLE CAUSE BECAUSE IT ALLOWED DEPUTY PFIEFF TO IGNORE UNDISPUTED FACTS AVAILABLE TO HIM AT THE TIME OF THE ARREST, DID NOT REQUIRE HIM TO SHOW THAT THERE WAS A PARTICULAR BELIEF OF GUILT WITH RESPECT TO MS. SECORD, AND FAILED TO REQUIRE EVIDENCE THAT MS. SECORD POSSESSED THE CULPABLE MENTAL STATE FOR THE CRIME OF TRESPASS.

The Fourth Amendment ensures that people are secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against warrantless searches conducted without probable cause. *See* U.S. Const. amend. IX. Functioning parallel to the Fourth Amendment, a police officer may conduct a warrantless arrest of an individual for a felony or misdemeanor which occurred in the officer's presence if there is probable cause. *Maryland v. Pringle*, 540 U.S. 366, 369 (2003); *See also United States v. Watson*, 423 U.S. 411, 414 (1976).

Probable cause does not exist unless at the moment of the arrest, the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, were sufficient to warrant a reasonable person in believing the specific person committed or was committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see also Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). Probable cause is a fluid concept lacking concrete and precise quantification. *Pringle*, 540 U.S. at 370. Nonetheless, this Court has determined that the probable cause standard requires that the belief of guilt be particularized with respect to the person to be searched or seized. *Id.* Officers are not allowed to merely ignore undisputed and available facts. *Baptiste v. J.C. Penny Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998). Additionally, some circuits have determined that probable cause to arrest only exists when there is probable cause for elements of the alleged crime, specifically the applicable mens rea. *Williams v. City of*

Alexander, 772 F.3d 1307, 1312 (8th Cir. 2014)*; See Wesby v. D.C.*, 765 F.3d 13, 20 (D.C. 2014); *United States v. Joseph*, 730 F.3d 336, 342 (3rd Cir. 2013); *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994).

In the present case, Deputy Pfieff failed to have knowledge of particularized facts which would lead a reasonable officer to conclude that Ms. Secord knowingly entered into the cottage unlawfully. The facts and circumstances relied on by Respondent to support a belief that a crime was committed by Ms. Secord and thus amounting to probable cause were resolved by ignored information provided to Deputy Pfieff by Ms. Secord and her friends at the time immediately leading to her arrest. Additionally, this court should require that under any approach, a police officer must consider whether any of the elements of the alleged crime exist before finding there is probable cause to make an arrest. Finally, even under a totality of the circumstances approach, the undisputed facts provided by Ms. Secord and her friends at the time leading up to the arrest still refute the claim that probable cause for her arrest existed.

A. The Second Circuit Applied an Improper Approach to Assessing Probable Cause Because Requiring Particularized Facts More Adequately and Fairly Balances the Interests of Police Officers and Individuals; and Since Deputy Pfieff Lacked Knowledge to Show That a Crime Was Committed Or That a Particular Belief of Guilt Existed with Respect to Ms. Secord, There Was No Probable Cause.

It is a long-standing principle that the purpose of the probable cause standard is to balance the interests of both police officers and those who encounter them. *Pringle*, 540 U.S. at 370. The standard protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while also providing law enforcement with "fair leeway" to make judgment calls when ambiguous challenges arise during the execution of their duties. *Id; see also Brinegar v. United States*, 338 U.S. 160, 176 (1949). However, this Court has previously

implemented limitations on the potential magnitude of errors within those judgment calls. *Id.* In order to support their claim of probable cause, police officers must "act on facts leading sensibly to their conclusions of probability." *Id.* at 177. The belief of guilt must be particularized with respect to the specific person to be seized. *Pringle,* 540 U.S. at 371. An officer cannot circumvent this requirement by relying on the fact that probable cause exists to seize a different person on the premises—the facts must be particularized with respect to each specific person. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979). Further, it is well settled that law enforcement must rely on the facts and circumstances *presently available* before determining whether probable cause exists to make an arrest. *Beck,* 379 U.S. at 91 (emphasis added).

Moreover, several circuits have held that police officers are unable to ignore the undisputed facts available to them at the time of the arrest. *BeVier v. Hucal,* 806 F.2d 123, 125 (7th Cir. 1986)*; see also Kingsland v. City of Miami* 382 F.3d 1220, 1228 (11th Cir. 2004); *Romero v. Fay,* 45 F.3d 1472, 1476-77 (10th Cir. 1995) *(*explaining that the probable cause standard "requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all..." before making a warrantless arrest); *Oliveira v. Mayer,* 23 F.3d 642, 647 (2nd Cir. 1994); *Taylor v. Farmer,* 13 F.3d 117, 121 (4th Cir. 1993). When the circumstances of an arrest are ambiguous or unclear, a police officer "may not close her or his eyes to facts that would help clarify the circumstances," but instead must use the available undisputed information to determine whether probable cause to satisfy the arrest actually exists. *BeVier,* 806 F.2d at 125.

This particularized approach to the probable cause standard when used by officers carrying out their duties allows the standard's application to better balance the interests of the officer and individual without becoming overly burdensome on the officer. Whereas the totality

of the circumstances approach, which leaves leeway for officers to decide not to take the additional step of identifying undisputed and particular facts to evaluate a specific belief of guilt with respect to a specific person based on the circumstances observed, justly offsets the balance of the two interests.

Ms. Secord does not contend that a rigid, strict test be required to prove probable cause or that the particularized facts approach would equate to that. It is certainly recognized that police officers should be afforded a certain level of discretion in order to effectively carry out their duties. Rather, the particularized facts approach would merely influence the officer's conclusions as to the probability that the alleged criminal committed a crime and allow the officer to sensibly act on those conclusions as this Court already requires. *See Brinegar*, 388 U.S. at 177. The approach does not, as the lower court claims, "narrow the ability of officers to use their experience and prudent judgment..." *Secord*, 123 F.4th at 7.

1. *Probable cause did not exist because under the particularized facts approach, Deputy Pfieff ignored the undisputed facts available to him which would have resolved his suspicions as to whether the group committed a crime.*

Deputy Pfieff failed to utilize the undisputed facts available to him which would have debunked his suspicions that the group committed a crime. The circumstances relied on by Deputy Pfieff and found to be concerning by the lower court were resolved by Ms. Secord and her friends with undisputed facts available at the time of the arrest. In his dissenting opinion, Judge Atkinson correctly acknowledges that the undisputed facts available at the time of the arrest would have explained to Deputy Pfieff— had he not ignored them—that the circumstances initially perceived were unsubstantiated. *Id.* at 10 (Atkinson, J., dissenting).

First, the clothing worn by the group first believed to be suspicious later revealed to be costumes the group previously purchased before arriving at the cottage. *Id*. at 7. When Deputy

Pfieff looked into the window of the cottage and saw the group at the table, he also should have noticed the Doritos, Diet Pepsi and snacks on the table. *Id.* at 10. Second, the group hid once Deputy Pfieff knocked on the door because they had not heard him announce himself as an officer and were unsure of his identity. *Id*. at 9. Just as the neighbor who called the police believed it was abnormal for someone to be in that area, the group while inside the cottage were surprised and alarmed when they heard a knock being that the area at the time was secluded. *Id.* Third, Fitzgibbon's inability to recall the contact information of his uncle was explained by his sheer shock of the event occurring amid a regular game night. *Id.* Fourth, Fitzgibbon explained to the officers that the owner of the cottage was his uncle who requested that Fitzgibbon visit the property regularly. *Id.* at 7. While he did not have a key of his own, Fitzgibbon showed the officers where his uncle kept the key for him to use during his visits. *Id.* at 9. Moreover, inside the cottage there were pictures within view of Fitzgibbon and his family. *Id.* Lastly, Respondent relies on the fact that Fitzgibbon's uncle expressed that Fitzgibbon was not permitted to have parties at the cottage. *Id.* at 7. This fact, however, should not be considered in the evaluation as to whether probable cause existed because probable cause requires that the only the facts available at the time of the arrest be considered to determine whether the warrantless arrest is permissible under the standard.

2. Deputy Pfieff did not have probable cause to arrest Ms. Secord because he failed to evaluate whether there was a specific belief of guilt with respect to Ms. Secord despite the facts available during the arrest.

In the present case, the application of a totality of the circumstances approach to show probable cause impeded on the individual Fourth Amendment rights of Ms. Secord because it excused the fact that Deputy Pfieff made a general conclusion as to whether *the group* engaged in wrongdoings and never acknowledged the facts available to evaluate the probability that Ms.

Secord *herself* committed the alleged crime of trespass. *See Ybarra*, 444 U.S. at 91 (holding that probable cause to arrest did not exist absent evidence that the particular individual committed or was committing a crime). Ms. Secord's Fourth Amendment interests were weighed less when the lower court failed to acknowledge that Deputy Pfieff arrested her without considering any particularized facts to support a belief that she committed a crime.

Here, there was no specific belief of guilt with respect to Ms. Secord that she committed criminal trespass in the second degree[1]. According to the Consolidated Laws of New York Penal Law Code, a person is guilty of criminal trespass in the second degree when he or she *knowingly* enters or remains unlawfully in a dwelling. § 140.15 (McKinney 2010) (emphasis added). Additionally, according to the Model Penal Code § 221.2 (2015), a person commits an offense if she *knowingly* enters or remains in a building or occupied structure. (emphasis added). If the person reasonably believed that the owner of the premises or person empowered to license access granted access, then that is an affirmative defense. *Id.*

The facts gathered at the time leading up to the arrest fail to provide sufficient knowledge that would lead a reasonable police officer to believe that Ms. Secord knew that her entry was unlawful. After Deputy Pfieff entered the cottage, it was explained to him that Ms. Secord had been invited by Fitzgibbon, the cottage owner's nephew, for a D&D game night with their group of friends. *Secord*, 123 F.4th at 9. Moreover, Deputy Pfieff learned that Fitzgibbon had apparent authority to invite guests to the cottage because he willingly informed the officers where he kept

[1] In the absence of the availability of the City of Angola Criminal Penal Code, the Consolidated Laws of the New York State Penal Code and the American Law Institute's Model Penal Code are used to denote Ms. Secord's convicted crimes.

the key to the cottage and that his uncle requested he visit the cottage weekly. *Id.* A reasonable officer likely would have concluded that Fitzgibbon was related to or at the very least good friends with the cottage owner because there were pictures of Fitzgibbon and his family in view throughout the cottage. *Id.*

Deputy Pfieff's arrest of Ms. Secord goes against the established precedent that probable cause must be satisfied with respect to each alleged criminal, specifically. *See Ybarra*, 444 U.S. at 91. Even if this Court were to agree with the Second Circuit's holding and find that the facts presented at the time did give rise to probable cause, the facts would only show that there was probable cause to believe that at most Fitzgibbon, not Ms. Secord, committed criminal trespass. At the time of the arrest, the facts relating to Ms. Secord only describe that she, as a member of the group, was in the candle lit cottage in costume and went into hiding when they heard the knock at the door. *Secord*, 123 F.4th at 9. All subsequent facts specifically involve Fitzgibbon—how he gained access to the cottage and his relationship with the actual owner. While Ms. Secord did physically enter the cottage, she did so under the belief that Fitzgibbon had permission to invite guests. Being that the alleged crime is not one of strict liability, Ms. Secord's entry alone is not enough show a probability that she committed a crime.

Deputy Pfieff needed specific knowledge with respect to Ms. Secord to satisfy the probable cause necessary to permit her warrantless arrest. Moreover, but for the unlawful arrest of Ms. Secord, her backpack would not have been subject to inventory search at the holding center revealing the brass knuckles which resulted in an additional conviction. Therefore, Ms. Secord's Fourth Amendment interests were not afforded proper weight when the lower court failed to acknowledge that Deputy Pfieff arrested her without considering any particularized facts to support a belief that she committed a crime.

B. This Court Should Adopt the Mens Rea Element Requirement as Utilized by Circuit Courts to Determine Probable Cause Because It Develops A Clearer Standard for Probable Cause Without Disrupting the Balanced Interest of Law Enforcement and Individuals.

Some circuits have held that there must be probable cause with respect to elements of the alleged crime for probable cause to exist. *Williams*, 772 F.3d at 1312. Many of those circuits have determined that at least the *mens rea* of the crime must be satisfied to have probable cause, if not all of the elements. *Wesby*, 765 F.3d at 20 ("But the police cannot establish probable cause without at least *some* evidence supporting the elements of a particular offense, including the requisite mental state.") (emphasis in original); *Joseph*, 730 F.3d at 342 ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense."); *Kuehl v. Burtis*, 173 F.3d 646,651 (8th Cir. 1999) (holding that the officer should have realized there was no probable cause when he received evidence that the defendant neither "attempted to cause bodily injury nor intentionally caused bodily injury" as required as an element of the alleged crime) (internal quotations omitted); *Gasho*, 39 F.3d at 1428 (finding that an officer must have probable cause for an element identifying specific intent).

This approach requiring at least one element of the crime to be necessary to prove probable cause for a warrantless arrest should be adopted uniformly because it develops a clearer standard without disrupting the balancing interest of citizens and law enforcement. The lack of probable cause for one specific element of a crime only decreases the overall probability that there is probable cause for arrest—it does not create a rigid threshold. It logically follows that an officer should in some manner be required to at least consider the elements of the crime when determining whether there is probable cause for an arrest because the elements are the foundational components of the crime itself. Simply put, a crime does not exist without an understanding of elements of which it is comprised.

Here, Deputy Pfieff did not have any facts within his knowledge that would lead a reasonable officer to believe that Ms. Secord had the requisite mental state of "knowingly" for the crime of trespass. As described previously, a person is guilty of criminal trespass in the second degree when they knowingly enter or remain unlawfully in dwelling. *See* N.Y. Penal Law § 140.15. However, Ms. Secord did not "knowingly" enter the cottage "unlawfully". In fact, Ms. Secord believed the alternative. She relied on Fitzgibbon's good faith belief that he had permission to enter the cottage and could provide license for the entry of his friends. If the Court decides to require that the *mens rea* of the crime be necessary to prove probable cause for an arrest, then Ms. Secord's arrest was unlawful because that necessary component was not available at the time of the arrest.

C. Even If This Court Determines That the Totality of the Circumstances Approach Is Appropritate, Ms. Secord's Arrest Was Unlawful Because the Suspicious Circumstances and Information Used to Support a Finding of Probable Cause Were Resolved at the Time of the Arrest.

If this Court should find that the second circuit's application of a "totality of the circumstances" approach is appropriate, Ms. Secord's arrest should still be found to be unlawful. Under the "totality of the circumstances" analysis, courts evaluate whether or not there is probable cause by using a flexible approach focusing on the "assessment of probabilities in particular factual contexts." *Harris*, 133 S.Ct. at 1056.

Applying this approach to to the present circumstances still fails to lead to a finding that probable cause existed. Each of the concerning circumstances relied on by the lower court's majority opinion were resolved by the surrounding circumstances as pointed out in the court's dissenting opinion. The group entered the cottage because they were invited by Fitzgibbon who had permission from the owner of the cottage to enter. *Secord*, 123 F.4th at 10. The group sat in

candlelight because the electricity was not working, as later proven true when Deputy Pfieff entered the cottage. *Id*. at 9. The group was dressed in seemingly suspicious clothing because they were engaged in costume play for a D&D game night. *Id*. Fitzgibbon clarified his reason for being unable to recall his uncle's phone number in Florida immediately because he and his friends were shocked that there was a knock at the door of the dark, isolated cottage, especially since it was "out of season" as indicated by the concerned neighbor. *Id*. Lastly, contrary to Respondent's unreasonable belief, the group was not harboring an illegal alien on the property, and there is no evidence to support that they were aware of Ms. Secord's immigration status. A reasonable police officer in these circumstances would not assume that a host checks the immigration status of each guest invited onto a property they have explicit authority to use to ensure that each person is in the country lawfully.

All of the circumstances relied on by Respondent to show that the facts available at the time of the arrest led to a probability that a crime was committed on that night were debunked and addressed at the time of the arrest. Thus, probable cause did not exist at the necessary time under the totality of the circumstances approach. The ability of officers to make general conclusions on broad facts of events using the totality of the circumstances approach leaves more room for error than this Court has previously been willing to accept – it ignores the purpose of balancing interests. Specifically here, while Ms. Secord's arrest is proven to be unlawful under both approaches, the lack of inherent safeguards in the totality of the circumstances approach allowed Deputy Pfieff's erred judgment call to receive more weight than Ms. Secord's Fourth Amendment rights, as it resulted in over a year of injustice for Ms. Secord.

II. THE "REASONABLENESS TEST" LAID OUT BY THE SECOND CIRCUIT FAILS TO PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED IMMIGRANTS BECAUSE (1) IT EFFECTIVELY SUBJECTS DETAINEES TO DETENTION WITHOUT LIMIT, AND (2) FAILS TO ADEQUATELY BALANCE THE INTERESTS OF UNDOCUMENTED IMMIGRANTS WITH THOSE OF THE GOVERNMENT

It has long been held by this Court that the Due Process Clause extends to all "persons" in the United States, including aliens who entered unlawfully. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). While immigration laws are designed in part to further national security interests, the doctrine of constitutional avoidance instructs that such statutes should be construed to avoid raising serious constitutional questions. *E.g. Ins v. Chadha*, 462 U.S. 919 (holding that one house of Congress may not veto a decision made by the Executive Branch to stay an alien's deportation); *United States v. Witkovich*, 353 U.S. 194, 201 (1957) (acknowledging Congress's reluctance to pass a statute allowing for prolonged detention of aliens prior to deportation).

The provision at issue subjects certain aliens who are deportable because of their criminal history to mandatory detention while proceedings to remove them from the United States are pending. *See* 8 U.S.C. § 1226(c). While all courts agree that mandatory detention under this statute is constitutional to prevent against public danger and risk of flight, the unanswered question remains as to how to determine the point at which detention becomes unreasonable and unlawful. *Secord*, 123 F.4th at 5. Previously, both the Second and Ninth Circuits' approach fell in line with this Court's relevant decisions by imputing a six-month limit on detention before a bail hearing is required. *See Lora v. Shanahan*, 804 F.3d 601, 614-15 (2nd Cir. 2015); *Rodriguez*

v. Robbins, 715 F.3d 1127, 1139 (9th Cir. 2013). Today, however, the Second Circuit wishes to adopt the approach favored by the Third and Sixth Circuit and require every detainee to file a habeas petition to challenge their detention, leaving it up to the district courts to determine whether the particular individual's detention has crossed a subjective threshold of "reasonableness," thus entitling him to a hearing. *Secord*, 123 F.4th at 5. The Second Circuit ruling should be reversed because the "reasonableness test" (1) essentially subjects undocumented immigrants to detention without limit; and (2) fails to adequately balance the interests of undocumented immigrants against competing government interests.

A. The "Reasonableness Test" Subjects Detainees to Prolonged Periods of Detention Because It Requires Every Detainee to Petition the Courts to Ensure Their Continued Detention Remains Lawful, Leaving Undocumented Immigrants at the Hands of the Government Without a Meaningful Opportunity to Be Heard.

The Fifth Amendment prohibits prolonged, unreasonable detention of non-citizens who are awaiting removal proceedings. *See Zadvydas*, 533 U.S. at 692 ("The serious constitutional problem arising out of a statute that…permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."); *see also Demore v. Hyung Joon Kim*, 538 U.S. 510, 528 (2003) (emphasizing that the reasonableness of detention is a function of its brevity). Even where a final order of removal has been issued against a non-citizen detainee, this Court has articulated that it is unconstitutional for that detainee to be held indefinitely. *See Zadvydas*, 533 U.S. at 689. At issue in *Zadvydas* was §1231(a)(6), a statute allowing for continued detention of deportable aliens in cases where the government is unable to process removal within ninety days. *Id.* at 683. The government argued that the statute authorized indefinite detention, stressing the statute's purpose of preventing flight and protecting the community. *Id.* at 690. Rejecting the government's contention, this Court held that the statute could not be construed to authorize an ostensibly indefinite period of detention despite the

impracticability of repatriation. *Id.* at 689. To avoid an unconstitutional result, the Court imputed a six-month limitation into the post-removal period of detention to protect due process rights of detainees. *Id*. at 701. This six-month period was chosen based on evidence that Congress had previously doubted the constitutionality of detention after six months, and after considering the administrative burden involved in a case-by-case assessment, the Court instructed that federal circuits follow the same guideline "for the sake of uniform administration". *Id.* 700-01.

Two years later, this Court upheld mandatory detention under §1226(c), as long as the detention was for a brief, limited period. *Demore,* 538 U.S. at 513. In *Demore,* an alien challenged the constitutionality of mandatory detention without a hearing. *Id*. at 515. The Court emphasized that unlike the post-removal detention statute at issue in *Zadvydas*, detentions under this particular statute "have a definite termination point." *Id*. at 529. While the detainee in *Demore* was held for six months, the Court found this to be a rare circumstance, stressing that the majority of detentions under this statute lasted for less than ninety days, and up to five months for the minority of cases in which the alien chooses to appeal. *Id*. 530-31. Justice Kennedy added an important caveat to this holding in his concurrence, stating that although §1226(c) is not per se unconstitutional, a detainee would be entitled to a bond hearing once the length of their detention became "unreasonable or unjustified." *Id*. at 532. *Demore's* holding, therefore, turns on the very brief period of detention that was typical under the statute at the time the case was decided. *Id.* at 528. When read together, both *Zadvydas* and *Demore* stand for the principle that any statute permitting detention without a definitive limit would fly in the face of the Fifth Amendment. *Rodriguez,* 715 F.3d at 1139 (applying a six-month limit consistent with the reasoning of both *Zadvydas* and *Demore*).

Here, the "reasonableness test" proposed by the Second Circuit cuts against the very principles articulated by both *Zadvydas* and *Demore,* as it leaves detainees at the will of the Department of Homeland Security, leaving them vulnerable to detention extending well beyond the presumptively lawful six-month period. *Secord*, 123 F.4th at 8 (Atkinson, J., dissenting). Since *Zadvydas* instructs that all detainees are entitled to a bail hearing after six months of detention – even after they have been ordered removed – then it necessarily follows that an undocumented alien not yet removable is entitled to at least the same temporal limitation on their detention while they await further proceedings. 533 U.S. at 701; *see also Lora*, 804 F.3d at 614-15. Allowing detainees under §1226(c) to be held for as long as it takes for the government to gather evidence and schedule a hearing effectively endorses detention without limit, devoid of any procedural safeguards to prevent the kind of prolonged detention the *Zadvydas* Court was concerned about. 533 U.S. at 682 ("[I]ndefinite detention of aliens…would raise serious constitutional concerns…."). Further, since a case-by-case assessment will only be performed if the detainee in question has requested review of their case and a court has granted their petition (*Secord*, 123 F.4th at 5), the "reasonableness test" leaves open the near certain outcome that only those with access to adequate legal representation and resources will have the opportunity to be heard before their detention crosses the threshold of being unlawful. Not only does this practice weaken the connection to the purpose of detention in the first place, but it severely undermines the goal of uniform administration of the law pronounced in *Zadvydas*. 533 U.S. at 701.

To assume that *Demore* stood for the purpose that a bright-line rule is not required, or that a six-month period of detention is constitutional, would be to overlook the facts that underpinned the Court's reasoning. At the time *Demore* was decided, detention periods averaged 45-90 days (538 U.S. at 530-31), whereas today there no longer is a "definite

termination point," since a non-citizen detained under §1226(c) who contests their removal typically spends many months – sometimes years – in detention due to the backlog of immigration proceedings. *Lora*, 804 F.3d at 605. In fact, a report in 2012 showed an average period for removal proceedings for criminal aliens was 455 days. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 81 (2012). This evidence is supported by reviewing the various cases that have employed the same "reasonableness test" standard urged by Respondent. Among those cases, instances of prolonged, unconstitutional detention included detentions for fourteen months (*Reid v. Donelan*, 819 F.3d 486 (1st Cir.2016)), eighteen months (*Hoang Minh Ly v. Hansen*, 351 F.3d 263, 266 (6th Cir. 2003)), thirty- five months (*Diop v. Ice/Homeland Sec.*, 656 F.3d 221, 226 (3d Cir. 2011)), and forty-eight months (*Sopo v. United States AG*, 825 F.3d at 1199 (11th Cir. 2016)). These cases demonstrate not only the failure of the case-by-case "reasonableness test" approach to protect undocumented immigrants from prolonged detention, but also exhibit the lack of uniform administration of the law for similarly situated individuals. The best way to avoid this unconstitutional result is to impute a temporal limitation into §1226(c) and require that undocumented immigrants awaiting removal proceedings – just like those who have already been ordered removed – be granted a bail hearing no later than six months after their detention.

B. The "Reasonableness Test" Fails to Properly Balance Competing Interests Because It Accords Too Much Weight to the Government's Concerns Without Considering the Fifth Amendment Protection from Wrongful Detention Guaranteed to Undocumented Immigrants.

A fundamental component of the Due Process Clause of the Fifth Amendment is the freedom from arbitrary, wrongful detention by the government. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Further, due process requires that both the purpose and duration for which an

individual is detained bear a reasonable relationship to each other. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Detention may be wrongful when, outside the criminal context, it is not substantially related to furthering the government's interest in preventing potential danger to the public. *See Zadvydas*, 533 U.S. at 690 ("There is no sufficiently strong special justification here for indefinite civil detention."); *Kansas v. Hendricks*, 521 U.S. 346, 368-69 (1997) (upholding a civil commitment statute when detention was limited to a small segment of particularly dangerous individuals and provided strict procedural safeguards); *United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (upholding pretrial detention where the government established the individual's threat to another individual or community). Moreover, procedural issues and convenience alone will not justify a law that runs counter to the Constitution. *See Chadha*, 462 U.S. at 944 ("Convenience and efficiency are not the primary objectives – or hallmarks – of democratic government.")

Where the goal to be achieved by detention is no longer probable, continued detention becomes unlawful. *See Zadvydas*, 533 U.S. at 690; *see also Demore*, 538 U.S. 532-33 ("[w]ere there to be an unreasonable delay by the INS in pursuing or completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.") (Kennedy, J., concurring); *Gordon v. Shanahan*, No. 15 Cv. 261, 2015 U.S. Dist. LEXIS 31630, at *11-12 (S.D.N.Y. Mar. 13, 2015) (finding it "unreasonable to penalize" alien by detaining him while he exercises his right to challenge his removal). In *Zadvydas*, where the deportation of removable aliens was rendered impracticable, the Court held that the goal of preventing flight was no longer a valid purpose to be served by detention extending longer than six months. 533 U.S. at 690. The Court further stressed that preventive detention based on dangerousness had

only been upheld when "limited to specially dangerous individuals and subject to strong procedural protections." *Id.* 690-91.

Here, the Second Circuit focused solely on the regulatory purposes for the "reasonableness test," without weighing the due process interests of undocumented immigrants against prolonged detention without justification. *See Secord*, 123 F.4th at 6 (noting a "particularly strained" removal docket, difficulty in obtaining an immigration judge, and the "clear and present" danger of releasing illegal aliens). This holding shifts the burden to every detainee to petition the court to evaluate the duration of their detention – which would certainly not eliminate any pressure on the current docket – and allows the government to operate without any procedural check under the presumption that all post-convicted detainees categorically pose a continued danger to society. In so doing, the Second Circuit has allowed the government to justify indeterminate periods of detention by labeling an entire class of individuals as being a flight risk and as having a dangerous character, without providing a definitive procedural opportunity for detainees to rebut such drastic presumptions. *See id*. ("[W]e cannot stand by and allow our decision to open the floodgates to terrorists."). This unjustified presumption leads to the very kind of arbitrary detention warned by Kennedy in his dissent in *Zadvydas*. 533 U.S. at 721 ("[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.") (Kennedy,J., dissenting).

While it is clear that Congress intended for these individuals to be detained pending deportation proceedings, this large group of detainees includes non-citizens who do not pose any danger to society, may have strong community ties, are not flight risks, and may have meritorious defenses to their removal. *Lora*, 804 F.3d at 605. In fact, a study published at the INS's request at the time of the *Demore* decision showed that of those criminal aliens that were

released under supervision, 92% attended all of their hearings. 538 U.S. at 565 (Souter, J., dissenting). Moreover, detention for fear of recidivism or future dangerousness may only be supported by strict procedural safeguards not present here. *See Zadvydas*, 533 U.S. at 690-91.

Further, the majority's emphasis on inconveniences is not only misguided; it is insufficient grounds to completely disregard the liberty interest of detainees. *See Demore*, 538 U.S. at 564 (rejecting the notion that system-wide denial of an opportunity to be heard can be justified by resource-driven decisions) (Souter, J., dissenting); *see also Chadha*, 462 U.S. at 944. Even if the administrative difficulty cited by the government were sufficient to justify detention, the Second Circuit failed to recognize that ICE did not only have six months to prepare their case – rather, they had one year and six months, beginning from the moment that Ms. Secord's criminal sentence began. And, since §1226(c) is triggered by a conviction carrying a penalty of at least one year in prison, it will always be the case that the government has at least eighteen months to prepare their case for removal – one year for the alien's prison sentence, and six months for the presumptively lawful detention period. After that point, the government may present evidence showing the individual's risk of flight or potential recidivism, and a neutral fact finder may then determine whether continued detention is justified as serving a lawful purpose, or may require supervised release of the detainee. *Zadvydas*, 533 U.S. at 696 ("The choice, however, is not between imprisonment and the alien living at large. It is between imprisonment and supervision under release conditions that may not be violated.") (internal quotations and citations omitted).

A bright line, six-month limit on detention under § 1226(c) adequately serves the purpose of allowing the government enough time to gather evidence for a hearing on dangerousness and flight risk without trampling on the Fifth Amendment rights of detainees because the government

will have had sufficient time to prepare their case for removal. Any logistical difficulties in having to adhere to a bright-line rule would merely represent the burdens that all government institutions must bear to avoid the risk of running afoul of the Constitution. *Rodriguez*, 715 F.3d at 1146.

Petitioner concedes that national security concerns are certainly compelling, and trusts that the government will do everything in its power to protect this country from global threats of terrorism. However, when that protection encroaches on the rights this Constitution has guaranteed to preserve, the actions taken by the government serve no longer to protect, but rather to subvert basic principles of liberty embedded in the national character and identity of the United States.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the Second Circuit be reversed.

Respectfully Submitted,

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