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,

Respondent.

LAURA SECORD,

Petitioner,

v.

CITY OF ANGOLA,

Respondent.

On Writs of Certiorari to
The United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

TEAM NO. 15
COUNSEL FOR PETITIONER
MARCH 20, 2017

QUESTIONS PRESENTED

1. Whether the facts and circumstances of the night of Petitioner's arrest establish both probable cause and exigent circumstances such that Deputy Pfieff was justified in entering a private home without consent or a warrant to effectuate an arrest.

2. Under the Due Process Clause, is the reasonable period approach the correct approach in determining the appropriate time limitation on mandatory detention without a bond hearing when an individual's liberty interest is at stake?

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STATEMENT OF THE CASE

Petitioner, Laura Secord, entered the United States without authorization in the winter of 2013 from Canada, where she is a citizen. R. at 2. On December 21, 2015 Ms. Secord was playing Dungeons and Dragons ("D&D"), a board game, with six (6) friends at a cabin located along Lake Erie. *Id*. Mr. James Fitzgibbon, the nephew of the owner of the cabin, had volunteered his uncle's cabin as a place where they could all play D&D. R. at 8-9. Mr. Fitzgibbon told the others that his uncle would not mind everyone being at the cabin as long as they kept it tidy. R. at 9. In keeping with the theme of the game, along the way to the cabin the group stopped at a party store to buy wizard and dwarf costumes for their game night. *Id*.

Upon arriving at the cabin, Mr. Fitzgibbon retrieved a key to the front door of the cabin from the patio. *Id*. Mr. Fitzgibbon knew where the key was kept because his uncle had asked him to regularly monitor the cabin while he was vacationing in Florida. *Id*. Once inside, the group began to play the game by candlelight. *Id*. Sometime later, a local resident reported to police that the lights were on in the cabin. R. at 2. This report was made because the cabin was normally occupied during the summer months. *Id*. Deputy Barnard Pfieff, from the Erie County Sheriff's office, was dispatched to the cabin. *Id*. Upon arrival Deputy Pfieff approached and peered through a window of the cabin where he observed "hooded and masked" individuals gathered around a candlelit table. *Id*.

After these initial observations Deputy Pfieff returned to his patrol car and radioed his on-call supervisor, Sergeant Slawter. *Id*. Sergeant Slawter told Deputy Pfieff to "[g]o find out what's going on." *Id*. At this point Deputy Pfieff approached the cabin and knocked on the door. *Id*. This startled the occupants of the cabin, as they believed they were alone, and they immediately hid upon hearing Deputy Pfieff's voice and knocking. *Id*. After hearing the repeated pounding on the door, the occupants of the cabin were "scared out of their wits" and Ms. Secord

"jumped out her skin." R. at 9. Deputy Pfieff then contacted his supervisor a second time, informing Sergeant Slawter of his observations. *Id*. Deputy Pfieff then entered the building, identified himself as a law enforcement officer and ordered those inside the dwelling to come out; the six occupants complied with this order and came out of hiding. *Id*.

Upon questioning the occupants about why they were in the cabin, Deputy Pfieff learned that Mr. Fitzgibbon had been given permission to use the cottage by his uncle and that Mr. Fitzgibbon possessed on his person a key to the front door. *Id*. Also, located in the cabin were pictures of Mr. Fitzgibbon with his family. *Id*. When Mr. Fitzgibbon provided law enforcement with his uncle's telephone number, they were unable to contact him that night. *Id*. When law enforcement contacted Mr. Fitzgibbon's uncle, he confirmed that his nephew was permitted to be there, but due to insurance liability concerns, he had asked his nephew "not to have any parties." *Id*.

That night Deputy Pfieff arrested the six occupants of the cabin for criminal trespass. R. at 3. A search of Ms. Secord's backpack revealed "brass knuckles," and she was also charged with possession of a deadly weapon. Ms. Secord was subsequently convicted of criminal trespass in the second degree and criminal possession of a deadly weapon in the fourth degree by the City of Angola in 2015. R. at 1. She was sentenced to one year in prison. *Id*. Upon her release from prison in 2016, she was delivered to the Immigration and Customs Enforcement ("ICE") regional office in Buffalo, New York, for deportation proceedings, in accordance with 8 U.S.C. § 1226. *Id*; R. at 6. She remained in ICE detention for six months. R. at 1.

The Criminal Defense Legal Clinic at Buffalo Law School assisted Ms. Secord in filing a habeas corpus petition in the Western District of New York contesting her arrest, and later helped file a second habeas corpus petition alleging that her detention was in violation of the

Second Circuit's decision *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). R. at 3-4. As her immigration proceedings continued to "drag on," the District Court granted her second habeas corpus petition regarding her ICE detention and ordered her immediate release. R. at 4. Her petition to reverse her criminal conviction was also granted by a separate Trial Court. *Id*. In ordering her release from ICE custody, the Trial Court noted that the earliest Ms. Secord's bail request could be scheduled was eleven months after she had been detained, and the earliest ICE could prepare a case regarding Ms. Secord's dangerousness or flight risk is six months from the time of detention. R. at 6. On appeal, the Second Circuit found that her release was improvidently granted and concluded that she should immediately be remanded into ICE custody. R. at 6. The Second Circuit reversed the Trial Court's decision to vacate Ms. Secord's criminal convictions. R. at 2.

SUMMARY OF THE ARGUMENT

This court should reverse the Second Circuit and find that Deputy Pfieff lacked both probable cause and exigent circumstances as required for nonconsensual warrantless entry into a private home to effectuate an arrest. For an officer to be in compliance with the requirements of the Fourth Amendment, an arresting officer must have both probable cause and be presented with exigent circumstances before entering a private home to effectuate an arrest. Determining if probable cause existed to arrest requires a fact specific analysis of the circumstances surrounding the arrest in question. Deputy Pfieff was not presented with enough objective facts to support a finding that probable cause existed. Additionally, Deputy Pfieff ignored clearly available exculpatory evidence that vitiated his probable cause determination.

The facts and circumstances surrounding Ms. Secord's arrest also fail to establish that Deputy Pfieff was faced with the exigent circumstances required to make warrantless

nonconsensual entry into a private home to effectuate an arrest. There are only an extremely narrow set of circumstances that will allow individual officers to enter a private home without consent or a warrant. Deputy Pfieff's actions and observations prior to entry show that he was not presented with a situation that created a compelling necessity for immediate action, there was no threat of evidence being destroyed, and there was no need to enter to protect or preserve life. Because Deputy Pfieff lacked both probable cause and exigent circumstances, the arrest and subsequent search of Ms. Secord was in violation of the rights afforded to her by the Fourth Amendment.

Additionally, this Court should reverse the Second Circuit and adopt the bright line six-month approach for determining when aliens subject to mandatory detention should receive a bond hearing. First, the bright line approach protects the liberty and due process rights of aliens. Mandatory detention infringes on an individual's liberty interest because of the serious physical, mental, emotional, and financial consequences that it imposes on aliens. Civil detention jurisprudence demonstrates the required protections of an individual's liberty interest. For example, there are strict limitations on civil detention of sexually dangerous individuals and detention of criminal defendants acquitted by reason of insanity. Following the court's jurisprudence, the six-month limit on detention without a bond hearing is an adequate protection for aliens' liberty interests. Moreover, the six-month limit provides aliens with their due process rights prior to their detention becoming unreasonable and thereby a violation of their rights. As demonstrated by statistics and cases, immigration proceedings tend to be extremely lengthy and easily lead to unreasonable detention. Second, the bright line approach avoids burdening district courts, and it is an easily administrable test that provides consistent results made by experienced immigration judges.

Alternatively, if this Court chooses to adopt the reasonable period approach, any further detention of Ms. Secord, without a bond hearing, is unreasonable under the circumstances of her case. Ms. Secord served a one-year criminal sentence and if she is further detained civil detention exceeding one year is very probable because she has already been detained for six months, and there is nothing in the record indicating when her removal proceedings will conclude. In addition, Ms. Second has not prolonged her proceedings in bad faith and the likelihood of her removal is nominal if her criminal convictions are overturned. Consequently, this Court should adopt the bright line approach, and in the alternative, find that further detention of Ms. Secord is unreasonable.

ARGUMENT

I. THE WARRANTLESS ARREST OF PETITIONER WAS IN VIOLATION OF THE FOURTH AMENDMENT AS DEPUTY PFIEFF LACKED BOTH PROBABLE CAUSE AND AN EXIGENT CIRCUMSTANCE TO SUPPORT ENTRY INTO THE HOME.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. An arrest qualifies as a "seizure" of a person under the Fourth Amendment, and must be reasonable under the circumstances. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2015). Warrantless entry into a private home to effectuate an arrest requires "[1] probable cause to either arrest or search *and* [2] exigent circumstances to justify a nonconsensual warrantless intrusion into private premises." *Kirk v. Louisiana*, 536 U.S. 635, 637 (2002) (emphasis added).

Only an extremely narrow set of circumstances will rise to the level of an exigency sufficient to allow individual officers to enter a private home without consent or a warrant to arrest someone of suspected criminal activity. *See*, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 509-10

(1978) (to protect or preserve life); *United States v. Santana*, 427 U.S. 38 (1976) (hot pursuit); *Schmerber v. California*, 384 U.S. 757 (1966) (destruction of evidence).

Deputy Pfieff had neither an arrest warrant for Petitioner, nor a search warrant for the cabin, when he entered the cabin arrested Petitioner, and subsequently searched her person. Because Deputy Pfieff was not acting under the authority of a warrant, he is required to have both probable cause and an exigent circumstance to justify his nonconsensual entry into the cabin. The objective facts and circumstances surrounding the arrest of Petitioner fail to support a finding that Deputy Pfieff had probable cause to arrest or that exigent circumstances existed such that nonconsensual warrantless entry was justified.

A. Deputy Pfieff lacked probable cause to enter the home.

Probable cause to arrest exists where, "at the *moment* the warrantless arrest was made, the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrestee had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89 (1964); *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (holding the probable cause determination depends upon the reasonable conclusions of the officer at the time of the arrest). A warrantless arrest lacking probable cause does not become validated by what is discovered in a subsequent search of arrestee. *Henry v. United States*, 361 U.S. 98, 103 (1959). Determining if probable cause existed is a fact specific exercise and must be analyzed using the facts of the particular case in which the legality of the arrest is questioned. *Wong Sun v. United States*, 371 U.S. 471 (1963).

More specifically, when determining if probable cause exists to arrest for trespass, courts have unanimously required more than the simple presence of the presumed trespasser. *See*, *e.g.*, *Hurem v. Tavares*, 793 F.3d 742 (7th Cir. 2015) (Owner of property was present with proof of

ownership and told officers arrestee was trespassing); *United States v. Hawkins*, 830 F.3d 742 (8th Cir. 2016) (Arresting officer was aware arrestee had received prior oral notice he could not be on premises); *Blomquist v. Town of Marana*, 501 Fed.Appx. 657 (9th Cir. 2012) (Arresting officer was aware arrestee had previously been removed from premises as a trespasser); *Strei v. Blaine*, 996 F.Supp.2d 763 (D. Minn. 2014) (Owner of property provided officers with proof of ownership, communicated to officers that arrestee was trespassing, and officer had previously notified arrestee he could not be on property); *But cf.*, *Davis v. City of New York*, 902 F.Supp.2d 405 (S.D.N.Y. 2012) (Officers lacked probable cause to arrest for trespass in housing authority building based solely on arrestee's refusal to identify resident who gave her permission to be in building, even knowing she was not a resident). Absent additional corroborating evidence, made available to officers prior to an arrest, the mere presence of an individual suspected of trespassing on a property does not give probable cause to arrest for criminal trespass.

Here, the lower court supported their finding that Deputy Pfieff had probable cause to arrest with facts discovered well after the arrest had occurred. Among these was the fact that the owner of the cabin later informed police that he asked Mr. Fitzgibbon "not to have any parties" at the cabin. R. at 7. The Court also used Petitioner's immigration status to support this finding, citing this as "perhaps most critical" to their determination that probable cause existed. *Id*. Because these facts were discovered after the arrest had already occurred, they are precluded from the probable cause analysis.

With that in mind, the facts available to Deputy Pfieff at the *moment* he made the arrest were: a report of a light coming from a seasonal cottage being occupied out of season; his observation that six individuals were inside the cabin located around a candlelit table; the individuals were wearing costumes and playing a game; the occupants "scatter[ed]" after being

startled by Deputy Pfieff but later emerged when he identified himself as a law enforcement officer; family pictures, including Mr. Fitzgibbons, that were located throughout the cabin; and finally, the fact that Mr. Fitzgibbon possessed a key to the cabin's front door. R. at 7.

Nothing within the objective facts available to Deputy Pfieff at the time of the arrest corroborated a belief that the occupants had, or were, committing a crime. Given that Deputy Pfieff had no evidence to contradict Mr. Fitzgibbon's statement that he was permitted to use the cabin, the interaction between the officer, Mr. Fitzgibbon, and other occupants of the cabin should have ended there. Instead, despite lacking probable cause to believe a crime had been or was being committed, Deputy Pfieff, and the other officers present, impermissibly entered the cabin and arrested the occupants.

1. Deputy Pfieff impermissibly ignored plainly available exculpatory evidence when determining whether he had probable cause to arrest.

Not only did the circumstances of that night fail to establish probable cause, Deputy Pfieff chose to ignore clearly exculpatory evidence available to him at the time of the arrest. An arrest, with or without a warrant, must stand upon firmer ground than mere suspicion, and an officer may not turn a blind eye to exculpatory evidence that is available to them at the time the arrest is made. *Wong Sun,* 371 U.S. at 479; *Kingsland v. City of Miami*, 382 F.3d 1120, 1229 (11th Cir. 2004).

When Deputy Pfieff entered the cabin, he found the occupants had previously been playing a game at a table while dressed in costumes. While arresting Petitioner and the other occupants, Deputy Pfieff ignored exculpatory evidence available to him, mainly: the uncontradicted claim by Mr. Fitzgibbon that his use of the cabin was with the owner's permission; Mr. Fitzgibbon possession of a key to the cabin; and, most noteworthy, the

photographs of Mr. Fitzgibbon and his family located in the cabin. Deputy Pfieff chose to ignore clearly available evidence that vitiated probable cause to arrest for trespassing.

Any of these facts taken independently would invalidate a reasonable officer's belief that the occupants of the cabin were committing a crime. Taken combined, the totality of the circumstances would show a reasonable officer in Deputy Pfieff's position that not only were the occupants not committing a crime, but that they had the cabin owner's permission to be present. In ignoring exculpatory evidence plainly available to him, Deputy Pfieff effectuated an arrest that lacked probable cause.

B. There were no exigent circumstances during Deputy Pfieff's observation of the occupants of the home that made a warrantless intrusion necessary.

Nothing within the record supports the proposition that an exigent circumstance existed at the cabin the night of Petitioner's arrest. As noted above, for a nonconsensual warrantless entry into a home to effectuate an arrest, the arresting officer is required to have both probable cause and an exigent circumstance to support entry. *Kirk*, *supra*, at 637. The exigent circumstances exception allows a nonconsensual warrantless search or seizure when an emergency leaves police insufficient time to seek a warrant, and permits warrantless entry of private property when there is need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence. *Tyler*, 436 U.S. at 509; *Kentucky v. King*, 563 U.S. 452, 459 (2011). In determining if an exigent circumstance exists, the analysis is case-specific, and requires analysis of "all of the facts and circumstances of the particular case." *Missouri v. McNeely*, 133 S.Ct. 1552, 1559 (2013). It is the Government that bears the burden of "demonstrate[ing] exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

1. Deputy Pfieff had sufficient time to seek a warrant.

To satisfy the exigent circumstances exception, the government must first show that there was insufficient time to seek a warrant. *Tyler*, *supra,* at 509. This court has held that the following circumstances provided insufficient time to seek a warrant: when entry is required to fight a fire, when law enforcement officers observe an occupant of a house being punched by another, and when the occupant of a house has pointed a rifle at an officer. *Id*.; *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *Michigan v. Fisher*, 558 U.S. 45 (2009). Courts have uniformly determined that an exigent circumstance exists only where there is a compelling necessity for immediate action, and real or immediate consequences would certainly occur absent law enforcement intervention.

Here, the circumstances of Deputy Pfieff's entry show that no emergency required immediate entry and sufficient time existed with which he could have applied for a search warrant. Upon arriving and making his initial observations, Deputy Pfieff didn't immediately enter the cabin; he instead called a supervisor for advice on how to proceed. R. at 2. This action shows that immediately following his observation of the inside of the cabin, Deputy Pfieff believed there was no compelling necessity for immediate entry. Furthermore, there were no observations of the interior of the cabin that could lead a reasonable officer to believe that immediate entry was required to prevent the imminent destruction of evidence or that emergency aid was needed by the occupants of the cabin. Deputy Pfieff made his initial observation of the occupants when they were inside the cabin, making the "hot pursuit" exception clearly inapplicable. R. at 2.

2. The "destruction of evidence" exception is inapplicable.

The destruction of evidence exception justifies nonconsensual warrantless into a home when "there are exigent circumstances in which police action literally must be 'now or never' to

preserve the evidence of the crime." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) (citation omitted). For warrantless entry to be justified under this exception, evidence must be at risk of being destroyed, and the police must have actual fear that the evidence is at risk of imminent destruction. *United States v. Ukomadu*, 236 F.3d 333 (6th Cir. 2001).

Here, Deputy Pfieff was unaware that actual evidence of criminal activity was present inside the cabin. Taking it a step further, Deputy Pfieff was presumably investigating a possible trespass. The only evidence needed to support a prima facie case of trespassing is Deputy Pfieff's observations, making a destruction of evidence claim impossible and his entry impermissible. Furthermore, there is no indication from the record that Deputy Pfieff was aware of any evidence present in the cabin, much less an actual fear that evidence was at risk of imminent destruction. Because Deputy Pfieff lacked actual knowledge of the presence of evidence inside the cabin, the "destruction of evidence" exception is inapplicable.

3. Emergency Aid exception is inapplicable to Deputy Pfieff's entry into the cabin because he entered in a law enforcement capacity.

Warrantless searches are also permissible when conducted not for the purpose of investigating criminal wrongdoing, but to advance "'special needs' other than the normal need for law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.7 (2001). This court has recognized only one non-law-enforcement purpose that will justify a nonconsensual, warrantless entry unsupported by an exigent circumstance and probable cause. The emergency aid exception permits entry "to protect or preserve life or avoid serious injury." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)). Police may enter a home without a warrant when they have an "objectively reasonable" basis for believing an occupant is injured or imminently threatened with such injury. *Brigham City,* 547 U.S. 398.

Deputy Pfieff's search and seizure of Petitioner are impermissible under the "emergency aid" exception. The record presents no facts or circumstances that would support a finding that an occupant of the house needed emergency medical assistance or that Deputy Pfieff was in any danger. Again, the timeline of Deputy Pfieff's actions that night prove that he did not believe immediate entry was necessary. He went back to his patrol car and contacted his supervisor two separate times before making entry. R. at 2. Deputy Pfieff did not enter the cabin with his weapon drawn, showing that he was not under the belief that he was in any danger. *Id*. Beyond that, the record also clearly indicated that Deputy Pfieff entered the house under a traditional law-enforcement capacity, making the emergency aid exception unavailable as a justification for entry.

II. THIS COURT SHOULD REVERSE THE SECOND CIRCUIT AND ADOPT THE BRIGHT LINE SIX-MONTH APPROACH FOR DETERMINING WHEN BOND HEARINGS ARE NECESSARY. ALTERNATIVELY, IF THE COURT ADOPTS THE REASONABLE PERIOD APPROACH ANY FURTHER DETENTION OF MS. SECORD WOULD BE UNREASONABLE.

"Freedom from imprisonment-from government custody, detention, or other forms of physical restraint-lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).[1] All circuit courts that have addressed this issue have held that there is an implicit temporal limitation in mandatory detention statutes in order to ensure adequate due process. Both the Ninth and Second Circuits have previously held that an alien who is subject to mandatory detention for six months must be given a bond hearing. *Lora v. Shanahan*, 804 F.3d 601, 601 (2d Cir. 2015); *Diouf v. Napolitano*, 634 F.3d 1081, 1081 (9th Cir. 2011). Similarly, four other Circuits have held that an alien can only be detained for a

[1] It is well settled that the Fifth Amendment entitles aliens to due process in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

"reasonable" period before a bond hearing is required. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1199 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 486 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 263 (6th Cir. 2003). In those circumstances, the alien would have to actively challenge their detention, forcing the District Court to weigh the factors for continued detention against the asserted liberty interest. *Sopo*, 825 F.3d at 1217-19. Because of the inherent uncertainty surrounding this standard, and because of the paramount importance attached to liberty, this Court should err on the side of caution and find that a bright line delineation is necessary.

First, the bright line approach protects the alien's liberty interest by curtailing the negative consequences of lengthy detention. *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015). Second, the bright line approach follows civil detention jurisprudence, which places strict restrictions on all forms of civil detention. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 376-79 (2014). Third, the bright line approach protects the liberty interest by affording due process before detention becomes unreasonable. *Diouf*, 634 F.3d at 1091. Furthermore, the bright line approach avoids due process violations by offering predictable and consistent results easily created by experienced immigration judges. *Sopo,* 825 F.3d at 1226 (Pryor, J., dissenting). Finally, if this Court chooses to adopt the reasonable period approach, further detention of Ms. Secord is unreasonable. Several factors should guide a district court in determining whether a particular criminal alien's continued detention is reasonable. *Sopo,* 825 F.3d at 1217. In evaluating the factual circumstances of Ms. Secord's case further detention without a bond hearing is unreasonable.

A. The bright line approach protects the interests of aliens and promotes judicial efficiency and consistency.

Detention during immigration proceedings severely impacts an alien's liberty interest due to the consequences that civil confinement has on an alien's life; analogous to the consequences of criminal detention. *Chavez-Alvarez*, 783 F.3d at 478. The bright line approach is superior because it follows this Court's precedent with regards to the limitations placed on civil detention. Anello, supra at 376-79. The six-month limitation on civil detention without a bond hearing protects an alien's liberty interest by affording them due process within a reasonable amount of time. *Diouf*, 634 F.3d at 1091. Furthermore, the bright line approach protects due process rights by providing consistent results. *Sopo,* 825 F.3d at 1226 (Pryor, J., dissenting). Finally, the reasonable period approach suffers because of the excessive burden it places on district courts, whereas the bright line approach is easily administrable by experienced immigration judges. *Id.*

1. A six-month limit on prolonged detention without a bond hearing protects the liberty and due process rights of aliens.

An individual's liberty interest is implicated by mandatory detention due to the serious consequences of confinement. *Chavez-Alvarez*, 783 F.3d at 478.Therefore, this Court should follow the limitations it has placed with regards to civil detention in other areas. Anello, supra at 376-79. Moreover, the bright line approach prevents aliens from unreasonably long detention without due process during lengthy and drawn out immigration proceedings. *Diouf*, 634 F.3d at 1091.

a. Mandatory detention infringes on an individual's liberty interest because of the serious consequences that it imposes on aliens.

Merely calling a confinement a civil detention does not, of itself, meaningfully differentiate it from penal measures. *Chavez-Alvarez*, 783 F.3d at 478. Detention of aliens is

"civil" detention because immigration proceedings are civil and not criminal so the assumption is that immigration proceedings are not punitive. *Id.*

However, as the court in *Chavez-Alverez* points out, aliens are held in county prisons. For example, the alien in *Chavez-Alverez* was held in York County Prison with the rest of the general prison population. *Id.* Furthermore, the court in *Rodriguez III* correctly stated that, "civil immigration detainees are treated much like criminals serving time. *Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015). They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. *Id.* Immigration and Customs Enforcement (ICE) detains individuals in "unduly restrictive, corrections-like conditions, isolated from their families and communities, with inadequate access to law libraries and other services, and often intermingled with criminal inmates." Anello, supra at 367.

Detention has real life negative consequences, not only for detainees, but also for their family members. For example, in *Lora* the individual was the primary caretaker of a two-year old U.S. citizen, who had to be placed in foster care for the duration of Lora's detention. . *Lora*, 804 F.3d at 616. In fact, in prisons where the aliens are detained, visitation is restricted and in most instances the visits are no-contact, thereby severely impacting family relationships. *Rodriguez*, 804 F.3d at 1073. Detainees like prison inmates, miss births, funerals, weddings, and college graduations. *Id.* Families lose a source of income, causing them to seek governmental assistance and their children to drop out of school. *Id.* Families also lose emotional support, causing relationships to be strained. Anello, supra at 368. Prison phone calls are expensive and communication is limited. *Id.* "The cumulative effects of these family separations reverberate throughout communities, removing productive members of the workforce, increasing poverty, and consigning thousands of children to foster care." *Id.* Moreover, detainees themselves are also

greatly impacted psychologically and physically by mandatory detention. *Id.* For instance, detainees can develop depression, anxiety, PTSD, and suicidal ideation due to the uncertainty of mandatory detention. *Id.*

The consequences that detainees suffer as a result of lengthy detention coupled with the complexity of the petition process makes the "reasonable period" approach adopted by some of the circuits untenable. First, immigration law and habeas law are both very complicated, and difficult to navigate, even for native speakers. *Rodriguez*, 804 F.3d at 1073. This difficulty is compounded for those that speak English as a second language or are illiterate. *Id*. Second, legal counsel is expensive and most aliens and families of aliens are already financially troubled, and only become moreso after the loss of the detained family members income. Anello, supra at 368. Third, confinement creates difficulty in obtaining and meeting with legal counsel even if an alien can afford legal counsel. *Rodriguez*, 804 F.3d at 1073. Fourth, even if aliens are familiar with the English language, resources in detention facility law libraries are scarce. *Id.* The reasonable period approach compels aliens to go through a nebulous and notoriously difficult process in order to secure their liberty. Conversely, the bright line approach automatically affords aliens the rights that they are guaranteed by the Constitution.

Here, while the record does not indicate if Ms. Secord has any family in the United States, this Court's ruling will have ramifications for all detained aliens and their families. Moreover, her indefinite detention, without any knowledge of when it will end, will have clear psychological and economic consequences. Finally, while Ms. Secord is fortunate enough to receive assistance from a legal clinic, most detained immigrants do not have access to this resource. Instead, they are left to their own devices and must continue filing habeas petitions in the hopes that somewhere, sometime, somehow a court will liberate them from their continued

detention. Consequently, this Court should adopt the bright line approach, and thereby protect alien's liberty interests.

b. Civil detention jurisprudence mandates strong protections for an individual's liberty interest.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Looking to civil detention jurisprudence the Supreme Court has found civil detention constitutional in very limited circumstances and has placed very strict restrictions on confinement. Anello, supra at 376-79.

The Supreme Court has held that civil detention of mentally ill persons is a significant deprivation of liberty and therefore the government must have a constitutionally adequate purpose for confinement. *Jones v. United States*, 463 U.S. 354, 361 (1983). Also, the nature and duration of the commitment must bear some reasonable relation to the purpose for which the individual is committed. *Id.* at 368. Stringent restrictions on civil detention also apply to civil detention of criminal defendants found incapable of standing trial; detention of criminal defendants acquitted by reason of insanity; detention of sexually dangerous individuals; and detention of individuals held in civil contempt. Anello, supra at 376-79.

As seen above, in all other areas of detention the Supreme Court has found that the Constitution requires some kind of due process that shows that a legitimate governmental interest justifies detention. *Rodriguez*, 804 F.3d at 1075. In *Demore*, the Court discussed that the governmental interest behind detention statutes in the immigration context was to ensure that deportable aliens could not commit further crime and they would appear at their removal hearings. *Demore v. Kim*, 538 U.S. 510, 518-21 (2003). However, mandatory bond hearings do not mean that those who are a flight risk or dangerous to the community will be automatically

released. A bond hearing affords aliens the mere opportunity to exercise their due process rights. As the court in *Rodriguez II* stated, "[the bright line approach] does not embrace an inflexible blanket approach to due process analysis, rather it requires individualized decision-making in the form of a bond hearing." *Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013).

Here, the adoption of a clear six-month rule protects the liberty interests of aliens by placing restrictions on civil detention in immigration proceedings similar to the restrictions on civil detention in other contexts. Thus, this Court following civil detention precedent and adopt the bright line approach.

c. The bright line approach affords aliens their due process rights by not waiting until detention has become unreasonable.

By not providing aliens with bond hearings after six months detainees risk being buried in the system, placing them at risk of undue and lengthy detentions that deny them their due process rights. *Leslie v. Attorney Gen. of U.S.*, 678 F.3d 265, 271 (3d Cir. 2012) (Finding alien's four year detention without bond hearing was unreasonable); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (Finding alien's detention of seven years without due process was unreasonable). Detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf*, 634 F.3d at 1092 n.13.

This Court in *Zadvydas* found that under the post-removal detention period statute aliens could not be detained indefinitely, and after six months the burden of proof shifted to the government to justify further detention. *Zadvydas*, 533 U.S. at 701. While in *Demore* this Court held that an alien's six-month detention did not violate due process this Court based their conclusions on statistics from the Department of Justice, which on August 26, 2016, the Solicitor General confirmed to be erroneous in a letter to the Supreme Court. Ian Heath Gershengorn, Re:

Demore v. Kim, S. Ct. No. 01-1491 Wall Street Journal (2016), http://online.wsj.com/public/resources/documents/Demore.pdf (last visited Feb 25, 2017).

This Court relied on statistics, which indicated that in removal cases where no appeal is lodged, the majority of such cases, the process lasts roughly a month and a half, while in those cases where an appeal is initiated, a minority of such cases, the process lasts about five months. *Demore*, 538 U.S. at 530. Therefore, this Court held that mandatory detention of aliens is authorized for "brief periods necessary for their removal proceedings." *Id.* Furthermore, Justice Kennedy in his concurrence stated that, "Were there to be an unreasonable delay by the INS in pursuing and 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." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

In actuality, according to recent statistics from 2015, four hundred and four days is the average time spent in detention. *Rodriguez*, 804 F.3d at 1072. "Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years." *Id.* Further, those who continue to seek relief through the appellate process extend their detention even further. *Id.* In essence, detainees are penalized with an extended detention simply for exercising their right to fight the removal process. For instance, appealing a Board of Immigration Appeals decision to the Ninth Circuit can extend confinement for eleven months. *Id.* The lawful permanent resident's removal proceedings in *Rodriguez* started in 2004, and his case was on appeal in the Ninth Circuit three times. *Id.* at 1072-73. Just recently the Supreme Court granted certiorari. *Rodriguez*, 804 F.3d at 1060, (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (U.S. June 20, 2016). As a result of the possible length of time in detention, aliens with

meritorious claims are discouraged from pursuing them and rather leave the country than be detained for years. *Rodriguez*, 804 F.3d at 1072.

Here, any further detention of Ms. Secord without a bond hearing is unreasonable. Ms. Secord was already detained for six months prior to being released. R. at 4. Her removal proceedings continue to "drag on" and there is no indication in the record as to when they might be concluded. R. at 2. Therefore, if Ms. Secord is remanded back to ICE custody she will be detained indefinitely until the arbitrary time that her detention becomes prolonged and thereby unreasonable. Her only hope of escape from continued confinement would be yet another habeas petition, with no certainty of it being received favorably by the district court.

The Court also points out that the first available judge even to hear a bail request could not be scheduled until eleven months after Ms. Secord began her detention, and that ICE cannot prepare a case to present to the immigration judge regarding dangerousness or flight risk in six months. R. at 6. This means Ms. Secord would have to be in detention for at least eleven months without being afforded her due process rights while the government takes an unreasonable amount of time to prepare for a bond hearing. Consequently, this Court should find that any detention without a bond hearing beyond six months including Ms. Secord's detention is unreasonable.

2. The bright line approach promotes judicial efficiency and consistency by being easily administrable by immigration judges who are more experienced in the field of immigration.

A case-by-case approach will result in unpredictable, inconsistent, and arbitrary outcomes that raise serious due process concerns. *Sopo,* 825 F.3d at 1225 (Pryor, J., dissenting). The purpose of due process protection is to shield against precisely this kind of arbitrary government action. *Id.* The bright-line approach averts these due process violations by offering "predictability in application" and "consistency in result." *Id.* at 1226.

The six-month period of detention is recognized for the sake of uniform administration in federal courts and in order to limit the occasions when courts will need to make difficult judgments. *Zadvydas*, 533 U.S. at 700-01. The bright line rule would provide aliens with ease and transparency in knowing what they can expect. *Sopo,* 825 F.3d at 1226. The case-by-case approach is better suited at the bond hearing where an experienced immigration judge can consider a variety of factors. *Id.* at 1227.

On the other hand, the reasonable period approach requires district court judges to consider a variety of different factors in determining the reasonableness of detention. *Sopo,* 825 F.3d at 1217-19. Each district court can consider the factors they want and give the weight that they believe each factor deserves thereby leading to unpredictable, inconsistent, and unfair results. *Ly*, 351 F.3d at 272. District courts do not possess the same expertise when it comes to immigration proceedings. *Id.* For instance, they are not familiar with how much time will be required to resolve each case. *Id.* There is no reason to create an extra step in order to determine whether an individual should be released on bond. *Lora*, 804 F.3d at 615-16. The immigration judge can consider the same factors as a district court judge can when determining whether the alien should be further detained. *Id.*

With the reasonable period approach, district courts will be forced to waste their time, effort, and resources by adjudicating unnecessary habeas petitions. *Id.* Further, while it is possible that administrative costs may rise under the bright-line approach, these costs are outweighed by the fundamental liberty interest at stake. *Sopo,* 825 F.3d at 1227 n.5 (Pryor, J., dissenting). Accordingly, this Court should adopt the bright line approach which serves the dual purpose of: (1) removing the extra burden placed on the district courts; (2) and preventing arbitrary and capricious results for detainees.

B. Alternatively, if this Court chooses to adopt the reasonable period approach, any future detention of Ms. Secord after she was already detained for six months, will be unreasonable.

If this Court adopts the alternative reasonable period approach, this Court should find that Ms. Secord's detention is unreasonable based on the factual circumstances of her case. The reasonable period approach requires the courts to balance the government's interest in continued detention versus the alien's liberty interest. *Sopo,* 825 F.3d at 1218-19. Once the alien's liberty interest has outweighed the justifications for detention without a bond hearing then detention becomes unreasonable and the court should grant the habeas petition. *Id.* at 1219. Several factors should guide a district court in determining whether a particular criminal alien's continued detention is necessary to "fulfill Congress's aims of removing criminal aliens while preventing flight and recidivism." *Id.* at 1217.

The most important factor for a court to consider is the time an alien has already spent in detention without a bond hearing. *Id.* The court in *Sopo* pointed out that because Congress and this Court relied on the statistics provided to them they believed that most removal proceedings would be completed within five months. *Id.* Consequently, the court followed this chain of logic and held that a bond inquiry is likely to be necessary within a six-month to one-year period. *Id.* In addition to these temporal concerns, the courts can also consider why the removal proceedings became protracted. *Id.* at 1218. Courts should look to whether the government or the alien posed any difficulties in removal proceedings: such as failing to actively participate or seeking continuances. *Id.* However, the court specifically pointed out that aliens should not be punished for pursuing legal remedies that are available to them, but the court may consider whether the alien prolonged the process in bad faith by for example filing frivolous appeals. *Id.*

Secondary factors include whether the alien's civil immigration detention exceeds the time the detainee spent in prison for the crime that rendered him removable. Related to this is

whether the location of civil detention differs from a place of criminal incarceration. *Id.* Additionally, the First Circuit in *Reid* reviewed expanded factors such as the likely duration of future detention, and the likelihood that the immigration proceedings will conclude with a final removal order. *Reid*, 819 F.3d at 500. The court also made clear that this list is not exhaustive, and will vary from case to case. *Id.* In balancing these many factors, the Chavez-Alvarez court held that after six months the liberty interest of an individual starts to outweigh the benefits of detainment. *Chavez-Alvarez*, 783 F.3d at 477. Once the liberty benefits begin to outweigh the benefit of detainment, the detention becomes no longer reasonable. *Id.*

Here, Ms. Secord's criminal sentence was for one year. R. at 1. Prior to her release by the district court she was already in mandatory civil detention for six months. R. at 4. There is no evidence in the record as to when her removal proceedings will conclude, and Judge Wechsler pointed out in his opinion that "her removal proceedings continue to drag on." R. at 2. If Ms. Secord is remanded back into ICE custody there are no indicators as to how much longer she will be detained beyond the six months she was already confined. Like the court in *Chavez-Alvarez* concluded that after six months detention without a bond hearing tends to unreasonableness.

Additionally, there is no evidence in the record that, when Ms. Record was released from custody, she attempted to flee or posed a danger to the community. Ms. Secord also pursued her legal options in good faith by filing the necessary habeas petition with the help of law school legal clinic. R. at 6. While her civil detention of six months has not exceeded her criminal sentence of one year, if Ms. Secord is further detained the possibility of her civil detention exceeding one year is a genuine possibility. Moreover, the record does not indicate where and if Ms. Secord is held with the general criminal population. Finally, the likelihood of Ms. Secord's proceedings resulting in a final removal order is nominal. If Ms. Secord's convictions are

overturned because her arrest violated the Fourth Amendment her removal due to criminal convictions would be overturned, and she could apply for a waiver of inadmissibility due to her entering the country illegally. Thus, any future detention of Ms. Secord without a bond hearing is unreasonable.

CONCLUSION

For the reasons above, Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

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