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IN THE
SUPREME COURT OF THE UNITED STATES

No. 1-2017

LAURA SECORD,
Petitioner

v.

WINFIELD SCOTT, in his official Capacity as Director, Department of Immigration and Customs Enforcement; and CITY OF ANGOLA
Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Petitioner,
Team #19

QUESTIONS PRESENTED

I. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Ms. Secord without a warrant and absent exigent circumstances.

II. Whether the "reasonableness test" to determine a time for bail hearings deprives Ms. Secord of her right to Due Process when the test leads to inconsistent application in the lower courts, was not Congress' intent when writing 8 U.S.C. §1226(c), and Respondent does not show an adequate public safety interest to justify such deprivation of personal liberty.

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STATEMENT OF THE CASE

This is a joint criminal and immigration case in which Petitioner, Laura Secord, was convicted of criminal trespass and possession of a dangerous weapon. Due to her immigration status, she was detained by ICE for six months while awaiting deportation proceedings.

(i) PROCEEDINGS BELOW

Laura Secord ("Ms. Secord") was charged with criminal trespass and subsequently tried and convicted in the City Court of Angola. (R. 3). Ms. Secord was also charged, tried, and convicted of criminal possession of a deadly weapon (R. 3). She was sentenced to one year in prison for both convictions, to be served concurrently. (R. 3). While in prison, Ms. Secord obtained representation from John Lord O'Brian, who then filed a habeas corpus petition on her behalf in the United States District Court for the Western District of New York. (R. 3). The petition alleged that her Fourth Amendment rights were violated due to an unlawful search and seizure claiming that Deputy Pfieff lacked probable cause to make an arrest. (R. 3). After completing her prison sentence, Ms. Secord was immediately transferred into ICE custody to begin deportation proceedings in accordance with 8 U.S.C. §1226. (R. 3-4). After spending six months in ICE custody, she filed another habeas corpus petition, arguing that her detention by ICE had passed the six-month bright-line rule outlined by both the Second and Ninth Circuit Courts of Appeals. (R. 4). The U.S. District Court for the Western District of New York granted the petition and Ms. Secord was immediately released. (R. 4). Her petition to vacate her criminal conviction was also granted. (R. 4). The City of Angola and Department of ICE appealed to the United States Court of Appeals for the Second Circuit. (R. 4). The Second Circuit reversed the District Court order, immediately remanding Ms. Secord back into ICE custody and reinstating her criminal conviction. (R. 4). She now appeals to this Court.

(ii) STATEMENT OF THE FACTS

Ms. Secord is a Canadian citizen living in the United States. (R. 1). Ms. Secord, a victim of emotional and physical abuse, ran away from home at the age of sixteen. (R. 8). While living on the streets of Toronto, Ms. Secord made friends with a group of online gamers. (R. 8). She then entered the United States and found solace in the Lake Erie area. (R. 2). For two years, Ms. Secord was an upstanding and hardworking individual who had no trouble with the law. (R. 8). She began meeting with the online group regularly and playing with them in person at their homes. (R. 8). The group decided to play the game to mark the winter solstice. (R. 8). James Fitzgibbon offered his uncle's cottage for the night, as he was given permission to visit the cottage every week or so. (R. 9). Fitzgibbon told everyone that his uncle was fine with them using the cottage and that they would head home by midnight. (R.9). The young adults brought snacks and dressed in costume. (R. 9). Fitzgibbon couldn't figure out how to turn on the electricity so they used candles to provide light. (R. 9).

On December 21, 2015, Officer Bernard Pfieff ("Pfieff") responded to an anonymous call reporting suspicious activity in a summer cottage house. (R. 2). Upon arrival at the cottage, Pfieff noticed candlelight inside the house, approached the house and peered through the window. (R. 2). Pfieff viewed Ms. Secord and the group huddled around the kitchen table, dressed in costumes, and playing a board game. (R. 9). Pfieff called his Sergeant who instructed him to "Go find out what's going on." (R. 2). Pfieff knocked on the door, identified himself, peered through the window, and witnessed the young adults scatter and hide. (R. 2). The young adults, who were terrified and thought an attacker was at the door, hid upon hearing the knock. (R. 9). Pfieff then opened the door, announced his presence, and un-holstered his firearm. (R. 2). The young adults emerged and Pfieff ordered them to the ground and searched them for weapons

and identification. (R. 2). Fitzgibbon admitted his uncle had given him permission, told Pfieff he had a key (R. 3), and attempted to call his uncle but he did not answer. (R. 9). Pfieff placed the six young adults under arrest and they were subsequently charged with criminal trespass. (R. 3). While her friends were released on their own recognizance, ICE detained Ms. Secord due to her immigration status. (R. 3).

SUMMARY OF THE ARGUMENT

The Second Circuit violated Ms. Secord's Fourth Amendment protection against illegal search and seizure when it found Officer Pfieff had demonstrated the requisite showing of probable cause to make a warrantless arrest. First, the Fourth Amendment protects the privacy of people by requiring an arrest warrant ordered by a neutral magistrate. Second, a warrantless arrest must be justified by a showing of probable cause and exigent circumstances, neither of which are present here. Lastly, probable cause is determined by a totality of the circumstances approach.

Furthermore, the Second Circuit violated Ms. Secord's Due Process rights when it chose to follow the "reasonableness test." First, contrary to the six-month bright-line rule, the "reasonableness test" leads to inconsistent application in the lower courts. Second, when enacting 8 U.S.C. §1226(c), Congress did not intend to give ICE the ability to detain aliens for unlimited periods of time. Finally, the Government does not show an adequate public safety interest to justify such deprivation of personal liberty. For these reasons, this Court should reverse the lower court's decision.

ARGUMENT

I. THE SECOND CIRCUIT ERODED THE FOURTH AMENDMENT PROTECTION OF INDIVIDUAL'S PRIVACY IN THE HOME WHEN IT INCORRECTLY APPLIED THE FACTS OF THIS CASE AND ERRED IN FINDING THAT PROBABLE CAUSE FOR AN ARREST WAS PRESENT.

The Fourth Amendment, made applicable to the States by the reason of the Due Process Clause, *Mapp v. Ohio* 367 U.S. 643 (1961), provides the "right of the people to be secure in their persons, houses…against unreasonable searches and seizures." U.S. CONST. amend. IV. From the time when the Framers drafted the Constitution, the principal concern they faced was ensuring the individual privacy rights a citizen carries with them. A paramount right, afforded by the Constitution, is that of the right to privacy in the home. U.S. CONST. amend. IV. It is well established that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed…" *United States v. United States District Court*, 407 U.S. 297, 313 (1972). The Framers were most seriously concerned with searches and seizures involving home invasions. *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977). In fact, this protection was granted even greater significance when this Court established the principle that the "Fourth Amendment protects people" and not simply places. *Katz v. U.S.*, 389 U.S. 347, 351 (1967). Further, this Court held that whenever a person possesses a reasonable expectation of privacy, he could avail himself of the protection granted by the Fourth Amendment. *Id*. Additionally, this Court has opined that the interests in "the sanctity of private dwellings [are] ordinarily afforded the most stringent Fourth Amendment protections" and thus "justify the warrant requirement." *United States v. Martinez-Fuerte,* 428 U.S. 543, 561 (1976). The invasiveness of a search and seizure of a person within a home trigger the necessary purpose of the warrant requirement. The warrant requirement is essential to the protection of the privacy interests affected by entries into the home. It restricts and defines permissible entries into the home by requiring law enforcement to establish probable cause. This allows a neutral judicial officer the opportunity to review the circumstances and protect against the uncorrectable denials of constitutional rights due to erroneous police actions. The Fourth Amendment is intended to prevent physical entry into the

home of an individual. American jurisprudence has evolved and been expanded to protect not only against unwarranted arrests, but also illegal entries into those areas in which an individual maintains a reasonable expectation of privacy.

A. The Privacy of the Home is the Foremost Interest Protected by the Fourth Amendment, and that Protection Extends to the Curtilage of the Home.

The home is afforded the greatest protection under the Fourth Amendment. "The Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 584 (1980); *see also Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984); *Steagald v. United States,* 451 U.S. 204, 210-211 (1981). This Court has placed the protection of the home as the chief concern involving warrantless entries. "When it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines,* 133 S.Ct. 1409, 1414 (2013). The protection has further been expanded to include clearly defined boundaries, or the curtilage, of the home as well. This Court regards the area "immediately surrounding and associated with the home as part of the home" attributable to the fact that it is "intimately linked to the home" as expectations of privacy are at their ultimate." *Id.* at 1415.

The Supreme Court has consistently upheld the notion the home is the chief interest protected under the Fourth Amendment. *Payton*, 445 U.S. 573 (1980). In *Payton,* law enforcement entered the defendant's premises, without a warrant or consent, in order to arrest him. *Id. at 576.* Justice Stevens highlighted the continuing reiteration that the Fourth Amendment holds the home above all else in regards to protection against unlawful entries. *Id.* at 585-86. Justice Stevens opined that the Fourth Amendment was clearly written to prevent evils broader than the abuse of a general warrant. *Id.* at 585. The Court stated that the Supreme Court, for decades, had stated with decisive terms that the Fourth Amendment applies to "all invasions on part of the government and its employees of the sanctity of a man's home…" *Id.*

Further, the Court in *Jardines* advanced the principle that the "area immediately surrounding and associated with the home [is] part of the home itself for Fourth Amendment purposes." 133 S.Ct. at 1414. The curtilage of the home, as the Court refers to it, is granted the same level of protection as the home itself in part because activities of the home life extend to these areas. *Id.* at 1415. Curtilage is "both physically and psychologically connected to the home, and privacy expectations are most heightened." *Id.* In *Jardines,* the Court found that law enforcement violated the defendant's Fourth Amendment rights when they entered the front porch of the defendant's home and conducted a search without a warrant. *Id.* at 1417.

The effect the Fourth Amendment has on the home cannot be lost in the present case. The Second Circuit ostensibly failed to adequately account for the level of protection afforded to an individual's home and its curtilage. In finding that Officer Pfieff had probable cause to make an arrest, the Second Circuit ignored the series of Supreme Court holdings granting such a significant protection to the home. Officer Pfieff not only approached the cottage but he peered through a window, which indicates his intimate location to the home. (R. 2). Much like the officer entering the curtilage in *Jardines,* the trespass into the curtilage here took place after only an anonymous tip reported suspicious activity. (R. 2). Without a warrant, law enforcement cannot justify an entry and search into the most protected zone of an individual's life. Similar to *Payton*, where officers entered the home after no response was made to their knocking, Officer Pfieff entered the home after knocking and not receiving a response. (R. 2). These are the forms of illegal entry that the Fourth Amendment was intended to prevent.

The warrant requirement does not unduly burden officers from doing their job if police can show they had probable cause for a search and it falls within a judiciously crafted set of exemptions known as exigent circumstances.

1. The Warrantless Search and Seizure Here Failed to Show the Requisite Level of Probable Cause and Presence of Exigent Circumstances.

The Fourth Amendment forbids the government from making a warrantless, nonconsensual entry into the home. *Payton*, at U.S. 573. In order to cross the threshold of the home to make an arrest, the government must establish the requisite level of probable cause along with a showing of exigent circumstances. *Welsh,* 466 U.S. at 750. Whereas probable cause to arrest and probable cause to search are separate, the Supreme Court reviews both under the same principles. *Illinois v. Gates,* 462 U.S. 213 (1983). Further, a showing of probable cause must support every search of the home. *U.S. v. Dawkins,* 17 F.3d 399, 403 (D.C. Cir. 1994). Probable cause means less than evidence that would justify condemnation. *Locke v. U.S.,* 11 U.S. 339, 344 (1813). The Supreme Court has held that probable cause is determined by a totality-of-the-circumstances approach. *Illinois,* 462 U.S. at 231. Additionally, the Court explained that they look at the "facts and circumstances within the officers' knowledge to determine if probable cause was present. *Carroll v. U.S.,* 267 U.S. 132, 162 (1925). The Supreme Court has further refined the definition of probable cause to connote "factual and practical considerations on which reasonable and prudent men act." *Brinegar v. U.S.,* 338 U.S. 160, 175 (1949). When determining if law enforcement had probable cause for an arrest, courts must look at the events that took place prior to the arrest and determine "whether these facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *Maryland v. Pringle,* 540 U.S. 366, 371 (2003). These definitions of probable cause have been the touchstones relied upon in preserving the Fourth Amendment rights of a citizen. *Brinegar,* 338 U.S. at 176.

In *Gates*, the Court determined that the "two-pronged test" previously used to determine probable cause should be substituted in favor of the totality of the circumstances approach.

Gates, 462 U.S. at 214. Justice Rehnquist stated that the process for determining probable cause is a fluid concept. *Id.* at 232. He further explained that both anonymous tips and the location of the suspicious activity are factors that are considered in the analysis of the circumstances due to the possibility that a deficiency in one element may be compensated for by another. *Id.* at 234, 243. The Court found that the circumstances presented demonstrated probable cause was present. *Id.* at 243. They took into account the anonymous tip, the location of the crime, and the fact that the anonymous letter contained sufficient details of current facts. *Id.*

In *Brinegar*, the Court was tasked with determining whether there was probable cause to make Brinegar's arrest. 338 U.S. at 164. Brinegar had a reputation for engaging in the criminal activity for which he was arrested, and he was in the area where he usually committed this crime. *Id*. at 177. The Court looked at all facts known to the officers at the time of the arrest and determined they had probable cause to make an arrest. *Id*. The Court made it clear, however, that officer's cannot make an arrest based on a whim, notion, or mere suspicion. *Id.* Justice Rutledge intended to protect citizens against unreasonable interferences by police officers. *Id.*

Here, based on the facts available to him at the time of the arrest, Officer Pfieff failed to demonstrate probable cause and exigent circumstances. When he entered the house to make an arrest, Officer Pfieff only knew for certain that the cottage was typically used in the summer (R. 2), that the young adults were playing a board game (R. 9), and that Fitzgibbons had permission to access the cottage. (R. 7). While the Second Circuit chose to afford weight to facts discovered post arrest, these cannot be taken into account. The anonymous tip Officier Pfieff relied on merely stated that there was "suspicious activity" because a cottage typically occupied in the summer was being used during the winter night. (R. 2). Unlike *Gates* and *Brinegar,* where the officers knew sufficient facts at the time of the arrest, Officer Pfieff was only made aware of

subjective suspicious activity. Upon arrival to the cottage, Officer Pfieff conducted his own illegal search by entering the curtilage of the home, peering through the window, then entering the home after an unresponsive knock and announce. (R. 2). Further, prior to entering the home, Officer Pfieff peered through the window and witnessed Ms. Secord engaged in a board game with friends around the kitchen table. (R. 10). As the Court reasoned in *Brinegar,* more than mere suspicion is necessary to make an arrest. 338 U.S. at 177. Allowing an arrest with anything less than probable cause, as is the case here, would leave citizens vulnerable to unreasonable actions.

a. Probable cause is determined by a multitude of factors none of which standing alone provides the requisite level of suspicion to make a warrantless arrest.

A totality of the circumstances approach to probable cause allows officers to fairly analyze and corroborate numerous probabilities presented to them. *Gates*, 462 U.S. at 232. Anonymous tips and area of the criminal activity can be taken into the determination of probable cause. *Id.* at 232, 243. While a tip from a known informant can be trusted and considered, anonymous tips are less reliable and "alone seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.,* 529 U.S., 266 (2000). The Supreme Court has never upheld "the constitutional validity of a warrantless arrest" when the record lacks substantial evidence of probable cause. *Beck v. State of Ohio,* 379 U.S. 89, 95 (1964). Further, the Court must look at the facts available to the officers at the time of the arrest. *Id.* at 96. Additionally, the Court in *Welsh* found it reasonable to take into account the gravity of the offense thought to be occurring when determining probable cause. *Welsh*, 466 U.S. at 751. While all of these factors are valuable to making such a determination, they must be viewed in totality.

In *Gates,* the Court found that an anonymous tip, by itself, "would not provide the basis for a magistrates determination that there was probable cause," due to its lack of reliability. 462 U.S. at 227. Although the Court would not accept an anonymous tip alone, they did rule that the officers had probable cause because enough information was present. *Id.* The Court explained that after the officers obtained facts through their own investigation, in addition to the area being well known for drug trafficking, the showing of probable cause was existent. *Id.* at 243. While an anonymous letter in *Gates* is similar to the anonymous tip here, the letter contained a "range of facts" compared to a tip that merely reported "suspicious activity." (R. 2). Officer Pfieff could not corroborate the anonymous tip because it was lacking in accurate information, if not any information at all. When dealing with anonymous tips probable cause does not require certainty but it does require probability of reliability and corroboration of those facts. *Gates,* 462 U.S. at 246. Without the ability to corroborate any facts, whether the officer failed to do so or was not given enough facts, Officer Pfieff acted on a whim when he arrested Ms. Secord.

The present case is similar to *J.L.*, where law enforcement acting on an anonymous phone tip, void of any significant details, seized the respondent. 529 U.S. at 268. In *J.L.*, an anonymous caller reported a young man, wearing a plaid shirt, carrying a gun. *Id.* When officers arrived, they approached a man wearing a plaid shirt, did not see a firearm or any suspicious activity, but seized him and conducted a search. *Id* at 269. The Court held that the tip "lacked the moderate indicia of reliability…essential to the Court's decision" in previous cases. *Id.* at 271. The tip in *J.L.*, albeit bare of substantial details, provided more than the tip here for the officers to act upon yet was still deemed unreliable. The anonymous call here provided far less and was weakened in reliability after Officer Pfieff peered through the window and could see the young adults playing a board game. (R. 9). To preserve prior holdings in which anonymous tips are considered in the

totality of the circumstances, this Court should find that, based on the events, probable cause was nonexistent.

b. Officer Pfieff failed to show the existence of exigent circumstances making Ms. Secord's warrantless arrest unjustifiable.

Following Supreme Court holdings that a warrant is required for entry into a home and to make an arrest, we must also take as true that the only way to avoid obtaining a warrant is if exigent circumstances are present. *Welsh*, 466 U.S. at 749. Without any, officers' failure to obtain a warrant is inexcusable and unreasonable. *Payton*, 445 U.S. at 586. *See Coolidge v. New Hampshire*, 403. U.S. 287, 296-297 (1984) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show…the presence of 'exigent circumstances'"). Courts have further held that absent indication of exigent circumstances or consent, a home may not be reasonably and lawfully entered to make an arrest. *Steagald*, 451 U.S. at 204. Further, because probable cause alone does not excuse the failure of an officer from obtaining a warrant, circumstantial exigencies are valuable in showing the necessity of not waiting to acquire a warrant. *Dawkins*, 17 F.3d at 405.

Welsh involved police entering the home and arresting a suspected drunk driver. 466 U.S. at 740. The Court held that although probable cause was demonstrated, the officers failed to establish the existence of circumstantial exigencies. *Id.* Further, the Court made it clear that the exception for exigent circumstances is carefully constructed to apply to real emergencies. *Id*. at 752. Justice Brennan highlighted a variety of acceptable exceptions such as hot pursuit of a felon, destruction of evidence, and preservation of life. *Id.* at 750. Additionally, the Court noted that "when the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut." *Id.*

It must follow then that Officer Pfieff had not established evidence of exigent circumstances. Officer Pfieff claims only to have peered through the window, witnessing Ms. Secord around the table with her friend. (R. 9). There is no indication of any criminal activity occuring. Similar to *Welsh*, here, no exigent circumstances were recognized to justify the officer's failure to obtain a warrant. Officer Pfieff relied solely on the fact that the young adults scattered and hid upon hearing a knock on the door. (R. 2). While the Government may consider the hiding to lead to any sort of exigent circumstances, they would fail to consider that Officer Pfieff unequivocally witnessed Ms. Secord playing a board game with her friends. (R. 9). Without any indication that potential evidence would be destroyed, the Second Circuit erred in finding circumstantial exigencies. Additionally, in *Welsh*, the Court ruled that the exception of exigent circumstances should "rarely be sanctioned when there is probable cause to believe that only a minor offense…has been committed." 466 U.S. at 753. Officer Pfieff had no belief that any offense was being committed. Further, Ms. Secord's brass knuckles were found after the booking occurring, meaning no harm to any human life could be justified as an exigent circumstance. (R. 3).

Although the existence of circumstantial exigencies is a necessary element to make a warrantless arrest, both Officer Pfieff and the Second Circuit do not rely on such justification. Even if probable cause was demonstrated, this Court should find the lack of exigent circumstances disconcerting, and reverse the Second Circuit decision.

c. A warrantless arrest lacking in both probable cause and exigent circumstances circumvents constitutional safeguards by relying on inconsistent post-arrest validations.

Subjective good faith alone is an inadequate method of protecting Fourth Amendment rights. *Beck,* 379 U.S. at 97. Absent a warrant, an arrest relies solely on the unreliable method of

justifying an arrest after the occurrence. *Id.* at 96. Further, the standard for determining a showing of probable cause is the same for an arrest as it is for a search and seizure. *Payton*, 445 U.S. at 585 ("it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable.").

In *Beck*, the police knew the defendant to have a criminal record and made an arrest based solely on that knowledge. 379 U.S. at 93. The Court found nothing to constitute a showing of probable cause and held that good faith on the part of the arresting officers was insufficient. *Id.* at 97. Further, in *Payton,* the Court plainly states that the same standard of probable cause as a search or seizure protects an individual from an arrest. 445 U.S. at 585. Here, the Second Circuit found Officer Pfieff to have probable cause to make an arrest (R. 7), even though he relied solely on an anonymous tip (R. 2) and relied on good faith in trusting the reliability of that tip. In doing so, Officer Pfieff conducted an illegal entry and subsequent arrest of Ms. Secord.

A warrantless arrest is afforded the same standard of probable cause as a warrantless search and seizure. In light of this, the standard was not met and accordingly the Second Circuit should be reversed.

II. THE "REASONABLENESS TEST" VIOLATES THE DUE PROCESS RIGHTS OF NOT ONLY MS. SECORD, BUT OF ALL CRIMINALLY DETAINED ALIENS.

"[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The reasonableness test proposed by the Government is a flagrant violation of Ms. Secord's Due Process rights because it denies her, and other detained aliens, a reliable and consistent chance to have a bond hearing despite being physically restrained for a prolonged period of time.

The Supreme Court has long upheld the power of the government to detain aliens. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). However, although mandatory detention is constitutionally permissible, detention for an indefinite period of time is not. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Additionally, since the Fifth Amendment forbids the government from depriving "any person" of "life, liberty or property without due process of law," aliens in deportation proceedings are also protected by the Due Process clause. U.S. CONST. amend. V. *See also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). In order to protect those Due Process rights, the Supreme Court held in *Demore v. Kim* that although an alien can be detained during deportation proceedings without the requirement of a bond hearing, that detention must be for a reasonably brief period of time. 538 U.S. 510, 528 (2003).

While all of the Circuits have interpreted §1226(c) and the subsequent holding in *Demore* to contain an implicit temporal limitation, the Circuits are split regarding what constitutes a "reasonably brief period of time." *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1212-13 (11th Cir. 2016). The Second and Ninth Circuits both adopted a firm six-month rule when they held that detention becomes unreasonable at the six-month mark. *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006). It is at that six-month mark that the government must provide the detainee with an immediate and individualized bond hearing during which the government must present evidence that the detainee should remain in custody. *Id. But see Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016); *Sopo*, 825 F.3d at1214; *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231-32 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 267-68, 270-71 (6th Cir. 2003) (all holding that an individualized case-by-case approach, or

"reasonableness test," is the proper mechanism by which to determine when detention has become unreasonably long and therefore requires a bond hearing).

A. A Reasonableness Test Leads to Inconsistency and Confusion in Application and Burdens Immigration Courts.

1. Pervasive Inconsistency Violates Due Process.

A clear six-month rule protects the Due Process rights of §1226(c) detainees because it provides a well-defined rule regarding when to seek redress if the government fails to provide them a bond hearing after six months in detention. The reasonableness test proposed by the First, Third, Sixth, and Eleventh circuits deprives Ms. Secord of her Due Process rights because there will be no consistency within the lower courts regarding at what point a detainee's imprisonment becomes unreasonable in length.

In his concurring opinion in *Sopo*, Justice Pryor described the reasonableness test methodology as one that "is unlikely to result in predictable or consistent outcomes." 825 F.3d at 1224 (*Pryor, J. concurring*). The Court in *Lora* had similar concerns: "[A]pply[ing] a reasonableness test on a case-by-case basis" frequently triggers "pervasive inconsistency and confusion" among district courts. 804 F.3d at 615. Even the First Circuit, which chose to adopt the case-by-case approach, agreed that the case-by-case approach "has resulted in wildly inconsistent determinations." *Reid*, 819 F.3d at 497.

In *Lora*, the detainee sought writ of habeas corpus after being detained without a bond hearing for six-months. 804 F.3d at 605. There, the United States Court of Appeals for the Second Circuit chose to enforce a six-month bright line rule as opposed to a "'fact dependent inquiry' as to the allowable length of detention" for each detainee. *Id*. at 608. Its decision to enforce the bright-line rule was based largely on the "pervasive inconsistency and confusion" that the reasonableness test would lead to in the district courts. *Id.* at 615. There, the Court

highlighted the reality that such a rule has already imposed on the lower courts. *Id*. While some courts have chosen to adopt the six-month rule "for the sake of uniform administration," others have chosen to evaluate detention lengths on a case-by-case basis, leading to wildly inconsistent outcomes. *See, e.g., Zadvydas*, 533U.S. at 700-701. *Compare, e.g., Martin v. Aviles*, No. 15 Civ. 1080(AT)(AJP), 2015 WL 3929598, at *3 (S.D.N.Y. June 15, 2015) (holding that detention of an alien for over a year without a bond hearing violates due process), *and Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (holding that detention of an alien for eight months without a bond hearing violates due process), *and Scarlett v. DHS*, 632 F. Supp. 2d 214, 223 (W.D.N.Y. 2009) (holding that detention of an alien for five years without a bond hearing violates due process), *but see Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y. 2010) (holding that alien's close to three years in detention was *not* unreasonable).

Arbitrary and inconsistent statutory application threatens the Due Process rights of detainees because it "deprive[s] [them] of their fundamental right to freedom from bodily restraint, which 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (*Sopo*, 825 F.3d at 1225 (*Pryor, J. concurring*) (quoting *Foucha*, 504 U.S. at 80). In the alternative, a clear six-month rule protects the Due Process rights of §1226(c) detainees because they have a clear understanding of when to seek redress if the government fails to provide them a bond hearing after six months in detention. *Sopo*, 825 F.3d at 1226 (*Pryor, J. concurring*). "Such a rule would provide much-needed guidance to the district courts and ease the burden on detained non-citizens—most of whom cannot afford to retain counsel to pursue a habeas petition." *See* Brief for ACLU at 14 as Amici Curiae Supporting Petitioner, *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469 (2015). Not only is the

clarity provided by the six-month bright-line rule beneficial to detainees and the preservation of their Due Process rights, but it is also advantageous for the courts.

2. The Reasonableness Test Places a Heavier Burden onto Immigration Courts.

With the six-month bright-line rule, courts will no longer need to "engage in a weighing of multiple factors merely to decide whether and when a hearing must be provided." *Sopo*, 825 F.3d at 1226 (*Pryor, J. concurring*). One of the Government's primary concerns with the six-month rule is that the courts will become over-burdened with the requirement. *Scott v. Secord*, 123 F.4th 1, 6 (2d Cir. 2016). However, this argument ignores the greater burden that the reasonableness test will put on the courts. It requires for every detainee to file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual detention has crossed the "reasonableness" threshold, thus entitling him to a bail hearing. Thus, two fact-specific evaluations: one to determine whether an alien is entitled to a bond hearing at all, and if a bond hearing occurs, then a second individualized inquiry must occur to determine whether to release the alien on bond. This is especially impractical considering the "current press of immigration removal proceedings faced by the Department's immigration judges." *Secord*, 123 F.4th at 6.

The reasonableness test proposed by the First, Third, Sixth, and Eleventh circuits deprives Ms. Secord and other detainees of their Due Process rights not only because there will be no consistency within the lower courts regarding at what point a detainee's detention has become unreasonable in length, but also because a requirement of two individualized hearings will severely overburden an already overworked judicial immigration system.

B. In Writing §1226(c), Congress Did Not Intend to Authorize Mandatory Detention of Criminal Aliens with No Limit on the Duration of the Imprisonment.

1. Congress Does Not Intend to Pass Unconstitutional Laws.

8 U.S.C. §1226(c) was upheld in *Demore v. Kim* when the Supreme Court held that detention during removal proceedings is constitutional. 538 U.S. 510, 528 (2003). That decision, however, was made when "removal proceedings [were] completed in an average time of 47 days and a median of 30 days." *Id*. at 529. Unfortunately, the United States is no longer facing that short span of time. With increasingly large numbers of non-citizens being taken into custody today, the amount of time that those individuals are detained creeps towards the "indefinite detention" that the Court in *Zadvydas* deemed a violation of the Due Process rights. *Zadvydas*, 533 U.S. at 690-91. *See also Sopo*, 825 F.3d at 1213 (emphasizing the "dramatic increase" in the average time spent in detention by noting that according to 2012 statistics, "the average amount of time that an alien with a criminal conviction spent . . . in detention was 455 days").[1] Today, however, a non-citizen in ICE custody could spend many months and sometimes even years in detention due to "enormous backlog in immigration proceedings." *Lora*, 804 F.3d at 604-05. Holding detainees for these long amounts of time cannot possibly reflect what Congress intended when it enacted 8 U.S.C. §1226(c), and the underlying goals of the statute will not be undermined by mandating the six-months bright-line rule.

Constitutional avoidance is the fundamental principal of statutory interpretation that courts should interpret statutes under the premise that Congress does not intend to pass unconstitutional laws. *Diop,* 656 F.3d at 231. *See also Zadvydas*, 533 U.S. at 689. The United States Court of Appeals for the Third Circuit followed this approach in *Diop v. ICE/Homeland Security* when it maintained that Congress' intended purpose for 8 U.S.C. §1226(c) was to

[1] Judge Hull noted in his opinion that these statistics were generated by 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) (relying on data from Syracuse University's Transactional Records Access Clearninghouse).

"ensur[e] that an alien attends removal proceedings and that his release will not pose a danger to the community." *Id.* Therefore, the Court continued, if §1226(c) can be interpreted in a way that avoids any doubts as to its constitutionality, but still satisfies that Congressional intent, then it will chose to interpret the statute in that way. *Id.* (quoting *Zadvydas*, 533 U.S. at 689). With that in mind, the Court ultimately concluded that a bond hearing must be provided to all detainees within a reasonable amount of time. *Diop,* 656 F.3d at 235.

Although the Court in *Diop* chose not to enact a bright-line rule regarding when a "reasonable amount of time" has passed, it did hold that the constitutionality of continued detention dwindles as the length of that detention increases. *Id.* at 234. ("[T]he constitutionality of this practice is a function of the length of the detention.... [T]he constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [certain] thresholds."). *See also Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) and holding that "[w]hen the period of detention becomes prolonged, 'the private interest that will be affected by the official action," is more substantial; greater procedural safeguards are therefore required.").

Once detention has passed a certain point of reasonability, the constitutionality of the statute comes into question again and changes must be made to ensure that Due Process rights are still protected. The United States Court of Appeals for the Ninth Circuit recognized and followed this reasoning to come to its decision in *Rodriguez v. Robbins.* 716 F.3d at 1133. There, the Court held that "the canon of constitutional avoidance requires us to construe the Government's statutory mandatory detention authority . . . as limited to a six-month period," after which a bond hearing must be held. *Id*.

Today, the average length of detention continues to rise as a result of the increased numbers of immigration proceedings. *Lora*, 804 F.3d at 604-05. In order to follow the constitutional interpretation of §1226(c), the Court here should adopt a six-month bright-line rule. Such a rule will protect the constitutionality of the statute by ensuring that the Due Process rights of the detainees are preserved, while still fulfilling the purpose of the statute—to ensure that aliens attend removal proceedings and their release will not pose a danger to the community.

2. If Congress Intended for Aliens to be Held Past Six Months, It Would Have Explicitly Stated so in the Statute.

When Congress enacted 8 U.S.C. §1226(c), It did not anticipate the influx of detained aliens that the United States is currently experiencing.[2] In *Nadarajah v. Gonzales*, the United States Court of Appeals for the Ninth Circuit pointed to Congress' use of a six-month bright line rule in 8 U.S.C. §1226a(a)(7). 443 F.3d at 1079. There, the Court emphasized this to show that when Congress intends to hold someone for more than six months, It says so explicitly in the statute and procedural safeguards are put in place ensure that Due Process rights are still protected. *Id.* Although Congress put procedural safeguards into place for §1226a, it could not have known that ten years after it passed 8 U.S.C. §1226(c), the same procedural safeguards would be necessary due to the influx of detained aliens. Although Congress did not know at the time that it needed to specifically impose a six-month rule to protect the Due Process rights of aliens detained under §1226(c), courts have read into similar statutes an implicit time-limitation

[2] At the time 8 U.S.C. §1226(c) was enacted in 2006, the number of aliens detained during that year was just over 250,000. National Immigration Forum Staff, *The Math of Immigration Detention*, NATIONAL IMMIGRATION FORUM (Aug. 22, 2013). http://immigrationforum.org/blog/themathofimmigrationdetention/.
By November of 2016, that number had increased to approximately 352,000 detainees, and continues to rise today. Jeh Johnson, *Statement by Secretary Johnson On Southwest Border Security*, DEPARTMENT OF HOMELAND SECURITY (Nov. 10, 2016), https://www.dhs.gov/news/2016/11/10/statement-secretary-johnson-southwest-border-security.

with a strict cutoff point like the six-month rule that Ms. Secord now requests. *See Diouf*, 634 F.3d at 1091-92 (holding that "[w]hen detention crosses the six-month threshold . . . the private interests at stake are profound.").

In *Diouf*, the United States Court of Appeals for the Ninth Circuit interpreted §1231(a)(6) as having an implicit six-month time limit after which the detainee is entitled to "a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Id.* at 1092. There, the Court felt that although Congress had not set a fixed time after which a bond hearing was required, the Due Process implications were such that a six-month bright-line rule was required to avoid serious Constitutional concerns. *Id.*

Ms. Secord's case is substantially similar to *Diouf*. Like §1231(a)(6), §1226(c) does not explicitly state a six-month bright-line rule after which detainees are entitled to a bond hearing. 8 U.S.C. §1226(c) (2006). However, at the time Congress wrote and enacted §1226(c), Due Process rights of the detainees affected by §1226(c) were not in substantial danger like they are today. Similarly, when the various courts that have interpreted §1226(c) since its enactment were evaluating its constitutionality, immigrants were not being detained in such high numbers and for as long as they are today. *See Demore*, 538 U.S. at 529 (at that time, "removal proceedings [were] completed in an average time of 47 days and a median of 30 days"). Had the political immigration climate been what it is today when Congress enacted §1226(c), it is reasonable to assume that Congress would have included a bright-line rule to protect the Due Process rights of detainees because it had already done so in past situations in which the Due Process rights of detainees were threatened. *See Nadarajah*, 443 F.3d at 1079. Therefore, Congress' failure to include a six-month bright-line time limitation on detention without a bond hearing should not

dissuade this Court from imposing one now in order to protect the Due Process rights of detainees across the country.

C. The Government Fails to Show a Strong Public Safety Interest that is Required to Deprive Individuals of Their Freedoms.

When individual liberties are at odds with state interest, Due Process requires a determination as to whether the state's interest is great enough to outweigh the deprivation of personal liberties. *Mathews*, 424 U.S. at 341. The Government argues here that there is a public safety concern in allowing ample opportunities for aliens to be released from detention on bond. *Secord*, 123 F.4th at 6. A ruling in favor of a six-month bright line rule will not, as the Government suggests, create a public safety hazard. *See Rodriguez*, 715 F.3d at 1146 (holding that such a ruling "will not flood our streets with fearsome criminals seeking to escape the force of American immigration law"). Instead, a holding that institutes a six-month bright-line rule will merely mandate that a bond hearing be held to determine whether the detainee should be released. *Id.* These hearings do not mandate that the detainee *must* be released at the six-month mark. *Id.* They "simply ensure that 'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

Not only has the Government failed to show that there is a substantial interest in public safety to discredit the six-month bright-line rule, but it has also ignored the likelihood that "reasonableness test" would allow the Department of Homeland Security to have free reign to keep aliens detained for as long as it deems necessary. Such a holding effectively gives the Department of Homeland Security the power to "keep undocumented immigrants detained at its whim, subject only to its own determination of what is reasonable under the circumstances." *Secord*, 123 F.4th at 6. (*Atkinson, J. dissenting*). The United States was founded on the bedrock

of personal liberty and freedom, to take that away without so much as a real and substantial threat to public safety would be to shatter the very foundation on which this Country was built.

When weighing the competing interest of the government against the protections guaranteed by the Due Process Clause of the Fourteenth Amendment—freedom from deprivation of life, liberty, and property without due process—individual liberty must prevail when the action the government proposes takes away all personal liberties, with little-to-no effect on public safety.

CONCLUSION

For the foregoing reasons, Ms. Laura Secord, Petitioner, respectfully requests that this Court REVERSE the decision of the United States Court of Appeals for the Second Circuit and find that Officer Pfieff lacked probable cause to make a warrantless arrest, and that because Ms. Secord has been held in ICE custody for over six-months, she should be immediately granted a bond hearing in front of a neutral magistrate.

Respectfully Submitted,

Team #19