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

and

LAURA SECORD,

Petitioner,

v.

CITY OF ANGOLA,

Respondent.

ON WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

BRIEF FOR THE PETITIONER

Team 21
Counsel for the Petitioner

QUESTIONS PRESENTED

I. Whether the Second Circuit applied the correct standard to determine if an investigating officer had probable cause to arrest the Petitioner; and

II. Whether the "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit adequately protects the Due Process rights of undocumented aliens.

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The district court's opinion is unpublished and does not appear in the record. The Second Circuit's opinion appears in the record on pages 1-10.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, … but upon probable cause."

U.S. Const. amend. V: "No person shall be … deprived of life, liberty, or property, without due process of law."

8 U.S.C. § 1227(a)(1)(B): "Any alien who is present in the United States in violation of this chapter or any other law of the United States … is deportable."

8 U.S.C. § 1226(c)(1):

> The Attorney General shall take into custody any alien who--
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

N.Y. PENAL Law § 265.01: "A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He or she possesses … metal knuckles."

N.Y. PENAL Law § 140.15: "A person is guilty of criminal trespass in the second degree when: (1) He or she knowingly enters or remains unlawfully in a dwelling."

STATEMENT OF THE CASE

Factual Background. During the winter of 2013, Laura Secord finally escaped a life of emotional and physical abuse and the horrors of living homeless as a young female on the streets of Toronto by immigrating to the United States via frozen Lake Erie. (R. at 8.) Born in Toronto to parents of Uzbek extraction, Ms. Secord had a troubled childhood, which led her to acquire brass knuckles to protect herself as a runaway on the streets of a major city. (R. at 8.) After building community ties with Dungeons and Dragons ("D&D") players in the Buffalo area, she capitalized on an unusually cold winter and entered the United States to start afresh. (R. at 8.) Between the winter of 2013 and December 2015, Ms. Secord found a place to live, held a steady job at Tim Hortons, and participated in games of D&D with players from the area. (R. at 8.)

On December 21, 2015, to celebrate the winter solstice, she and five of her friends sought to play D&D in a "spooky" location. (R. at 8.) James Fitzgibbon, one of D&D players, offered his uncle's cottage, explaining to the group that his uncle would be "cool with it" as long as they "didn't mess the place up." (R. at 9.) Believing that Mr. Fitzgibbon had authority from his uncle to use the cottage for this purpose, Ms. Secord and her friends embarked on their adventure, picking up costumes along the way to add to the excitement. (R. at 9.) Upon arrival at the cottage, Mr. Fitzgibbon retrieved his uncle's spare key, which he had previously used while checking on the property for his uncle, and let the D&D players inside. (R. at 9.)

After receiving a call from a resident expressing concern that someone appeared to be at a summer cottage in the winter, Deputy Barnard Pfieff approached the cottage where the D&D players had begun their game. (R. at 2.) He saw individuals in costumes gathered around a candlelit table before knocking on the door. (R. at 2.) When no one responded, Deputy Pfieff entered the cottage and announced that he was a police officer. (R. at 2.) The six D&D players

immediately came forward. (R. at 2.) Mr. Fitzgibbon explained that, while none of the six lived there, he was the nephew of the owner and had permission to be there. (R. at 3.) As proof, Mr. Fitzgibbon showed the officer the key he had used to open the door along with the key's hiding spot under a planter on the back patio, a spot that only someone with knowledge likely would have looked. (R. at 3.) After Mr. Fitzgibbon could not remember his uncle's Florida contact information, Deputy Pfieff arrested all six D&D players for criminal trespass in the second degree, even though there was no evidence of vandalism and despite Mr. Fitzgibbon's assertion that his uncle had granted him permission to be there, as evinced by his knowledge of the key's hiding place and family photos around the cottage that included Mr. Fitzgibbon. (R. at 3, 9.) After the arrest and after an initial search of the six players for weapons, police searched Ms. Secord's backpack at the police station and found a pair of brass knuckles. (R. at 3.) The police charged her with criminal possession of a deadly weapon in the fourth degree. (R. at 3.)

The City Court of Angola subsequently tried and convicted Ms. Secord of both crimes, sentencing her to a year in prison. (R. at 3.)

Procedural History. While incarcerated in the Erie County Correctional Facility, Ms. Secord filed a habeas petition in the United States District Court for the Western District of New York, seeking to have her arrests and convictions overturned because Deputy Pfieff had violated her Fourth Amendment rights against unlawful search and seizure because he lacked probable cause to arrest her. (R. at 3.) While that petition was pending, Ms. Secord's sentence ended and she was immediately transferred into ICE custody, where she remained for six months. (R. at 3-4.) She then filed another habeas petition for release from ICE detention because the length of her detention was presumptively unreasonable based on Second Circuit precedent. (R. at 4.) The

District Court granted both of Ms. Secord's petitions. (R. at 4.) The United States Court of Appeals for the Second Circuit, however, reversed. (R. at 4.)

SUMMARY OF THE ARGUMENT

At the heart of this case are questions regarding the extent to which government officials may tread upon an individual's Fourth and Fifth Amendment rights before triggering a constitutional violation. An officer may not arrest an individual when there are insufficient indicia of probable cause to do so in light of the totality of the circumstances known to the officer. Moreover, it is unconstitutional for an officer to search the backpack of someone who has been unlawfully detained except in narrow circumstances, which do not apply here. When a "reasonableness" requirement for determining when detained aliens are entitled to bail hearings amounts to indefinite detention, a bright-line approach is necessary to secure detainees' Due Process rights. Even if ICE delays hearings due to legitimate backlogs and without any ill intent, the delay itself, when it lasts at least six months, as indicated by this Court's precedent, is presumptively unreasonable and a violation of the detainees' Fifth Amendment rights.

I. **Probable Cause.** After entering the cottage and consulting with those inside, Deputy Pfieff lacked probable cause to arrest Ms. Secord for criminal trespass because it was evident from the totality of the circumstances that she believed that she had permission to be there—a complete defense to the charged crime. One of Ms. Secord's friends had invited her to the cottage. During the friend's conversation with Deputy Pfieff, he revealed that the cottage belonged to his uncle who was away for the winter in Florida. The friend further stated that he had permission to be there because he was in charge of checking on the cottage through the winter. Moreover, Deputy Pfieff saw that the individuals inside the cottage were only wearing costumes because they were engaged in a game of D&D, as evinced by the board game located

on the kitchen table. Furthermore, there was no sign that the individuals had broken into the home. In fact, Ms. Secord and her friends had entered using a spare key. The nephew revealed to Deputy Pfieff that he knew the location of the spare key as further proof that he had authorization to be there. Regardless of whether Deputy Pfieff believed the nephew, he had no reason to doubt that Ms. Secord believed that she had permission to be in the cottage.

Because Deputy Pfieff lacked probable cause to arrest Ms. Secord, the subsequent search of her backpack, which produced brass knuckles, was also an illegal search under the Fourth Amendment. Alternatively, even if Deputy Pfieff had probable cause to arrest Ms. Secord, the search was still unconstitutional because it was outside the scope of a search incident to arrest. When there is a lawful arrest, police may search the area within the arrestee's immediate control to prevent the arrestee from destroying evidence or from obtaining a weapon. Here, neither concern supported the police's search of Ms. Secord's backpack because her backpack was not within her immediate control since the police had seized it.

II. **Mandatory Release.** By abandoning its bright-line approach of limiting detention without a bail hearing to six months, the Second Circuit has undermined this Court's jurisprudence, which guarantees all persons within the United States, including aliens, the protections of the Due Process Clause of the Fifth Amendment, which applies in deportation proceedings. The bright-line approach guarantees that aliens awaiting deportation proceedings will receive bail hearings in a timely manner. A "reasonableness" test, on the other hand, leads to undue delay and inconsistent rulings at the district court level for similarly situated detainees due to the random outcomes of individual habeas petition litigation. Instead, a bright-line approach places the burden on ICE to prove that the detainee either poses a risk of flight or danger to his or her community. Moreover, in a post-removal context, this Court held that detention in excess of

six months was presumptively unconstitutional. Thus, a bright-line approach limiting pre-hearing detention without a bail hearing to six months better satisfies this Court's Due Process jurisprudence than would a reasonableness test.

Even if this Court finds that a bright-line approach is imprudent, it should still reverse the Second Circuit because, by abandoning its precedent without more than a consideration of unworkability, the Second Circuit has contradicted the doctrine of *stare decisis*. Moreover, ICE has failed to prove that Ms. Secord either poses a flight risk or is a danger to her community. As such, even without a bright-line six-month rule, it would be unreasonable for ICE to detain her.

This Court, therefore, should reverse the Second Circuit Court of Appeals.

ARGUMENT

I. The Second Circuit Erred In Reversing the District Court's Finding of No Probable Cause to Arrest Ms. Secord.

The Second Circuit, in overturning the District Court's ruling, cast aside Ms. Secord's Fourth Amendment rights by validating Deputy Pfieff's unwarranted arrest. The Fourth Amendment's protection against unreasonable searches and seizures is a critical safeguard against arbitrary government. *See Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). This Court has long recognized the importance of a robust Fourth Amendment and has extended Fourth Amendment protections to non-U.S. citizens. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Almeida-Sanchez v. United States*, this Court applied the Fourth Amendment to a search of a non-citizen. *See id.* Furthermore, because this Court has interpreted the Due Process Clause of the Fifth Amendment as applying to "all 'persons' within the United States . . . whether their presence here is lawful, unlawful, temporary, or permanent," presumably the Fourth Amendment has a similarly broad application—particularly in light of

Almeida-Sanchez. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Almeida-Sanchez*, 413 U.S. 266. Thus, Ms. Secord—despite her alien status—should receive Fourth Amendment protection.

Under the Fourth Amendment, law enforcement officials must have probable cause before making an arrest. *See Maryland v. Pringle,* 540 U.S. 366, 370 (2003). Probable cause is a fluid concept that adheres to no rigid set of legal guidelines or precise definitions. *See id* at 370-71. Rather, it turns on a reasonable assessment of the probability that a crime has occurred or is ongoing based on the facts available at the time. *Id.* Facts are considered objectively from the perspective of a prudent person and his or her ability to draw a reasonable belief. *See Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Furthermore, probable cause requires evaluation of the totality of the circumstances. *See id*. All relevant facts must therefore be considered and police may not ignore any available and undisputed facts. *See Baptist v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998). Moreover, the probable cause standard is particularized with respect to each person to be searched or seized. *See Pringle*, 540 U.S. at 371.

As the dissent below noted, the majority omitted some critical facts from its opinion. The majority failed to mention facts corroborating Mr. Fitzgibbon's assertion that he was the nephew of the cottage's owner and authorized to be at the cottage. While Mr. Fitzgibbon momentarily forgot his uncle's Florida contact information, he showed Deputy Pfieff family photos around the cottage and knew where the uncle kept the spare key. In addition, there were no signs of a break-in but clear signs that occupants were engaging in a playful game—an unlikely activity for trespassers. Taken as a whole, these facts support Ms. Secord's assertion that she believed she had permission to be on the property—a valid defense to criminal trespassing.

Moreover, Ms. Secord's brass knuckles—which she had obtained while homeless in Toronto—were in her backpack. Since Deputy Pfieff lacked probable cause to arrest Petitioner

for trespassing, the police also lacked probable cause to conduct a warrantless search of Petitioner's backpack incident to arrest. Yet even if there was probable cause to arrest for trespassing, the backpack was outside the scope of a search incident to arrest because the bag was not within Ms. Secord's immediate area of control.

This Court therefore should reverse the Second Circuit and affirm the District Court's decision that the police lacked probable cause to arrest Ms. Secord.

A. Deputy Pfieff lacked probable cause to arrest Ms. Secord for trespass because she believed she was authorized to be in the cottage.

The facts known to Deputy Pfieff at the time of the arrest reveal that Ms. Secord believed that she was authorized to be in the cottage. A person is guilty of second degree criminal trespassing when they "*knowingly* enter[] or remain[] unlawfully in a dwelling." N.Y. Penal Law § 140.15 (McKinney 2010) (emphasis added). Thus, "a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass." *People v. Basch*, 325 N.E.2d 154, 156 (N.Y. 1975). Therefore, even a mistaken belief to a right to enter the premises precludes a finding of criminal trespass. *See, e.g., People v. Powell*, 691 N.Y.S.2d 263, 267 (N.Y. Sup. Ct. 1999).

In *Mitchell v. City of New York*, police officers arrested approximately thirty people for trespassing when they discovered a party in progress at what police mistakenly believed to be an abandoned brownstone. 841 F.3d 72, 75 (2d Cir. 2016). Relevant to the officers' decision in that case was that the partygoers did not know the host or who owned the premises. *Id.* The charges were later dropped, but plaintiffs brought claims against the city *inter alia* for false arrest. *Id.* The Second Circuit vacated the district court's grant of summary judgment in favor of the officers regarding the false arrest claim. *Id.* at 75. Notably, the court held that the absence of a known host or owner was not enough to constitute probable cause for trespassing. *Id.* at 79.

Unlike the partygoers in *Mitchell,* Ms. Secord knew her host. Mr. Fitzgibbon, the nephew of the cottage's owner, invited her into the cottage under the pretext that he had permission from his uncle. Therefore, even if the uncle did not consent to her presence on the property, she had no knowledge that she was unauthorized. More importantly, Deputy Pfieff had reason to believe she thought she was permitted to be in the cottage because Mr. Fitzgibbon identified himself to Deputy Pfieff as the nephew of the cottage's owner and told the officer that he had permission to be there. Indeed, Mr. Fitzgibbon showed Deputy Pfieff and the other officers that he had particular knowledge of where the owner kept the spare key. While it is true that Mr. Fitzgibbon could not recall his uncle's Florida contact information, his momentary lapse in memory did not give the officer probable cause to suspect that he was not authorized to be there with a few friends because the story was otherwise internally consistent. *Cf. People v. Williams*, 16 A.D.3d 151, 151-52 (N.Y. App. Div. 2005) (finding probable cause for trespass when a defendant changed the story explaining his presence). Although Fitzgibbon may have momentarily forgotten his uncle's phone number, he recalled his uncle's name and his whereabouts. *Cf. People v. Tinort*, 272 A.D.2d 206, 207 (N.Y. App. Div. 2000). Furthermore, the cottage contained family photos in which Fitzgibbon was included. On the whole, the officer should have reasonably concluded that Fitzgibbon was indeed the nephew of the owner.

Since Ms. Secord knew Mr. Fitzgibbon's uncle was the owner of the cottage, there was no reason for her to doubt the legitimacy of his invitation. In *Mitchell*, the partygoers did not know the identity of their host, yet the court held that the officers had no probable cause. *See* 841 F.3d at 79. Here, there was a host who had apparent authority to invite Ms. Secord into the cottage. Furthermore, she was never told that she was not allowed to be in the cottage. *Cf. Carpenter v. City of New York*, 984 F. Supp. 2d 255, 266 (S.D.N.Y. 2013). Thus, if Deputy

Pfieff had considered the totality of circumstances he would have understood that Ms. Secord reasonably believed that she had permission to be inside the cottage.

The fact that a neighbor called the police, that Deputy Pfieff saw hooded figures with a candle in the cottage, and that Ms. Secord and her friends took cover when the officer knocked on the door warrant further investigation. However, these facts alone do not substantiate probable cause. *Cf. Illinois v. Wardlow,* 528 U.S. 119, 124 (2000). Indeed, after entering the cottage, Deputy Pfieff learned that Fitzgibbon had permission to be there, and that should have ended the inquiry. The realities were these: Mr. Fitzgibbon was authorized to check on the cottage for his uncle during the winter; Ms. Secord and her friends were wearing costumes and using a candle because they were playing a game—evidenced by the game board on the table; and the players scattered because they were scared when they heard a knock at the door.

Officers are not permitted to disregard facts that establish a defense. *See Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003); *see also Baptist*, 147 F.3d at 1259. The facts that were readily evident to Deputy Pfieff soon after he entered the cottage vitiate any probable cause to arrest Ms. Secord for trespassing. They reveal that Ms. Secord was invited to the cottage by an apparently authorized host and that she believed she had permission to be on the property. Thus, Deputy Pfieff lacked probable cause to arrest her for trespassing, and this Court should overturn the Second Circuit's decision and affirm the District Court's ruling.

B. The police lacked probable cause to arrest Ms. Secord for possession of brass knuckles because their search of her backpack was illegal.

The police's warrantless search of Ms. Secord's backpack, which contained the brass knuckles, was illegal because it violated this Court's jurisprudence regarding searches incident to lawful arrest. Warrantless searches incident to a lawful arrest are permissible in some cases, but are subject to certain limitations. *See Chimel v. California*, 395 U.S. 752, 763 (1969). Namely,

the search is only justified when preventing the arrestee from gaining possession of a weapon or from destroying evidence and when the search is confined to the area within the arrestee's "immediate control." *See id.* Here, Deputy Pfieff's search was illegal because it was not incident to a lawful arrest and because the backpack was outside Petitioner's area of immediate control.

1. Deputy Pfieff's search of Ms. Secord's backpack was an illegal search incident to an illegal arrest.

This Court has routinely affirmed a police officer's ability to conduct a warrantless search incident to arrest; however, the underlying arrest must be lawful. *See, id*. Consistent language indicating a *lawful* or *legal* arrest as a prerequisite to a search incident to arrest runs throughout relevant case law. *See, e.g., Agnello v. United States*, 269 U.S. 20, 30 (1925); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914). In *Chimel*, police arrested petitioner and then proceeded to search his entire house. *See* 395 U.S. at 753. Although police had a valid arrest warrant, they had no search warrant. *See id.* at 753-54. This Court's opinion in *Chimel* reasoned through the relevant progression of cases, each of which recognized the legality of a warrantless search in certain circumstances when coupled with a *lawful* arrest. *See id.* at 755-64. Here, Deputy Pfieff did not lawfully arrest Ms. Secord because he lacked probable cause to suspect that she was trespassing. Unlike the police in *Chimel*, Deputy Pfieff neither had a lawful arrest warrant nor probable cause to arrest. Thus, reliance on the doctrine of search incident to arrest was misplaced since the underlying arrest was unlawful.

Only permitting searches incident to a lawful arrest is consistent with protecting Fourth Amendment liberties. *Cf. Pringle*, 540 U.S. at 370. Upholding searches where the underlying arrest was not supported by a warrant or probable cause would be ripe for police abuse. Under such a regime, police could arbitrarily conduct searches whether or not they had probable cause. The Fourth Amendment's probable cause requirement is meant to insulate against such abuse.

See id. In the present case, the police needed a warrant to search Ms. Secord's bag because the officer lacked probable cause to lawfully arrest her for trespassing. Therefore, the officer could not conduct a warrantless search incident to arrest. Furthermore, without the unlawful search, the police would have no facts on which to base the possession of a weapon charge. Thus, this Court should reverse the Second Circuit and reinstate the District Court's decision.

> 2. Even if Deputy Pfieff had probable cause to arrest Ms. Secord for trespassing, his search of Ms. Secord's backpack was illegal because it fell outside the scope of a search incident to arrest.

Even if Deputy Pfieff had probable cause to arrest Ms. Secord for trespassing, the police's warrantless search of her backpack was still illegal because the bag was outside her area of immediate control. This Court, in *Chimel*, emphasized that warrantless searches incident to lawful arrest are only justified when the search is confined to the area within the arrestee's immediate control and is conducted to prevent the arrestee from destroying evidence or obtaining a weapon. *See Chimel*, 395 U.S. at 768. There, the police searched the petitioner's entire house after executing a valid arrest warrant. *See id.* at 753-54. However, this Court invalidated the search because although the arrest was valid, the petitioner still had an expectation of privacy in his own home. *See id.* at 763. Warrantless searches incident to lawful arrest are therefore only justified when conducted within the arrestee's area of immediate control to prevent the arrestee from obtaining a weapon or from destroying evidence. *See id.*

In *United States v. Chadwick*, federal agents arrested respondents after finding them with a footlocker filled with drugs. *See* 433 U.S. 1, 4-5 (1977). The agents brought the respondents, along with the footlocker, to the federal building. *See id.* at 4. Once at the federal building—with respondents in custody—the agents opened and searched the footlocker. *See id*. However, they had neither a search warrant nor the respondents' consent to search. *See id.* This Court

emphasized that the respondents' Fourth Amendment rights relating to the contents of the footlocker were not diminished by their arrest. *See id.* at 11. The respondents still had an expectation of privacy that the contents of the footlocker would remain private, absent a judicial warrant. *See id.* Notably, the agents' search of the footlocker could not be justified by the *Chimel* concerns. *See id.* at 13. There was no risk that the respondents could obtain a weapon from the footlocker or destroy evidence within the footlocker because the agents had seized it. *See id.* Put simply, "these justifications are absent where a search is remote in time or place from the arrest." *Id.* at 764 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

The present case is analogous to *Chadwick* in that police conducted their search after detaining both the bag and Ms. Secord at the station. While the *Chimel* Court blessed warrantless searches intended to prevent an arrestee from obtaining a weapon, there was no risk of Ms. Secord obtaining her brass knuckles, even though they were in her backpack because the bag was no longer within her immediate control. *See Chimel*, 395 U.S. at 768. The present case mirrors the facts in *Chadwick*. *See* 433 U.S. at 4-5. Had the footlocker in *Chadwick* been within the respondents' area of control, there would have been a risk that respondents could have destroyed the evidence. *See id.* at 13. However, that risk was obviated when agents seized the footlocker. *See id.* The same is true here. Had police not seized the backpack, there would have been a risk that Ms. Secord could access a weapon. Once police seized the backpack and brought it to the station, however, the risks that Ms. Secord would destroy the evidence or obtain a weapon disappeared. The search was too remote from the time and place of her arrest to be justified.

Therefore, this Court should overturn the Second Circuit's decision and hold that the police lacked probable cause to arrest Ms. Secord for criminal possession of brass knuckles.

II. The Second Circuit Erred In Abandoning Its Bright-Line Approach to Pre-Deportation Bail Hearings Established in *Lora*, Depriving Detainees of Their Due Process Rights.

By abandoning its bright-line approach of limiting detention without a bail hearing to six months, the Second Circuit has needlessly cast doubt on the availability of Due Process to aliens awaiting deportation proceedings. In fact, as the dissent in the opinion below noted, "the [Second Circuit] has effectively sentenced those facing deportation to imprisonment without end." (R. at 8.) Such indefinite detention raises important constitutional concerns, as "[l]iberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention." *Zadvydas*, 533 U.S. at 718 (2001) (Kennedy, J., dissenting). Moreover, the Fifth Amendment entitles aliens to due process in deportation proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). Indeed, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693. Specifically, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

This Court has previously upheld the constitutionality of 8 U.S.C. § 1226(c), a provision of Congress's 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which requires the Department of Homeland Security to detain aliens who have committed certain crimes when they are released from prison. *See Demore v. Kim*, 538 U.S. 510, 531 (2003). But Chief Justice Rehnquist's reasoning indicated that the "limited period of [the detainee's] removal proceedings"—six months—was critical to his conclusion. *See id.* Justice Kennedy's concurrence further illuminated the issue, concluding, "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." *Id.* at 532-33 (Kennedy, J., concurring). Moreover, in a post-removal context, this Court held that detention in excess of six months was presumptively unconstitutional. *See Zadvydas*, 533 U.S. at 701. Taking these two holdings together, a bright-line approach limiting pre-hearing detention without a bail hearing to six months satisfies this Court's Due Process jurisprudence in this realm.

Moreover, a bright-line rule also alleviates some of the problems created by a reasonableness test, namely inconsistent application at a district court level. *See id.* at 700-01 (adopting a six-month rule to clarify the rule for the ease of administration). Furthermore, a bright-line approach avoids random outcomes resulting from individual habeas litigation, *see Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015), without "open[ing] the floodgates to terrorists," as the opinion below suggests. (R. at 6.) Instead, a bright-line approach places the burden on ICE to prove that the detainee either poses a risk of flight or danger to his or her community. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013).

Even if this Court finds that, despite its holdings in *Demore* and *Zadvydas*, a bright-line approach is imprudent, it should still reverse the Second Circuit for two additional reasons. First, by abandoning its *Lora* precedent without more than a mere consideration of unworkability, the Second Circuit has contradicted the doctrine of *stare decisis*. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). Second, ICE has failed to establish that Ms. Secord either poses a flight risk or is a danger to her community. As such, even without a bright-line six-month rule, it would be unreasonable for ICE to detain her.

This Court, therefore, should reverse the Second Circuit Court of Appeals and affirm the District Court's decision to release Ms. Secord from ICE custody.

A. To avoid constitutional concerns, the Court should interpret 8 U.S.C. § 1226(c) as containing an implicit temporal limitation.

While this Court has left no doubt that the government may constitutionally detain illegal aliens pursuant to 8 U.S.C. § 1226(c), *see Demore*, 538 U.S. at 531, indefinite detention raises Due Process concerns. Moreover, although this Court has not expressly stated that a temporal limitation exists, it should do so today in order to avoid serious constitutional concerns and to affirm the interpretation of *Demore* adopted by each of the circuits that have addressed the question. *See, e.g.*, *Lora*, 804 F. 3d at 606; *Rodriguez*, 715 F.3d at 1137; *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 267–68, 271 (6th Cir. 2003).

Indeed, in *Demore*, Chief Justice Rehnquist emphasized that the short duration of the detention—six months, in fact—persuaded him that it was constitutional. *See* 538 U.S. at 528. Importantly, the Chief Justice distinguished *Demore* from *Zadvydas*, a case in which the period of detention had been "indefinite" and "potentially permanent," *see* 533 U.S. at 690-91, on this ground. *See* 538 U.S. at 528. Furthermore, Justice Kennedy's concurrence in *Demore* underscored the constitutional demand for a temporal limitation on 8 U.S.C. § 1226(c), suggesting that an unreasonable delay by the INS in pursuing and completing deportation proceedings would suggest that the government was incarcerating individuals for other impermissible reasons. *See id*. at 532-33 (Kennedy, J., concurring).

Thus, the Court should read 8 U.S.C. § 1226(c) as containing a temporal limitation.

B. Because a "reasonableness" test fails to protect the Due Process rights of detainees, this Court should hold that detention without a bail hearing exceeding six months is presumptively unreasonable.

1. *Zadvydas* and *Demore*, taken together, suggest that a detention exceeding six months is presumptively unreasonable.

This Court's jurisprudence relating to deportation proceedings leads to the natural conclusion that six months is a presumptively reasonable period of detention without a bail

hearing. Accordingly, the Court should formally adopt the approach taken by the Ninth Circuit, holding that pre-bail hearing detention of more than six months is presumptively unreasonable. *See Rodriguez*, 715 F.3d at 1138. In *Zadvydas*, this Court held that post-removal-detention of up to six months was presumptively constitutional. *See Zadvydas*, 533 U.S. at 701. After that point, the alien is entitled to a hearing, and the burden shifts to the government to prove the need for further detention. *See id.* Just two years later, in *Demore*, where the INS had detained an alien for six months without an opportunity for a bail hearing, the Court held that such detention was constitutional because it lasted only "for the limited time of his removal proceedings." *See Demore*, 538 U.S. at 531.

At the time the Court decided *Demore*, the average "limited time" of removal proceedings was indeed brief. *See id.* at 529. Many cases involved no detention time at all, as removal proceedings took place while the alien was still incarcerated for the underlying conviction. *See id.* According to the Executive Office for Immigration Review, in eighty-five percent of cases in which aliens were detained pursuant to § 1226(c) at that time, removal proceedings were completed in an average time of forty-seven days and a median of thirty days. *See id.* In the other fifteen percent of cases, in which the alien appealed the decision of the Immigration Judge, the appeal took about four months. *See id.* Thus, the total detention time for an alien who appealed was about five months at the time this Court decided *Demore*. *See id.*

Based on its emphasis on temporal limitations in *Demore* and *Zadvydas*, it seems doubtful that the Court would have concluded that detainment without a bail hearing for longer than six months would have been reasonable. While deportation proceedings typically moved quickly in 2001 and 2003, brief detainment unfortunately no longer constitutes the norm. *See Lora*, 804 F.3d at 605. As recently as 2015, the Second Circuit acknowledged, "today, a non-

citizen detained under section 1226(c) … regularly spends many months and sometimes years in detention due to the enormous backlog in immigration proceedings." *Id.* In fact, the Second Circuit drew a bright-line six-month rule in response to the fear that without such a clear rule "thousands of individuals in immigration detention [would] languish in county jails and in short-term and permanent ICE facilities [indefinitely]." *Id.* Moreover, the Second Circuit considered *Demore* and *Zadvydas* as well as "the pervasive confusion over what constitutes a 'reasonable' length of time that an immigrant can be detained without a bail hearing," and concluded that the "interests at stake … are best served by the bright-line approach." *Id.* at 614-15.

This Court therefore should hold that pre-bail hearing detention exceeding six months is presumptively unreasonable.

> 2. Adopting a six-month rule ensures equal treatment among detainees without increasing the risk that a detainee will be improperly released.

Besides being a natural outgrowth of *Demore* and *Zadvydas*, the six-month rule ensures that detainees are no longer the victims of "random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years." *Lora*, 804 F.3d at 615. Instead, a bright-line approach avoids "the pervasive inconsistency and confusion exhibited by district courts … when asked to apply a reasonableness test on a case-by-case basis [with] an approach that affords more certainty and predictability." *Id.* Moreover, contrary to the Second Circuit's opinion in this case, a bright-line rule granting a bail hearing to a detainee after six months will not result in "open[ing] the floodgates to terrorists." (R. at 6.) Instead, a bright-line approach limiting pre-hearing detention to six months only places on the government the burden to prove that the detainee either poses a flight risk or is a potential danger to the community. *See*

Lora, 804 F.3d at 616. Thus, rather than entitling the detainee to release after six months regardless of the circumstances, the six-month rule only guarantees a bond hearing.

While the Third and Sixth Circuits have ostensibly rejected a bright-line approach, those courts have improperly concluded that a bright-line approach disfavors a fact-dependent inquiry. *See Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015); *Diop*, 656 F.3d at 232-33; *Ly*, 351 F.3d at 271. To the contrary, a bright-line rule limiting pre-hearing detention to six months only guarantees that a fact-specific inquiry will indeed occur to determine whether the detainee poses a risk of flight or danger to the community. *See Lora*, 804 F.3d at 616; *see also Rodriguez*, 715 F.3d at 1139 ("[T]he [holding] requires individualized decision-making—in the form of bond hearings.") Moreover, in *Diop*, the Third Circuit, while promulgating a "reasonableness" standard, expressed doubt about its potential effectiveness, stating bluntly, "[w]e cannot simply rely on the Government's determination of what is reasonable." *Diop*, 656 F.3d at 234. Indeed, although the *Diop* court rejected a six-month bright-line rule, it noted that this Court's guidance on deportation proceedings at least suggested that "the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [six months]." *Id.*

This Court, therefore, should adopt a bright-line rule that detaining an alien for more than six months is presumptively unreasonable because it remedies two of the greatest deficiencies of relying on *ad hoc* habeas petitions: inconsistent outcomes resulting from unreliable judicial determinations of what is reasonable and delayed resolution of bail hearings on the merits. By drawing this bright-line, the detainees, ICE, INS, and the courts will know that, when an alien has been detained for at least six months, the government now bears the burden to establish that he or she is a flight risk or a danger to the community. Moreover, because this Court's bright-line

approach only shifts the burden from detainees to the government, it will not lead to the release of dangerous detainees. Instead, it only ensures that all detainees receive due process.

3. Even if the Court refuses to adopt a bright-line approach, the Second Circuit's reversal of *Lora* violates *stare decisis* principles.

By reversing its position in the case at bar less than two years after its ruling in *Lora*, the Second Circuit, without a sufficient basis, has disregarded *stare decisis*. *Cf. Planned Parenthood*, 505 U.S. at 854. In the present case, the Second Circuit's entire basis for overruling *Lora* rests on the six-month rule's apparent unworkability. While practical workability is certainly a consideration, it is not in itself dispositive. *See id*. Instead, a court should also consider whether the rule has induced reliance that would lend a special hardship to those the rule affects and create inequitable results; whether related principles of law have developed as to have left the old rule "no more than a remnant of abandoned doctrine," or whether facts have changed, as to have rendered the rule inapplicable or unnecessary. *Id.* Had the Second Circuit considered these factors, it would have reached a different result—namely, the Second Circuit would have affirmed both its holding in *Lora* and Ms. Secord's release.

The reversal of the Second Circuit's six-month rule, while it had not been in effect long, would create special hardships on detainees by shifting the burden to them to file habeas petitions to challenge the detention, and the district courts must then determine whether the individual's detention has crossed the "reasonableness" threshold, entitling the detainee to a bail hearing. *See Lora*, 804 F.3d at 614. When Due Process concerns are present, the burden on detainees is too great to justify the Second Circuit's decision to overrule its *Lora* precedent.

Moreover, the Second Circuit's opinion in the present case underscores that neither the principles of law nor the facts upon which it based its decision in *Lora* have changed. To justify overruling *Lora*, the Second Circuit opined that the first available judge to hear Ms. Secord's bail

request could not be scheduled until eleven months after her detention began, and that "ICE officials simply had no time … to locate witness, [sic] obtain statements, or prepare in any way for a hearing." (R. at 6.) But these were the exact factors that led the Second Circuit in *Lora* to hold that "without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, [have] real-life consequences for immigrants and their families." *Lora*, 804 F.3d at 616. Indeed, the Second Circuit emphasized that the bright-line approach was actually better for circuits such as the Second and Ninth, which "have been disproportionately burdened by a surge in immigration appeals." *Id.* at 615. These larger immigration dockets, the Second Circuit noted, would be better served with a bright-line approach. *See id.* at 616.

This Court therefore should reverse the Second Circuit because *stare decisis* demands it.

C. Detaining Ms. Secord for more than six months would have been unreasonable, even without a bright-line rule.

This Court should reverse the Second Circuit's decision to return Ms. Secord to ICE custody, even in the absence of a bright-line approach, because ICE failed to demonstrate to the district court that Ms. Secord was either a flight risk or danger to her community. According to *Lora*, the detainee will receive bail "unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." *Lora*, 804 F.3d at 616; *see also Rodriguez*, 715 F.3d at 1131.

The majority opinion below fails to cite a single fact that ICE presented to the district court to justify denying bail to Ms. Secord prior to her deportation proceeding. Instead, the court below only mentioned that ICE's Buffalo office was especially burdened with a heavy caseload due to its proximity to the Canadian border. Moreover, the Second Circuit suggests that it is enough for ICE to detain Ms. Secord without cause merely because "ICE officials simply had no time … to locate witness, [sic] obtain statements, or prepare in any way for a hearing" to

determine whether Ms. Secord posed a risk of dangerousness or flight risk. (R. at 6.) Notably, ICE failed to move forward with any of Ms. Secord's deportation proceedings during the eighteen months that passed since her convictions in the City Court of Angola, as she served a year in prison there before being transferred to ICE, where she was held without a bail hearing for six months. An immigration backlog, however, cannot rationalize refusing Ms. Secord her constitutionally protected Due Process rights. *See Lora*, 804 F.3d at 616. A comparison between the facts in the present case and those in *Lora* highlight why this Court should reverse the Second Circuit and affirm the district court's decision to release Ms. Secord from ICE custody.

In *Lora*, the detainee was a lawful permanent resident of the United States and a citizen of the Dominican Republic. *See id.* at 605. ICE agents took him into custody pursuant to 8 U.S.C. § 1226(c) three years into his five-year probation term resulting from drug-related convictions. *Id.* The Second Circuit concluded that "[n]o principled argument [could be made] for the notion that he is either a risk of flight or is dangerous," because Lora had community ties, attended school, and has held a job since coming to the United States some twenty-five years earlier. *Id.* at 616. Moreover, the Second Circuit noted that Lora "is in jeopardy of removal as a consequence of what now stands as a conviction in 2009 for third degree possession of a controlled substance for which he received a conditional discharge." *Id.* Nothing about this crime or Lora's circumstances suggest that Lora posed a risk of danger or that he was likely to flee.

While Ms. Secord has lived in the United States since 2013, she has created significant ties to the United States, working a job at Tim Hortons and joining a community of friends who play D&D. Furthermore, Ms. Secord found a place to live and stabilized her life in the United States after growing up in Toronto as the daughter of parents of Uzbek extraction. She took refuge in the United States, fleeing homelessness, emotional and physical abuse at home, and the

dangers of living alone as a young woman on the streets of Toronto. Her only trouble with the law took place in December 2015, when she and her friends innocently played a game of D&D at the summer home of an uncle of one of the players. More important, the district court threw out her convictions both for criminal trespass and criminal possession of a dangerous weapon, concluding that her arrest and convictions violated her Fourth Amendment rights against unlawful search and seizure. Thus, the circumstances surrounding Ms. Secord's habeas petition are similar to Lora's in that both involve illegal aliens who have contributed to their communities by working jobs and by participating in unifying events. Moreover, both Ms. Secord's and Lora's convictions either were set aside or reduced via conditional discharge.

This Court therefore should hold that Ms. Secord's release from ICE custody was proper.

CONCLUSION

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

Respectfully submitted,

Team 21
Counsel for the Petitioner