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 from the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

Team Number 25

QUESTIONS PRESENTED

1. Whether the Second Circuit incorrectly applied the probable cause standard to the arrest of Ms. Secord.

2. Whether the reasonableness test to determine the length of detention prior to a bail hearing, adopted by the Second Circuit in this case, adequately protects the due process rights of aliens.

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STATEMENT OF FACTS

Laura Secord is a Canadian citizen who escaped a physically and emotionally abusive environment by running away from home at age sixteen. R. at 8. Ms. Secord lived on the streets of Toronto for a period, and found a new family of her own through a group that met weekly at a shelter to play a tabletop fantasy game called Dungeons and Dragons (D&D). *Id.* Through this group of friends, she grew close to a group of D&D players in the Buffalo area. *Id.* Ms. Secord decided to emigrate to the United States in 2013, and entered the United States by hitchhiking to Fort Erie and walking across the frozen surface of Lake Erie. *Id.*

Ms. Secord began working at a Tim Horton's near Lake Erie, and became closer with the D&D group in her new home. *Id.* She had no trouble with the law until her encounter with Deputy Pfieff in December, 2015. *Id.* at 8. Ms. Secord and her friends, including James Fitzgibbon, decided to take a day-trip on December 21, 2015 to play D&D in a cabin on Lake Erie owned by Mr. Fitzgibbon's uncle. R. at 2, 8-9. Mr. Fitzgibbon indicated that he had permission to use the cabin, and drove the group to Angola, New York. *Id.* at 9. They arrived at the cabin dressed in fantasy costumes as wizards, dwarves, and other characters, and brought snacks and beverages. *Id.*

Later that day, Deputy Pfieff received a call from a resident of Angola indicating that a light was on at the cabin. *Id.* at 2. Upon arriving at the cabin, Deputy Pfieff briefly looked into the cabin's window, where he observed the group playing D&D in costume by candlelight. *Id.* After consulting with his supervisor, Deputy Pfieff knocked on the door, startling the group, and subsequently entered the home. *Id.* Once inside, he drew his weapon and ordered the group to come into view. R. at 2. Upon questioning, Mr. Fitzgibbon explained that his uncle owned the cabin and that he had permission to use it, and provided Deputy Pfieff with the spare key for the

cabin's front door. *Id.* at 3. The entire group was nonetheless arrested and charged with criminal trespass. *Id.* Ms. Secord was additionally charged with possession of a deadly weapon when a search of her belongings yielded a pair of brass knuckles that Ms. Secord had kept from her time living on the streets of Toronto as a teenager. *Id.* at 3, 8.

Ms. Secord was convicted of criminal trespass in the second degree and criminal possession of a deadly weapon in the fourth degree, and was sentenced to a year in the Erie County Correctional Facility. *Id.* at 3. After securing the assistance of the University at Buffalo School of Law's Criminal Defense Legal Clinic, Ms. Secord's legal team filed a habeas corpus petition on her behalf, which alleged a violation of her Fourth Amendment rights. *Id.* While the petition was pending before the court, Ms. Secord's sentence ended and she was delivered into the custody of the Department of Homeland Security in Buffalo, New York pursuant to 8 U.S.C. § 1226(c). R. at 3-4. She remained in Immigration and Customs Enforcement (ICE) detention for six months. *Id.* at 4. Ms. Secord was released following an additional habeas corpus petition filed by her legal team, when the District Court found that her six-month ICE detention exceeded the bright-line boundary set in *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). *Id.* at 4. Ms. Secord's initial petition to throw out her convictions was also granted at a later date. *Id.*

The City of Angola and ICE appealed separately, and were joined before the Court of Appeals for the Second Circuit. *Id.* Upon issuance of the Second Circuit's decision, Ms. Secord was returned to ICE custody. *Id.* Ms. Secord currently remains in the United States in ICE custody as she awaits the results of her present appeal. R. at 1-2.

SUMMARY OF ARGUMENT

This Court should apply the heightened exigent circumstances test in determining whether Deputy Pfieff had probable cause to enter the cabin and arrest Ms. Secord because she

was inside of a private home and Deputy Pfieff did not witness any activity that indicated that exigent circumstances requiring law enforcement intervention were present. However, should the Court determine that the probable cause standard alone is applicable, Deputy Pfieff did not have probable cause to enter the cabin because the activities he observed from outside the cabin did not indicate that criminal activity was afoot, and an anonymous telephone tip alone was not sufficient to justify a search of the cabin. The deputy also did not have probable cause to arrest Ms. Secord because once he entered the cabin, the evidence he observed did not reasonably indicate that criminal activity was occurring.

This Court should adopt the six-month bright-line test to determine how long an alien can be held prior to a bail hearing because it better protects due process rights of aliens, provides certainty and predictability, and protects aliens and their families from the devastating consequences of prolonged detention. Under the bright-line test, aliens held in detention under § 1226(c) for six months are entitled to receive a bond hearing. At the hearing, the alien is entitled to release unless the government can prove by clear and convincing evidence that the alien is either dangerous or a flight risk. However, regardless of the test this Court adopts, Ms. Secord is entitled to a bond hearing both because she has been held longer than the six-month threshold necessary for the bright-line test and because the factors usually considered under the reasonableness test weigh in favor of her receiving a bond hearing.

ARGUMENT

I. MS. SECORD'S CONVICTIONS SHOULD BE OVERTURNED BECAUSE THE ERIE COUNTY SHERIFF'S DEPARTMENT LACKED PROBABLE CAUSE TO ENTER THE CABIN AND MAKE ARRESTS.

The Erie County Sheriff's Department lacked probable cause to enter the cabin and to arrest Ms. Secord and the others present, thus Ms. Secord's convictions for trespass in the second degree and possession of a dangerous weapon in the fourth degree should be overturned.

A. The Second Circuit Failed to Apply the Exigent Circumstances Standard That is Required to Enter the Home, and the Circumstances of Ms. Secord's Arrest Do Not Meet This Heightened Standard.

The courts have consistently applied heightened Fourth Amendment protections to invasions into "the sanctity of a man's home." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *see also* U.S. CONST. amend. IV. This Court has firmly established that private homes are to be treated with the utmost respect, and warrantless searches of private homes may only be conducted in the most extenuating circumstances. "To be arrested in the home involves . . . an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least *in the absence of exigent circumstances*, even . . . when probable cause is clearly present." *Payton v. New York* 445 U.S. 573, 588-89 (1980) (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)) (emphasis added).

Based on the recognized sanctity of private homes, this Court has treated warrantless searches and seizures made within the home as presumptively unreasonable. *See id.* Furthermore, this presumption may only be overcome in a narrow set of circumstances. *See id*. The threshold of the home may be breached only in exigent circumstances, limited to instances where the "needs of law enforcement [are] so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.*; *see also Kentucky v. King*, 563 U.S. 452, 460 (2011) (recognizing exigent circumstances are established in accordance with the Fourth Amendment's bar on warrantless searches of the home); *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) (narrowing available exceptions to those of true life-threatening emergency and disallowing a non-emergency "murder scene" exception).

Under the exigent circumstances standard, officers may enter a home for limited purposes that rest specifically on the necessity of officers entering the home immediately. *See King*, 563

U.S. at 460. For example, officers may enter to (1) administer emergency aid to an occupant or to protect a person from imminent harm, (2) pursue a fleeing suspect, or (3) prevent the immediate destruction of evidence. *See id.* (collecting cases). In contrast, even the clearest indications of ongoing criminal activity in a home do not provide the exigent circumstances required to make a warrantless search and seizure permissible. *See State v. Brown*, 216 N.J. 508, 523 (2014) (finding no exigent circumstances to enter the home when police, in response to tips from multiple confidential informants and a concerned neighbor, observed individuals entering and exiting a home fifteen times with small items that were then handed off to buyers).

None of the exigent circumstances that could justify officers entering a home were present preceding the officer's entry in this case. The record does not suggest that Deputy Pfieff believed evidence was being destroyed or that anyone inside the cabin was in danger, nor was the officer pursuing a fleeing suspect when he entered Mr. Fitzgibbon's cabin. Despite this, Deputy Pfieff entered the cabin. R. at 2. In the absence of exigent circumstances, Deputy Pfieff's warrantless search of the home was improper.

Ms. Secord's situation also raises even fewer suggestions of criminal behavior than that observed in *Brown*. Unlike *Brown*, in which the officers observed the individuals for more than two hours, Deputy Pfieff undertook very limited observation of Ms. Secord and her friends. 216 N.J. at 523; R. at 2. The officer took one brief look during which he saw only "hooded figures," then looked through the window again while knocking. R. at 2. Deputy Pfieff did not see any weapons when he examined the cabin and its occupants, and saw no indication of any illegal activity, unlike the obvious nature and multiple credible tips of the theft that were present in *Brown*. 216 N.J. at 523; R. at 2. Deputy Pfieff simply saw a group of people in costume seated around a table. R. at 9. Further still, Deputy Pfieff entered the cabin with no credible belief

there was any illegal activity, while in *Brown* the officers could observe criminal activity without ever entering the home. 216 N.J. at 523; R. at 2. Because officers cannot enter the home even when there is criminal activity, Deputy Pfieff's entrance into the cabin when there was no indication of illegal activity or exigent circumstances was improper, and Ms. Secord's arrest and subsequent convictions must be overturned.

B. Even If This Court Applies the Probable Cause Standard, There Was Insufficient Probable Cause to Justify Searching the Cabin or Arresting Ms. Secord.

A police officer has probable cause for a search when the information available to that officer would indicate to a reasonable person in the officer's situation that "contraband or evidence of a crime is present." *Florida v. Harris*, 133 S. Ct. 1050, 1053 (2013) (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)). Whether probable cause exists in regards to a search, seizure, or arrest depends on an analysis of the totality of the circumstances and cannot be reduced to a standardized set of factors. *See id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). This Court unambiguously emphasized that probable cause is to be assessed in light of the specific factual contexts in which the events preceding an arrest take place. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983) (finding probable cause where a confidential informant's tip was sufficiently supported by common sense and corroborated by police work).

1. Under the totality of the circumstances, Deputy Pfieff did not have sufficient information to establish probable cause to search the cabin because he improperly relied on an unknown caller and did not observe suspicious behavior.

In *Gates*, the Court specifically disapproved of inflexible standards when assessing the weight of information from confidential informants in determining probable cause. *See id*. This Court has rejected the idea that a single factor in a vacuum can determinatively establish probable cause, and has established that a tip from an informant cannot replace a fully

contextualized probable cause analysis. *Id. at* 230-32 (establishing the totality of the circumstances test and rejecting a two-pronged test based solely on information from a confidential informant). If more firsthand information is available to an officer beyond the account of a witness, then the officer must incorporate that information in determining whether probable cause exists. *See Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998) (holding that officers could not rely solely on information obtained from security guards where firsthand video was also available). Additionally, avoidance of police officers can be treated as a factor contributing to probable cause, but flight from an officer alone is not sufficient to establish probable cause. *See Harris v. United States*, 577 F. App'x. 70, 72 (2d Cir. 2014) (finding probable cause to search a vehicle when a suspect displayed suspicious behavior and then fled police by car); *United States v. Christophe*, 470 F.2d 865, 868-69 (2d. Cir. 1972) (finding probable cause when flight from police was paired with a specific tip from a reliable informant, including names and details of illegal activity).

In this case, the totality of the circumstances did not reasonably indicate to Deputy Pfieff that "contraband or evidence of a crime" was present in the cabin where Ms. Secord and her friends were playing D&D. *Harris*, 133 S. Ct. at 1053. In entering the private home, Deputy Pfieff relied primarily on information from an unnamed Angola resident, who reported "suspicious activity" when he saw a light on in the cabin. R. at 2. This was hardly a reliable source, unlike in *Christophe*, where a confidential informant gave the police a tip with specific details of the crime. 470 F.2d at 868-69; R. at 2. In addition to the unreliable nature of the tip, this Court also held in *Gates* that any tip from an informant must be considered in the common sense context that includes assessment of the informant's veracity, corroboration with visible fact, and common sense. 462 U.S. at 232. Here, the tip arrived from an unnamed caller,

contained very little verifiable information, and could readily have been investigated by Deputy Pfieff's own observations. R. at 2. While in *Gates* the officers were able to investigate and corroborate details of the tip with diligent police work, the tip in this case lacked any of the common sense factors that establish probable cause for a search, such as observable signs of criminal activity. 462 U.S. at 232; R. at 2. Furthermore, while it is the case that Ms. Secord and her friends appeared startled when the officer knocked on the cabin's door, unlike *Harris*, in which the suspect fled and a car chase ensued, none of the individuals inside the cabin tried to flee. 133 S. Ct. at 1053; R. at 2. In the absence of any additional factors that could indicate that Ms. Secord or any other member of the group were engaged in a criminal act, Deputy Pfieff did not have sufficient probable cause for a search of the cabin.

This case should be treated similarly to *Baptiste*, because in both cases the officers had firsthand information available to corroborate or disprove reports that were provided by other individuals. In *Baptiste*, the officers relied on information from trained security guards, whose sole purpose was to monitor and identify those suspected of shoplifting. 147 F.3d at 1259. In contrast, Deputy Pfieff's only evidence of unusual activity was a phone call from an unknown caller. R. at 2. In fact, once Deputy Pfieff arrived at the cabin, he had the opportunity to observe Ms. Secord and her friends, who were dressed in wizard costumes, with snacks and pop, playing a tabletop roleplaying game. R. at 2. Similarly, in *JC Penny*, the officers had the opportunity to see the conduct themselves in a videotape available to corroborate the conduct observed by the security guards. 147 F.3d at 1259. However, the Court in *JC Penney* held that arresting officers could not rely solely on information obtained from store security guards when information was available to the officers in the form of a videotape of the conduct the guards had witnessed, and that the behavior witnessed did not establish probable cause because the video cut against the

guards' version of events. *Id.* Comparably, here, Deputy Pfieff's own observations of Ms. Secord and her friends in the cabin suggested that their behavior was benign, and this supersedes any information the Deputy may have gained from an anonymous phone call. R. at 2.

The record does not indicate that Deputy Pfieff believed, based on the totality of the circumstances, that there was either contraband or evidence of a crime occurring at the cabin. Instead, he impermissibly relied on a single phone call from an unnamed person to conduct a warrantless search of the cabin. *Id.* Given the totality of the circumstances, Deputy Pfieff did not have probable cause to search the cabin.

2. After entering the cabin, Deputy Pfieff did not have sufficient information to establish probable cause to arrest Ms. Secord.

A person's proximity to or association with another person for whom an officer has probable cause for an arrest is not sufficient to justify an arrest without the presence of additional suspicious elements. *See Maryland v. Pringle*, 540 U.S. 366, 368-73 (2003) (holding there was probable cause to arrest both the driver and the passengers of a car because cash and drugs were readily visible and all parties were uncooperative). Similarly, a person's proximity to someone committing or suspected of a crime does not automatically give rise to probable cause to search or arrest that person. *See Ybarra v. Illinois*, 444 U.S. 85, 87-90 (1979) (citing *Sibron v. New York*, 392 U.S. 40, 62-63 (1968)) (holding a warrant to search a tavern and its owner did not establish probable cause to search and subsequently arrest tavern patrons).

In addition, "[f]or probable cause to exist, there must be probable cause for all elements of the crime, including *mens rea*." *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014). The crime of trespass in the second degree requires proof that the person violating the statute was aware that they were unlawfully present in another person's dwelling. N.Y. Penal Law, §140.15; *see also People v. Insogna*, 448 N.Y.S.2d 328, 328 (1982).

Here, the record does not indicate why Deputy Pfieff did not believe Mr. Fitzgibbon's statement that he was an invited guest at the cabin after he produced a key. R. at 3. However, assuming *arguendo* that the officer believed that Mr. Fitzgibbon was committing a crime, this does not enable Deputy Pfieff to arrest everyone else in the cabin merely because they were also present. *Pringle*, 540 U.S. at 372. In *Pringle*, the car contained clear indications of a crime—readily visible physical evidence including large amounts of cash and drugs—that enabled the officer to arrest not only the driver, but also the car passengers. *Id.* Here there was no indication Ms. Secord was also subject to arrest, as she was merely in the cabin with Mr. Fitzgibbon. Furthermore, even if the officer had probable cause to arrest Mr. Fitzgibbon, this would not enable the officer to arrest Ms. Secord, based on the precedent set in *Ybarra*, unless there was also probable cause to believe Ms. Secord committed a crime. 444 U.S. at 87. As discussed in I.B.1, *supra*, this was not the case.

Additionally, Ms. Secord was under the impression she had permission to be in the cabin, because Mr. Fitzgibbon told Ms. Secord that his uncle, the cabin's owner, would not mind if he invited friends to the cabin. R. at 9. Mr. Fitzgibbon's production of a key itself should have dispelled any suspicion that Ms. Secord believed she was on the property unlawfully because Deputy Pfieff could not reasonably believe, based on production of the key, that Ms. Secord knew she was unlawfully on the property. *Id.* This negates the knowledge element of the criminal trespass statute and, consequently, probable cause to arrest Ms. Secord. *See* N.Y. Penal Law, §140.15; *Williams*, 772 F.3d at 1312.

There were no exigent circumstances that would have justified Deputy Pfieff's entrance into the home under the heightened standard that should have been applied in this case. The circumstances of both the officer's entrance into the home and his arrest of Ms. Secord

additionally do not establish probable cause, and Ms. Secord's convictions should be overturned under either test.

II. THE REASONABLENESS TEST TO DETERMINE A BAIL HEARING DOES NOT PROTECT THE DUE PROCESS RIGHTS OF ALIENS BECAUSE IT DOES NOT PROVIDE GUIDANCE FOR HOW LONG IS UNREASONABLE, PRODUCES INCONSISTENT RESULTS, WASTES JUDICIAL RESOURCES, AND HARMS THOSE WHO ARE HELD IN PROLONGED DETENTION.

The Fifth Amendment's Due Process clause applies to all persons in the United States. U.S. CONST. amend. V; *Reno v. Flores*, 507 U.S. 292 (1993). Due Process protects the right of "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—[that] lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Under 8 U.S.C. § 1226(c) aliens may receive mandatory detention for committing, *inter alia*, crimes of moral turpitude pending a removal hearing. 8 U.S.C. § 1226(c) (1996); *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding mandatory detention under § 1226(c)). However, this Court has recognized that such detention cannot be indefinite, as it would raise constitutional concerns. *See Zadvydas*, 533 U.S. at 682. To avoid Due Process violations, mandatory detention of aliens under § 1226(c) must be limited to a "brief period." *Demore*, 538 U.S. at 513.

All circuits that have considered the issue have also recognized that there is a time limit on how long aliens may be held in detention prior to a removal hearing. *See, e.g.*, *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). However, these circuits are split as to when those held under § 1226(c) are entitled to a bond hearing pending a removal decision. *See Sopo v. United States Att'y Gen.*, 825 F.3d 1199, 1214-15 (2016) (detailing split amongst circuit courts). The Second and Ninth Circuits adopted a six-month bright-line test, under which aliens are entitled to a bond hearing after being held for six months. *Lora*, 804 F.3d at 614-15 (adopting the six-

month bright-line test); *Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (adopting the six-month bright-line test, stating "an alien's continuing detention becomes prolonged at the 180-day mark") (citing *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (internal citations omitted)). At a bond hearing, the detained alien must be released unless the Government can prove by clear and convincing evidence that she is dangerous or a flight risk. *See Rodriguez*, 715 F.3d at 1135-36.

In contrast, the First, Third, Sixth, and Eleventh Circuits have adopted a reasonableness test. *Sopo*, 825 F.3d at 1214-15 (summarizing adoption of reasonableness test in these circuits). Under this test, an alien is entitled to a bond hearing after she has been held for a reasonable period. *See id.* at 1217-18. The reasonableness of the detention period is determined by looking at various factors, such as the length of detention without a bond hearing, why removal proceedings have been prolonged, the likelihood the alien will be removed following a final order of removal, whether the alien's civil detention has exceeded time spent in prison for the crime that rendered him removable, and whether the facility for civil detention is significantly different than a facility for criminal detention. *See id.* If the alien files a petition arguing a violation of due process, a district court examines the circumstances of the case to decide whether the length of the alien's detention has become unreasonable, entitling her to a bond hearing. *See Reid v. Donelan*, 819 F.3d 496, 495 (1st Cir. 2016). This Court is urged to adopt the bright-line test over the reasonableness test.

A. The Bright-Line Test Protects Due Process by Properly Limiting Detention to a Brief Period, Providing Certainty and Predictability, Preserving Judicial Economy, and Reducing the Severe Adverse Consequences of Prolonged Detention.

1. The bright-line test appropriately limits detention to a brief period that is consistent with the legislative intent of § 1226(c).

In upholding the constitutionality of § 1226(c), this Court stressed that detention without a bond hearing must be for a "brief period." *Demore*, 538 U.S. at 513. Specifically, this Court held that § 1226(c) authorized mandatory detention for only a "limited period of [the alien's] removal proceedings," which was "roughly a month and a half in the vast majority of cases in which [§ 1226(c) is] invoked, and about five months in the minority of cases." *Id.* at 529-31.

Congressional intent further supports the notion that six months is the limit for reasonable detention without a bond hearing. *See Zadvydas*, 533 U.S. at 701 (concluding that Congress doubted the constitutionality of detention for more than six months under 8 U.S.C. § 1231(a) (2012)). At the time of *Demore*, the majority of removal proceedings were completed within four months. *See Sopo*, 825 F.3d at 1229 (Pryor, J., dissenting). Today, aliens may face detention for far longer periods, with average case processing times exceeding one year and lasting on average 455 days. *See Lora*, 804 F.3d at fn. 9; *see also Sopo*, 825 F.3d at 1213.

Additionally, this Court has previously held that six months was a "presumptively reasonable period of detention." *Zadvydas*, 533 U.S. at 700-01 (finding a six-month period reasonable in the context of post-removal-determination detention); *see also Demore*, 538 U.S. at 529 (noting that detention under § 1226(c) lasts for less than the presumptively valid 90 days considered in *Zadvydas*). Thus, if the government completed a majority of removal proceedings in less than six months, Congress could sensibly conclude mandatory detention for longer than six months is unreasonable. *See Sopo*, 825 F.3d at 1229 (Pryor, J., dissenting).

Furthermore, detention is not meant to be a punishment in a civil context. Rather, the purpose of detaining aliens is to prevent aliens that may be removed from the United States from absconding or committing other crimes before they are removed. *See id.* at 1211. This purpose is supported by the fact that "the length of detention 'bear[s] no relationship to the seriousness of

[her] criminal history' or the merit of her defenses to removal." *Id.* at 1226 (Pryor, J., dissenting) (citing *Rodriguez*, 804 F.3d at 1079). It is also significant that in upholding a "brief period" for detention under § 1226(c), this Court stressed that if detention were prolonged "it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring).

2. The bright-line test provides certainty and predictability, and preserves judicial economy.

Practical advantages, such as ease of administration and consistency of results, are strong considerations in adopting any test. Unlike the bright-line test, the reasonableness test considers a plethora of factors for deciding whether the length of detention is unreasonable. *See, e.g.*, *Sopo*, 825 F.3d at 1217-19 (collecting factors). Courts that have adopted the reasonableness test argue that flexibility in determining whether there should be a bond hearing is beneficial, because the court can consider the particular circumstances of the case. *See id.* at 1224 (Pryor, J., dissenting). However, these considerations are likely to lead to unpredictable and inconsistent outcomes for those seeking a bond hearing. *See id*. Such arbitrary outcomes raise constitutional concerns because "the touchstone of [substantive] due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Indeed, multiple circuits have raised the concern that a case-by-case test would lead to arbitrary outcomes, and this concern has played out in those circuits that have adopted the reasonableness test. In rejecting the reasonableness test in *Lora*, the Second Circuit observed that such a test causes "pervasive inconsistency and confusion." 804 F.3d at 615 (citing difficulty for district courts deciding what "constitutes a 'reasonable' length of time that an alien can be detained without a bail hearing"). Even the First Circuit, which ultimately adopted the

reasonableness test, acknowledged that a case-by-case approach leads to "wildly inconsistent determinations." *Reid*, 819 F.3d at 497. The Third Circuit has experienced problems in applying the reasonableness test, finding "[d]istrict court judges have applied the reasonableness standard to interpret similar facts in different ways." Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 396 (2014). Similarly, the Second Circuit saw large disparity among various district courts prior to implementing the bright-line test. *Compare Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (finding eight months' detention without a bond hearing was unreasonable), *with Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y 2010) (holding almost three years of detention without a bond hearing was not unreasonable).

Additionally, this Court has recognized the unpredictability and inconsistency that accompanies a case-by-case approach. In *Zadvydas*, this Court adopted a six-month presumption of reasonableness for detention under § 1231(a), a related immigration statute, because the bright-line approach creates "uniform administration in the federal courts" and limits when courts would be required to make "difficult judgments" about whether to release detained aliens under § 1231(a). 533 U.S. at 700-01. This reasoning similarly applies here, demonstrating the utility and uniformity of adopting a bright-line approach for aliens who have been detained under § 1226(c).

In contrast to the concerns raised by the reasonableness test, the bright-line test is applied in a predictable and consistent manner: after six months, aliens are entitled to a bond hearing to determine whether continued detention is necessary. The bright-line test would not waste resources addressing the same issues that would be raised in the bond hearing. *See Reid*, 819 F.3d at 498 ("[t]he federal courts' involvement is wastefully duplicative" because "the evidence

and arguments presented in a "reasonableness" hearing . . . are likely to overlap [with] a bond hearing."). All the factors considered when courts apply the case-by-case approach "could just as well be considered by an immigration judge deciding whether to release a § 1226(c) detainee on bond." *Sopo*, 825 F.3d at 1227 (Pryor, J., dissenting). Thus, courts could retain the flexibility to consider multiple factors on the question of release at the bond hearing. *See id.*

The size of immigration dockets is another practical consideration for determining which test should be adopted. A bright-line approach is essential in circuits with a larger backlog of immigration appeals. *See Lora*, 804 F.3d at 615-16 ("The Second and Ninth Circuits have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes of their immigration dockets. With such large dockets, predictability and certainty are considerations of enhanced importance."); *Reid*, 819 F.3d at 498 (arguing that the "inefficient use of time, effort, and resources" of having both a reasonableness and bond hearing "could be especially burdensome in jurisdictions with large immigration dockets.").

3. The bright-line test reduces the severe negative consequences for individuals that results from prolonged detention.

Without a six-month rule, detained aliens are subject to detention for a potentially unlimited time. This has severe and very real consequences both for aliens and their families. *See Lora*, 804 F.3d at 614, 616, fn. 23 (finding the "disastrous impact of mandatory detention" in Lora's case were inexcusable, as he had extensive community and family ties and lost both steady employment and educational opportunities, and citing similar stories of aliens' lives being dismantled by prolonged detention); *Reid*, 819 F.3d at 498 (citing to the harms suffered by detainees and their families addressed in Reid's and his amici's briefs).

Those being held pending a removal order are often treated like criminals. *See Chavez-Alvarez*, 783 F.3d 469, 478 (3d Cir. 2015) (noting that the facility in which Chavez-Alvarez was

being held also housed those serving time for crimes). The court in *Rodriguez* discussed these conditions, noting that aliens "are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors." *Rodriguez,* 715 F.3d at 1073. Prolonged detention also has profound social ramifications. For example, visitations are restricted and often implement no-contact rules, aliens miss important life events such as birthdays and funerals, their families lose a main source of income, prompting the need for government assistance, and their children are often forced to give up educational opportunities. *See id*.

It is also difficult for aliens to navigate the legal landscape in the United States. Aliens often have little knowledge of the U.S. court system, lack resources to obtain legal counsel, and may not have the language skills required to represent themselves. *See Sopo*, 825 F.3d at 1226 (Pryor, J., dissenting); *Rodriguez*, 715 F.3d at 1073 (noting that access to minimal legal resources "compound[s] the challenges of navigating the complexities of immigration law and proceedings"). Adopting a bright-line rule would ease the painful consequences on aliens and their families, and reduce the barriers to obtaining their release.

4. Circuits that have adopted the reasonableness test disagree on the utility of the test and who bears the burden of proof under the test.

In addition to the numerous gaps in the reasonableness tests' protection of Due Process rights, the circuits that have adopted it disagree on their reasons for adopting the test, its application with respect to what factors a district court should consider in determining the reasonableness of detention, and who bears the burden of proof on whether the alien is dangerous or a flight risk.

The circuits that have adopted the reasonableness test are divided in their reasons for adopting the test. In adopting the reasonableness test, the Third, Sixth, and Eleventh Circuits emphasized the need for a case-by-case approach that allowed courts to consider the

circumstances of a particular case. *Sopo*, 825 F.3d at 1214-15 (stating "whether detention of a criminal alien has become unreasonable depends on the factual circumstance so the case."); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011) ("Reasonableness, by its very nature, is a fact-depending inquiry"); *Ly v. Hansen*, 351 F.3d 263, 267-68 (6th Cir. 2003) (holding aliens may be held for a time reasonably required to complete removal proceedings). The First Circuit, in contrast, adopted the reasonableness test based on legal precedent, although it recognized there was little practical advantage to the test. *Reid*, 819 F.3d at 496, 498 (emphasizing that the reasonableness test has inconsistent outcomes, wastes judicial resources, and may increase detention length, and questioning the institutional competence of federal to adjudicate issues related to removal proceedings).

Additionally, these circuits have rested their decision to adopt the reasonableness test based on uncertainty about adopting the bright-line test, such as the fact that the Supreme Court declined to create a bright-line test in *Demore* and the concern that a bright-line rule requires release after six months of detention. *See Sopo*, 825 F.3d at 1223 (Pryor, J., dissenting) (highlighting that under either the bright-line test or reasonableness approach, the bond hearing does not automatically grant release); *Reid*, 825 F.3d at 497 (pointing to the Supreme Court's decision in *Demore* not to specify a time limit for detention). However, their concerns with a bright-line test are largely unfounded. First, a determination not to create a bright-line test in *Demore* does not mean that the bright-line test is inappropriate. *See Sopo*, 825 F.3d at 1230 (Pryor, J., dissenting). Indeed, this Court did not adopt a reasonableness test in *Demore* although it had equal opportunity to do so. Rather, a more logical inference would be that this Court did not need to establish a test in *Demore*, because it was addressing a different issue, whether § 1226(c) was facially unconstitutional. *See* 538 U.S. at 513-14. Second, the concern that a

bright-line rule would require release is unfounded. This concern conflates the question of whether an alien is entitled to a bond hearing with whether the alien is entitled to release. *See Sopo*, 825 F.3d at 1223 (Pryor, J., dissenting). Additionally, there is a concern that an alien could deliberately cause delays in the removal proceeding, obtain a bond hearing and upon release, flee to avoid being removed. *See id.* at 1216. However, this also misinterprets release under the bright-line rule because "[t]he mere fact that the government has detained an alien for an unreasonable amount of time does not mean that the alien is entitled to release." *Id.* at 1227 (Pryor, J., dissenting).

The circuits that have adopted the reasonableness test are also split on who bears the burden of proof at a bond hearing. The First and Eleventh Circuits place the burden on the alien, requiring her to demonstrate she is neither a flight risk nor a danger to others. *Id.* at 1220; *Reid*, 819 F.3d at 501-02. The Third Circuit, in contrast, places the burden of proof on the government to show that the alien is either dangerous or a flight risk. *Diop*, 656 F.3d at 233. This places the Third Circuit more squarely in line with the Second and Ninth Circuits, which places a clear and convincing evidence standard of proof on the government. *Lora*, 804 F.3d at 616; *Rodriguez*, 804 F.3d at 1087.

Considering all these factors, this Court should adopt the six-month bright-line test because it better protects the due process rights of aliens and is more administrable, efficient, and fair than the reasonableness test.

B. Ms. Secord's Detention is Unreasonable, and She is Entitled to a Bond Hearing Under Either the Bright-Line or Reasonableness Tests.

This Court is urged to adopt the six-month bright-line test as the standard for determining when an alien is entitled to a bond hearing pending a removal determination. Under the bright-line test, detention is presumed to be unreasonable after six-months, and an alien is entitled to a

bond hearing before an immigration judge. *See Lora*, 804 F.3d at 614-15; *Rodriguez*, 715 F.3d at 1136.

In this case, Ms. Secord has been detained by ICE for over six months, entitling her to a bond hearing. R. at 1. The immigration judge will determine, in that hearing, whether Ms. Secord should be released on bond or whether she should remain in detention because she poses either a danger to society or is a flight risk. *Lora*, 804 F.3d at 614-15. However, Ms. Secord's detention has been unreasonably prolonged both based on her initial six-month detention before her release from ICE custody, and by her current detention following the Second Circuit's reversal of the bright-line test. R. at 1-2.

However, assuming *arguendo* that this Court decides to adopt the reasonableness test, Ms. Secord is still entitled to a bond hearing. Under the reasonableness test, the district court determines whether the length of detention is unreasonable based on factors such as the length of detention without a bond hearing and why removal proceedings have been prolonged. *See Sopo*, 825 F.3d at 1217-18. If the court determines that detention is unreasonable, then the alien is entitled to a bond hearing before an immigration judge. *See Reid*, 819 F.3d at 495.

Although the reasonableness test does not provide clear guidance on what is "reasonable," courts adopting this test have stated that at some point between six months and one year the question of whether mandatory detention is reasonable is raised. *See Sopo*, 825 F.3d at 1217 ("The need for a bond inquiry is likely to arise in the six-month to one-year window"); *Chavez-Alvarez*, 783 F.3d at 478 ("[B]eginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time Chavez-Alvarez had been detained for one year, the burdens to Chavez-Alvarez's liberties outweighed any justification for . . . detain[ing] him without bond."). Additionally, those jurisdictions that adopted the reasonableness test have

held that detentions lasting less than one year are unreasonable. *See Chavez-Alvarez*, 783 F.3d at 477 (finding that nine-month detention "strain[ed] any common-sense definition of a limited or brief civil detention."); *Monestime*, 704 F. Supp. 2d at 458 (prior to *Lora*, ordering a bond hearing after eight months' detention).

Here, Ms. Secord has been held for at least eight months, including her six-month detention before being released, and the two months during which she has been held following the Second Circuit's reversal of the Circuit Court for the Western District of New York. R. at 1-2. Additionally, the factors commonly considered by circuits that have adopted the reasonableness test weigh in favor of Ms. Secord's securing a bond hearing. For example, Ms. Secord has never sought to prolong her proceedings in bad faith and has not proven to be a flight risk based on her appearances following her initial release. R. at 1-2, 4. Ms. Secord has also been held for a time comparable to others who have received bond hearings, such as in *Monestime* and *Chavez-Alvarez*, where the court held that detention for eight and nine months, respectively, without a bond hearing was unreasonable. 704 F. Supp. 2d at 458; 783 F.3d at 477. Thus, under either the six-month bright-line test or the reasonableness test Ms. Secord should be afforded a bail hearing.

CONCLUSION

Based on the foregoing, petitioner respectfully requests that this court overturn Ms. Secord's convictions for trespass and possession of a deadly weapon, and release Ms. Secord from ICE custody pending a removal hearing.