No. 01-2017

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 United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

TEAM #29
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1. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Laura Secord; and
2. Whether the "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens.

STATEMENT OF FACTS

Petitioner, Laura Secord, is a young woman of Canadian citizenry who had an incredibly tragic childhood. R. at 8. She was born in Toronto, and faced emotional and physical abuse at home for her entire life, until she ran away at age 16 and began living on the streets. R. at 8. During her period of homelessness, Ms. Secord's only source of community was a group of friends at a shelter with a shared love of a popular board game, Dungeons and Dragons ("D&D"). R. at 8. In 2012, Ms. Secord discovered a larger D&D community in Buffalo and decided to emigrate in 2013 to join this community. R. at 8. For the first time in her life, Ms. Secord found a safe place to live, and gainful employment at Tim Hortons. R. at 8. Ms. Secord spent her free time playing D&D with her friends. R. at 8. Prior to December 21, 2015, Ms. Secord had no trouble with the law. R. at 8.

On December 21, 2015, Ms. Secord and five friends were playing D&D in a cottage on Lake Erie in Angola. R. at 9. In December of 2015, the group decided to celebrate the winter solstice by playing the board game somewhere "spooky." R. at 9. James Fitzgibbons, a member of the group, volunteered his uncle's cottage. R. at 9. Mr. Fitzgibbons told the group that his uncle was in Florida for the winter, but would not mind the group using the house, so long as they "didn't mess the place up." R. at 8-9.

With the destination set, Ms. Secord and her friends began to plan for their exciting night in, stopping on the way to Angola to pick up costumes for the event and grabbing snacks, beer, and pop at a gas station. R. at 8-9. They arrived at the cottage in the evening, intending to stay until midnight before heading home to work the next day. R. at 8-9. Mr. Fitzgibbons let the group in through the front door, using a key retrieved from the patio. R. at 9. The group lit

candles and prepared for the game, dressing in their costumes as wizards, dwarves, and other characters, and began to play the board game. R. at 9-10.

Sometime in the evening, the group was startled by a knock at the door and quickly hid from their would-be attacker in the nearly empty neighborhood. R. at 9. By that point Deputy Pfieff had entered the cottage through its unlocked front door. R. at 2. Deputy Pfieff did not have any type of warrant. R. at 2. Instead, the deputy was brought to the cottage by a phone call from an unnamed local Angola resident, stating that he had noticed lights in one of the summer cottages along Lake Erie, but providing no further information. R. at 2. When the group realized that it was Deputy Pfieff, a member of law enforcement, knocking at the door, they emerged from hiding. R. at 9. Deputy Pfieff ordered all of them on to the ground and began to search them, recovering driver's licenses for everyone except Ms. Secord. Deputy Pfieff also began to question the group of friends. R. at 2. He learned from James Fitzgibbons that the group had permission to use the cabin from Mr. Fitzgibbons' uncle. R. at 3. Mr. Fitzgibbons informed the deputy that he was in charge of checking his uncle's summer cottage about once a week during the winter. R. at 9. Mr. Fitzgibbons even produced the key used to enter the front door, informing the officer that he'd gotten the key from the front porch. R. at 3. The deputy also observed pictures of Mr. Fitzgibbons and his family throughout the house. R. at 9. Though Mr. Fitzgibbons was unable to immediately produce the uncle's contact information, the deputy made no other attempts at that time to determine whether the cottage actually belonged to Fitzgibbons' uncle or whether the group had permission to be there. R. at 3.

Based only upon Deputy Pfieff's own observations of the young adults and the tip from the unnamed caller, Ms. Secord, and her five friends were placed under arrest. R. at 3. Ms. Secord and the group were subsequently charged with criminal trespass and Ms. Secord was

further charged with possession of a deadly weapon when she admitted that the brass knuckles found at the cottage were a possession of hers, a vestige of the protection she once needed as a young woman living on the streets. R. at 3, 9. Though Ms. Secord's five friends were then released on their own recognizance, Secord remained in custody because she is an undocumented immigrant living in the United States. R. at 3. Ms. Secord was tried and convicted of criminal trespass in the second degree and possession of a deadly weapon in the fourth degree in the City Court of Angola. R. at 3. She was sentenced to a year in prison for the two convictions, to be served concurrently. R. at 3. After completing her prison sentence, Ms. Secord was then remanded to Immigrations and Customs Enforcement (ICE) custody because of her immigration status. R. at 3.

Ms. Secord filed two habeas petitions in federal court, one to be released from ICE custody and one to throw out her conviction. R. at 4. The District Court granted both of Ms. Secord's petitions. R. at 4. The Second Circuit Court of Appeals joined the two petitions for review and reversed both of the district court's decisions. R. at 4. This Court granted certiorari to consider both issues. R. at 11.

SUMMARY OF THE ARGUMENT

The Second Circuit applied the incorrect standard to determine whether probable cause existed to arrest Ms. Secord. The Court of Appeals erred by failing to consider the entirety of the totality of the circumstances available to the law enforcement officer at the time of the arrest. The Court of Appeals instead upheld Ms. Secord's conviction, despite a lack of any evidence available to the officer demonstrating probable cause of the requisite mens rea. In fact, evidence present at the time of the incident demonstrates Ms. Secord did not have the requisite mens rea for the alleged crime. Law enforcement may not ignore exculpatory evidence, including evidence

suggesting an innocent state of mind, when conducting their totality of the circumstances analysis. In this case, the police officer's complete disregard of exculpatory or exonerating evidence, particularly undisputed evidence, directly contradicts the requirement that probable cause be examined in terms of the totality of the circumstances.

Law enforcement may not close their eyes to facts that would clarify the circumstances of an arrest, particularly where it is unclear whether a crime had taken place or where further investigation would have exonerated the suspect. In fact, law enforcement officers have a duty to complete at least a minimal investigation of the available information, including exculpatory evidence, prior to concluding that probable cause exists to effect an arrest without a warrant. Because the Court of Appeals did not include all of the available evidence in its analysis, including evidence pointing to a lack of probable cause, it failed to consider the totality of the circumstances that is the cornerstone of probable cause analysis. Therefore, both of Ms. Secord's convictions should be overturned because under the proper standard, there was no probable cause to support her arrest and the subsequent search.

This Court should adopt the easily administrable bright line rule that aliens detained pursuant to section 1226(c) of the Apprehension and Detention of Aliens statute must receive an automatic bail hearing within six months' detention. 8 U.S.C. 1226(c). Across the country, Immigration and Customs Enforcement ("ICE") detains immigrants for extremely long periods of time prior to their removal proceedings, resulting in enormous human and fiscal costs. Deprivation of liberty and an individual's right to be free from imprisonment is at stake. Because incredibly long detention has become the norm, there must be a procedural safeguard, a firm cutoff bright line rule, to protect Due Process rights.

The Due Process clause applies to all persons within the United States, including aliens. This forbids the government from depriving any such person of liberty without due process of law. Under Supreme Court doctrine, it is unreasonable for ICE to detain Ms. Secord for longer than six months without a bail hearing. Section 1226(c) was enacted with the intent that detainment prior to removal proceedings be brief and prompt – not for detainees to languish in detention unable to see their families and subject to humiliating conditions for months or even years on end.

The "reasonableness" test adopted by the court below is vague, provides limited guidance, and has resulted in pervasive confusion and inconsistency among district courts that must apply it. What is worse, this test requires detainees to file habeas petitions in order to be heard. This is an incredibly unfair requirement given that these individuals do not have a right to counsel, may not know they have this remedy available to them, or may lack English proficiency. This Court should reverse the Second Circuit's opinion and adopt a six-month bright line rule, rather than the amorphous "reasonableness test," to determine a time for bail hearings.

ARGUMENT

I. THE COURT OF APPEALS USED THE INCORRECT STANDARD TO DETERMINE IF PROBABLE CAUSE EXISTED TO ARREST MS. SECORD.

The Court of Appeals erred by conducting an incomplete "totality of the circumstances" analysis of probable cause. Probable cause analysis requires that a law enforcement officer, and the court reviewing his actions, consider the totality of the circumstances available to the officer at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The Court of Appeals in this case disregarded the lower court's analysis that the lack of evidence indicating the requisite mens rea vitiated the probable cause asserted by law enforcement in this case. R. at 6-7. Disregarding a set of possibly exculpatory facts, and permitting law enforcement to do the same

with little investigation into the truth of those facts, directly contradicts the requirement that probable cause be examined in terms of the totality of the circumstances. As a result, the Court of Appeals should have considered the exculpatory evidence in its analysis of probable cause, and should have required law enforcement to do the same. Without assessing all of the available evidence in its analysis, including evidence pointing to a lack of probable cause, the Court of Appeals failed to consider the totality of the circumstances.

A. Requiring an Objective Establishment of Probable Cause Based on the Totality of the Circumstances Protects Fourth Amendment Rights.

In order to effect a warrantless arrest, law enforcement must demonstrate that probable cause exists and that compelling reasons justify the absence of a search warrant. *McDonald v. United States*, 335 U.S. 451, 454 (1948). The requirements for effecting a warrantless arrest must be at least as stringent as those required to obtain a warrant, so as to ensure law enforcement compliance. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Warrantless arrests necessitate higher standards of analysis compared to arrests with warrants. Warrantless arrests pose a greater threat to the Fourth Amendment right to be free from unreasonable searches and seizures; they bypass the procedural safeguards in place to ensure that searches and seizures are reasonable. *Beck v. Ohio*, 379 U.S. 89, 96 (1964). By sidestepping the requirement that probable cause be established before a magistrate judge prior to a search or seizure, warrantless arrests place the judgment of probable cause into the hands of individual police officers.

However, the ability of the individual police officer to establish probable cause and thereafter effect a warrantless arrest is strictly circumscribed. The standard an officer must use when determining that probable cause exists is an objective one, based on the totality of the circumstances. *Pringle*, 540 U.S. at 371. And it is the courts' function to determine whether "...the facts available to the officer at the moment of the arrest would 'warrant a man of

reasonable caution in the belief' that an offense has been committed." *Beck,* 379 U.S. at 96 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Thus, it is the role of the courts to ensure that law enforcement officers are conducting their analysis based on the totality of the circumstances and analyzing all of the available facts prior to making a warrantless arrest.

Federal Constitutional precedents demonstrate the strict standards by which probable cause and warrantless arrests must be analyzed. However, states' statutory limits placed on law enforcement serve as the basis for federal courts' analyses of whether law enforcement officers are authorized to make a warrantless arrest in certain circumstances. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). In New York, law enforcement may arrest a person without a warrant for "[a] crime when he or she has reasonable cause to believe that such person has committed a crime, whether in his or her presence or otherwise." N.Y. Crim. Proc. Law § 140.10 (b) (2017). Therefore, the totality of the circumstances examined by law enforcement must demonstrate that there is a probability that a crime was committed. *Id.* The circumstances also must show the particular person who committed the crime. *Id.*; *See also United States v. Cortez*, 449 U.S. 411, 417-18 (1981) ("detaining officers must have a particularized and objective basis for suspecting the particular person stopped of a criminal activity").

B. Probable Cause Cannot Be Established Without Evidence That Ms. Secord Had the Requisite Mens Rea.

Law enforcement had no evidence demonstrating that Ms. Secord had the requisite mens rea for the crime of trespass at the time of her arrest. In order for probable cause to be established, probable cause must be established for every element of the offense. *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014). ("For probable cause to exist, there must be probable cause for all elements of the crime, including mens rea."). As a result, the totality of the circumstances must provide an objective basis for determining that every element of the crime

has been met in order for probable cause to be established. Under New York law, criminal trespass in the first, second, and third degree all require that the offender knowingly enter or remain unlawfully. N.Y. CLS Penal Law §§ 140.10, 140.14, 140.17 (2017). Therefore, in order for Deputy Pfieff to have probable cause to arrest Ms. Secord, he must have probable cause that she trespassed knowingly. *See, e.g.*, *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (where child neglect statute required "knowingly" mens rea, law enforcement officer needed some evidence that parent knew of the children's predicament but failed to prevent it in order to establish probable cause). Even where the facts known by the law enforcement officer support an inference of criminal behavior, these facts are insufficient to support a determination of probable cause in the absence of evidence of the requisite mens rea. *Id.* No evidence exists here to demonstrate that Ms. Secord had a "knowing" mens rea. In fact, without evidence of Ms. Secord's knowledge of her unlawful presence on the property, Deputy Pfieff did not have the probable cause necessary to lawfully effect an arrest.

C. Law Enforcement Were Not Permitted to Ignore Evidence Exculpating Ms. Secord in Their Totality of the Circumstances Analysis.

The evidence available to Officer Pfieff at the time of Ms. Secord's arrest in fact indicated that Ms. Secord had an innocent state of mind. Law enforcement cannot ignore or disregard undisputed facts in their probable cause analysis. *Baptiste v. J.C. Penney Co*., 147 F.3d 1252, 1259 (10th Cir. 1998). The totality of the circumstances analysis, while providing that law enforcement officers can look at the entirety of the circumstances surrounding the alleged crime, also requires that they consider facts tending to dissipate probable cause. *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988). To hold otherwise is to allow law enforcement officers unyielding discretion to claim probable cause, even in light of significant facts to the contrary. In

fact, even where significant inculpatory information exists, officers should not disregard plainly exculpatory evidence. *Id.*

At the time of the arrest, Deputy Pfieff was aware of a number of undisputed facts that exculpated Ms. Secord and demonstrated that she reasonably believed she was lawfully on the premise. Officer Pfieff knew that the Mr. Fitzgibbons used a key to enter the cottage. R. at 3. He saw that the group of friends was dressed as wizards, elves, and other characters. R. at 9. He saw that they were playing a board game. R. at 10. He learned that Mr. Fitzgibbons was watching the cottage for his uncle and had permission to be there. R. at 3. He learned that it was Mr. Fitzgibbons who let invited the group to the cottage and let them in. R. at 3. He saw pictures of Mr. Fitzgibbons and his family in the cottage. R. at 9. All of these factors indicate that Ms. Secord either had permission to be at the cottage or she reasonably believed she had permission to be there on the basis of Mr. Fitzgibbons' word. Because this exculpatory evidence was undisputed, it cannot be ignored by law enforcement. *Baptiste*, 147 F.3d at 1259. Rather, law enforcement had an obligation to consider that evidence as a part of its totality of the circumstances probable cause analysis.

D. Analyzing the Totality of the Circumstances Required Law Enforcement Officers to Investigate the Evidence Exculpating Ms. Secord.

The police in this case also did not complete the investigation required to determine if probable cause existed to believe that Ms. Secord engaged in criminal behavior or if she had the requisite mens rea for the crime of trespass. It is an important aspect of the probable cause determination that, "...police officers may not ignore easily accessible evidence and thereby delegate their duty to investigate and make an independent probable cause determination based on that investigation." *Baptiste,* 147 F.3d at 1259. They must interview readily available witnesses, investigate basic evidence, or otherwise look into whether a crime has been

committed prior to effecting a warrantless arrest. *Romero v. Fay*, 45 F.3d 1472, 1476-77 (10th Cir. 1995). Failure to investigate exculpatory or other information prior to arrest can prevent the establishment of probable cause. *See, e.g.*, *United States v. Ramirez-Rivera*, 800 F.3d 1, 28 (1st Cir. 2015) (failure to attempt to corroborate informant's tip vitiated probable cause); *Sevigny v. Dicksey*, 846 F.2d 953, 958 (4th Cir. 1988) (failure to learn what easily could have been learned vitiated probable cause); *Bigford*, 834 F.2d at 1219 (failure to complete minimal investigation vitiated probable cause); *BeVier*, 806 F.2d at 128 (failure to pursue reasonable avenues of investigation vitiated probable cause); *Kuehl*, 173 F.3d at 650 (failure to conduct a reasonably thorough investigation vitiated probable cause).

It is in keeping with law enforcement's duty to examine the totality of the circumstances that officers may not close their eyes to facts that would clarify the circumstances of an arrest, particularly where it is unclear whether a crime had taken place or where further investigation would have exonerated the suspect. *BeVier*, 806 F.2d at 128; *Kuehl at* 650. While law enforcement need not have proof beyond a reasonable doubt at the time of arrest, *Brinegar v. United States*, 338 U.S. 160, 174 (1949), they must at least conduct a reasonably thorough investigation where there are no exigent circumstances or where minimal, reasonable further investigation would shed light on the events. *Kuehl,* 173 F.3d at 650.

In the case at hand, there were no exigent circumstances preventing law enforcement from embarking upon further investigation. Ms. Secord and her friends were all detained in the cottage by multiple officers, being questioned about the circumstances and cooperating with police. R. at 2-3. The crime they were accused of was not violent or dangerous, any evidence related to the crime was not in a movable container, nor was there evidence in danger of being destroyed. *United States v. Jeffers*, 342 U.S. 48, 52 (1951) (no exigent circumstances where no

question of violent, no movable vehicle, no imminent destruction). As a result, the police had a duty to further investigate the circumstances, particularly as to whether Mr. Fitzgibbons actually had permission to be in the cottage or, at least, whether he led them to believe they had permission to be in the cottage.

The police could have conducted the required investigation easily. They could have contacted the unnamed informant or other neighbors to inquire about the owner of the cottage.. They could have looked up the property owner information and gotten in contact with the owner that way. They could have asked each member of the group of friends how they came to be at the cottage and asked if they had any information like text messages or emails, demonstrating that Mr. Fitzgibbons had invited them to the property under the auspices of having permission to be there. There are any number of easy steps the police could have taken to confirm or rule out Ms. Secord's explanation for being on the property. But without doing that minimal investigation that could have exonerated her or at least clarified the totality of the circumstances, probable cause cannot not be established. *Kuehl,* 173 F.3d at 650.

II. THERE WAS INSUFFICIENT PROBABLE CAUSE TO ARREST AND SEARCH MS. SECORD UNDER EITHER STANDARD.

When applying the full totality of the circumstances analysis that should have been applied in the Second Circuit's analysis, it is clear that no probable cause existed to arrest Ms. Secord on grounds of trespassing. At the time of the arrest, Deputy Pfieff had no evidence to indicate that Ms. Secord had the requisite mental state, that of knowledge, to commit the crime of trespass. This lack of evidence alone is enough to vitiate probable cause as, without probable cause of the requisite mens rea, there can be no probable cause to believe a person committed the crime. *Williams*, 772 F.3d at 1312.

Further, not only was there no evidence indicating that Ms. Secord had a guilty mind, but there was evidence indicating that she had an innocent one. There was undisputed evidence that Mr. Fitzgibbons had invited Ms. Secord and her friends to the property. R. at 3. There was also evidence that Mr. Fitzgibbons himself had the right to be on the property, given the pictures found throughout the house and his ease of entry into the property. R. at 3, 9. However, even if Mr. Fitzgibbons himself was trespassing, Ms. Secord believed she had been invited and the evidence suggests that was a reasonable belief. She received an invitation from Mr. Fitzgibbons and was also able to observe the ease with which he entered the property and the family photos located throughout the cottage. R. at 3, 9. The evidence available to Deputy Pfieff at the time of the arrest shows that Ms. Secord had every reason to believe that she was on the property lawfully and, thus, did not possess the "knowledge" mens rea required for the crime of trespass.

The police's failure to further investigate this exculpatory information does not justify summarily concluding that probable cause existed. While police are permitted some margin of error, their mistakes must be reasonable, *BeVier*, 806 F.2d at 126 (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949), and they must utilize the means at hand to minimize the risk of error. *Id.* at 128. Because the police did not fully investigate, they could not have been certain of the totality of the circumstances nor of whether Mr. Fitzgibbons' or Ms. Secord's legitimate explanations were true. Failure to learn this basic information, available at the scene and through a quick search or phone call, was not a reasonable mistake. And, without knowledge of the totality of the circumstances, law enforcement could not sufficiently conclude that there was probable cause to effect a warrantless arrest.

Looking past the Court of Appeals' failure to consider the entirety of the circumstances in the probable cause analysis, the facts upon which the Second Circuit did conclude that probable

cause existed were still insufficient to merit such a conclusion. In particular, the entire interaction with Ms. Secord and her friends began when the deputy received a phone call from an unnamed neighbor. R. at 2. The phone call merely reported suspicious activity, in that the caller saw lights on in a house in an area where many residents were away for the winter. R. at 2. The caller did not allege any specific incidence of criminal activity, nor did the call contain any other indicia of reliability. This Court has held that an informant's veracity, reliability, and basis of knowledge are all relevant factors in determining the value of his report. *Illinois v. Gates*, 462 U.S 213, 230 (1983). Information from the caller including a detailed description of the alleged wrongdoing, an eyewitness account of the alleged wrongdoing, facts not easily obtained, and prediction of future plans can indicate the high value of an informant's tip. *Id.* None of these factors were here. Thus, the informant alone is not enough to establish probable cause.

Nor were the officer's observations sufficient to establish probable cause. As Judge Atkinson made clear in his dissenting opinion, the group of friends were wearing costumes and playing a board game while eating snacks *in clear view* of Deputy Pfieff when he looked through the window. R. at 10. Despite these facts, Deputy Pfieff decided to enter the house without waiting for a response from its occupants, striking fear into its occupants before questioning them. R. at 9. But probable cause certainly did not exist before that moment, and "[i]f the police officers did not have probable cause to arrest prior to their questioning the plaintiffs, the answers, if in response to an uninvited entry and harsh questions, cannot provide the probable cause." *Moore v. Marketplace Restaurant, Inc*., 754 F.2d 1336, 1347 (7th Cir. 1985). Neither the unnamed caller nor the deputy's own observations prior to entering the cottage established probable cause and the only subsequent actions taken by Ms. Secord and her friends, namely hiding briefly upon hearing an unknown intruder enter the cottage and attempting to answer the

deputy's questions, were prompted by the deputy's own actions and, thus, are not sufficient to establish probable cause.

Therefore, applying the correct standard of evaluating the totality of the circumstances, as well as reexamining the Court of Appeals' findings of facts, the evidence demonstrates that there was insufficient evidence to establish probable cause and arrest Ms. Secord. As a result, Ms. Secord's conviction for trespass in the second degree should be overturned. Additionally, because the search of Ms. Secord's backpack, which revealed the brass knuckles within, R. at 3, was a search incident to arrest, this conviction too must be overturned because without a lawful arrest, there can be no lawful search incident to arrest.

III. THE COURT SHOULD ADOPT A SIX-MONTH BRIGHT LINE RULE FOR BAIL HEARINGS TO PROTECT THE DUE PROCESS RIGHTS OF IMMIGRANTS DETAINED PURSUANT TO 8 U.S.C. § 1226.

This Court should reverse the Second Circuit's opinion in *Scott v. Secord* where it applied the amorphous "reasonableness" test to immigrant detention without a bail hearing. R. at 5. This approach requires every detainee to file a habeas petition challenging their detention, then the district courts must then adjudicate the petition to determine whether that individual's detention has crossed the "reasonableness" threshold, and only then is the detainee entitled to a bail hearing. *Id.* This "reasonableness test" does not protect the Due Process rights of undocumented aliens. While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with long-held constitutional values. *Rodriguez v. Robbins* (*Rodriguez II*), 715 F.3d 1127, 1146 (9th Cir. 2013), *cert. granted sub. nom. Jennings v. Rodriguez*, 136 S. Ct. 2489, 2016 WL 1182403 (June 20, 2016) (No. 15-1204).

A. In Order to Avoid Fifth Amendment Due Process Violations, There Must Be a Definite Temporal Limit on Immigration Detention Without a Bail Hearing.

The Fifth Amendment Due Process Clause forbids the government to deprive any person of liberty without due process of law. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The Due Process Clause applies to all persons within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693. Freedom from imprisonment – government custody, physical restraint, or other detention – "lies at the heart of the liberty protected by the Due Process Clause." *Id.* at 679. As a result, Ms. Secord, an unlawful alien, is entitled by the Fifth Amendment to due process – adequate procedural safeguards – in her deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 343-44 (1993).

This court has consistently construed immigration statutes to include procedural protections necessary to avoid constitutional problems. *See, e.g.*, *Yamata v. Fisher*, 189 U.S. 86, 101 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). Because a statute permitting indefinite detention would raise "serious constitutional concerns," the *Zadvydas* court established a six-month bright-line period of detention after which judicial review was required to review the likelihood of an alien's removal. 533 U.S. at 681, 701. While the question now before the Court is length of detention without a bail hearing, versus detention preceding removal in *Zadvydas*, the procedural bar on indefinite detention is still applicable. *Lora v. Shanahan, et al.*, 804 F.3d 601, 613 (2d Cir. 2015); *Rodriguez II*, 715 F.3d at 1133.

The Apprehension and Detention of Aliens statute confers authority to the Attorney General to detain certain classes of aliens. 8 U.S.C. § 1226(c). It is under this authority that Ms. Secord was taken into Immigration and Customs Enforcement ("ICE") custody. The language of this statute does not authorize mandatory detention beyond six months; Congress would have used clearer terms if they intended to authorize long-term detention. *Cf. Zadvydas*, 533 U.S. at

697. The legislature intended that bail hearings are permissible because such detention has a definite termination point. *Rodriguez II*, 715 F.3d at 1137. To read this statute as permitting indefinite detention would raise significant constitutional concerns, and in order to avoid them, the Ninth Circuit and Second Circuit (prior to *Scott v. Secord*) have construed it to contain "an implicit temporal limitation." *Lora*, 804 F.3d at 603.

An individual cannot be afforded adequate procedural protections if there is no definitive point in time by which they must be heard. *Rodriguez II*, 715 F.3d at 1136. A fundamental requirement of due process is the opportunity to be heard at a meaningful time. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Individualized decision-making, in the form of bail hearings, is necessary in order to determine whether or not there will be continued detention during the pendency of a deportation proceeding. *Id. See generally United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding civil pretrial detention of criminal defendants only with a finding of dangerousness or flight risk at individualized bond hearings). Justice Kennedy noted in his concurrence in *Demore v. Kim* that an alien "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." 538 U.S. 510 (2003) (Kennedy, J. concurring).

B. Six-Months' Detention Is the Temporal Limit on Immigrant Detention Without a Bail Hearing.

When faced with prolonged detention, this Court requires rigorous individualized procedures to ensure that length of detention remains reasonable in relation to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The Supreme Court has held that for detention pursuant to section 1226(c) to be reasonable, aliens detained pursuant to the Immigration and Nationality Act § 236(c) could be constitutionally held "for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. The *Demore* court held this because the

government provided the Court with statistics that most immigrants were in detention for only a month, and others for only up to three to five months without a bond hearing. *Id.* As a result, the Court found it reasonable that the respondent alien was detained for six months prior to being granted habeas relief. *Id.* at 529-30. In concurrence, Justice Kennedy cautioned that: "[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it would 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).

In August 2016, the Solicitor General ("SG") released a letter to this Court disclosing several "significant errors" in the statistics presented to the Court by the government in *Demore* were incorrect, and understated time immigrants spend in detention. Letter from Office of Solicitor Gen., U.S. Dep't of Justice, to Scott S. Harris, Clerk, Supreme Court of the United States (Aug. 26, 2016) http://online.wsj.com/public/resources/documents/Demore.pdf ("SG Letter"). The Executive Office for Immigration Review ("EOIR") provided the statistics initially, and discovered these significant errors over ten years after *Demore*. *Id.* Originally, the Justice Department told the *Demore* court that in 85% of cases where there was no appeal, the average time of removal proceedings was forty-seven days, less than two months. *Demore*, 538 U.S. at 529. The EOIR stated that the average time to resolve a removal proceeding involving an appeal was four months. *Id.* The Supreme Court then added those two statistics together to determine that the average length of removal proceedings was five months. *Id.* at 530. The SG letter explains that the EOIR provided incorrect statistics, and the Supreme Court also incorrectly added together the statistics provided. DOJ Letter. The actual average length of detention is 382 days – over one year. *Id.*

While the Respondent may request this Court to follow the reasoning of the circuit courts that apply a "fact-dependent inquiry" into length of the detention, these courts relied on the erroneous statistics supplied by the government in *Demore*. *See, e.g.*, *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (applying a reasonableness test rather than bright line rule to length of detention because *Demore* "emphasized that mandatory detention pursuant to § 1226(c) lasts only for a 'very limited time' in the vast majority of cases."). Courts have been applying a reasonableness test rather than bright line cutoff under the false impression that most detentions are for less than six months. *Id.*

Even before the SG disclosed its significant errors to this Court, some circuit courts questioned the reality of the statistics provided in *Demore* and saw the necessity for a definitive point in time for a bail hearing.[1] The Second Circuit noted that since *Demore* was decided there has been an enormous increase in the number of aliens taken into custody pending removal; nearly four hundred thousand every year as of 2009. *Lora*, 804 F.3d at 604-05. The result is that the average length of detention since then has "worsened considerably." *Id.* at 605.

In the Central District of California, for the 1,042 *Rodriguez* class members, the average length of detention was over thirteen months, with a median of nearly one year. *Prolonged Detention Fact Sheet*, American Civil Liberties Union, https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf ("Detention Fact Sheet"). The Ninth Circuit reasoned that a six-month rule is necessary because average detention length lasts double the time the Court understood it to be in *Demore*. The Government's brief to this Court in *Demore*

[1] *E.g.*, "[A] non-citizen detained under section 1226(c) who contests his or her removal regularly spends many months and sometimes years in detention due to the enormous backlog in immigration proceedings. There are thousands of individuals in immigration detention within the jurisdiction of this Court who languish in county jails and in short-term and permanent ICE facilities." *Lora*, 804 F.3d at 605.

specifically stated that the average time of detention for removal proceedings is "far below the six-moth period that this Court determined was presumptively reasonable" in *Zadvydas*. Brief of Petitioner at *39, *Demore v. Kim*, (No. 01-1491), 2002 WL 31016560. Given the Government's in-brief argument and the Supreme Court's reasoning in *Demore*, and the finding that average length of detention is well over a year, *a fortiori*, six months is the presumptively reasonable length of time of detention without a bail hearing. We urge this Court to follow their previous reasoning that three to five months is reasonable, and apply a bright line six-month rule to avoid further Due Process violations. *Lora*, 804 F.3d at 615 ("*Zadvydas* and *Demore*, taken together, suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention.").

C. A Six-Month Bright Line Rule for Detention Without a Bail Hearing Is Essential to Ensure Certainty and Predictability.

Past a six-month threshold, there are profound private interests at stake; the risk of erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker is substantial. *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011). The Supreme Court has recognized that bright line rules provide clear guidance and ease of administration to government officials, especially in the context of immigration detention. *See, e.g., Zadvydas,* 533 U.S. at 700–01 (adopting six-month rule "for the sake of uniform administration," while also noting that it would limit the need for lower courts to make "difficult judgments"); *cf. Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (48-hour time limit on detention prior to probable cause hearing is reasonable to provide some degree of certainty that the state is acting within constitutional bounds).

Similarly situated individuals should be treated the same; adopting a six-month rule will ensure that similarly situated detainees receive similar treatment. *Lora*, 804 F.3d at 615-16. A

six-month rule will avoid the random outcomes that arise from individual habeas litigation where some detainees have counsel and others do not, and "some habeas petitions are adjudicated in months are others are not adjudicated for years." *Id.* Thus, there is a great need for a firm cut-off for detention without a bail hearing for those in ICE custody. *Id.* There is an enormous risk of erroneous deprivation at stake in custody hearings, and prolonged incarceration deprives an individual of a particularly important interest; this substantial risk increases without periodic hearings. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

While in the Second (prior to the *Secord* opinion) and Ninth Circuits Ms. Secord would be afforded a bail hearing within six-months' detention, in other Circuits, Ms. Secord would have no certainty, and could languish in detention for months on end. R. at 4. A six-month bright line rule will not lead to flood of fearsome criminals on the streets of America - rather, this rule will provide an opportunity for a neutral decision maker to determine whether the alien might deserve conditional release from their prison-like detention, rather than languishing there for months or even years on end. *Rodriguez II*, 715 F.3d at 1146.

A "reasonableness test" would allow the government to justify a delay in proceedings on administrative backlog. R. at 6. However, given the immense private interest at stake, it is not as though uniform administration would place an unreasonable burden on the government. *Rodriguez II*, 715 F.3d at 1146. For example, in the Ninth Circuit, following the district court's order in *Rodriguez v. Robbins* (*Rodriguez I*), 2012 WL 7653016 (C.D. Cal. 2012) hundreds of hearings took place "belying any suggestion that the preliminary injunction is prohibitively burdensome." *Rodriguez II*, 715 F.3d at 1146. Even if the government did face severe logistical difficulties in implementing a six-month rule, this would merely be the burden of complying with a statute, construed in a way to avoid the risk of running afoul of the Constitution. *Id.* The

burden imposed on the Government by requiring hearings before an Immigration Judge within a certain length of time, at the bond hearing stage of proceedings, is a reasonable one. *Diouf*, 634 at 1092.

IV. THE COURT SHOULD STRIKE DOWN THE "REASONABLENESS" TEST BECAUSE IT DOES NOT PROTECT DUE PROCESS RIGHTS.

The Second Circuit's standard in *Secord* is vague and provides extremely limited guidance on what a "reasonable" length of time is. R. at 5. The *Secord* court would have judges apply this incomprehensible "totality of the circumstances" test on a case by case basis without even providing factors that should be considered. *Id.* Meanwhile, an immense interest – individual liberty and freedom from imprisonment --is at stake. During prolonged detention, detainees and their families suffer extensive hardship. *Reid v. Donelon*, 819 F.3d 486, 498 (2016). The major hardship that needless prolonged detention imposes on individuals outweighs any alleged harm to Government interests. *Rodriguez II*, 715 F.3d at 1134.

The "reasonableness test" outlined by the Second Circuit in *Secord* requires that detainees file habeas petitions. R. at 5. However, constitutional principles apply to the government's conduct whether a habeas petition is filed or potentially forthcoming. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1217 n. 8 (11th Cir. 2016). This Court has not held that in civil detention proceedings the possibility of a habeas petition excuses the government from its due process obligations. It is incredibly unfair to employ case-by-case determinations conditioned on habeas petitions; due process violations will inevitably result. Most immigrants in mandatory detention do not know that the habeas petition is available to them, or do not have the resources to hire an attorney to assist them with their petition. *Reid*, 819 F.3d at 498. For example, most class members in *Rodriguez* are indigent and not proficient in English; thus this requirement would deny most of these individuals of detention review. *Rodriguez II*, 715 F.3d at 1085.

In addition to the unfairness of the habeas petition requirement, this standard is also difficult for courts to apply in a consistent manner. There is pervasive confusion over what constitutes a "reasonable" length of time. *Reid*, 819 F.3d at 497 ("[T]he approach has resulted in wildly inconsistent determinations."); *Lora*, 804 F.3d at 614-15. For example, district courts in the Second Circuit, prior to *Lora*, exhibited inconsistency and confusion when asked to apply a reasonableness test on a case by case basis. *Lora*, 804 F.3d at 615. *Compare, e.g.*, *Martin v. Aviles*, No. 15 Civ. 1080(AT)(AJP), 2015 WL 3929598, at *2–3 (S.D.N.Y. June 15, 2015) (holding an alien for over a year without a bond hearing violated his due process rights), *and Minto v. Decker*, No. 14 Civ. 07764(LGS)(KNF), 108 F. Supp. 3d 189, 196 (S.D.N.Y. 2015) ("Because Petitioner's detention has exceeded twelve months—in the absence of any evidence that Petitioner might be a flight risk or a danger to the community—he is entitled to an individualized bond hearing."), *and Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (ordering bond hearing after eight months detention), *and Scarlett v. DHS*, 632 F. Supp. 2d 214, 223 (W.D.N.Y. 2009) (five years detention unreasonable), *with Johnson v. Orsino*, 942 F. Supp. 2d 396 (S.D.N.Y. 2013) (fifteen month detention not unreasonable), *and Luna–Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y. 2010) (nearly three years of detention not unreasonable).

Detained individuals include long-time lawful residents with relatively minor criminal convictions, asylum seekers with no criminal history who are imprisoned for years even after they have been found to have a credible claim, and others with extensive family ties to this country, including having U.S. citizen children. *Id.* A reasonableness approach has the effect of increasing detention times for those least likely to actually be removed at the conclusion of their proceedings. *Reid*, 819 F.3d at 497-98. Data compiled for *Rodriguez II* reveals that many of

those detained have strong legal arguments to remain in the United States and ultimately win their cases. Detention Fact Sheet.

A substantial majority of those with a criminal history present no danger or flight risk and can be safely released on bond or other conditions of supervision, particularly because they have all served their criminal sentences *before* coming into ICE custody. *Id.* ICE continues to detain these immigrants, separating them from their U.S. citizen family members and the communities to which they have deep ties, all at a great cost to taxpayers. *Id.* DHS detains these individuals in jails and private facilities under prison-like conditions. *Id.* They wear jail uniforms and most commonly have "no contact" visits with family. *Warehoused and Forgotten, Immigrants Trapped in Our Shadow Private Prison System*, American Civil Liberties Union (June 2014). Secure alternatives to detention cost no more than $14 a day and have proven effective in ensuring that immigrants return to court. Detention Fact Sheet.

In essence, courts do not know what "reasonable length of time" is supposed to mean. Given varying interpretations of what is "reasonable," the unlikelihood of many immigrants' ability to file habeas petitions, and the "disastrous impact" of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous, a "reasonableness test" is destructive and detrimental to both individual and public interest. *Lora*, 804 F.3d at 614-15.

CONCLUSION

For the aforementioned reasons, this Court should reverse the Second Circuit's opinion in *Scott v. Secord* and overturn Ms. Secord's convictions.