

No. 1-2017

IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2017

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly applied the objective standard to determine if the Deputy had probable cause to arrest Petitioner; and
2. Whether a “reasonableness” standard to determine the time individuals mandatorily detained pending removal proceedings will receive a bail hearing adequately protects the due process rights of detainees.

TABLE OF CONTENTS

| | |
|--|----|
| QUESTIONS PRESENTED..... | 2 |
| TABLE OF AUTHORITIES..... | 4 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... | 6 |
| STATEMENT OF THE FACTS..... | 6 |
| SUMMARY OF THE ARGUMENT..... | 9 |
| ARGUMENT | |
| I. The Second Circuit incorrectly applied the objective standard for determining probable cause in Petitioner’s case when it ignored pertinent, available facts and improperly considered post-arrest discoveries..... | 11 |
| A. The Second Circuit erred by ignoring the available, undisputed fact that Petitioner was given permission to enter the property..... | 13 |
| B. The Second Circuit erred by considering facts discovered subsequent to Petitioner’s arrest in its probable cause analysis. | 16 |
| II. The “reasonableness” standard to determine the time individuals mandatorily detained pending removal proceedings will receive a bail hearing fails to adequately protect detainees’ due process rights..... | 17 |
| A. To avoid serious due process concerns, 8 U.S.C. § 1226(c) must be interpreted to require a bail hearing within a reasonable period of time..... | 18 |
| B. A bright-line temporal rule, as opposed to a “reasonableness” standard, ensures that individuals subject to mandatory detention receive a bail hearing within a reasonable period of time..... | 20 |
| 1. Applying a “reasonableness” standard leads to inconsistent determinations and results in arbitrary, prolonged detention..... | 22 |
| 2. A bright-line temporal rule eliminates the need for two hearings, thus, allowing the government to more quickly resolve pending removal cases.... | 25 |
| 3. Possible habeas corpus relief does not relieve the government of its due process violations..... | 26 |
| C. In this case, Petitioner’s detention has been unreasonably prolonged..... | 27 |
| CONCLUSION..... | 28 |

TABLE OF AUTHORITIES

United States Supreme Court Cases

| | |
|--|----------------|
| <i>Beck v. Ohio</i> , 379 U.S. 89 (1964)..... | 12, 16 |
| <i>Brinegar v. United States</i> , 338 U.S. 160 (1949)..... | 11 |
| <i>Clark v. Martinez</i> , 543 U.S. 371 (2005)..... | 19, 20, 22 |
| <i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)..... | 25 |
| <i>Denmore v. Kim</i> , 538 U.S. 510 (2003)..... | 19, 20, 21 |
| <i>Dunaway v. New York</i> , 442 U.S. 200 (1979)..... | 11 |
| <i>Florida v. Harris</i> , 133 S.Ct. 1050 (2013)..... | 12 |
| <i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992)..... | 18 |
| <i>Henry v. United States</i> , 361 U.S. 98 (1959)..... | 12, 13 |
| <i>Illinois v. Gates</i> , 462 U.S. 213 (1983)..... | 11, 14 |
| <i>INS v. St. Cyr.</i> , 533 U.S. 289 (2001)..... | 18 |
| <i>Jackson v. Indiana</i> , 406 U.S. 715 (1972)..... | 25 |
| <i>Johnson v. United States</i> , 333 U.S. 10 (1948)..... | 12 |
| <i>Jones v. United States</i> , 362 U.S. 257 (1960)..... | 11 |
| <i>Maryland v. Pringle</i> , 540 U.S. 366 (2003)..... | 13 |
| <i>McNeil v. Director, Patuxent Inst.</i> , 407 U.S. 245 (1972)..... | 26 |
| <i>Morrisette v. United States</i> , 342 U.S. 246 (1952)..... | 13 |
| <i>Reno v. Flores</i> , 507 U.S. 292 (1993)..... | 18 |
| <i>United States v. Ventresca</i> , 380 U.S. 102 (1965)..... | 11 |
| <i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)..... | 25 |
| <i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)..... | 18, 19, 20, 21 |

United States Court of Appeals Cases

| | |
|---|------------------|
| <i>Baptiste v. J.C. Penney Co.</i> , 147 F.3d 1252 (10th Cir. 1998)..... | 14 |
| <i>Diop v. ICE/Homeland Sec.</i> , 656 F.3d 221 (3d Cir. 2011)..... | 21 |
| <i>Gasho v. United States</i> , 39 F.3d 1420 (9th Cir. 1994)..... | 13, 15 |
| <i>Lora v. Shanahan</i> , 804 F.3d 601 (2d Cir. 2015)..... | 8, 9, 21, 22, 23 |
| <i>Ly v. Hansen</i> , 351 F.3d 263 (6th Cir. 2003)..... | 20, 24 |
| <i>Reid v. Donelan</i> , 819 F.3d 486 (1st Cir. 2016)..... | 21, 23, 24, 26 |
| <i>Rodriguez v. Robbins</i> , 804 F.3d 1060 (9th Cir. 2015)..... | 21 |
| <i>Sopo v. U.S. Att’y Gen.</i> , 825 F.3d 1199 (11th Cir. 2016)..... | 23, 24, 25, 27 |
| <i>United States v. Lopez</i> , 482 F.3d 1067 (9th Cir. 2007)..... | 13, 14, 15 |
| <i>United States v. Ortiz-Hernandez</i> , 427 F.3d 567 (9th Cir. 2005)..... | 14 |
| <i>Williams v. City of Alexander</i> , 772 F.3d 1307 (8th Cir. 2014)..... | 13 |

United States District Court Cases

| | |
|--|----|
| <i>Akinola v. Weber</i> , No. 09-3415, 2010 WL 376603 (D.N.J. Jan. 26, 2010)..... | 24 |
| <i>Gupta v. Sabol</i> , No. 1:11-CV-1081, 2011 WL 3897964 (M.D. Pa. Sept. 6, 2011)..... | 24 |
| <i>Jayasekara v. Warden</i> , No. 1:10-CV-1649, 2011 WL 31346 (M.D. Pa. Jan. 5, 2011)..... | 24 |
| <i>Luna-Aponte v. Holder</i> , 743 F. Supp. 2d 189 (W.D.N.Y. 2010)..... | 24 |

Constitutional Provisions

| | |
|----------------------------|-------|
| U.S. CONST. amend. IV..... | 6, 11 |
| U.S. CONST. amend. V..... | 6, 17 |

Statutes

| | |
|--|--------------------------------------|
| 8 U.S.C. § 1226(c) (2006)..... | 6, 8, 10, 18, 19, 20, 22, 23, 26, 27 |
| N.Y. Penal Law § 140.15 (McKinney 2010)..... | 6, 15 |

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The pertinent part of the Fifth Amendment to the United States Constitution, the Due Process Clause, provides: “No person shall . . . be deprived of . . . liberty . . . without due process of law.” U.S. CONST. amend. V.

8 U.S.C. § 1226(c) regarding the mandatory detention of aliens provides: “The Attorney General shall take into custody any alien who— . . . is deportable . . . on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year. . . .” 8 U.S.C. § 1226(c)(1)(C) (2006).

N.Y. Penal Law § 140.15 regarding criminal trespass provides: “A person is guilty of criminal trespass in the second degree when: 1. he or she knowingly enters or remains unlawfully in a dwelling” N.Y. Penal Law § 140.15 (McKinney 2010).

STATEMENT OF THE FACTS

This Court is being asked to reverse the United States Court of Appeals for the Second Circuit’s decision that upheld a finding of probable cause to justify a warrantless arrest and overturned its bright-line rule for determining the time at which mandatorily detained individuals pending removal proceedings must receive a bail hearing. *See Secord v. City of Angola*, 123 F.4th 1 (2d Cir. 2016).

Petitioner Laura Secord, a Canadian citizen, ran away from her abusive home at age sixteen and lived on the streets of Toronto. *Id.* at 8 (Atkinson, J., dissenting). While homeless, she lived largely alone, but she regularly met a group of friends at a shelter to play the game “Dungeons and Dragons.” *Id.* She later became close with online Dungeons and Dragons players who lived in the Buffalo, New York area and decided to enter the United States in 2013 to connect with these friends in person. *Id.* While in Buffalo, she did in fact connect with the Dungeons and Dragons players. *Id.* She also secured a place to live and obtained a job working at a local coffee shop. *Id.*

Petitioner’s first and only encounter with the law was in December 2015, when her friends decided to gather in a “spooky” location to play Dungeons and Dragons in celebration of the Winter Solstice. *Id.* One member of the group offered to host the gathering at his uncle’s cottage along Lake Erie in Angola. *Id.* at 8-9. He had been watching over his uncle’s cottage while his uncle was out of town. *Id.* at 9. On the way to the cottage, the group stopped to purchase snacks and costumes for their game. *Id.* When they arrived at the cottage, they entered through the front door using a key the cottage owner left for his nephew and lit candles because they did not know how to turn on the lights. *Id.* The group then put their costumes on and began playing their game. *Id.*

Petitioner and her companions ran through the cottage and hid after being startled by a loud, unexpected knock at the door. *Id.* They emerged when they realized the knocker was not an intruder, but rather a law enforcement officer. *Id.* Deputy PfiEFF was dispatched to the cottage after a resident of Angola reported “suspicious activity” in the cottage. *Id.* at 2. The only basis for the resident’s report was seeing lights on inside the cottage. *Id.* When the Deputy arrived at the cottage, he saw Petitioner and the other players in their costumes gathered around a table by

candlelight. *Id.* After knocking, he entered through the unlocked door and the group came out from hiding. *Id.* The Deputy ordered the group to the floor, and searched them for weapons and identification. *Id.* Petitioner had cash but no identification on her person. *Id.*

The Deputy and additional officers who were dispatched to the scene began questioning the individuals. *Id.* at 3. The group admitted that none of them lived in the cottage, but the cottage owner's nephew explained that he had permission to use his uncle's cottage while his uncle was out of town and that his uncle left him a spare key on the back patio. *Id.* Because the cottage owner's nephew was unsure of how to contact his uncle at that time, the individuals were all arrested and charged with criminal trespass in the second degree. *Id.* After Petitioner was arrested, her backpack was searched and law enforcement officials found a pair of brass knuckles. *Id.* Petitioner had carried the brass knuckles for protection since her time being homeless in Toronto. *Id.* at 8. She was subsequently charged with criminal possession of a deadly weapon in the fourth degree. *Id.* at 3. The others in the group were released, but Petitioner was forced to remain in custody due to her citizenship status. *Id.*

Petitioner was convicted on both the trespass and possession of a deadly weapon counts and served one year in prison. *Id.* at 3. While in prison, Petitioner filed a petition for a writ of habeas corpus arguing that her warrantless arrest was in violation of the Fourth Amendment. *Id.* Upon her release from prison, and while the habeas petition regarding her unlawful arrest was still pending, she was taken into Immigration and Customs Enforcement (ICE) custody pursuant to 8 U.S.C. § 1226(c). *Id.* at 3-4. She spent six months in ICE detention. *Id.* at 4. After six months passed, she filed another habeas petition arguing that her immigration detention beyond six months violated her Fifth Amendment due process rights. *Id.* Petitioner was ultimately released from ICE detention in accordance with the Second Circuit's decision in *Lora v.*

Shanahan, 804 F.3d 601 (2d Cir. 2015), which set a bright-line six-month limit for mandatory detention pending removal proceedings. *Id.*

Both of Petitioner's habeas petitions were eventually granted. *Id.* Accordingly, Petitioner was immediately released from ICE custody and both her convictions were overturned. *Id.* The City of Angola and ICE both appealed separately. *Id.* The Second Circuit joined the appeals and reversed the District Courts' decisions and remanded Petitioner back into ICE custody. *Id.*

SUMMARY OF THE ARGUMENT

The principles applied by the Second Circuit in its review of Ms. Secord's case conflict with the well-established precedent of its own jurisdiction and that of this Court, and would effectively eliminate individuals' Fourth Amendment right to be free from unreasonable seizures in the form of warrantless arrests, as well as individuals' Fifth Amendment due process right to be free from unreasonably prolonged detention.

The Fourth Amendment was enacted to protect individuals from unreasonable police interference and unsubstantiated charges of crime. The Framers of the United States Constitution did not take these concerns lightly, nor has this Court in interpreting the Fourth Amendment and its commands. It is well-established that warrantless arrests must be supported by probable cause. Probable cause is an objective standard, determined by evaluating all the facts and circumstances available to the law enforcement officer at the time of the arrest. Because probable cause must be particularized to the crime alleged, an officer must reasonably believe that all elements of a specific crime are met.

The Second Circuit did not apply the correct standard to determine whether the Deputy had probable cause to arrest Petitioner. Instead, it deviated from the traditional application of the objective standard in two ways: (1) it ignored the available and undisputed fact that Petitioner

had permission from the property owner's nephew to enter the property, and (2) it considered post-arrest discoveries in its evaluation of the totality of the circumstances. Because the Deputy could not have reasonably believed that all elements of trespass were met and determinations of probable cause must be made considering only those facts that were known to the Deputy at the time of the arrest, the Second Circuit erred in finding probable cause.

In addition to erring in its probable cause determination, the Second Circuit's decision to abandon the bright-line temporal rule for determining when an individual subject to mandatory detention must receive a bail hearing fails to protect Petitioner's and all other detainees' Fifth Amendment due process rights. The Due Process Clause of the Fifth Amendment protects individuals from unreasonably prolonged detention. In enacting 8 U.S.C. § 1226(c), Congress did not specify the specific time at which a detainee must be given an individualized bail hearing before an immigration judge. As such, some circuits have adopted a "reasonableness" standard for determining the time a § 1226(c) detainee will receive a bail hearing, while others have adopted a bright-line temporal rule.

The choice between a bright-line rule and a standard shapes the experience of individuals subject to mandatory detention. The jurisdictions that have adopted a "reasonableness" standard have seen inconsistent results where some detainees only spend a few months in detention before receiving a bail hearing, while others spend years in detention. Those individuals who spend an arbitrarily prolonged period of time in immigration detention not only suffer mentally, physically, and financially, but they have an exceptionally difficult time challenging removal. Considering the "reasonableness" standard results in the same factors being considered in two separate individualized proceedings and this Court has directed that six months is the presumptively reasonable period of time for detention in removal cases, this Court should reject

the “reasonableness” standard adopted by the Second Circuit. Instead, this Court should enforce a bright-line temporal rule where individuals subject to mandatory detention pending removal proceedings must be given an individualized bail hearing within six months, at the very minimum, into their detention.

ARGUMENT

I. The Second Circuit incorrectly applied the objective standard for determining probable cause in Petitioner’s case when it ignored pertinent, available facts and improperly considered post-arrest discoveries.

Under the Fourth Amendment, all individuals have the right to be “secure in their persons.” U.S. CONST. amend. IV. This Court has interpreted this right as a prohibition against unreasonable arrests, otherwise known as seizures of one’s own person. *Dunaway v. New York*, 442 U.S. 200, 207 (1979). The Fourth Amendment also provides that “no warrants shall issue, but upon probable cause.” U.S. CONST. amend. IV. This requirement that all warrantless arrests be supported by probable cause lies at the heart of the Fourth Amendment, *see Dunaway*, 442 U.S. 200, and exists to “safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

It is undisputed that there is a “strong preference[] for searches conducted pursuant to a warrant.” *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *see also Katz v. United States*, 389 U.S. 347, 346 (1967) (“Over and over again this Court has emphasized that . . . searches conducted . . . without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . .”) (citation omitted). In acknowledging the strong preference for warrants, this Court has indicated that “the resolution of doubtful or marginal cases [of probable cause] . . . should be largely determined by the preference to be accorded to warrants.” *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (citing *Jones v. United States*, 362 U.S. 257, 270 (1960));

see also Agnello v. United States, 269 U.S. 20, 33 (1925) (warrantless searches have been held unlawful “notwithstanding facts unquestionably showing probable cause”). Accordingly, in cases where the probable cause determination is a close call, a search conducted with a warrant should be upheld, while a warrantless search should more likely be rejected for lack of probable cause. *Id.*

In emphasizing the fundamentality of the probable cause requirement, this Court has stated the following constitutional standard: an arrest based on less than probable cause is always constitutionally unreasonable. *Henry v. United States*, 361 U.S. 98, 100-01 (1959). In explaining this standard, this Court has described probable cause as a “practical and commonsensical standard” that considers “the totality of the circumstances.” *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). This common-sense determination is an objective one, based on inferences that can be drawn by reasonable individuals. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

When the validity of a warrantless arrest is challenged, a court must determine whether “the facts available to the officers *at the moment* of the arrest would ‘warrant a man of reasonable caution in the belief’ that an offense has been committed.” *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (emphasis added). The Second Circuit incorrectly applied the objective standard to determine whether the Deputy had probable cause to arrest Petitioner because (1) it ignored available, undisputed facts which negated an essential element of the alleged crime committed, and (2) it considered facts discovered subsequent to Petitioner’s arrest in its analysis. The standard and reasoning applied by the Second Circuit would allow law enforcement officials to make arrests based on information amounting to less than true probable cause and, thus, would lead to an unfair and intangible broadening of probable cause that is inconsistent with the

underlying goals of the Fourth Amendment. Accordingly, this Court should reverse the Second Circuit's finding of probable cause.

A. The Second Circuit erred by ignoring the available, undisputed fact that Petitioner was given permission to enter the property.

By finding that probable cause existed to arrest Petitioner for trespass even though there was available evidence that negated the elements of the alleged crime committed, the Second Circuit applied the incorrect standard of probable cause. The focus of the probable cause analysis is the existence of “a reasonable ground for belief of guilt” and such “belief of guilt must be particularized with respect to the person to be . . . seized.” *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003).

To demonstrate probable cause, “there must be probable cause for all elements of the crime.” *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014). “[M]ere suspicion, common rumor, or *even strong reason to suspect*” a crime is not enough. *Henry v. United States*, 361 U.S. 98, 101 (1959) (emphasis added). This Court has emphasized the fundamental principle “that a person is not criminally responsible unless criminal intent accompanies the wrongful act.” *Gasho v. United States*, 39 F.3d 1420, 1429 (9th Cir. 1994) (citing *Morrisette v. United States*, 342 U.S. 246, 251 (1952)). Therefore, “when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred.” *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007) (quoting *Gasho*, 39 F.3d at 1429).

Without probable cause for the requisite specific intent of the alleged crime, probable cause cannot be found to justify a warrantless arrest. In *Gasho*, the defendants were arrested for attempting to forcibly remove property and frustrate a lawful seizure. *Gasho*, 39 F.3d at 1429. The Ninth Circuit stated that “specific intent to frustrate seizure” required, at a minimum,

knowledge that the goods were seized. *Id.* Because the government had not actually taken dominion of the goods, nor informed the defendants that they were being taken, the defendants did not have notice or knowledge of their seizure. *Id.* at 1429-30. Therefore, it was “unreasonable to believe that [defendants] knew the [goods] were seized.” *Id.* at 1430. Absent a reasonable belief that defendants had the minimal knowledge necessary to possess the requisite specific intent of the crime, probable cause was not sufficient to justify the warrantless arrest. *Id.*

Aside from the requirement that probable cause support the specific intent element of the offense, law enforcement officials “may not ignore available and undisputed facts,” *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998), nor can they “disregard facts tending to dissipate probable cause.” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007); *see also Illinois v. Gates*, 462 U.S. at 238 (reiterating that a magistrate [or law enforcement official] must “make a practical, common-sense decision” based on “all the circumstances . . . before him.”). Thus, even if the factors known to law enforcement officials initially support a finding of probable cause, when additional information indicates that there is “less than a fair probability” that a crime has occurred, a law enforcement official must not execute the arrest. *Lopez*, 482 F.3d at 1072 (“[E]vidence which may support, or incline toward, a finding of probable cause can, of course, be vitiated by countervailing evidence.”); *see also United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005) (Probable cause “may be dissipated if the investigating officer later learns additional information that the defendant has not engaged . . . in criminal activity. A person may not be arrested . . . if previously established probable cause has dissipated.”).

In *Lopez*, the police initially had probable cause to arrest the defendant for an attempted shooting based on his similarities to a physical description of the suspect. *Lopez*, 482 F.3d at 1073. However, the Ninth Circuit held that after learning of “substantial evidence . . . tending to

show that the defendant was not the person responsible” for the crime, the police did not have probable cause to believe that the defendant was the attempted shooter. *Id.* at 1074. Therefore, the warrantless arrest was unjustified. *Id.* at 1075.

Although the Second Circuit claimed to apply the objective standard for determining probable cause in Petitioner’s case, it did so incorrectly. The Second Circuit erred by upholding probable cause for the arrest absent probable cause for each element of trespass. The applicable trespass statute provides that “a person is guilty of criminal trespass in the second degree when: he or she knowingly enters or remains unlawfully in a dwelling.” N.Y. Penal Law § 140.15 (McKinney 2010). Accordingly, to validly arrest Petitioner without a warrant, the Deputy would have needed to show probable cause for both elements of the crime: (1) that Petitioner’s entry was unlawful and (2) that Petitioner had knowledge of that fact.

Similar to the law enforcement officers in *Gasho* who could not have reasonably believed that the specific intent element of the offense was met, the Deputy could not have reasonably believed that Petitioner knowingly entered the cottage unlawfully. While the Deputy may have initially suspected that Petitioner had unlawfully entered the property based on the tip from the local resident, he had no reason to believe that she had knowledge of her unlawful entry since he was explicitly told that the nephew of the property owner “had permission [from his uncle] to use the cottage.” Petitioner’s belief that she had permission to enter the property was reasonable since the property owner’s nephew told the group his uncle would be “cool” with him hosting the gathering at the cottage and let the group into the cottage through the front door using a key. Just as the additional evidence in *Lopez* tended dissipate probable cause by showing that the defendant was not the correct suspect, this additional information tended to dissipate probable cause by showing that the specific intent element of trespass was not met.

Overall, both the Deputy and the Second Circuit ignored the undisputed fact that Petitioner was invited onto the property by the property owner's nephew, and therefore could not have knowingly committed criminal trespass. The refusal of the Second Circuit to consider this undisputed fact and give it due weight among the totality of the circumstances was erroneous.

B. The Second Circuit erred by considering facts discovered subsequent to Petitioner's arrest in its probable cause analysis.

The Second Circuit's evaluation of probable cause was also erroneous because it considered and relied heavily upon facts that were not available to the Deputy at the time of Petitioner's arrest. In order to justify a warrantless arrest, probable cause must be determined at the time the arrest was made. *Beck*, 379 U.S. at 96 ("When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers *at the moment of the arrest* would 'warrant a man of reasonable caution in the belief' that an offense has been committed.") (emphasis added). The importance of evaluating only factors known at the time of the arrest, rather than including subsequently discovered facts, was emphasized by this Court in *Beck*: "[a]rrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the *far less reliable* procedure of an after-the-event justification for arrest or search, too likely to be subtly influenced by familiar shortcomings of hindsight judgment." *Id.* Due to this substantial and unfair risk of hindsight bias, any facts or justifications discovered subsequent to an arrest should not be considered in determining whether an officer had probable cause to make an arrest. *Id.*

The Second Circuit inappropriately considered facts discovered subsequent to Petitioner's arrest to support a finding of probable cause. In its discussion of the "numerous circumstances that supported Deputy Pfieff's probable cause determination," the Second Circuit included both the fact that the property owner "*later* admitted that [his nephew] did not have his

permission” to enter the property, as well as “the discovery that [they] were harboring an illegal alien on the property.” Neither of these facts were known to the Deputy at the time of Petitioner’s arrest. In fact, the Second Circuit conceded that the Deputy did not discover the property owner’s lack of consent until after Petitioner’s arrest and that Petitioner’s citizenship status was not confirmed at the time of the arrest.

These two facts were not insignificant in the Second Circuit’s probable cause analysis. Not only were they discussed among the “many circumstances” supporting probable cause, but the Second Circuit claimed the discovery that Petitioner was an illegal alien present on the property was “perhaps [the] most critical” factor, which ultimately led to the conclusion that probable cause existed. Because the Deputy did not know at the time he arrested Petitioner that the property owner did not give consent for Petitioner to enter the property or that Petitioner was an undocumented alien, these facts could not have informed his evaluation of probable cause. The inclusion of such facts by the Second Circuit is wholly inconsistent with this Court’s well-established, objective test for determining probable cause. As such, this Court should reverse the Second Circuit’s finding of probable cause.

II. The “reasonableness” standard to determine the time individuals mandatorily detained pending removal proceedings will receive a bail hearing fails to protect detainees’ due process rights.

The Second Circuit’s decision to abandon the bright-line temporal rule to determine when an individual subject to mandatory detention pending removal proceedings must receive a bail hearing—in favor of a case-by-case, “reasonableness” balancing test approach—fails to adequately protect the due process rights detainees are entitled to.

The Due Process Clause of the Fifth Amendment states that “[n]o person shall . . . be deprived of . . . liberty . . . without due process of law.” U.S. CONST. amend. V. Freedom from

detention is irrefutably a liberty interest protected by the Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (recognizing that a noncitizen’s “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects”) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Undocumented aliens facing removal proceedings are entitled to due process protection. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”). Undocumented aliens are afforded such due process protection because once an individual enters the United States, they are considered a “person” within the meaning of the Fifth Amendment. *See Zadvydas*, 533 U.S. at 693 (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”). In order to adequately guarantee Petitioner the due process protection she is entitled to—and all individuals subject to mandatory detention pending removal proceedings—this Court should reject the “reasonableness” standard adopted by the Second Circuit and instead adopt a bright-line temporal rule for when mandatorily detained individuals must receive a bail hearing.

A. To avoid serious due process concerns, 8 U.S.C. § 1226(c) must be interpreted to require a bail hearing within a reasonable period of time.

8 U.S.C. § 1226(c) cannot be interpreted to authorize mandatory detention of undocumented aliens with no limit on the duration of imprisonment. The canon of constitutional avoidance instructs that when construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is “fairly possible,” the Court is obligated to construe the statute to avoid such problems. *INS v. St. Cyr.*, 533 U.S. 289, 300 (2001).

A statute permitting indefinite detention of an undocumented alien raises serious constitutional concerns. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In *Zadvydas*, this Court employed the canon of constitutional avoidance in interpreting the post-removal detention statute (8 U.S.C. § 1231) and held that it contains an implicit reasonableness limitation. *Id.* at 699. In recognizing that bright-line rules provide clear guidance and lead to “uniform administration in the federal courts,” this Court set six months as a presumptively reasonable period for detention. *Id.* at 701. Six months was significant for purposes of due process analysis because “Congress previously doubted the constitutionality of detention for more than six months.” *Id.*; *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005) (extending *Zadvydas* to inadmissible noncitizens).

Two years after *Zadvydas*, this Court examined the statute at issue in this case, 8 U.S.C. § 1226(c), which mandates detention during removal proceedings for a class of deportable or inadmissible aliens who have been convicted of one or more specified crimes. *See Denmore v. Kim*, 538 U.S. 510, 531 (2003). In upholding the constitutionality of the statute, this Court emphasized that, for detention under 8 U.S.C. § 1226(c) to be reasonable, it must be for a brief period of time. *Id.* at 528-29 (distinguishing the six-month detention at issue in *Denmore* from the apparent indefinite detention in *Zadvydas* by recognizing how “the detention here is of a much shorter duration”). At the time *Denmore* was decided (2003), the Court emphasized that detention “last[ed] roughly a month and a half in the vast majority of cases in which [mandatory detention was] invoked, and about five months in the minority of cases in which the alien cho[se] to appeal.” *Id.* at 529-30. The brevity of mandatory detention pending removal proceedings was essential to this Court because “[w]ere 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 proceedings, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.” *Id.* at 532-33 (Kennedy, J., concurring).

B. A bright-line temporal rule, as opposed to a “reasonableness” standard, ensures that individuals subject to mandatory detention receive a bail hearing within a reasonable period of time.

While *Zadvydas* instructs that 8 U.S.C. § 1226(c) includes a “reasonable” limit on the amount of time that a person can be subject to mandatory detention pending removal proceedings, Congress did not expressly provide the specific timing for when a detainee must receive an individualized bail hearing before an immigration judge. *See* 8 U.S.C. § 1226(c)(2) (“The Attorney General may release an alien . . . [if] the alien will not pose a danger to the safety of others or of property and is likely to appear for any scheduled proceeding.”). Consequently, pre-removal detentions have ranged from a period of months to a period of years before detainees have had the opportunity to challenge his or her detention at an individualized bail hearing. *See, e.g., Denmore*, 538 U.S. 510, 531 (2003) (six months); *Ly v. Hansen*, 351 F.3d 263, 265 (6th Cir. 2003) (one year and five months); *Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1220 (11th Cir. 2016) (three years and six months). These cases illustrate that mandatory detention pending removal proceedings can—and indeed do—last well beyond the one-and-a-half-month to six-month range emphasized in *Denmore* and the six-month “reasonableness” presumption articulated in *Zadvydas* and *Clark*.

While the circuit courts agree that mandatory detention pending removal proceedings must not be “unreasonably” prolonged, the circuit courts remain split on how to determine when a § 1226(c) detainee is entitled to an individualized bail hearing before an immigration judge. The first approach, adopted by the Third, Sixth, First, and Eleventh Circuits, determines whether detention of individuals has become unreasonable based on the factual circumstances of each

case. See *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003); *Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3d Cir. 2011); *Reid v. Donelan*, 819 F.3d 486, 498 (1st Cir. 2016); *Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1215 (11th Cir. 2016). Under this approach, detainees are required to file a petition for a writ of habeas corpus in order to challenge their detention. *Sopo*, 825 F.3d at 1219. After a detainee has filed his or her habeas petition, the district court must then adjudicate the petition to determine whether the individual’s detention has crossed the line from “reasonable” to “unreasonable,” thus entitling the detainee to an individualized bail hearing before an immigration judge. *Id.* In adjudicating the habeas petition, the district court must balance the government’s interest in detention against the detainee’s liberty interest. *Id.*

In contrast, the second approach, adopted by the Ninth Circuit and previously by the Second Circuit, establishes a bright-line temporal limit on mandatory detention—six months—after which time a detainee is entitled to an individualized bail hearing before an immigration judge. See *Rodriguez v. Robbins*, 804 F.3d 1060, 1079 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). At the bail hearing, the government must prove by clear and convincing evidence that continued detention is warranted by dangerousness or risk of flight. *Rodriguez*, 804 F.3d at 1087. The Second Circuit previously adopted the bright-line six-month rule because the court found that “*Zadvydas* and *Denmore*, taken together, suggest that the preferred approach for avoiding due process concerns in [the] area [of alien detention] is to establish a presumptively reasonable six-month period of detention.” *Lora*, 804 F.3d at 614. Additionally, the Second Circuit believed the bright-line six-month rule would best serve the interests of the circuit because of the “. . . pervasive confusion over what constitutes a ‘reasonable’ length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of

immigrations who are neither a flight risk nor dangerous” *Id.* Ultimately, the Second Circuit adopted a bright-line six-month rule to mitigate the “real-life consequences for immigrants and their families” that “endless months of detention, often caused by nothing more than bureaucratic backlog,” creates. *Id.* at 616.

As recognized by the Second Circuit in *Lora*, the choice of a bright-line rule or standard shapes the experience of individuals subject to mandatory detention. The Second Circuit previously admitted that a bright-line rule, as opposed to a “reasonableness” standard, “ensures that similarly situated detainees receive similar treatment” and “avoids the 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.” *Id.* at 615. Ultimately, a bright-line rule is necessary to enforce this Court’s instruction that, under the canon of constitutional avoidance, courts should apply a definite standard that avoids serious constitutional problems altogether. *See Clark v. Martinez*, 543 U.S. 371, 384 (2005) (noting that the Court is not free to interpret statutes as becoming inoperative when they approach constitutional limits). Simply adopting a “reasonableness” standard, without definitive bright-line guidance, amounts to interpreting 8 U.S.C. § 1226(c) to “authorize detention until it approaches constitutional limits,” which is exactly the approach this Court rejected in *Clark*. Thus, this Court should reject the Third, Sixth, First, Eleventh, and Second Circuits’ “reasonableness” standard approach and instead adopt the bright-line temporal rule employed by the Ninth Circuit and previously by the Second Circuit.

1. Applying a “reasonableness” standard leads to inconsistent determinations and results in arbitrary, prolonged detention.

Jurisdictions that have employed a case-by-case, multifactor balancing test in

habeas proceedings to test the reasonableness of an individual's mandatory detention have produced inconsistent results that exacerbate, rather than resolve, due process concerns. District courts that have employed the "reasonableness" standard have been instructed by their respective circuit courts to evaluate various factors, including: (1) the total length of time of detention; (2) the likely duration of future detention; (3) the likelihood that the proceedings will end in a final removal order; (4) whether any delay in the proceedings can be attributed to the government or the detainee; and (5) a comparison between the length and nature of the current detention and the detention in prison for the crime that rendered the detainee removable or inadmissible. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1217-19 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016).

The standard of "reasonableness" as determined by the above-mentioned factors provides no uniform guidance as to when a bail hearing before an immigration judge is required. As such, courts have inconsistently applied the factors. *See Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part) ("I must acknowledge the mounting evidence demonstrating that, in the specific context of § 1226(c) detention and despite the best efforts of judges, courts have been unable to apply flexible reasonableness standards in a manner that generates predictable, consistent, and fair outcomes."); *Reid*, 819 F.3d at 497 (admitting that the case-by-case approach has "resulted in wildly inconsistent determinations"). The Second Circuit even acknowledged that "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis weighs . . . in favor of adopting an approach that affords more certainty and predictability." *Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015).

These inconsistent results are a consequence of district court judges interpreting similar facts in different ways when adjudicating habeas petitions. For instance, some judges have taken the position that continued detention beyond six months to allow a *detainee* to pursue an appeal does not justify denying a request for a bail hearing, while other judges have taken the opposite position. *Compare Gupta v. Sabol*, No. 1:11-CV-1081, 2011 WL 3897964, 3 (M.D. Pa. Sept. 6, 2011) (finding a twenty-month detention unreasonably prolonged even though it was caused by the detainee's two appeals), *with Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 197 (W.D.N.Y. 2010) (finding a thirty-nine-month detention not unreasonably prolonged because the detainee's appeal was pending).

Additionally, some judges have taken the position that continued detention beyond six months to allow the *government* to pursue an appeal renders an individual's detention unreasonably prolonged, while other judges have taken the opposite position. *Compare Akinola v. Weber*, No. 09-3415, 2010 WL 376603, at *5 (D.N.J. Jan. 26, 2010) (finding a seventeen-month detention unreasonably prolonged due to the government's pending appeal), *with Jayasekara v. Warden*, No. 1:10-CV-1649, 2011 WL 31346, 5 (M.D. Pa. Jan. 5, 2011) (finding a sixteen-month detention not unreasonably prolonged since the government's choice to appeal was reasonable).

To add even further inconsistency and complication, the jurisdictions who have adopted a "reasonableness" standard have noted that the factors cited above are not exhaustive and that there may be "other factors that bear on the reasonableness of categorical detention." *See Reid*, 819 F.3d at 501; *Sopo*, 825 F.3d at 1218. For instance, some courts have expressly expanded the "reasonable" period for detention to accommodate the size of their immigration dockets. *See, e.g., Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) (admitting that "[a] bright-line time

limitation . . . would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant." Due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Accordingly, the constitutional reasonableness of spending a prolonged period of time in an immigration detention facility, without being deemed dangerous or a flight risk, cannot depend on the caseload of any particular judge or jurisdiction.

Without clarifying to some degree of certainty what constitutes "unreasonable detention," district courts adjudicating habeas petitions will continue to apply inconsistent, unpredictable, and seemingly arbitrary standards. "[T]he touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The bright-line temporal rule approach, and not the case-by-case, "reasonableness" balancing test approach, is the only way to ensure individuals do not experience arbitrary, prolonged detention.

2. A bright-line temporal rule eliminates the need for two hearings, thus, allowing the government to more quickly resolve pending removal cases.

While a "reasonableness" standard affords the government desired flexibility, having to challenge detainees' habeas petitions impedes the government's ability to quickly resolve pending removal cases, which further exacerbates due process concerns. A bright-line temporal rule provides comparable flexibility since undocumented aliens are not automatically released after six months. *Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part). Rather, they are afforded bail hearings where an immigration judge makes individualized

determinations whether continued detention is justified on grounds of dangerousness or risk of flight. *Id.* at 1226-27.

Most—if not all—of the factors circuit courts have instructed district courts to consider when applying the “reasonableness” standard will be considered by an immigration judge deciding whether to release a § 1226(c) detainee on bail. *Id.* at 1227. Thus, the “reasonableness” standard results in the consideration of the same factors in two separate individualized proceedings: once when determining whether a detainee is entitled to a bail hearing in the first place and once again when deciding, after such a hearing, whether to release the detainee on bail. *See Reid*, 819 F.3d at 498 (“[I]t is . . . likely that the evidence and arguments presented in a ‘reasonableness’ hearing before a federal court are likely to overlap at the margins with the evidence and arguments presented at a bond hearing before an immigration court.”). By eliminating the need for two hearings, a bright-line temporal rule allows the government to redirect its attention back to quickly resolving pending removal cases. Considering it naturally follows that the quicker the government can resolve pending removal cases, the sooner individuals will be released from immigration detention, a bright-line temporal rule better ensures fidelity to due process principles.

3. Possible habeas corpus relief does not relieve the government of its due process violations.

The option to file a petition for a writ of habeas corpus does not provide an adequate procedural system for safeguarding detainees’ due process rights. Due process requires an administrative process to protect against unreasonable detention, notwithstanding the availability of habeas corpus review to challenge such detention. *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 257 (1972) (“It is elementary that there is a denial of due process when a person is committed or . . . held without a hearing and opportunity to be heard.”).

An alternative procedure to habeas corpus review is especially needed in the case of mandatorily detained undocumented aliens since many detainees are unrepresented, unfamiliar with the American legal system, and do not speak the English language and, thus, are poorly suited to navigate the complicated procedures of a habeas petition. *See Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1226 (11th Cir. 2016) (Pryor, J., concurring in part and dissenting in part) (“[C]larity and predictability is particularly critical in the immigration context, where detainees frequently lack knowledge of the American court system; the resources, financial and otherwise, to obtain an attorney; and the language skills required to navigate the legal thicket.”) (internal quotations omitted). Since a “reasonableness” standard only affords detainees possible relief through the habeas corpus process, this Court must adopt a bright-line temporal rule to protect the due process rights of the substantial number of detainees who cannot realistically seek habeas relief or succeed in a habeas petition.

C. In this case, Petitioner’s detention has been unreasonably prolonged.

Petitioner is neither a danger to the community nor a flight risk and, thus, her continued detention violates her due process rights. In order to keep Petitioner in detention without violating her due process rights, the government must show that she is either a danger to the community or a flight risk. *See* 8 U.S.C. 1226(c) (“The Attorney General may release an alien . . . [if] the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.”).

Petitioner is not a danger to the community—she had never been in trouble with the law prior to this case. In terms of her trespass conviction, she was in the cottage under the assumption that the owner had given his nephew permission to host friends for a gathering. This assumption was reasonable since the cottage owner’s nephew specifically said that his uncle

would be “cool” with the group coming over and produced a key to the cottage. In terms of the conviction for criminal possession of a dangerous weapon, Petitioner possessed the brass knuckles for protection while she was a young woman alone and homeless on the streets in Toronto. There is no evidence that Petitioner had ever used the brass knuckles or was planning to use them. Ultimately, neither the trespass nor brass knuckles convictions demonstrate that Petitioner is a danger to the community.

Petitioner is also not a flight risk. Prior to the above two mentioned convictions, she had been living in Buffalo, New York for two years. During those two years in Buffalo, she secured housing for herself, maintained employment at a local coffee shop, and connected with a group of friends who share a similar interest in the game Dungeons and Dragons. Considering her lack of a dangerous disposition and her strong ties to the community, continued detention violates her due process rights.

CONCLUSION

The Second Circuit applied the incorrect standard for determining whether the Deputy had probable cause to arrest Petitioner for trespass when it (1) ignored available, undisputed facts which explicitly vitiated the elements of the alleged offense committed, and (2) included hindsight discoveries in its analysis. Additionally, the Second Circuit’s decision to abandon the bright-line temporal rule for when an individual subject to mandatory detention must receive a bail hearing—in favor of a “reasonableness” standard—fails to adequately protect the due process rights of detainees. For the foregoing reasons, this Court should reverse the decision of the Second Circuit.

Respectfully submitted,

Team 3
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