

No. 1-2017

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**The Supreme Court of the United States**

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Laura Secord,  
*Petitioner,*

v.

City of Angola, et al.,  
*Respondents.*

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT,**

**Case Nos. 1-2017 & 2-2017  
(Consolidated)**

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**BRIEF FOR THE PETITIONER**

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**Team 9**

### **QUESTIONS PRESENTED**

1. Whether the Second Circuit erred in determining a standard for probable cause when they did not consider whether there was evidence of specific elements of criminal trespassing in the second degree particularized to the suspect.
2. Whether the Due Process Clause of the Constitution prohibits ICE from detaining aliens for longer than six months without first providing an individualized bond determination.

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## **STATEMENT OF THE FACTS**

Secord is asking this Court to reverse a decision of the Second Circuit Court of Appeals which found that (1) using purely a totality of the circumstances approach, probable cause existed to arrest her for criminal trespassing in the second degree and (2) Due Process does not require that aliens being held pending removal proceedings receive a bail hearing if their detention lasts longer than six months.

Ms. Secord is a Canadian native of Uzbek descent. R. at 8. At age sixteen, Secord had run away from Toronto and was living on the streets and homeless. *Id.* Her only friends or family consisted of a group of Dungeons and Dragons (D&D) players that lived in the Buffalo area whom with she communicated online. *Id.* In 2013, she immigrated to the United States bringing with her brass knuckles which were imperative to her survival while she was homeless. *Id.* Once in the United States, Secord connected with the online D&D community, found stable employment, and lived peacefully in the Buffalo area. *Id.*

In December 2015, after two years of being in the United States, Secord and a group of a half dozen D&D players decided to mark the Winter Solstice by playing a game—in full costume—in a cottage owned by the uncle of James Fitzgibbons, one of the players. R. at 2-3, 8-9. Arriving at the condo, Fitzgibbons assured Secord and other members of the group that they were allowed to be at the cottage as long as they did not make a mess. R. at 9. Fitzgibbons used a key to enter the cottage's front door, set up some candles and the game, and even provided snacks for his friends. *Id.* After hours of playing D&D late into the night in just the low flicker of candlelight, the players heard a loud baging on the front door. *Id.* "Scared out of their wits," Secord and the other players ran and hid, fearful of a "diabolical attacker". *Id.* Realizing it was in fact a police officer, the players quickly and voluntarily exited their hiding places to approach the officer and

answer any questions he may have had. *Id.* Although the officer had direct line of sight to see the framed photographs of Fitzgibbons and his family, the officer still interrogated Fitzgibbons and the other players. *Id.* Fitzgibbons informed the officer that he was the nephew of the owner of the cottage and showed him his key implying his permission to use the cottage, but the officer did not believe him and continued to arrest and search the players. *Id.* Although the other players were released on their own recognizance, Secord remained in custody on account of her immigration status. She was later found guilty of trespassing and possession of brass knuckles and sentenced to one year in prison. *Id.*

While in Erie County Correctional Facility, Secord received legal assistance from the Criminal Defense Legal Clinic at the University of Buffalo, who filed two habeas corpus petitions on her behalf. R. at 3-4. The first petition argued that she was arrested without probable cause in violation of her Fourth Amendment rights. R. at 3. While that petition was pending Secord's sentence ended, and she was transferred into the custody of Immigrations and Customs Enforcement (ICE) to be held pending her deportation proceedings. R. at 3-4. Secord was held in ICE custody for six months until the law students filed the second habeas petition, this time arguing that Secord's prolonged detention violated Due Process and that she was entitled to a bail hearing. R. at 4.

The petitions were heard by different judges and both were granted. R. at 4. The District Court determined the police officer did not have probable cause to arrest Secord due to the lack of evidence suggesting the players were entering the cottage against the true owner's will. R. at 6. After this determination, Secord was released from ICE custody while the City of Angola and ICE both appealed. R. at 4. The appeals were joined for reasons of judicial economy, and the Second Circuit reversed both determinations of the District Court in a split decision. *Id.*

Considering the probable cause issue, the Second Circuit reversed the lower court's decision as an "impossible standard" would be set if officers were required to have "direct, affirmative proof of intent." R. at 7. Applying strictly a totality of the circumstances standard, the Second Circuit considered the report of suspicious activity, costumes, and other activity as enough to have probable cause that Secord was criminally trespassing in the second degree. *Id.* Regarding her mandatory release, Secord was remanded to the custody of ICE with instructions that she was entitled to a bail hearing within "a reasonable time given the particular circumstances," even though no judge was even available to hold a bail hearing until at least eleven months after she was first detained. R. at 6. She remains in ICE custody pending this appeal.<sup>1</sup> This Court granted Ms. Secord's petition for a writ of certiorari on Feb. 20, 2017.

### **SUMMARY OF THE ARGUMENT**

The Second Circuit incorrectly reversed the District Court's finding when applied a strict totality of the circumstances standard to determine whether the police officer had probable cause to arrest Secord. To make a warrantless arrest, an arresting officer must have probable cause that an individual is engaged in wrongdoing. Probable cause is a fluid, common sense concept where the court considers the totality of the circumstances to determine if the officer had a reasonable suspicion that the suspect committed a crime. Along with the totality of the circumstances, the court must consider whether there was probable cause for all the elements of the crime including the mens rea element. The court must also look to whether the officer had evidence of probable cause for each element of the particular crime the suspect was arrested for. In the final part of the

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<sup>1</sup> It is unclear from the record how much time has elapsed since Secord was remanded to ICE custody. Secord was arrested on Dec. 21, 2015 and spent one year in City Prison - through at least Dec. 21, 2016. R. at 1. She then spent six months in ICE custody before her Habeas petition was granted - through at least June 21, 2017. R. at 4. She was sent back to ICE custody following the Second Circuit's decision which, according to the Supreme Court's order granting certiorari (dated Feb. 20, 2017), was sometime in 2016. R. at 11 ("Case below: 123 F.4th 1 (2nd Cir. 2016)").



totality of the circumstances test, the court must consider whether the officer conducted a reasonably thorough investigation to support the probable cause used to arrest the suspect. The Second Circuit considered the totality of the circumstances, but did not consider the above factors mentioned. The court did apply the correct standard when they did not consider whether the officer had probable cause for the knowing element of trespassing in the second degree. Also, the court was incorrect when they did not consider whether the officer had evidence of each of the elements. Had the court considered the evidence before the officer at the time of arrest, the court would clearly see there was not probable cause that would satisfy the knowing element of trespassing. Finally, the court did not consider whether the officer conducted a reasonably thorough investigation prior to arresting Secord. Without considering each of these factors, the holding must be reversed as the incorrect standard was applied.

While the Second Circuit did not apply the factors above, even if they were considered, the Second Circuit's decision must still be reversed as the court failed to consider whether probable cause for criminally trespassing in the second degree existed particular to Secord, thus did not apply the correct standard. Once the court, considering all of the evidence, determines probable cause did exist for each element of the crime, the court must then determine if the probable cause was particularized to the arrested person. In order to arrest someone, the officers must have probable cause that the specific person they are arresting is the one that committed the crime in question. The arresting officers could not have had probable cause that Secord, particularly, committed the crime of criminal trespassing in the second degree as there was no evidence that she knowingly entered the dwelling unlawfully. Not considering this factor, the Second Circuit's decision must be reversed and the correct standard was not applied.

Should the Court decide that probable cause did exist for Secord's arrest, it must then address the question of whether her continued detention by ICE violates her constitutional right to due process. The Second Circuit incorrectly reversed its own precedent when it held - primarily for policy reasons - that due process did not require ICE to provide Secord with a bond hearing after her detention passed the six-month mark. The right to be free from bodily restraint is one of the basic liberties the Constitution protects, yet Secord has been confined for over six months and remains in detention, that is supposed to be non-punitive, with no end in sight.

Because a potentially indefinite detention would raise serious constitutional questions, the Court has interpreted provisions of the Immigration and Naturalization Act (INA) the Court that seem to authorize indefinite detention as containing an inherent limitation. Secord is asking the Court to apply a similar bright-line rule to §1226(c), which requires detention of aliens convicted of certain crimes during their removal proceedings. Because the Court has previously held that aliens are entitled to a bond hearing with six-months of a removal order being entered, applying the same bright-line rule in the present case would promote a consistent application of the INA.

Extending the Court's prior holdings applying a bright-line rule in the immigration detention context is necessary to fully avoid the constitutional question presented by a statute that authorizes indefinite detentions. Should the court hold that the statute requires a case-by-case determination of the reasonableness of an alien's detention before a bond hearing is required, the district courts will essentially be answering the constitutional question on an as-applied basis. A ruling in Secord's favor will not guarantee her release from ICE custody; it will merely guarantee her a right to a hearing, at which point the government may present evidence that she is a flight risk or presents a danger to the community. However, as the court below recognized the INS "simply could not prepare a case to present to the immigration judge about Secord's dangerousness

or flight risk.” R. at 6. Therefore, this Court should reverse the decision of the Second Circuit and hold that detentions under §1226(c) are subject to a six-month limitation, after which the detainee is entitled to an individualized bond determination.

## **ARGUMENT**

### **I. THE SECOND CIRCUIT DID NOT APPLY THE CORRECT STANDARD IN DETERMINING IF THERE WAS PROBABLE CAUSE TO ARREST SECORD FOR CRIMINAL TRESPASS IN THE SECOND DEGREE.**

To make an arrest without a warrant, an officer must have probable cause that a crime is being committed or about to be committed. In determining what probable cause is, courts have long held it to be a fluid concept easily defined as whether the facts in the certain scenarios would cause a reasonable or prudent person to believe a crime was committed. In determining if probable cause exists, the court must use a totality of the circumstances test including the consideration of whether there was probable cause for each element of the crime, whether the officer had at least some evidence supporting that probable cause, and whether the officer conducted a reasonably thorough investigation prior to arresting an individual. If the court determines probable cause exists, the court must next determine whether the existing probable cause is particular to the person being arrested. Without the Second Circuit considering all of the factors and whether the probable cause was particularized to Secord, the wrong standard was applied and their decision must be reversed.

- A. A. This court should reverse the second circuit’s decision because the circuit court applied the incorrect standard in determining the officers had probable cause to arrest Secord without a warrant.

The Fourth Amendment right to be free from unreasonable searches and seizures requires an arrest be based on probable cause. *Lambert v. City of Dumas*, 187 F.3d 931, 935 (8th Cir. 1999); *see also Terry v. Ohio*, 392 U.S. 1 (1968) (holding that in construing the Fourth Amendment’s

search and seizure provision, when a law enforcement officer accosts and restrains a person's freedom he has seized that person). Probable cause is a practical, common sense, nontechnical standard that considers the totality of the circumstances. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *see also Maryland v. Pringle*, 540 U.S. 336 (2003). However, there is no precise definition of what constitutes probable cause; rather, it depends on the facts and circumstances within the arresting officers' knowledge at the moment the warrantless arrest was made. *Beck v. Ohio*, 379 U.S. 89 (1964). Those facts must warrant a prudent man to believe the arrestee committed a crime. *Id.* This requires that when an officer makes a warrantless arrest: he have probable cause for all elements of the crime, have a minimal level of evidence for all elements of the crime, and conduct a reasonably thorough investigation which includes considering exculpatory evidence.

For probable cause to exist, there must be probable cause for all elements of the crime, including the mens rea requirement. *See Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014) (citing *Kuehl v. Burtis*, 173 F.3d 646 (8th Cir 1999)). In *Kuehl*, a store owner had an altercation with a suspected thief. *Kuehl*, 173 F.3d at 648-50. The store owner, a woman, inadvertently slapped the suspected thief in an attempt to get him to leave the store after he began yelling and threatening her. *Id.* at 648. He then turned and hit her in the face with a closed fist causing bruising. An employee witnessed the altercation. *Id.* An officer was dispatched to the scene and while he interviewed the plaintiff for only twenty seconds, he refused to interview the employee who witnessed the altercation. *Id.* The officer stated he "made up [his] mind" and arrested the store owner for simple assault. *Id.* at 649. The charges were eventually dropped and the store owner sued the officer for arresting her without probable cause under 42 U.S.C § 1983. *Id.* The trial court granted summary judgment based on qualified immunity to the officer. *Id.* However, the circuit court reversed holding that because the officer arrested the store owner

without probable cause his actions violated the clearly-established constitutional rights under the Fourth Amendment. *Id.* at 650. The court held that throughout his investigation the officer failed to investigate the circumstances that would have explained why the store owner struck the man. *Id.* at 649. He did not have probable cause to make a finding on whether the store owner intended to cause bodily harm, as is required for a simple assault charge under the applicable law. *Id.* at 651. Thus, without having probable cause for all the elements of the crime she was arrested for, the arrest was overturned. *Id.*

Although probable cause does not require the same type of evidence a conviction would require, police must show at least some evidence supporting the elements of a particular crime. *See Adams v. Williams*, 407 U.S. 143 (1972); *see also United States v. Christian*, 187 F.3d 663 (D.C. Cir. 1999). In *Christian*, officers arrested a man after they observed a dagger in plain view in his car. *Christian*, 187 F.3d at 667. The statute providing the basis for the crime stated that it was illegal to possess the dagger with intent to use it unlawfully against another. *Id.* The court held that since the government lacked any direct evidence in regards to the defendant's intended use of the dagger, the officers lacked probable cause to arrest him. *Id.* The court reasoned that in specific intent crimes the officers must possess probable cause for the element in order to believe that a crime occurred. *Id.*; *see also Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994).

Further, in order to have probable cause to issue a warrantless arrest, officers are required to conduct a reasonably thorough investigation prior to arresting a suspect. *See Kuehl*, 173 F.3d at 650 (holding that had the officer conducted a reasonably thorough investigation he would have found the store owner had a reason for hitting the suspected thief). In *Kuehl*, the court acknowledged that officers have substantial latitude in drawing inferences from factual circumstances; however, they must also reasonably consider evidence that negates the possibility

the suspect has committed a crime. *Id.*; see also *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1999) (holding that the seizure of a truck constituted a Fourth Amendment violation because the officers lacked probable cause to seize the vehicle based on the theory it was stolen when minimal investigation and consideration of mitigating factors would reveal it was not stolen.); *Baptiste v. J.C. Penny Co.*, 147 F.3d 1252, 1257 (10th Cir. 1998). Moreover, in *Baptiste*, the court held that officers did not have probable cause to make an arrest based on a security guard's statement when there was mitigating factors. In that case, the plaintiff (the woman arrested sued under §1983), explained and produced receipts for the allegedly stolen goods and there was a videotape that exculpated her. Thus, because the officers failed to conduct a reasonably thorough investigation and consider mitigating evidence there was no probable cause for her arrest.

In the present case, the Second Circuit did not apply the correct standard in determining that Deputy PfiEFF had probable cause to arrest Secord because the officer did not make a particularized finding on the mens rea requirement of trespassing in the second degree. As indicated in the circuit court's opinion, nothing the officer's learned at the scene suggested that Secord knew or should have known she was at the cottage without permission. Rather, it appeared the group was at the cottage with the true owner's (Fitzgibbon's uncle) permission.

Further, the circuit court erred in their decision because it did not require the officers to have evidence to each element of the crime. In *Christian*, the court held in order to have probable cause to make a warrantless arrest, the officer must make a finding and have at least some evidence to each element in a specific intent crime. In the present case, there was no evidence that showed Secord was knowingly on the property without permission. To the contrary, there were statements from Fitzgibbon's that his uncle owned the property and he and Secord truly believed they were

on the property lawfully as they were not having a party nor did they enter the house by some unlawful method such as breaking a window.

Finally, the circuit court applied the wrong standard because, as the dissent points out, there was evidence that negated the possibility the suspects committed a crime. In *Baptiste*, the court held that because the defendant had receipts and a video that showed she had now stolen the items, the officer did not have probable cause to make a warrantless arrest. In the current case, there was mitigating evidence that diminished the probable cause that Secord committed a crime, specifically the knowing element of trespassing in the second degree. For example, it appeared the suspects believed they had permission to be there, there was a board game on the kitchen table, they were in costumes, and had snacks on the table. These facts indicate that the defendant had not committed the crime of criminal trespass.

B. To support a finding of probable cause, the court must have considered whether there was a reasonable belief of trespassing in the second degree particular to Secord.

The appellate court's decision should be reversed as particularized guilt of trespassing in the second degree was not considered in regards to Secord. Determining what exactly amounts to probable cause has been a challenging feat for the courts. *See* Corbin Houston, *Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense*, 21 U. Chi. Legal F. 809 (2016). Courts have repeatedly declined to accept probable cause as falling into a neat set of legal rules. *Id.* at 812. Instead, courts recognize probable cause as a fluid concept where the probability of guilt for a specific crime must be assessed on a case by case basis. *Id.* Courts have, however, consistently held probable cause must be particularized with respect to the person being searched or seized. *Ybarra v. Illinois*, 100 S. Ct. 338 (2012). "This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another

or to search the premises where the person may happen to be.” *Id.* at 341. Police officers are only able to arrest an individual after they discover reliable information or evidence that raises a reasonable belief that a specific person committed the crime or was about to commit the crime in question. Tracey Maclin, *The Pringle Case’s New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment*, 2004 Cato Sup. Ct. Rev. 395 (2004).

For example, in *Ybarra*, the defendant, a customer of a bar, was convicted for unlawful possession of a controlled substance after police officers executed a search warrant to search the bar for drugs. *Ybarra*, 100 S. Ct. at 341. The defendant’s conviction was later overturned after the reviewing court found the arresting officer did not have probable cause that the defendant himself was involved in any criminal activity or that he was armed or dangerous. *Id.* Upon further review, the reviewing court noted the arresting officers knew nothing about the defendant *particularly*, except that he was present in the public bar at the same time the police thought the bartender would be selling a controlled substance. *Id.* at 342 (emphasis added). The officers did not know the defendant nor did they recognize him as a person with a criminal history. *Id.* Without a reasonable belief that the defendant particularly was engaged in any criminal wrongdoing or he was there to buy drugs, probable cause to arrest the defendant did not exist.

In the present case, the appellate court did not apply the correct standard of review in determining whether there was probable cause because they did not consider whether there was particularized probable cause that Secord committed trespassing in the second degree. Upon entering the house, the officers questioned Secord and her friends about why they were in the house. R. at 3. While Secord herself did not live in the house, she told the officer one of the people at the house with her was the nephew of the owner of the house and was given permission to enter and remain in the house. *Id.* Upon entering, the nephew of the owner of house told all his friends



his uncle said they were allowed to be on the property and go inside to play a board game. *Id.* at 10. In fact, the nephew entered the house through the front door with a key, thus not giving any indication that they were unwelcome. *Id.* at 3. After further inquiry by the police officer, the nephew admitted he was not allowed to throw a party, but truly did believe he could have some friends over to play a board game. *Id.*

To arrest Secord, the police officers needed to have probable cause. Specifically, according to New York Penal Code, the officers needed to have a reasonable belief that Secord, herself, knowingly entered or remained unlawfully in the dwelling. N.Y. Penal Law § 140.15. Secord, reasonably relying on her friend's statements that his uncle was allowing them to use the house, did not knowingly enter the house unlawfully. *R.* at 3. Once she was inside, she was still under the impression that they were all there lawfully. *Id.* It was not until the police officers continued to interrogate the nephew that she learned the nephew was not authorized to have a party in the house. *Id.* However, the nephew himself did not believe having a couple friends over to play a board game constituted a party, thus reasonably believed he had permission to use the house. *Id.* at 10. Accordingly, Secord herself believed they were lawfully entering the house. Believing she was truly allowed to be there, the police officers could not have had a reasonable belief that Secord remained unlawfully in the house. When questioned by the arresting officers, Secord stated they were allowed to be in the house by the owner. *Id.* at 3. When further pressed, Secord did not change her story and stated facts that supported her belief that they were lawfully in the house such as using the key and the nephew's authorization. *Id.* Without a reasonable belief that Secord knew she, herself, was entering or remaining in the house unlawfully, the arresting officers did not have probable cause to arrest her. The appellate court should have applied this particularized probable cause standard when reviewing the lower court's

decision. Not considering whether there was probable cause particularized to Secord for trespassing in the second degree, the appellate court's decision should be reversed.

## **II. DUE PROCESS PROHIBITS ICE FROM DETAINING ALIENS FOR LONGER THAN SIX MONTHS WITHOUT FIRST PROVIDING AN INDIVIDUALIZED CUSTODY HEARING.**

The Second Circuit incorrectly reversed both the District Court and its own precedent when it held that Due Process did not require the INS to provide Secord with a bond hearing before her detention exceeded the six-month mark. Due Process requires that before an individual can be subject to prolonged non-punitive civil commitment, the government must first establish that detention is justified *as to that individual*. *Demore v. Kim*, 538 U.S. 510, 540 (2003) (Souter, J., concurring) (“Due process calls for an individual determination before someone is locked away.”). In the context of detentions incident to removal proceedings, this Court has held that detention becomes prolonged after six-months, at which point the alien is entitled to a bond hearing. *Zadvydas v. Davis*, 533 U.S. 678 (2001). Yet in the present case, the INS relies on Congress’s categorical determination set forth in 8 U.S.C. §1226(c) to justify the Secord’s detention for nearly a year without a bail hearing. R. at 8. (observing that “the first available judge even to *hear* a bail request could not be scheduled until eleven months after Secord began her detention.”) (emphasis in original).

It has been settled law for over a century that the constitutional right to due process is afforded to all persons within this country’s borders regardless of their residency status. *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893). “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755, (1987). Continued detention of Secord violates this well-established liberty norm. Therefore, this Court must reverse.

A. §1226(c) contains an inherent temporal limitation on the length of detentions it authorizes.

In order to avoid potentially unconstitutional results, §1226(c) should be read to contain an inherent temporal limitation on the length of detentions authorized under the statute. Even in the immigration context, potentially indefinite detentions are unconstitutional. Because removal proceedings are civil, not criminal, they are presumed to be non-punitive and cannot have a punitive effect. *Zadvydas*, 533 U.S., at 690 (“The [removal] proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.”). Non-punitive civil detention requires a “sufficiently strong special justification” and must “bear[] a reasonable relationship to the purpose for which the individual was committed.” *Id.*

This Court has identified the purpose of detentions in removal cases as two-fold: (1) ensuring the alien’s presence at future removal proceedings, and (2) protecting the community from potential harm. *Id.* The government is not required to use the least burdensome means to achieve these statutory goals, however, the government’s justification for detaining a person must outweigh the individual’s liberty interest. *Id.* In *Demore v. Kim*, the Court held that INS may rely on Congress’s determination that certain criminal aliens should be “detained for the brief period necessary for their removal proceedings” in order to achieve those goals. 533 U.S. 510, 514 (2005); See also 8 U.S.C. §1226(c). However, *Demore* contemplated a situation where the average detention lasted roughly a month and half, and recognized that Due Process would require a bond hearing “[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings.” *Id.* (Kennedy, J., concurring). Neither of these purposes are served by Secord’s continued confinement or can justify her continued detention without an individualized hearing. See *Zadvydas*, 533 U.S. at 691. (“There is no sufficiently strong special justification here for indefinite civil detention—at least as administered under the INA.”).

Prior to 1996, the Attorney General had broad discretion to conduct bond hearings and release aliens from custody during their removal proceedings. *Demore*, 538 U.S. at 518-22 . In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in response to a “wholesale failure by the INS to deal with increasing rates of criminal activity by aliens” who were released on bond. *Id.* Congress concluded that this was due to the INS’s failure to detain aliens during pending their deportation proceedings. Congress came to this decision despite the fact that the INS was underfunded, and its decision to issue bond was usually resource-driven and determined “in large part, according to the number of beds available” as opposed to an individual alien’s risk of flight or likelihood to reoffend. *Id.* at 520. (“It is of course true that when Congress enacted §1226, individualized bail determinations had not been tested under optimal conditions.”). §1226(c) of the Immigration and Naturalization Act, as amended by IIRIRA, removed the Attorney General’s discretion to authorize bail for aliens who have been convicted of certain crimes pending the completion of their removal proceedings. *Id.* 8 U.S.C. §1226. However, there must be some limit to the length of time an alien can be detained under that statute.

i. Prolonged civil detention requires an individualized finding.

Because statutes that authorize indefinite detention would “raise serious constitutional concerns,” the Court has interpreted sections of the INA that seemingly authorize indefinite detention to contain an inherent temporal limitation. *Zadvydas v. Davis*, at 682; *See also Clark v. Martinez*, 543 U.S. 371 (2005). Although detention is a necessary part of the deportation process, “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Generally, Due Process also requires that the government show by clear and

convincing evidence that an individual poses a danger to the community before civil commitment can be imposed. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

In *Zadvydas v. Davis*, the Court interpreted a related provision of the INA that seemingly authorized indefinite detention. 533 U.S. 678 (2001). The Court, applying the constitutional avoidance canon, held that because “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem” the statute must be read “to contain an implicit ‘reasonable time’ limitation.” *Id.* at 690. Two years later in *Demore v. Kim*, the Court created a narrow exception to the general rule that civil commitment requires an individualized hearing when it held that certain aliens may be detained for the “limited period” necessary to complete their removal proceedings based on the categorical presumption of dangerousness created by congress in §1226(c). 538 U.S. at 527. The plaintiff in *Demore* argued that even a relatively short detention without an individual finding of dangerousness violated his right to Due Process. Secord acknowledges that her initial detention was constitutional, but argues that her detention is no longer serving the purpose for which she was committed. *Id.*

*Demore*, upheld the detention of certain aliens who have conceded their removability for the “brief period necessary for their removal proceedings.” 538 U.S. 510. Although *Demore* interpreted the same statutory provision at issue here, §1226(c), the holding is inapplicable for two reasons. First, the Plaintiff in *Demore* conceded his removability. The same is not true here. Unlike the *Demore* Plaintiff, Secord has a strong incentive to be present at future hearings in order to contest the eventual entry of a removal order. Second, the Court in *Demore* relied on incorrect information provided by the government purportedly showing the brevity of detentions under the statute. *See infra*, part ii.

Pre-removal order detentions are meant to ensure the alien's presence at future hearings and protect the community from potentially dangerous criminals. Secord is not dangerous, and not pose a flight risk. Unlike the *Demore* plaintiff, who conceded that he was removable, the Petitioner here intends to challenge the entry of a removal order, and thus has incentive to appear for future hearings. Secord works in the Buffalo area and considers it to be her home. R. at 8. Her only friends or family live in the Buffalo area, and nothing in the records indicates that she has even spoken with anyone from her home country since she arrived in the United States in 2013. *Id.* She is also non-violent and prior to her 2015 arrest she had no run ins with the law. Although she was in possession of brass knuckles at the time of her arrest, she was charged with only charged with simple possession, not a violent crime.

Although the government may detain aliens during the "limited period" necessary for removal proceedings, it may only do so for a "reasonably necessary" period. *Demore v. Kim*, at 526. Thus, the amount of time that an alien can be held under §1226 is subject to an inherent time limitation. When detention becomes unreasonably long, it is no longer authorized under §1226(c). Once INS's mandatory detention authority under §1226(c) ceases, the agency derives its detention authority from the discretionary detention provisions of §1226(a), which requires the INS to provide detainees with a bond hearing.

- ii. Demore recognized that detentions under §1226(c) would become unconstitutional in the event of unreasonable delays by the INS during the removal process.

In his concurrence in *Demore*, Justice Kennedy noted that when mandatory detentions under the INA become unreasonable due to delays caused by the INS, it becomes necessary to inquire whether detention is no longer achieving its goal of facilitating deportation. He concluded that this was "not a proper inference, however, either from the statutory scheme itself or from the circumstances of th[e] case." The circumstances have changed, and this inference is now proper.

*See e.g., Chavarria-Reyes v. Lynch*, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting) (“the Immigration Court, though lodged in the Justice Department, is the least competent federal agency, though in fairness it may well owe its dismal status to its severe underfunding by Congress, which has resulted in a shortage of immigration judges that has subjected them to crushing workloads.”).

The current situation faced by aliens held under §1226(c) varies dramatically from the situation the *Demore* Court envisioned. Aliens “regularly spend[] many months and sometimes years in detention due to the enormous backlog in immigration proceedings.” *Lora v. Shanahan*, 804 F.3d 601, 605 (2nd Cir. 2005) *overruled by Scott v. Secord*, 123 F.4th 1 (2nd Cir. 2016). *Demore* does not control the present case because *Demore* argued that *any* pre-removal order detention was unconstitutional absent an individualized bond determination. *Secord* acknowledges that §1226(c) authorizes her confinement for a “brief period” pending her removal proceedings, but argues that her detention has become prolonged and is therefore no longer authorized by the statute when “read in light of the Constitution’s demands.” *See Zadvydas*, 533 U.S. at 690.

The Court’s ruling in *Demore* is also called into question because it relied, in large part, on incorrect data about the length of detentions. In August 2016, the acting Solicitor General wrote to the clerk of this Court to explain that the government had inadvertently provided inaccurate information in its brief in *Demore*. *See* Letter from Solicitor General Ian H. Gershengorn to Hon. Scott S. Harris (Aug. 26, 2016), <http://on.wsj.com/2mtjnUP>. The data provided by the government incorrectly showed that the average detention time was approximately “a month and a half in the vast majority of cases... and about five months in the minority of cases in which the alien chooses to appeal.” *Demore*, 538 F.3d at 530-31. The Court relied on this information to conclude that detentions under §1226(c) last only a “brief period” and were therefore not unconstitutional *per*

*se. Id.* The government now acknowledges that the information supporting that conclusion was incorrect.

We now know that at the time *Demore* was decided, the average length of detention in appealed cases was over a year – twice as long as the Court believed - and that the length has continued to rise. Emily R. Summers, *Prioritizing Failure: Using the "Rocket Docket" Phenomenon to Describe Adult Detention*, 102 Iowa L. Rev. 851 (2017). In New York, where Secord is currently held, the average length of detention for all cases is now 234 days, or almost eight months; far greater than the presumed 47-day average in *Demore. Id.* at 871. Furthermore, an immigration judge was not even available to preside over a bond hearing until eleven months after Secord was transferred to ICE custody. R. at 8. These statistics show that the current potential for detentions under §1226(c) to become prolonged is far greater than what the Court believed it to be when it upheld the statute in 2003.

**B. The Court should apply a bright-line six-month rule after which the alien is entitled to a presumption that his continued detention is unreasonable.**

The Court has identified the six-month mark as the point in time when detention is no longer ‘petty’ and constitutes such a sufficient deprivation of liberty that additional procedural protections are required. *Baldwin v. New York*, 399 U.S. 66 (1970). In post-removal detention cases, the Court has also applied a bright-line rule to determine when a potentially indefinite detention becomes unreasonable, at which point the detainee is entitled to a bond hearing. *Zadvydas*, 533 U.S. at 701. The Court has not addressed whether that same bright-line rule applies to pre-removal detentions. While the case law clearly establishes that detention under §1226 is constitutional, all Circuit Courts that have addressed the issue agree that detentions under §1226(c) are subject to some type of “reasonableness” limitation. *See Reid v. Donelan*, 819 F.3d 486, 494



(1st Cir. 2016) (collecting cases). They differ, however, on how to determine whether detention is reasonable in a given situation. *Id.*

The First, Third, and Sixth Circuits hold that reasonableness must be decided on a case-by-case basis. *Id.* at 495; *Diop v. ICE/Homeland Security*, 656 F.3d 221, 233; *Ly v. Hansen*, 351 F.3d 263, 271 (2003). “Under this approach, every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the “reasonableness” threshold, thus entitling him to a bail hearing.” *Lora v. Shanahan*, 804 F.3d 601, 614 (2nd Cir. 2015), *cert. denied*, 136 S. Ct. 2494, (2016), *overruled by Scott v. Secord*, 123 F.4th 1 (2nd Cir. 2016). By contrast, the Ninth Circuit, applies a bright-line rule under which detention beyond six-months is presumptively unreasonable. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). Prior to the Circuit court’s decision in this case the Second Circuit also applied this rule. *See R.* at 6. Under this approach, every alien held under §1226(c) must be given a bond hearing within six months of being detained or otherwise be released. *Reid*, 819 F.3d at 495. ICE may continue to hold an alien beyond this timeframe if it shows at a bond hearing that the individual detainee poses a flight risk or is likely to reoffend.

The Court should extend its holding in *Zadvydas* and apply the same bright-line rule to pre-removal order detentions in order to protect the due process rights of the alien detainees and to fully avoid the constitutional question. Requiring individualized determinations as to the reasonableness of an alien’s detention would be the equivalent of requiring District Courts to decide the constitutionality of the statute as-applied; it would not avoid the constitutional question. Additionally, applying the same six-month rule here would promote a consistent application of the statute, and would avoid a situation where aliens who have been ordered removed have more constitutional protections than aliens whose removal proceedings are still pending.

- i. The Court has previously identified the six-month mark as the point at which confinement becomes prolonged and requires additional procedural protections

The Court has often applied bright-line rules to determine when constitutional rights attach or when they have been violated. This Court, for example, has determined that the Sixth Amendment right to trial by jury does not apply to “petty” offenses – offenses carrying a maximum sentence of imprisonment for less than six months. *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of ‘petty.’”). In *Baldwin v. New York*, this Court applied a bright-line six-month rule for determining when the length of a potential detention gave rise to heightened procedural protections for the detainee. A similar rule applies to probable cause determinations. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Determinations made within 48 hours are presumed to be reasonable, but after that point the burden shifts to the government to justify the unreasonable delay. *Id.* A similar bright-line rule should be applied here. Such bright-line rules are necessary to “articulate more clearly the boundaries of what is permissible.” *Id.*

*Baldwin* involved a man charged with ‘jostling’ and sentenced, without a jury, to the maximum sentence of one year in prison. The Court observed that with few exceptions, convictions in the U.S. imposed without a jury have carried a maximum sentence of no more than six months in prison since the late 1700’s. *Id.* at 70-71. In imposing a bright-line rule, the Court was aware that line drawing “requires attaching different consequences to events which, when they lie near the line, actually differ very little.” *Id.* at 73. A bright-line rule is even more appropriate here because aliens held under §1226 are often unrepresented, and their only remedy is a habeas petition which can take years to process, and is only available after their detention has become prolonged.

In *Zadvydas* the Court applied a similar six-month rule to aliens for whom a final order of removal had been entered, but who could not be deported because no country was willing to accept them. Once a removal order has been entered, the alien is entitled to a bond hearing every six months. Four years later in *Clark v. Martinez*, the Court applied the *Zadvydas* holding to another provision of the INA that contained an identical detention provision for aliens deemed inadmissible at the border. 543 U.S. 371, 380-81. Although immigrants detained at the border are not entitled to Due Process, the Court adopted the same six-month rule in order to give identical statutory terms identical meanings. Although the statutory language contained in §1226 is not identical to the language in *Zadvydas* and *Clark*, it is susceptible of the same interpretations – either it authorizes indefinite detentions, or it authorizes detentions “only for a period reasonably necessary to secure the alien’s removal.” See *Demore*, 538 U.S. at 550. This Court should take the logical next step and hold that detentions under §1226 are subject to the same reasonableness limitation and apply the same bright-line rule.

- ii. A bright-line rule is necessary to fully avoid the constitutional question and to avoid perverse results that Congress could not have intended.

Applying the same rule here would promote a consistent application of the immigration detention statutes and better serve the intended purpose of the constitutional avoidance a cannon. Although the *Zadvydas* Court applied the constitutional avoidance canon, its analysis more closely resembled the plain-statement rule. *Id.* at 696-99. See also, *United States v. Bass*, 494 U.S. 336 (1971) (“In traditionally sensitive areas... the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”). Indeed, the Court specifically noted that “if Congress had meant to authorize long-term detention... it certainly could have spoken in clearer terms.” *Id.* at 697. The Court further noted that it “found nothing in the statute’s legislative history that clearly demonstrates a

congressional intent to authorize indefinite, perhaps permanent, detention.” *Id.* at 699. The statute at issue in *Zadvydas*, like the statute at issue here, was amended by the IIRIRA of 1996. *See* Pub. Law 104-208 (1996). Therefore, the Congressional intent to authorize prolonged detentions that was lacking in *Zadvydas*, is also lacking in this case.

Determining the reasonableness of an alien’s detention on a case-by-case basis would not fully avoid the constitutional question at issue. District Courts reviewing Habeas petitions would still be required to decide whether Due Process had been violated in each individual case. Although the Court would have given the statute a constitutional interpretation by reading it to only authorize detentions for a “reasonable period” the determination of reasonableness in each case would essentially be a constitutional decision. The constitutional question would not be avoided, it would simply be made by the lower courts on an individualized basis. Additionally, determining reasonableness on a case-by-case basis would essentially authorize detention “until it approaches constitutional limits,” which the Court specifically declined to do in *Clark*. 543 U.S., at 384. As the Court has noted, such an approach to statutory interpretation would “spare [the Court] the necessity of ever finding a statute unconstitutional as applied.” *Id.*

Further, the same bright-line rule the Court applied to post-removal order detentions in *Zadvydas* must apply to detentions under §1226(c) to avoid perverse consequences that Congress could not have intended. Under *Zadvydas*, if a removal order has been entered, the alien is entitled to a presumption after six months that his continued detention is unreasonable. But the same is not currently true for aliens whose cases that remain pending. Aliens who are actively contesting their removal charges – and for that reason have a heightened incentive not to abscond or reoffend – are not given the same opportunity for bond that is available to aliens who have been ordered removed.

By not applying the same bright-line rule here, the Court would be creating an incentive for INS to delay the entry of a removal order and thereby avoid the need to justify continued detention. Furthermore, not applying the same bright-line rule to aliens with pending cases would mean that the Constitution affords more procedural protections for aliens who have been ordered removed than it does for aliens contesting their removability. This cannot be the law.