No. 1-2017 and No. 2-2017

In the Supreme Court of the United States

LAURA SECORD,
Petitioner,
v.
WINFIELD SCOTT, in his Official Capacity as Director, Department of Immigration and Customs Enforcement,
Respondent,

and

LAURA SECORD,
Petitioner,
v.
CITY OF ANGOLA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

Team 14
Anonymous & Associates
14 Moot Court Blvd.,
Angola, New York 14006

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Respondent; and

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

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Constitutional Provisions & Statutes *Page(s)*

Cases *Page(s)*

In the Supreme Court of the United States

No. 1-2017

LAURA SECORD,
Petitioner,
v.
WINFIELD SCOTT, in his Official Capacity as Director, Department of Immigration and Customs Enforcement,
Respondent,

No. 2-2017

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 RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 123 F.4th 1 (2nd Circ. 2016).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV 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."

8 U.S.C. § 1226(a) provides in pertinent part:

> "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."

8 U.S.C. § 1226(c)(2) provides in pertinent part:

> "The Attorney General may release an alien [lawful or unlawful] only if the Attorney General decides pursuant to section 3521 of title 18… that 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. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien."

8 U.S.C. § 1226(e) provides:

> "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

N.Y. Penal Law § 140.15 provides:

> "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling… Criminal trespass in the second degree is a class A misdemeanor."

N.Y. Penal Law § 265.01 provides in pertinent part:

> "A person is guilty of criminal possession of a weapon in the fourth degree when… [a person] possesses any dangerous or deadly weapon and is not a citizen of the United States."

STATEMENT

I. FACTUAL BACKGROUND

This action is in certiorari from the judgement entered by the Second Circuit Court of Appeals. This case arises from the arrest of Petitioner, Laura Secord, for criminal trespass in the second degree, executed by Deputy Bernard Pfieff without a warrant. Scott v. Secord, 123 F.4th 1, 1 (2nd Circ. 2016).

On December 21, 2015, a report of suspicious activity was made to the Erie County Sheriff's department regarding a home that was believed to be unoccupied during the winter season. *Id.* at 2. Deputy Pfieff was dispatched to the scene, located in Angola, New York, to assess

the situation. *Id.* Upon arrival, Deputy Pfieff immediately noticed flickering light emanating in the window, thought to be a lit candle. *Id.* Duty-bound to investigate further, Deputy Pfieff approached the home and through the window was able to identify several disguised persons in the candle light. *Id.*

Deputy Pfieff then returned to his vehicle, reporting what he had seen to his acting supervisor. *Id.* Urged by his superior to assess the situation more, Deputy Pfieff left his vehicle and approached the front door of the home. *Id.* He knocked loudly on the door, announcing he was there on behalf of the Sheriff's Department. *Id.* Through the window in the door, Deputy Pfieff was able to see the disguised individuals flee at the sound of his knock, prompting him to enter the home to prevent the destruction of evidence. *Id.* Prior to entering the home, Office Pfieff again radioed the Sheriff's Department informing them of the situation and requesting backup. *Id.*

Once inside the home, Deputy Pfieff again identified himself as a member of the Sheriff's Department. *Id.* When no response was given, Deputy Pfieff attempted to turn the lights on in the home but discovered the electricity was shut off. *Id.* Further inspection of the room, containing drawings, documents, and various items, prompted Deputy Pfieff to draw his weapon and order the individuals to come forward. *Id.* At this point, six young adults emerged, dressed in Halloween-esq attire. *Id.* Deputy Pfieff then ordered them all to the ground where he searched their persons for weapons and identification. *Id.* Each individual had New York licenses, not addressed to the home in question, with the exception of Petitioner who had only cash on her person. *Id.*

Deputy Pfieff then questioned the individuals, by which time backup from the Erie County Sheriff's Department had arrived. *Id.* at 3. One of the individuals, not Petitioner, claimed to be the nephew of the homeowner who had given him permission to be in the house. *Id.* When pressed, he was unable to provide any contact information of his 'uncle' and admitted that he did not

possess a key to the home, instead having used a hidden spare on the patio. *Id.* When the individuals were unable to provide other justification for being in the home, aside from permission by the homeowner that none had contact information for, they were arrested and transferred to the Erie County Holding Center before being charged with criminal trespass. *Id.* Petitioner's arrest led to her conviction for both second degree criminal trespass and possession of a dangerous weapon: a pair of brass knuckles, which was found in her backpack at the Sheriff's Department. *Id.*

II. COURSE OF PROCEEDINGS

Petitioner, an undocumented alien, was convicted and sentenced to one year in prison for second degree criminal trespass and fourth degree possession of a dangerous weapon. *Id.* While completing her sentence, Petitioner filed a habeas corpus petition, claiming her Fourth Amendment rights had been violated by unlawful arrest. *Id.* While this petition was pending, she completed her sentence and was immediately transferred to Immigration Customs and Exchange (herein after referred to as "ICE") to await a deportation hearing regarding her status as an undocumented alien. *Id.* at 3-4.

While in the custody of ICE, Petitioner filed a second habeas corpus petition addressing that she had yet to have a bail hearing in the requisite time, dictated by Second Circuit case law to be six months. *Id.* at 4. Petitioner's second habeas corpus petition was brought before a District Court judge who ordered her immediate release, preventing ICE from adequately determining whether Petitioner posed a flight risk or was a danger to the community. *Id.* Petitioner's original habeas corpus petition regarding her Fourth Amendment rights were later determined by a separate District Court judge who reversed her conviction based on a failure to find probable cause for each element of the arrested offence. *Id.*

On appeal, the Second Circuit reversed the holdings of the District Court. *Id.* Petitioner's conviction was reinstated, finding that based on the totality of the circumstances standard applied to probable cause, her arrest was constitutionally valid. *Id.* at 7. Further, the Second Court overturned their previous decision regarding a bright-line rule to dictate the time in which an undocumented alien was to receive a bail hearing. *Id.* at 4. Instead, they adopted a more narrowly tailored test that better serves the differing needs of communities within its jurisdiction. *Id.* at 5. Petitioner was then taken back into custody to await a bail hearing within a reasonable amount of time, at which point she filed for certiorari. *Id.* at 6. Certiorari was subsequently granted by this Court on February 20, 2017.

SUMMARY

Firstly, this Court should find that totality of the circumstances is the correct standard held to probable cause assessments, including those of warrantless arrests. Because probable cause is applied the same way to search and arrests for both the issuance of warrants and for validating arrests made without warrants, a distinction cannot be made to alter the requirements for warrantless arrests alone. Stacy v. Emory, 97 U.S. 642 (1878). In the interest of promoting consistency in both this Court's history of authority and in the standard applied to constitutional rights between states, totality of the circumstances is the correct standard to examine probable cause. Further, in the absence of compelling reason to alter it presently, it should remain as such.

Additionally, this Court should find totality of the circumstances maintains the balance that exists between government's need to enforce the law and the privacy of citizens. As administered, totality of the circumstances preserves an officer's ability to arrest offenses supported by probable cause, despite the inability of officers to acquire information of a suspect's mental state. Further,

totality of the circumstances allows officers the ability to react to ever changing circumstances which can mean the difference in preserving evidence or protecting civilians and their own safety.

By altering probable cause standards away from totality of the circumstances, officers will face difficulty in applying theory to practice, resulting in both prevention and deterrence for officers to make valid arrests in the field. For these reasons, the correct standard as applied by the Second Circuit is totality of the circumstances when examining probable cause for warrantless arrests. As such, Deputy Pfieff had probable cause to arrest Petitioner for criminal trespass in the second degree based on the totality of the circumstances known to him at the time.

Secondly, this Court should find that that a "reasonableness test" better balances the protection of due process of undocumented aliens and the needs of society. Petitioner asserts that her due process rights were violated in accordance with case law ruled on by the Second Circuit. That case, however, was overturned after the court found that the six-month bright line rule is unworkable given the current situation regarding ICE detainment procedures. Further, this bright line rule did not adequately address due process concerns in a framework balancing other needs, including the government's and the populations. Her due process rights, as construed under Title 8, §1226, were being exercised when the District Court ordered her release. Instead, they should have been allowed to continue and be fully expressed in a bail hearing that explored Ms. Secord's particular set of circumstances in order to render a decision.

This holding reinforces traditional concepts such as local courts determining what is a "reasonable amount" of time based upon the particular needs in that community. Additionally, it forces the government to conduct "fact specific inquiries" into a petitioner to determine if they were viable for bond or if they posed a risk of danger or flight. The current statistics of the ICE detainee population make such an approach desirable. This ruling will improve the manner in

which removal determinations are conducted, keep in line with Congressional intent and maintain protection of individuals due process rights.

For these reasons, we ask the Court to find that the Second Circuit correctly reversed the District Court's holdings, finding that 1) Deputy Pfieff did have probable cause to arrest Petitioner, correctly applied to totality of the circumstances, and 2) while Petitioner was entitled to a bail hearing in a reasonable amount of time, reasonableness should not be defined by a bright-line, arbitrary distinction.

ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY APPLIED TOTALITY OF THE CIRCUMSTANCES AS THE STANDARD TO DETERMINE WHETHER PROBABLE CAUSE EXISTS FOR WARRANTLESS ARRESTS.

The Second Circuit correctly ruled that the warrantless arrest of Petitioner by Deputy Pfieff was based on probable cause held to the totality of the circumstances standard. The Petitioner's appeal claims that absent a warrant, Deputy Pfieff was required to have probable cause for each element of New York Penal Code §140.15[1] for criminal trespass in the second degree. This Court, however, has long since defined probable cause as adhering to the totality of circumstances standard. Illinois v. Gates, 462 U.S. 213, 242 (1983). It only requires reasonable belief by a prudent officer that a crime has or is being committed in their presence. *Id.* The majority of circuits, including the Second Circuit, adhere to the binding precedent set by this Court which seeks to provide consistency of constitutional rights among states and to maintain the balance between

[1] "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling… Criminal trespass in the second degree is a class A misdemeanor." N.Y. Penal Law § 140.15 (McKinney).

government need and citizen's protections from unreasonable seizure. For these reasons, detailed below, totality of the circumstances should be reaffirmed as the correct standard to determine the existence of probable cause, inclusive of warrantless arrests.

A. A totality of circumstances standard adheres to precedent and promotes consistent applications of constitutional rights among the states.

Historically, probable cause has been held to the standard of totality of the circumstances when determining whether action on behalf of the state is constitutionally valid.[2] Inclusive of warrantless arrests, this Court has justified its opinions of probable cause on public policy interests. Those interests include consistency in both their authority in holdings and in preventing variability of citizen's constitutional rights among states and their respective courts. It is then that precedent should remain as it is, for want of a reason otherwise.

i. Precedent has clearly defined probable cause and its requisite need to consider reasonableness under the totality of the circumstances standard.

Probable cause for a warrantless arrest is defined by this Court as 1) a relatively prudent officer, 2) having reasonable belief, 3) that the particular individual to be arrested, 4) has committed or is committing a crime, 5) that is either a felony or in their presence, 6) based on the totality of circumstances known to the officer at the time of arrest. Stacy v. Emory, 97 U.S. at 645. *Accord* Beck v. State of Ohio, 379 U.S. 89, 91 (1964); Illinois v. Gates, 462 U.S. at 242; Maryland v. Pringle, 540 U.S. 366, 371 (2003).

History is a very important factor to consider when seeking to understand constitutional rights. Virginia v. Moore, 553 U.S. 164, 168 (2008). The need to define probable cause originated

[2] This includes both search and arrest executed by law enforcement with and without the existence of a warrant.

out the Fourth Amendment that which establishes citizens are to be free from unreasonable search and seizure, inclusive of when the acting officer is not armed with an arrest warrant. U.S. Const. amend. IV. Despite clear definition, therein exists a need to maintain the requisite balance of "citizen's [protection] from rash and unreasonable interferences with privacy" while also "[allowing] free leeway for enforcing the law in the community's protection." Brinegar v. United States, 338 U.S. 160, 176 (1949).

Determining whether an arrest without a warrant is valid then is "analyzed… in light of traditional standards of reasonableness" which in turn is determined by the existence of probable cause. Virginia v. Moore, 553 U.S. at 171; *e.g.* Atwater v. City of Lago Vista, 532 U.S. 318, 346 (2001). "No argument is made that there is a substantial difference in the meaning of [reasonable cause and probable cause], and we think there is none. If there was a probable cause of seizure, there was a reasonable cause." Stacey v. Emery, 97 U.S. at 646.

As early as 1878, this Court defined probable cause as "the facts and *circumstances* before the officer [being] such as to warrant a man of prudence and caution in believing" that the search will result in evidence of a crime or, in the case of arrest, the individual to be arrested has committed a crime. *Id*. at 645 (emphasis added). This definition has been applied in all situations where determining probable cause is necessary, including issuing a search or arrest warrant, determined by a magistrate, or to warrantless arrests or searches by law enforcement in the field. *Virginia*, 553 U.S. at 172; *accord* Whren v. United States, 517 U.S. 806 (1996). *See* Illinois v. Gates, 462 U.S. 213 (1983).

Probable cause for an arrest without a warrant is further limited to offenses that are either felonies or are committed and/or being committed in the presence of the officer. United States v. Watson, 423 U.S. 411, 418 (1976). "In a long line of cases, [this Court has] said that when an

officer has probable cause to believe a person committed even a minor crime in [their] presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable." *Virginia*, 553 U.S. at 171 (quoting Wyoming v. Houghton 526 U.S. 295, 300 (1999)). This is a measure in place to prevent unreasonable or constitutionally invalid arrests of individuals for minor crimes that are not in view of the officer and therefore difficult to establish probable cause under totality of the circumstances. Lastly, it is had definitively been noted by this Court that probable cause is not a standard that is satisfied by good faith alone, but must be supported by evidence of reasonable belief. "We may assume that officers acted in good faith [in making warrantless arrests] … 'but good faith… is not enough.'" Beck v. State of Ohio, 379 U.S. at 97 (quoting Henry v. United States, 361 U.S. 98, 102 (1959)).

In the landmark case, *Illinois v. Gates*, this Court "reaffirm[ed] the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations." *Illinois*, 462 U.S. at 242; see also Maryland v. Pringle, 540 U.S. 366; United States v. Ventresca, 380 U.S. 102 (1965); Brinegar v. United States, 338 U.S. 160. "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois*, 462 U.S. at 231 (quoting *Brinegar*, 338 U.S. 160 at 175). It is therefore that by examining the totality of circumstances standard, it "permits a balanced assessment of the relative weights of all the various indicia of reliability" that are required while assessing probable cause. *Illinois*, 462 U.S. at 234 (examining totality of the circumstances as to probable cause applied through government informant tips).

In an effort for conformity and concise language, probable cause can only include so many considerations in its definition. Left out of the one-sentence definition, yet included in the language

of this Court's opinions regarding probable cause over time have consisted of: common sense, nontechnical, practical, probabilities, and fluid ability not required to be examined by legal technicians. *Brinegar*, 338 U.S. at 175-176 ("practical, nontechnical," "practical and common-sensical standard"); *accord Illinois*, 462 U.S. at 232 ("fluid concept," "deals with probabilities and depends on the totality of the circumstances"); *Maryland*, 540 U.S. at 370-371.

Each term supports a finding that totality of the circumstances has been established by this Court as not being able to be narrowed down into a list. "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Maryland*, 540 U.S. at 370-371 (quoting *Illinois*, 462 U.S. at 232 (1983)).

As applied to the current matter, Deputy Pfieff had probable cause to arrest Petitioner for second degree criminal trespass, as defined by N.Y Penal Code §140.15. "A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling… Criminal trespass in the second degree is a class A misdemeanor." N.Y. Penal Law § 140.15 (McKinney). Deputy Pfieff, undisputed to being a reasonably prudent officer, responded to a report that there was suspicious activity occurring in a home known to be unoccupied at the time. When Deputy Pfieff then arrived, he discovered several disguised individuals huddling in a room around candle light. While it is arguable that Deputy Pfieff was on constitutionally protected area when he viewed the individuals from the window, it is equally arguable that he was duty bound to ensure the light emanating from the home—believed to be vacant—was not in fact a fire.

Only after reporting to his supervisor, and per their instruction, did Deputy Pfieff knock on the door, and announce his presence. Because of the exaggerated reaction by the individuals, which could be seen through the window in the door, Deputy Pfieff entered the home lawfully under the

exigent circumstance exception[3], in fear that evidence would be destroyed by those seeking to hide their culpability.

Once questioned, the individual that claimed permission to be in the home was unable to remember the owner's name or number, and was not in physical possession of the key to the home at the time question. Based on the totality of the circumstances, Deputy Pfieff had reasonable belief that the individuals, in common enterprise, were currently trespassing in the home unlawfully.

It is therefore that probable cause has repeatedly been defined by this Court and held to the standard that is totality of the circumstances, that which is reasonably limited by safeguards to prevent abuse of power. It is then, under the totality of the circumstances, Deputy Pfieff had reasonable belief that Petitioner had entered a dwelling unlawfully within his presence, authorizing him to arrest without a warrant.

ii. Following precedent prevents variability in both the authority of this Court and further prevents variability of constitutional rights among states.

As demonstrated above, precedent establishes a totality of the circumstances standard when assessing probable cause for a warrantless arrest. More than that, "[w]hether or not a search [or arrest] is reasonable within the meaning of the Fourth Amendment… has never depend[ed] on the law of the particular State in which the [act] occurs." *Virginia*, 553 U.S. at 172-173. "While '[i]ndividual States may surely construe their own constitutions as imposing more stringent

[3] The exigent circumstance doctrine permits law enforcement to enter a home when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). While "the Fourth Amendment has drawn a firm line at the entrance to the house...the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification" to enter without a warrant. *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

constraints on police conduct than does the Federal Constitution,' state law did not [and does not] alter the content of the Fourth Amendment." *Id*. at 172-174. Further, "[practices of local police enforcement] 'vary from place to place and from time to time' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'" *Id*. at 172 (quoting Whren v. United States, 517 U.S. at 815).

To blur the line that is clearly drawn by this Court between state laws and constitutional rights will result in greater variability of what is constitutionally valid in one state versus another. By having a standard that is defined simply as "an offence" rather than "all elements of an offence," you maintain a better consistency between states that undeniably differ on elements for specific crimes. Further, were probable cause to be based on elements of the state's laws, there would be a wide net casted on what is constitutional in that single state over time simply because laws frequently change state by state. If you multiply that fact by every state, the constitutional rights of individuals are varied in a countless accumulation over time and place.

One could argue that there is already variability among states, as states are free to create laws independent of one another. The difference, however, is that under the totality of circumstances standard, a state's elements of the crime are not in dispute. *See generally Id.* If there is a dispute as to probable cause, a hearing will be had to determine if an objectively prudent officer had reasonable belief that a crime was being committed. *See generally Id.* To rule in favor of the Petitioner's proposed standard would be to weave state laws into the meaning of the Fourth Amendment where they have never existed prior.

Additionally, "[w]hen 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' than an offense has been committed." *Beck*,

379 U.S. at 96 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). "We have traditionally recognized a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgement in the field be converted into an occasion for constitutional review." Atwater v. City of Lago Vista, 532 U.S. at 321. To perpetuate the courts to require probable cause on each element of the crime will result in the need for more hearings, further burdening the court system. It is therefore in the best interest of the court to instill consistency among the states by affirming probable cause is held to the totality of the circumstances as to warrantless arrests.

As was the controversial, landmark case *Atwater v. City of Lago Vista*, in the absence of an "epidemic" of warrantless arrests by officers and "dearth of horribles demanding redress" there is therefore a lack of incentive to overrule precedent. *Id.* Accordingly, the standard attributed to probable cause for a warrantless arrest should remain the totality of the circumstances.

B. Totality of the circumstances maintains the balance of law enforcement with the protected rights of citizens.

This Court should find totality of the circumstances is not only precedent, but is in the interest of "readily administrable" law. *Virginia*, 553 U.S. at 172 (quoting Atwater, 532 U.S. at 347). "In determining what is reasonable under the Fourth Amendment, we have given great weight to the "essential interest in readily administrable rules." *Id.* Under the Petitioner's proposed standard, offenses which include a specific mens rea will render officer's completely unable to arrest without a warrant, in addition to hampering the reaction time that is often critical to officer's safety and the safety of the community.

i. Totality of the circumstances equally applies probable cause standards to warrantless arrests, inclusive of those that have a requisite mens rea.

Perhaps the most important cause to maintain totality of the circumstances as the applicable standard in question centers on the need to allow officers to arrest, without a warrant, on offenses that specify a particular mens rea element where probable cause exists. The purpose of warrantless arrests "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia*, 553 U.S. at 173. Further, warrantless arrests "safeguard evidence and ensure[s] [the officer's] own safety." *Id*. Recently addressed in *Florida v. Harris*, this Court reserved the a lower court's holding because the law in question held "absent [a requisite element of the law] will preclude a finding of probable cause," thus resulting in a blanket inability to arrest without a warrant. The court continued, saying "that is the antithesis of a totality of the circumstances analysis." Florida v. Harris, 133 S. Ct. 1050, 1056 (2013).

In the present case, that requisite element of the law would be mens rea. Because it is unreasonably burdensome, if not often times impossible, for an acting officer to develop probable cause of an individual's mental state at the time they encounter a crime, they are completely prevented to arrest without a warrant if the offense in question specifies a mens rea. This undermining occurs, despite the crime in question happening or has happened in the officer's presence (or is a felony offense), and information known to the officer at the time would indicate, upon their common sense and assessment of all other information known to them, that there is a fair probability a crime has been committed.

Presently, were the Petitioner to succeed on their proposed higher standard, law enforcement would be prohibited from utilizing warrantless arrests for a large part of the crimes in their state for lack of probable cause to determine mens rea. While it is clear that culpability

determined by a jury is not incorporated into an assessment of probable cause, there is something to be said for the effectiveness of the standards of law when they are questioned. Had Deputy Pfieff not have been able to show probable cause for mens rea on each particular person that evening, there would be no reasonable legal remedy to prevent the crime from occurring. Indeed, it is unlikely that any officer would be able to prevent a crime from occurring if required to find probable cause of a mens rea element in the face of overwhelming reason to believe a crime has or is being committed. For these reasons, totality of the circumstances is the correct standard to be applied to probable cause for warrantless arrests.

ii. Totality of the circumstances allows for officers to react accordingly to often unpredictable situations they face on a regular basis.

Often, officers are faced with unpredictable situations that require them to react "on the spur (and in the heat) of the moment" while at the same time "draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made*." Atwater*, 532 U.S. at 347. It then is the job of the "Courts attempting to strike a reasonable Fourth Amendment balance [to] credit the government's side with an essential interest in readily administrable rules." *Id*. For that reason, officers should be held to the totality of circumstances standard which is "expressed in terms that are readily applicable by the police in the context of the law enforcement activities" and "not qualified by all sorts of ifs, ands, and buts." New York v. Belton, 453 U.S. 454, 458 (1981).

The unfortunate downfall of a probable cause standard that would require officers to meticulously check off each element of an offense rests on "an officer on the street might not be able to tell" what degree the offense is. *Atwater*, 532 U.S. at 348. "[I]dentical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest." *Id*. These include

prior offenses of the suspect, details as to weight or quantity of any evidence found on their person, and so on. *Id*. In fact, when the court was petitioned to draw a line between warrantless arrests for offenses that proffer no jail time (i.e. are fine only offenses) from offenses greater than a fine, this Court found the distinction "'very unsatisfactory line[s]' to require police officers to draw on a moment's notice." *Id*. at 350 (quoting Carroll v. United States, 267 U.S. at 157). This uncertainty, as it was found in *Atwater*, hampers the ability of officers to react appropriately to situations and therefore cannot not be found to be a readily administrable standard in practice.

Previous language from this Court further emphasizes that probable cause, "according to its usual acceptation, means less than evidence which would justify condemnation." *Illinois*, 462 U.S. at 232 (quoting Locke v. United States, 7 Cranch 339, 349 (1813)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision." *Maryland*, 540 U.S. at 371 (2003) (quoting *Illinois*, 462 U.S. at 235). Because this Court has held that probable cause is most certainly less than that required of conviction by a jury, it would stand to reason that it is not required to satisfy for all elements of a crime when making a warrantless arrest based upon reasonable belief of guilt.

Finally, as an acting officer in the field, they are entitled to qualified immunity when readily able to show they acted with sufficient probable cause. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341-43 (1986)). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 502 U.S. at 229 (quoting Davis v. Scherer, 468 U.S. 183, 196 (1984)). Were the standard of probable cause to be raised to the higher standard proposed by the Petitioner, there is the realistic threat of deterrence

of officers from making valid arrests based on their uncertainty of a stricter standard which may result in a detriment to that officer personally.

The logical follow up to this issue of deterrence is to simply suggest "if in doubt, do not arrest." *Atwater*, 532 U.S. at 350–51. "The first answer [to this] is that in practice [it would] boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those "ifs, ands, and buts" rules [this Court has] generally thought inappropriate in working out Fourth Amendment protection." *Id*. "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 629 (1989). "Beyond that," applying the "when in doubt, do not" method would create "systematic disincentive to arrest in situations where [...] arresting would serve an important societal interest." *Atwater*, 532 U.S. at 350–51. This would then, effectively, defeat the very purpose that would be sought by officers in fear of being sued for invalid arrests.

The final argument to be made against Deputy Pfieff is that he would have been able to eventually obtain a warrant. The fault in this argument, though, is that the time would take for him to do so, late in the night, would provide ample opportunity for the individuals to either flee, destroy evidence, or otherwise prevent the due course of justice. Further, as established by precedent, probable cause is not so defined as to be able to apply to warrantless arrests alone. Probable cause is the standard for a search or arrest, with or without a warrant. Altering this standard will affect the ability for law enforcement to arrest without a warrant while also their ability to obtain a warrant as well. It is therefore, in support of precedent and maintaining the balance of government need and privacy of citizens that probable cause should be held to the current standard of probable cause.

II. THE "REASONABLENESS TEST" AS ARTICULATED BY THE SECOND CIRCUIT PROTECTS THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.

The Reasonable Test as advocated by the Second, Third Circuit and Sixth Circuit calls for a "fact-dependent inquiry" assessing "all of the circumstances of any given case." Diop v. ICE/Homeland Security, 656 F.3d 221 (3d Cir. 2011). This approach determining the appropriateness of a bail hearing as opposed to forcing hearings to be held for every detainee, including those that would not be considered eligible for bail under various sections of Title 8. This test accounts for due process considerations for individuals within the ICE detention system.

Title 8 U.S.C. Section 1226 authorizes the detention of any alien deemed deportable, lawful or otherwise, by the government until their removal hearings are held. 8 U.S.C. § 1226. There is no guarantee of a bail hearing for detainees in the statute as it was passed in 1996 and amended in 1998. In fact, the express opposite is present, that the Attorney General may "continue to detain the arrested alien." 8 U.S.C. § 1226(a)(1). No alien detained in such a fashion, whether a lawful resident or unlawful trespasser, is entitled to a bail hearing as a matter of law unless they file a petition to have one. This understanding was upheld in *Demore v. Kim*, which interpreted Title 8, section 1226 of the United States Code to authorize the Federal Government to detain a deportable alien without bond until the final Deportation Hearing is held. 538 U.S. 510, 2003. This was considered consistent with the Fifth amendment's due process clause. *Id*. When that case was decided, the average time an unlawful alien spent in detention prior to receiving a deportation hearing was forty-seven days. Syracuse.edu, Immigration Court Backlog Keeps Rising, TRAC Immigration, http://trac.syr.edu/immigration/reports/385/ (last visited March 20, 2017).

This rule in Title 8, § 1226 is intended to have two effects. 8 U.S.C. § 1226. First, it ensures those individuals who have been found to be deportable under the provisions of Title 8 appear at their final deportation hearing. *Id.* Second, it prevents the release of convicted criminals back into the community. *Id*. Indeed, since these individuals had committed an offense for which deportation was mandatory, there is no incentive for them to return on their own accord. Thus, it was deemed proper that unlawful aliens who were subject to mandatory deportation were not entitled to a bail hearing unless specifically petitioned for. Even after petitioning for a bail hearing, there is no guarantee that a hearing would be granted. 8 U.S.C. § 1226(a)(1).

Historically, the government has been given wide latitude in enforcing the flow of persons across our borders. Previous iterations of our immigration statutes contain similar detention provisions to the current form of Title 8. 8 U.S.C. § 1226. The Immigration Act of 1917 made it clear that bail in deportation cases is "not granted as a matter of right," but at the government's discretion. This was later upheld by the Court in Carlson v. Landon, 342 U.S. 524, 541 (1952). Other holdings find that Congress may make rules that would be unacceptable if applied to its citizens. Mathews v. Diaz, 426 U.S. 67, 80 (1976). Under the current version of Title 8, passed in 1996, bail proceedings are available at the request of the detainee. 8 U.S.C. § 1226(a)(1). Ms. Secord exercised this right. The chain of events for due process was interrupted when the District Court ordered her release instead of allowing the bond hearing to be scheduled and proceed.

Historic trends also demonstrate the necessity to keep such individuals detained until they have had a deportation hearing. In 2003, when *Demore* was decided, the percentage of individuals who did not return for their deportation hearings was 40%. Dept. of Homeland Security, Office of the Inspector General Report, April 14, 2006 (https://www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf). This percentage has only grown. *Id.* As noted in *Demore*, Congress was already

concerned with this statistic and believed discretionary release would lead to many deportable criminal aliens skipping their hearings. *Demore*, 538 U.S. at 519.

In theory, this ability to detain individuals already known to have committed offenses for which deportation is warranted is intended to streamline the process of removal. Unlike in other immigration cases, the Executive Office of Immigration Review (EOIR) does not have to expend resources in determining whether the individuals in question are deportable. The individuals have already demonstrated, through some combination of unlawful admission or criminal conduct, that they have met one of the deportability criteria contained in Title 8, § 1227. 8 U.S.C. §1227. The burden of proof in removal proceedings is on the individual being considered for deportation. In this instance Ms. Secord would have to demonstrate that she was not an unlawful resident subject to deportation, as her unlawful alien status was confirmed during her previous criminal trial. Detaining them throughout the process is supposed to expedite their removal, there being no reason to revisit whether the individual is deportable and thereby eliminating the chance that they will not appear as directed. Ms. Secord, still being in custody, would have appeared at her removal hearing. The removal hearing is simply the mechanism by which a deportation order will be administered.

Ideally, the immigration situation in the United States would allow this system to function properly. Those detained as deportable due to the commission of less severe crimes or only due to unlawful status would be allowed to file petitions to be considered for bail. In these cases, if the severity of their transgression was not egregious, bail hearings could be granted in a reasonable time to put their personal affairs in order or obtain further legal counsel. This was thought process of the court when *Demore* was decided and the average wait time for a deportation hearing was 47 days. Since that decision in 2003 however, the wait time for a removal hearing has ballooned to over 630 days. Syracuse.edu, Immigration Court Backlog Keeps Rising, TRAC Immigration,

http://trac.syr.edu/immigration/reports/385/ (last visited March 20, 2017). The Second Circuit's decision in *Lora v. Shanahan*, relied on by the District Court and the petitioner, calls for a six-month limitation on detention while awaiting removal hearings. Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015). In establishing this bright line rule, the court has only exacerbated the problem of volume. This in turn has made it more difficult to determine which individuals should be closely scrutinized. With the best intention of ensuring due process for all as reinforced by *Zadvydas*, the court has ignored the practical reality that the population of detainees in the ICE system is nearing half a million people. Zadvydas v. Davis, 533 U.S. 678 (2001). Guaranteeing them all a bail hearing within six months is proving unfeasible. Particularly considering that a large percentage of those guaranteed a hearing will be denied bail based on the severity of the crime they are in detention for.

The nature of the immigration issues in the United States makes situations vastly different depending on geographic location. Depending on where one is located, there could be a few dozen to tens of thousands in ICE custody, vastly altering the potential wait times. Establishing the "reasonable test" would allow local courts to determine how to best serve their communities. This would reinforce precedent that local courts may "exercise an independent judgement on what is reasonable," depending on their local situations. Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 614 (1940).

In the immigration context, an independent judgement on what is reasonable should include: 1) whether or not detention has extended beyond the average time; 2) probable extent of future removal proceedings; 3) likelihood of removal; and 4) conduct of both the alien and the government. These factors were proposed by the Sixth Circuit in 2003 and provide a guideline for handling the fact-specific inquiries at a local level that would best serve the interests of both the

government and the detainees in question. Hoang Minh Ly v. Hansen, 351 F.3d 263, 271 (2003). This framework incorporates issues that would be relevant for both parties, takes into account local realities and does not attempt to force an arbitrary time limit.

Attempting to enforce a universal standard of six months will also have other consequences. Per recent studiess, up to forty percent of the current detention population are guilty of crimes meeting the standards for deportation under Title 8, § 1227, including felonies and crimes of moral turpitude. Current statistics also demonstrate over 200,000 of the current 542,411 detainees have already waited longer than the six months advocated by the Lora decision. As a result 80,000 criminals convicted of serious crimes could potentially be released back into communities across the US upon filing petitions. Syracuse.edu, Immigration Court Backlog Keeps Rising, TRAC Immigration, http://trac.syr.edu/immigration/reports/385/ (last visited March 20, 2017). This cannot be what Congress intended when the law was passed. Any interpretive construction of a statute should not be "plainly contrary to the intent of Congress." United States v. X-Citement Video, Inc., 513 U.S. 468 (1994).

The six-month standard does little to reinforce due process aside from setting a mandatory time limit on the ability of the government to detain potentially dangerous aliens. Indeed, applying such a standard in the face of the current realities of the immigration system is an overreach that will have lasting consequences. Mandating that convicted criminals that have already been found guilty and deportable under Title 8, § 1227(a)(2), is an inappropriate diversion of resources. Such individuals would not be eligible for parole due to the nature of their crimes. Forcing a temporal limit to be met by an overworked system does not equate to due process. Rather, it amplifies the existing problems and poses a potential danger to the population at large. Further, statutes that "treats aliens differently from citizens does not in itself imply that such disparate treatment is

'invidious'." Mathews v. Diaz, 426 U.S. 67, 80 (1976). In this context, they serve a greater purpose that requires balancing with individual needs. The six-month rule ignores Congressional intentions and does not properly balance the needs of those making such claims against the needs of the nation's population.

The *Lora* standard of six months was ill-advised, being outdated immediately when it was decided in 2015. It did not consider the current state of the ICE detainee population. It merely attempted to rectify a perceived issue with due process when in fact due process was being served, albeit slowly. The average wait time for a removal hearing is currently 21 months. Syracuse.edu, Immigration Court Backlog Keeps Rising, TRAC Immigration, http://trac.syr.edu/immigration/reports/385/ (last visited March 20, 2017). Petitioning for a bail hearing is the proper exercise of due process afforded by the law. In fact, there is no guarantee that a petition for a bail hearing will be granted. This was deemed acceptable in *Demore*, 538 U.S. at 517. The reaction of the District Court in this case demonstrates this complication, as by ordering Ms. Secord's release in accordance with *Lora*, the District Court interrupted the very due process it was purporting to uphold. No bail hearing was held. Ms. Secord was simply released. The same would hold true for thousands of convicted criminals. This cannot be the intended outcome even in the pursuit of due process. The Second Circuit itself has acknowledged the unworkability of the six-month rule and is advocating, along with the Third and Sixth Circuit, a better alternative in the "reasonableness test."

The "reasonableness test" to determine a time period for bail hearings protects due process for unlawful aliens while balancing those concerns against societal interests. By specifically mandating that District Court's be involved with the process, the concern of the ICE system being overworked is mitigated. It also provides federal court oversight of ICE intentions. Further,

specific inquiries into the nature of every individual's case ensures that due process is afforded instead of a one-size fits all approach. The appropriate district courts can determine what "reasonable" time periods are for their particular geographic localities. While the national statistics are daunting, some areas are less congested than others which will lead to a disparity in the length of time spent waiting for proceedings to occur. A geographic diversity of reasonableness is not unprecedented in other areas of the law, such as the application of the McNab-Mallory rule. Corley v. United States, 556 U.S. 303 (2009). This approach has proven more effective at reducing the number of dangerous illegal aliens released prematurely back into the population. This was ultimately Congress' goal in crafting the legislation.

Had this standard been advanced previously, there would be less congestion in the ICE system as it currently stands. Grappling with the possibility of granting hearings to every petitioner who has been detained for more than six months, the already strained ICE system was forced to increase its wait times. Indeed, had the "reasonableness test" been in place when Ms. Secord was first transferred to an ICE facility and more resources been freed she may have found herself testifying in her own bail hearing sooner than the amount of time it has taken to get to this point procedurally. That would be a far superior protection of her due process rights.

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

Team 14
Anonymous & Associates
14 Moot Court Blvd.,
Angola, New York 14006

MARCH 2017