

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 Supreme Court of the
United States**

BRIEF FOR THE RESPONDENTS

TEAM NUMBER 16
Counsel for Respondents

QUESTIONS PRESENTED

- I. Whether the Second Circuit correctly applied the totality of the circumstances standard to determine if Deputy Pfieff had probable cause to arrest Petitioner, when he arrived to the scene of the incident to find masked individuals around a table illuminated by candlelight, he identified himself as an sheriff, and entered without force, all persons in the dwelling fled, and the he later learned that Petitioner did not have permission to be on the premises.
- II. Whether the “reasonableness test”, articulated by the Second Circuit, used to determine a time for bail hearings, protects the Due Process rights of undocumented aliens when it allows the government time to ascertain the individual facts necessary for each case to determine bail while balancing the society’s need for safety.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In pertinent part of the Fourth Amendment of the United States Constitution, “The right of people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated...” U.S. CONST. amend. IV

In pertinent part of the Fifth Amendment of the United States Constitution, “no person shall be...deprived of life, liberty, or property without the due process of law”. U.S. CONST. amend. IV

STATEMENT OF THE FACTS

In 2015, Petitioner, Laura Secord (hereinafter “Petitioner”), a Canadian citizen, was arrested and convicted at trial in the City of Angola Court of criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree. (R. at 1). After being convicted, Petitioner was sentenced to a year in prison for her crimes. (R. at 1). While serving her sentence, she filed a habeas corpus petition with the United States District for the Western District of New York alleging that her arrest was in violation of the Fourth Amendment of the Constitution. (R. at 1.) Subsequently, Petitioner was released from County Prison and delivered to Immigration and Customs Enforcement (hereinafter “ICE”) regional office in Buffalo while her petition was pending. (R. at 1). During this time, Petitioner’s sentence had ceased and she was transferred to the Department of Homeland Security for her deportation proceedings, in proper accordance with 8 U.S.C § 1226. (R. at 4). Petitioner then filed a subsequent habeas corpus petition arguing that ICE had detained her longer than allowed, which, along with the reversal of conviction was granted by the District Court. (R at 4). Both the City of Angola and ICE appealed separately to the United States Court of Appeals for the Second Circuit, to which the appeals were joined and the District Court’s determinations were reversed. (R. at 4). On February 20, 2017, the Supreme Court of the United States granted a Petition for writ of certiorari on both appeals. (R. at 11).

On December 21, 2015, Petitioner who illegally entered the United States by walking across a frozen Lake Erie in 2013, was found inside a summer cottage along the lake. (R. at 2). During the winter, these cottages are usually closed, however, there were lights on inside one of the cottages that caused concern for a resident in the area. (R. at 2). This suspicious activity led Deputy Barnard Pfeiff, an officer from the Erie County Sheriff’s office, to arrive on the scene for

an inquiry. (R. at 2). Deputy PfiEFF observed several hooded or masked individuals gathered inside the property around a table, which was illuminated by candlelight. (R. at 2). He then relayed his observations to his supervisor, Sergeant Slawter, who told him to “go find what’s going on”. (R. at 2). With these instructions, Deputy PfiEFF returned to the cottage, knocked on the front door, and identified himself as an officer from the Sheriff’s Department. (R. at 2). After knocking and announcing of his presence, Deputy PfiEFF observed the hooded individuals scatter and hide within the cottage. (R. at 2). He once again reported these observations to his supervisor and called for backup to come to the scene. (R. at 2).

After the first attempt at knocking on the front door and announcing his presence, Deputy PfiEFF found the door was unlocked and opened it, and announced once again out loud who he was, to which there was no response. (R. at 2). Since the lights were not working, he used the dim light provided by the candles and observed drawings and other documents on the table. Deputy PfiEFF un-holstered his sidearm while ordering the individuals to come out from the dark crevices. (R. at 2). Petitioner, along with five other individuals, surfaced from hiding in disguises and were ordered to put their hands within sight above their heads and remain on the floor. (R. at 2). When the backup that Deputy PfiEFF had called for arrived they all began to question the masked individuals. *Id.* While the other individuals had identification, it came to light that Petitioner did not have any form of identification on her, but instead only had cash and a pair of brass knuckles. (R. at 3).

None of the individuals, including the Petitioner, owned or had permission to use the premises. (R. at 2). Furthermore, James Fitzgibbon, one of the other five individuals, claimed he had permission as the nephew of the true owner. (R. at 3). However, Fitzgibbon’s uncle admitted that his nephew had no permission to be there. (R. at 3). Petitioner, in addition to the other

individuals, were arrested and then brought to the Erie County Holding Center, to be charged for criminal trespass. (R. at 3). Along with criminal trespass, Petitioner was also charged with possession of a deadly weapon due to her possessing brass knuckles in her backpack. (R. at 3). Petitioner admitted that the brass knuckles were hers that she brought into the United States when entering illegally. (R. at 3).

The United States Court of Appeals for the Second Circuit reversed both determinations disagreeing with the District Court's reasoning to release Petitioner from ICE and to discard of her convictions. (R. at 4). The Circuit court held there to be no bright line rule for the time of a bail hearing and only that it must be held within a reasonable time under the circumstances that are present for the individual. (R. at 4). Moreover, the court looked to the previous determinations of this Court that a brief time period is constitutional under the Fifth Amendment of the Constitution and it protects the due process rights of undocumented aliens. (R. at 5). Due to this, the Circuit Court remanded Petitioner back to ICE to allow for a fact dependent inquiry before a bail hearing. (R. at 5). Furthermore, the circuit court held that Deputy Pfieff had probable cause when arresting Petitioner due to the totality of the circumstances faced at the time of the arrest. (R. at 7). The court reasoned that the District court's decision "sets and impossible standard for arresting officers". (R. at 7). Moreover, the court noted that there does not need to be direct, affirmative proof of intent when making an arrest but to use what this Court has held and look to the "practical and commonsensical standard" by looking at all the circumstances, which the Circuit court found in reviewing the observations of Deputy Pfieff at the time of arrest.

SUMMARY OF THE ARGUMENT

The Second Circuit applied the correct standard to determine if Deputy PfiEFF had probable cause to arrest Petitioner and properly utilized the “reasonableness test” to determine a time for bail hearings, as it protects to Due Process rights of undocumented aliens. This Court has continuously held that the totality of the circumstances standard is proper when assessing whether an officer, or a reasonable prudent officer in the same position, had probable cause to make an arrest. When evaluating the totality of the circumstances, this Court has found that it is imperative to view not only the events that occurred during the arrest, but the events leading up to the arrest itself. The alternative standard, proposed by the lower courts, requires the arresting officer to have direct, affirmative proof of intent to commit a crime from the arrestee. This standard, referred to as the innocent mental state standard, is unattainable for arresting officers, as it will limit their ability to exercise their professional judgment. Moreover, it will force the arresting officers to adhere to a uniform bright line rule for every arrest, which this Court has ruled against on numerous occasions due to the absent uniformity in each case, as demonstrated by the totality of the circumstances. This Court should affirm the Second Circuit’s decision and uphold the precedent that has been utilized and shown to properly determine probable cause.

The case-by-case approach is within the confines of the United States Constitution and protects Due Process rights of aliens. This approach ensures each alien receives an individualized fact-dependent inquiry that meets this Courts determination of a brief period for detention, not incarceration. A brief period is determined by the individual alien’s circumstances and place of detainment. The Department of ICE and Immigration Judges located in or near Buffalo have established that there has been an increase of immigration removals due to its proximity to the Canadian border. For this reason, ICE requires additional time in circumstances when the

detainee has no ties to the community in which he or she resides, or the country in which he or she is currently in. Here, Petitioner has no ties to Buffalo and is not a legal citizen of the United States. Moreover, ICE has a duty to keep American citizens safe from dangerous undocumented aliens. Thus, the United States Court of Appeals for the Second Circuit was correct in ordering Petitioner be immediately remanded back to the custody of ICE. The Second Circuit also properly rejected any bright line rule in favor of the case-by-case approach to determine if the length of detention has become unreasonable. Therefore, the decision of the Second Circuit should be affirmed.

ARGUMENT

I. THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD BEING THE TOTALITY OF THE CIRCUMSTANCES WHEN DETERMINING IF DEPUTY PFIEFF HAD PROBABLE CAUSE TO ARREST PETITIONER.

The Fourth Amendment of the United States Constitution states in, in relevant part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” U.S. CONST. amend. IV. The totality of the circumstances standard, as utilized by this Court and the Second Circuit, protects an arrestee’s Fourth Amendment rights, as it looks to all events surrounding each individual arrest. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Brinegar v. United States*, 338 U.S. 160, 177-78 (1949). Additionally, this standard assures that not only the arresting officer had the belief that a crime was just committed or going to be committed throughout the arrest, but that a reasonable prudent officer in the same position would hold the same beliefs given the same circumstances. *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013); *Maryland*, 540 U.S. at 370; *Ornelas v. United States*, 517 U.S. 690, 693 (1996); *Illinois v. Gates*, 462 U.S. 213, 234 (1983); *Brinegar*, 338 U.S. at 175-

76. Since this Court has held that the totality of the circumstances standard is the correct standard when determining whether an officer has probable cause to make an arrest, the Second Circuit was proper in its actions of reversing the District Court's decision. *Maryland*, 540 U.S. at 371; *Illinois*, 462 U.S. at 231; *Brinegar*, 338 U.S. at 176.

The District Court's proposal of an innocent mental state standard is a standard of impossible reach for arresting officers. (R. at 7). The Second Circuit rejected a direct, affirmative proof of intent requirement for arresting officers because it would undermine the skill and sensible judgment of trained officers. *Id.* Thus, forcing officers into overlooking the totality of the circumstances to determine the arrestee's definitive mindset. *Id.*; *Finigan v. Marshall*, 574 F.3d 57, 63 (2d. Cir. 2009). This unattainable standard will not allow law enforcement agencies to properly protect people's rights, whereas the totality of the circumstances approach will allow agencies to protect societies and the arrestee's Fourth Amendment rights.

- A. The Supreme Court of the United States has held that when determining whether an officer had probable cause to make an arrest, the proper standard is whether a reasonable prudent officer, given the same totality of the circumstances, would do the same.

This Court has continuously concluded that the totality of the circumstances standard is the only applicable standard to determine if there is probable cause, where an arresting officer, or a reasonable prudent officer in the same position, to know if a crime was being, or going to be, committed at the time of an arrest. *Florida*, 133 S. Ct. at 1057; *Maryland*, 540 U.S. at 370; *Ornelas*, 517 U.S. at 693; *Brinegar*, 338 U.S. at 175-76. In *Maryland*, the defendant gave the officer permission to search his car that was originally stopped for speeding. *Maryland*, 540 U.S. at 368. The officer discovered a large amount of cash and cocaine in different compartments within the car and after none of the three passengers admitted to knowing anything relating to

what was found, the officer arrested all of them. *Id.* At the station, the defendant waived his Miranda Rights and admitted he was the owner of the cash and the cocaine. He also stated that the other two passengers did not have knowledge of the cocaine, leading the arresting officer to release the other two passengers. *Id.* at 369. The District Court, as affirmed by the Maryland Court of Special Appeals, found that the arresting officer had probable cause to arrest the defendant for possession of the cocaine with the intent to distribute, whereas the Court of Appeals of Maryland found that the officer lacked the necessary probable cause for the arrest. *Id.* This Court unanimously held that due to the circumstances presented in the car, any reasonable officer could have concluded that there was a common enterprise of drug dealing amongst the three passengers as evidenced by the circumstances being, the amount of drugs, cash, and the admittance by the defendant. *Id.* at 374.

This Court should find that the Second Circuit applied the proper standard when evaluating whether Officer Pfieff had probable cause to arrest Petitioner since it used the same standard set forth by this Court in *Maryland v. Pringle*. In *Maryland*, the events leading up to the arrest began with a car stopped for speeding that turned into the arresting officer conducting a consensual search. The events leading up to the arrest by Deputy Pfieff began with a phone call from a concerned neighbor that suspicious activity was occurring in a nearby house, including the use of candles, which led to Deputy Pfieff arriving at the scene. (R. at 2). When Deputy Pfieff arrived on the scene, he looked into the windows of the dwelling and found disguised individuals around a table. *Id.* He then consulted with his Sergeant on how to proceed. *Id.* This is similar to the actions taken by the arresting officer in *Maryland*, as he conducted the consensual search where ample amounts of cocaine and cash were found. After finding the cocaine and cash,

the arresting officer in *Maryland* asked the passengers of the car who the cocaine and cash belonged to. *Maryland*, 540 U.S. at 368.

Furthermore, the actions that occurred during both Deputy Pfieff's arrest and the arrest in *Maryland*, were parallel in nature. When none of the three passengers took responsibility of ownership, the officer arrested all of the passengers. *Id.* at 369. Deputy Pfieff took comparable actions to the arresting officer in *Maryland* by arresting all occupants in the dwelling after entering and determining that none of them had definitive permission to occupy the dwelling during this time. (R. at 3). Since this Court in *Maryland* held that the officer had probable cause to arrest the defendant for possession of the drugs, given the reasonable inferences, which could be made by any reasonable officer, this Court should find that the Second Circuit, applying the same totality of the circumstances standard, was correct.

This Court has determined an arresting officer had probable cause under the totality of the circumstances within the officer's knowledge, along with reasonably trustworthy information, as it would warrant a man in a similar position to believe an offense was being committed. *Brinegar*, 338 U.S. at 175-76. In *Brinegar*, the arresting officers were on highway patrol, watching for people illegally transporting liquor from suppliers to possible black market places. *Brinegar*, 338 U.S. at 162. The officers took immediate notice of the defendant's car due to the fact that the driver had been previously arrested five months earlier for illegally transporting liquor by the same officers, and who had been recently observed hauling whisky on two occasions in the previous five months. *Id.* at 162-63. The officers chased the defendant's vehicle, eventually forcing him off of the road, stopped the vehicle and questioned the defendant. *Id.* at 163. This led to him admitting on having twelve cases of liquor in his car, resulting in the officers searching for, and locating, the twelve cases. *Id.* The District Court, as well as the Court

of Appeals for the Tenth Circuit found that, given the officers' knowledge of the totality of the circumstances leading up to the search and arrest, the officers' had probable cause to arrest the defendant. *Id.* at 171. This Court affirmed the holding of the two lower courts, asserting that due to the defendant's previous arrest, paired with his previous work moving liquor in the illegal market, and his admission post car chase, the officers acted as any other officers would have given the circumstances, and therefore had probable cause. *Id.* at 177.

This Court should find that the Second Circuit applied the proper standard when determining whether Officer Pfieff had probable cause to arrest Petitioner as it applied the same standard set forth by this Court in *Brinegar*. 338 U.S. at 177-78. Prior to Deputy Pfieff arriving to the scene of the crime on the night in question, a neighbor called 911 and reported to the dispatcher that she saw suspicious activity, including candlelight, coming from a nearby home that was normally vacant during the time, due to the season. (R. at 2). This is analogous to the circumstances in *Brinegar*, as there were events before the arresting officers saw the defendant's car, including both of them being party to his arrest 6 months earlier, and witnessing him hauling whiskey for illegal purposes twice within the previous five months. Deputy Pfieff had communications with the occupants, as well as Petitioner, prior to making his arrests, where he entered the unlocked door after identifying himself as an officer, where all of the lodgers fled his sight. *Id.* Similarly, in *Brinegar*, the officers had communications with the defendant prior to arresting him, in which he consented to a search of his vehicle. *Brinegar*, 338 U.S. at 162.

In determining that the officers had probable cause to arrest the defendant in *Brinegar*, this Court not only looked at the circumstances from the day in question, but also to the events leading up to the defendant's arrest. *Id.* This Court should once again adapt the same approach, and not only look at Deputy Pfieff's actions once he arrived on the scene, but also the events

leading up to Petitioner's arrest. When examining the totality of the circumstances, the conclusion should be that Deputy Pfieff had probable cause when arresting Petitioner. If this Court does not find that the Second Circuit applied the proper standard when evaluating whether Deputy Pfieff had probable cause when arresting Petitioner, this Court will be suggesting an impossible standard for arresting officers to carry out. (R. at 7).

B. Using an unattainable standard for probable cause, such as the innocent mental state approach, will unravel the concrete framework that the Supreme Court has put in place regarding a probable cause standard.

The application of this unorthodox standard of the innocent mental state to determine probable cause, as utilized by the United States District Court for the Western District of New York, would drastically undermine this Court's determination that the experience and prudent judgment of officers is all that is necessary when evaluating the totality of the circumstances. *Finigan*, 574 F.3d. at 62, 63; *United States v. Arvizu*, 534 U.S. 266, 277 (2002). In *Finigan* the plaintiff was estranged from her husband, who still resided in their once shared marital residence. *Finigan*, 574 F.3d. at 60. The plaintiff had knowledge that her estranged husband was not home for an extended period of time, and as a result, called a locksmith to gain access into her old marital home without permission from her estranged husband. *Id.* After gaining access, the plaintiff returned to her old marital residence, and loaded a van with her belongings from the residence. *Id.* The responding officer, who had knowledge that the estranged husband was not home, arrived at the scene after being dispatched as a result of a of burglary report in the neighborhood. *Id.* The officer questioned the plaintiff regarding the property that was taken from the home, as well as whether the plaintiff had permission to be in the residence. *Id.* The plaintiff told the officer that she had legal title to the premises, her divorce attorney cleared the actions she was taking, and that she used a locksmith to enter. *Id.* The Second Circuit overturned the

District Court, and determined that the arresting officer did have probable cause to arrest the plaintiff. This was albeit the alleged innocent mental state the plaintiff attempted to argue at the time of arrest, since any reasonable prudent officer given the same totality of the circumstances would have concluded that the plaintiff was, or had just, committed a crime. *Id.* at 64.

The Second Circuit determined that the United States District Court in *Finigan* applied the incorrect standard in ruling that the arresting officer did not have probable cause by only focusing on what the officer knew, including that of the arrestee's mental state, at the time of the arrest. *Finigan v. Marshall*, 473 F. Supp. 2d 348, 356 (2007). The District Court determined that at the time of the arrest, it was not clear to the arresting officer whether the arrestee had entered her old marital residence illegally, after sharing with the officer that she had legal title to the property, had forgotten her key, and used the locksmith to enter. *Finigan*, 473 F. Supp. 2d at 351. The District Court found that it was not objectively reasonable for the officer to believe that probable cause existed, given the fact that the information provided to the officer did not prove the arrestee was committing or about to, commit, a crime at the time of the arrest. *Id.* at 355-56.

Given that the surmountable facts and procedural history in *Finigan* that are analogous to the case, this Court should follow the direction of the Second Circuit and find that the District Courts' innocent mental state standard is incorrect due to its unattainable requirements for the arresting officers. The District Court in *Finigan* found that the arresting officer did not have probable cause to arrest the arrestee as the facts known to the officer at the time of the arrest were not enough to show that the arrestee had committed, or had the actual intent to commit, a crime. This is parallel to the District Court ruling in the case at bar, which found that Deputy PfiEFF did not have probable cause to arrest Petitioner, as the facts he was made aware of at the time of the arrest showed that she, along with the other occupants within the dwelling, were not

there unlawfully, and were not committing, or did not have the intent to commit a crime. (R. at 4-6). The Second Circuit, in both *Finigan* and the current case before this Court, overturned the decision of the District Courts, and determined that both arresting officers had probable cause, after applying the totality of the circumstances standard, which is continuously utilized by this Court. (R. at 4).

Moreover, the responding officer in *Finigan* and Deputy Pfieff were presented with similar circumstances both prior to, and during, the arrests they each made. The circumstances that Deputy Pfieff faced included arriving to the scene of the crime on the night in question after a neighbor called 911 reporting suspicious activity in a nearby, normally vacant home. (R. at 2). This is similar to the circumstances the arresting officer in *Finigan* faced when he received a call from the dispatcher for a reported burglary at a house where he knew the owner was not occupying at the present time. The arresting officer in *Finigan* arrived to the scene of the incident to find the arrestee in action, moving furniture and personal belongings from the home into a van and proceeded to question the arrestee about her actions. Comparably, Deputy Pfieff arrived to the scene of the incident, identified himself at the door to which he observed the occupants fleeing, and entered to begin questioning the dwellers. (R. at 2). Deputy Pfieff then proceeded to learn inconsistent information that made it so the dwellers and arrestee did not have apparent permission to occupy the dwelling, which is when he arrested them. (R. at 2). After the arresting officer in *Finigan* learned that the arrestee did not have apparent permission to be at her old marital residence, or apparent permission to be taking her belongings from the residence, the officer proceeded to arrest her. Due to the similarities between the Courts in *Finigan* and Deputy Pfieff, this Court should find that both District Courts applied the incorrect standard of innocent

mental state, as it is an impossible standard, and uphold the Second Circuit’s standard of totality standard as the correct standard when evaluating probable cause.

This Court, through adapting the totality of the circumstances standard, has rejected bright line rules and rigid tests, and has determined probable 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.” *Florida*, 133 S. Ct. at 1056; *Maryland*, 540 U.S. at 370; *Ornelas*, 517 U.S. at 695. Moreover, this Court has repeatedly held that when examining probable cause, all that is required is whether there is a “fair probability” on which reasonable and prudent persons act, not in which legal technicians act, when determining if a crime has been, or is going to be, committed. *Florida*, 133 S. Ct. at 1056 (citing *Illinois*, 462 U.S. at 232-33); *Maryland*, 540 U.S. at 371; *Brinegar*, 338 U.S. at 173. Thus, police officers are not to act as legal technicians would such as in a trial when determining intent or a defendant’s possible innocent mental state.

Furthermore, it has been noted by this Court that it is not necessary for there to be a “prima facie” showing of criminal activity, just a likelihood that criminal activity would occur or has occurred given the circumstances. *Illinois*, 462 U.S. at 235. Here, the police had exactly that and believed Petitioner had no permission to be on the premises or to carry a deadly weapon. Additionally, in *Illinois*, this Court noted that, “probable cause’s focus is on ‘probabilities’, not ‘hard certainties’”. *Illinois*, 462 U.S. at 231. Due to the aforementioned fundamental beliefs of this Court, the Second Circuit properly found the District Court applied an impossible standard for arresting officers, requiring direct, affirmative proof of intent by the arrestee. (R. at 7).

It is imperative that this court not narrow the ability of officers to use their prudent judgment and experience to assess the credibility of suspects, granting them deference in a field

in which they are adequately trained to perform in. (R. at 7); *Arvizu*, 534 U.S. at 277; *United States v. Cortez*, 449 U.S. 411, 419 (1981). Furthermore, if an arrestee is later found not guilty, it does not vitiate the existing probable cause that was present at the time of the arrest. *Criss v. City of Kent*, 876 F.2d 259, 262 (6th Cir. 1988). Here, the District Court set forth that an innocent mental state of an arrestee would vitiate probable cause, however, as *Criss* proposes, even a latter declaration of an arrestee's innocence, is not enough to vitiate probable cause if it was present at the time of the arrest. *Criss*, 876 F.2d at 262. Therefore, it is critical that this Court continue on its path of applying the attainable standard of the totality of the circumstances and not veer down the impossible path of the innocent mental state standard that the District Court propose.

II. THE SECOND CIRCUIT CORRECTLY DETERMINED THAT THE REASONABLENESS TEST USED TO DETERMINE THE TIME FOR BAIL HEARINGS DOES PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.

The United States Court of Appeals for the Second Circuit properly held that the reasonable test, used to determine the time for bail hearings, protects the Due Process Rights of undocumented aliens. (R. at 5). The Fifth Amendment of the United States Constitution declares that “no person shall . . . be deprived of life, liberty, or property, without due process of law.” *U.S. CONST. amend. V*. It is well settled that the Fifth Amendment entitles aliens to due process in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). “[T]he Due Process clause applies to all ‘persons’ within the United States including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Following an arrest of an undocumented alien, an immigration judge will routinely conduct a bail hearing to decide whether the alien should be imprisoned or released while the removal proceedings are pending. *Lora v. Shanahan*, 804 F.3d 601, 608 (2d Cir. 2015) *cert. denied*, 136 S. Ct. 2494 (2016). However, where aliens are convicted of certain crimes, 8 U.S.C. § 1226(c)

requires mandatory detention for the length of the removal process. *Id.* This Court in *Demore*, upheld the constitutionality of section 1226(c), and stated, “for detention under the statute to be reasonable, it must be for a brief period of time.” *Demore v. Hyung Joon Kim*, 538 U.S. 510, 528 (2003). While the constitutionality of section 1226(c) is not contested, the circuit courts remain at odds on how to determine the “brief period of time” or “reasonable” limit on the amount of time an alien can be detained without a bail hearing in accordance with this section. The First Circuit has joined the Third and Sixth Circuits in interpreting “reasonableness” as authorizing a “fact-dependent inquiry requiring an assessment of all the circumstances of any given case” to determine whether detention without a bail hearing is unreasonable. *Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3d Cir. 2011); *Hoang Minh Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *See also Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 475 (3d Cir. 2015) (explaining “the highly fact-specific nature” of the balancing framework). Alternatively, only the Ninth Circuit has adopted a bright line rule limiting detention of an alien to a six-month period, subject to a finding of flight risk or dangerousness. *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013).

A. The reasonableness test used to determine the time for bail hearings does protect the due process rights of aliens because it protects their procedural rights to a hearing within a workable time frame.

The reasonableness test, otherwise known as the case-by-case approach, protects the due process rights of undocumented aliens by giving them a procedural hearing within an individualized timeframe based on his or her circumstances. The Constitution forbids the government from depriving “life, liberty, or property, without due process of law.” *U.S. Const. amend. V*. The protections and obligations secured by the Fifth Amendment extend to entitle aliens within the country’s borders to due process just the same. *Zadvydas*, 533 U.S. at 693. This

Court has concluded that Section 1226(c) was intended to remedy Congress' concern with the immigration authorities' failure to deal with the increasing rates of criminal activity among aliens. *Demore*, 538 U.S. at 518. This statute ensures that aliens would be present at their removal proceedings "and not on the loose in their communities, where they might pose a danger." *Id.* at 519. However, Justice Kennedy highlighted an important limitation of this Court's holding by stating, "were there to be an unreasonable delay by the [ICE Officials] in pursuing and completing deportation procedures, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 531-33 (Kennedy, J., concurring). However, the detainment necessary under the proper case-by-case approach is not a form of incarceration, but rather a necessary step to ensuring the safety of society.

The case-by-case approach protects undocumented aliens' due process rights because it ensures each alien receive an individualized fact-dependent inquiry within the parameters of the "brief period" for removal proceedings. *Id.* at 530. This Court stated, that *post-removal* detention becomes prolonged at the six-month mark. *Zadzydas*, 533 U.S. at 701. However, when addressed with *pre-removal* detention, this Court did not specify the exact point in time when an alien's pre-removal detention becomes prolonged. *Demore*, 538 U.S. at 521. Although, *Demore* stated pre-removal detention lasts anywhere between a month and a half to five months, it subsequently denied the detainee's request for a bond hearing after six-months in custody, finding six-months to be within the meaning of a "brief period." *Id.* at 530. This Court found the six-month detention period to be reasonable for several reasons. First, the court gave weight to the fact that the detainee had requested a continuance of his removal hearings. *Id.* Second, this Court found continued detention reasonable and a constitutionally permissible part of the removal process due

to the problems faced with convicted criminal aliens failing to appear for their deportation hearings or committing more crimes before their deportation hearings commence. *Id.* at 518.

A case-by-case approach provides an alien with due process within a reasonable time, and if the detainee feels the time has been unreasonable, they have recourse in the courts by filing a habeas petition. The Second Circuit noted that “every detainee must file a habeas petition challenging his or her 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.” (R. at 5) (*emphasis added*). Thus this Court believed that to fulfill the purpose of §1226(c), a reasonable length of detention is a period that is within a month and a half to five months. *Demore*, 538 U.S. at 530. Since a threshold was set by this Court, “the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past those thresholds.” *Diop*, 656 F.3d at 234. Therefore, there needs to be an inquiry into each individual on an ad hoc basis. This Court should follow its precedent reasoning that “§1226(c) yields to the constitutional requirement that there be a further, individualized inquiry into whether continued detention is necessary to carry out the statute’s purpose.” *Diop*, 656 F.3d at 235; *See Zadvydas*, 533 U.S. at 699 (reading § 1231 to contain an implicitly “reasonable time” limitation on the length of post-removal detention).

- B. The Second Circuit correctly determined that the case-by-case fact-dependent inquiry requiring an assessment of all the circumstances of any given case is reasonable because it makes the proceedings fair for both sides and prevents aliens from using dilatory tactics.

The Second Circuit correctly applied the case-by-case approach for detention of an undocumented alien prior to a bail hearing, which calls for a fact-dependent inquiry to prevent illegal aliens from being released prematurely back in the population. (R. at 5). The Second Circuit joined the Third Circuit when determining that the most reasonable approach in

determining whether pre-removal mandatory detention has become prolonged, is the case-by-case method, as applied in *Diop*, 656 F.3d at 223. In *Diop*, the petitioner was taken into custody by ICE for removal proceedings as an alien who committed crimes involving moral turpitude and controlled substances as in accordance with Section 236(a) of the IIRIRA, which are now codified in 8 U.S.C. § 1226(a). *Id.* The petitioner was held for 1,072 days—two years, eleven months, and five days. *Id.* The court asserted that §1226(c) says that “aliens can be detained for as long as removal proceedings are ‘pending,’ even if they are ‘pending’ for prolonged periods of time. *Id.* at 231.

Individual review is necessary to determine whether detention has become unreasonable. *Id.* at 233. The Third Circuit held that Diop’s thirty-five months of detention without a post-Joseph hearing, which gages whether the detention was consistent with the purpose of §1226(c). *Id.* at 234; *In re Joseph II*, 22 I. & N. Dec. 799, 800 (B.I.A. 1999); *See Demore*, 538 U.S. at 514 (explaining that a Joseph hearing gives an alien the opportunity to avoid mandatory detention by establishing that he is not an alien, was not convicted of a crime requiring mandatory detention, or is otherwise not subject to mandatory detention). In holding for *Diop*, the court agreed with the Government’s argument that, “the reasonableness determination must take into account a given individual detainee’s need for more or less time, as well as the exigencies of a particular case.” *Diop*, 656 F.3d at 234. Additionally, the court noted that it must consider the lower courts timely procedural errors that caused unnecessary delay. *Id.* Ultimately, the Third Circuit explicitly declined to adopt a one-size fits-all approach. *Id.*

Justice Kennedy stated in *Demore* that continued detention becomes unreasonable at a certain point where the Government cannot justify its actions that continued detention is consistent with the purpose of preventing flight and dangers to the community. *Demore*, 538

U.S. at 531-33 (Kennedy, J., concurring). The Third Circuit found the best way to avoid unreasonable detention is to decide the cases by a fact-dependent inquiry that will vary depending on the individual circumstance, and explicitly declined to establish a bright-line rule on time. *Diop*, 656 F.3d at 233. Thus, the court in *Diop*, held that it was unreasonable to detain Diop for thirty-five months without a post-*Joseph* hearing, and stay consistent with the purpose of §1226(c). *Id.* Similar to the petitioner in *Diop*, Petitioner here was convicted of several crimes that qualified her for mandatory detention and removal under 8 U.S.C. §1226(a). (R. at 3). The Petitioner in the case at bar is also analogous to *Diop* because each were detained for deportation proceedings for at least six-months. (R. at 4). However, this is where the similarities between the two come to an end. Unlike the petitioner in *Diop*, here Petitioner waited an additional six-months to file a habeas corpus petition while in custody for her deportation hearing. *Id.*

While the Department of ICE and immigration judges are congested, they continue to work within the parameters of their recourses to fulfill their obligations in an appropriate manner within the case-by-case approach. The length of time Petitioner here waited for her deportation proceedings were not delayed by the lower courts procedural errors and was the product of a press of immigration removal proceedings challenged in this department. (R. at 6). The Second Circuit gave two examples to prove her wait was not procedural error and thus finding the six-month rule unworkable. First, “the first available judge to hear a bail request could not be scheduled until eleven months after Secord began her detention.” *Id.* Second, given the overtasked need for deportation hearings, ICE officials could not prepare for a hearing about Secord’s dangerousness or flight risk within the six-months that she was in custody. *Id.* Furthermore, Secord has been in the custody of the Department of Homeland Security (hereinafter “DHS”) for her Deportation hearing for only six-months. *Id.* Contrast that with the

petitioner in *Diop*, who spent thirty-five months in custody, crippled with timely procedural errors that caused unnecessary delay. *Diop*, 656 F.3d at 234. Here, Petitioner has no time costly procedural errors nor is she faced with any unreasonable standards of deportation proceedings. (R. at 6). Furthermore, the case at hand is different because Petitioner does not have any identification, she does not have any longstanding employment, and she was found illegally trespassing into the United States with a deadly weapon. (R. at 2).

The Department of ICE has a duty to keep the citizens of this safe. Moreover “[it] is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.” *United States v. Flores- Montano*, 541 U.S. 149, 153 (2004). If ICE releases Petitioner, a potentially dangerous alien, back into the country without enough time to determine her dangerousness or flight risk, simply because a time limit has elapsed, would be unjust to the citizens that ICE is meant to keep safe.

The Sixth Circuit also agrees with the case-by-case approach, as demonstrated by *Hoang Ming Ly v. Hansen*, which found it to be most appropriate for the pre-removal context because it considers the individual’s circumstance as well as the immigration judge’s caseload. 351 F.3d at 271. In *Hoang Ming Ly*, the detainee was convicted of credit card and bank fraud, which he served twelve months for. *Id.* at 265. The detainee was then transferred to the custody of the Immigration and Naturalization Service (hereinafter “INS”) and held for an additional eighteen months without a deportation hearing. *Id.* at 271. In determining if such a length was unreasonable, the Sixth Circuit used factors including: “the length of detention, the foreseeability of actual removal, and the conduct of both the immigration authorities and the detainee.” *Id.* at 271-72. The court ultimately reasoned the length of detention for the detainee was unreasonable for two reasons. First, although the detainee was partially responsible for the length of the

proceedings, the full length of the detention for removal proceedings was considerably longer than his criminal sentence of his two convictions. *Id.* at 271. Second, the court found the removal to the detainee's home country was not foreseeable. *Id.* at 266. The detainee in *Hoang Ming Ly* was Vietnamese, and due to the lack of a repatriation treaty between the United States and Vietnam, removal to his home country of Vietnam was not foreseeable. *Id.* Therefore, the Sixth Circuit held, that given the time of his incarceration and the fact that removal of the alien is not in the reasonably foreseeable future, his detention of over 500 days was unreasonable. *Id.* at 272.

Applying the same case-by-case approach and using the same factors used in *Hoang Ming Ly*, this Court should find Petitioner's detention is reasonable based on her circumstances. Like the detainee in *Hoang Ming Ly*, Petitioner was sentenced to twelve months in prison for her two criminal convictions. (R. at 3). However, after Petitioner served her criminal conviction sentence, she was detained for a mere six months by ICE. (R. at 4). Her detention in the custody of ICE was only half the amount of time she served for her several criminal convictions. *Id.* Contrary to the detainee in *Ly*, whose length of custody for deportation was almost double his sentence for his two criminal convictions. *Hoang Ming Ly*, 351 F.3d at 271. Furthermore, unlike the detainee in *Hoang Ming Ly*, Petitioner's home country is Canada. (R. at 2). She is not faced with the same national treaty problems that were prominent in *Hoang Ming Ly*, and which ultimately led the circuit court to conclude his deportation was not in the reasonably foreseeable future. *Id.* at 272. Petitioner's detention is only being extended because the first available judge to hear a bail hearing is not available for another five months, which still amounts to less time she served for her criminal convictions, and the ICE officials need for more time to prepare for her hearing. (R. at 6). Therefore, this Court should follow the Sixth Circuit's case-by-case approach and find Petitioner's detention has not reached an unreasonable period and can occur

within the reasonable foreseeable future.

The First Circuit was faced with a similar issue in *Ried v. Donelan*, and favored the approach that focused on individualized review to determine whether the detention becomes unreasonable. 819 F.3d 486, 495 (1st Cir. 2016). The detainee in *Ried*, committed crimes that triggered mandatory detention under Section 1226(c). *Id.* at 492. After serving his sentence for his criminal convictions, the detainee was held by the DHS for fourteen months. *Id.* The First Circuit was adamant in rejecting the bright-line approach and affirmed the lower court's decision that the detention was unreasonable. *Id.* at 496. In affirming, the circuit court reasoned with factors such as: "the length of the detention; the period of detention compared to the criminal sentence; the foreseeability of removal; the prompt action of immigration authorities; and whether the petitioner engaged in any dilatory tactics" shall be used to determine if detention has become prolonged *Id.* at 501

If the same factors were applied to the Petitioner, this Court should find the detention to be within the reasonableness standard adopted by the First Circuit. First, the length of detention for Petitioner has been only six months. (R. at 4). This Court has previously held six months to be a reasonable time period. *See Demore*, 538 U.S. at 521 (finding six months to be within the meaning of a "brief period"). Second, the period of detention by ICE has been six months, which is only half the amount of time Secord served under her criminal sentence. (R. at 4). Thus, the detention should still be within a reasonable amount of time thus far. Third, the Government has stated in their argument that an immigration judge can be scheduled after eleven months since detention began. (R. at 6). Since Petitioner has already served six out of the eleven months, she only has five months of continued detention before she can and will foreseeably get a bond hearing. Therefore, her total time of mandatory detention before her bail hearing will still be

three months shorter than the petitioner in *Reid*. Fourth, the immigrant authorities simply could not present a case within the six months due to the overwhelming removal docket in cases arising in Buffalo. (R. at 6). In Petitioner’s case, neither her nor ICE officials engaged in dilatory tactics or unfair delay. *Id.* Therefore, based on the factors used in the First Circuit, this Court should join it in applying the case-by-case approach to determine the reasonable time for a bail hearing.

The Second Circuit properly rejected the six-month bright line rule and this Court should follow the trend of circuit courts steering away from a strict rigid rule as set forth in the Ninth Circuit. *Rodriguez*, 715 F.3d at 1127; *See Hoang Ming Ly*, 351 F.3d at 271 (declining to accept the rigid six-month rule); *See also Diop*, 656 F.3d at 233 (declining to establish a bright-line rule that makes detention unreasonable). The Ninth Circuit found the government’s mandatory detention under Section 1226(c) is limited to a six-month period, subject to a finding of flight risk or dangerousness. *Rodriguez*, 715 F.3d at 1133. The plaintiffs in *Rodriguez*, were a class of non-citizens challenging their six-month and longer detention without a bond hearing. *Id.* at 1130. In deciding the case, the court considered four factors, including: “(1) appellees’ likelihood of success on the merits; (2) whether they have established a likelihood of irreparable harm; (3) the balance of equities; and (4) where the public interest lies.” *Id.* at 1133. The court ultimately held, considering these factors, the government shall be limited when detaining aliens awaiting deportation proceedings to six-months, absent findings of flight risk or dangerousness. *Id.*

Furthermore, this Court should not overrule the case-by-case approach, in favor of a rigid six-month bring line rule because of its possible inefficient means. The Second Circuit adopted the bring line approach, established in the Ninth Circuit’s decision in *Robbins* for over one year. *Lora*, 804 F.3d at 616. Since its implementation, that approach has proven unworkable in practice. (R.5). As evidenced in the District Court by news reports and other, “the removal

docket is particularly strained for those cases arising in Buffalo, due to its proximity to the Canadian boarder.” (R.6). Moreover, other ICE officials and Immigration judges in the same circuit are overburdened the same. *Id.*

The Ninth Circuit’s bright line rule gives possible criminals and terrorists an incentive to delay their case to six months only to have them released because the time is up. The First, Third, and Sixth Circuits have rejected the Ninth Circuit’s rigid six-month rule in part because of this concern. *See Chavez-Alvarez*, 783 F.3d at 476 (noting “aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute”). Furthermore, the Ninth Circuit’s rigid six-month rule gives aliens the ability to control their outcome through lagging and hindering tactics. If the detention precedes to the six-month length required by a bright line rule, albeit by a delay on the alien’s own accord, the alien would have to have a bond hearing and possibly be released into society before the government has adequate time to inquire about the individual’s circumstances.

Moreover, the Ninth Circuit’s bright line rule has repeatedly required immigration judges to grant multiple continuances to aliens, which can last months at a time. *See Martinez- Guzman v. Holder*, 356 Fed. Appx. 985, 987 (9th Cir. 2009) (reversing the denial of a motion for a fifth continuance). Furthermore, the Ninth Circuit in *Ahmed v. Holder*, held the courts should use a case-by-case approach to determine if a denial of a continuance constitutes an abuse of discretion. 569 F.3d 1009, 1012 (9th Cir. 2009). Therefore, the Ninth Circuit’s six-month approach has proven ineffective because it ultimately grants the immigration judge the discretion to grant multiple continuances that can last longer than six months. Moreover, the Ninth Circuit allows the immigration judge to use the case-by-case approach to determine if the multiple continuances are necessary. *Id.*

Thus, the Ninth Circuit's rigid one size fits all approach is ineffective in its objective to keep detention at a minimal time period because the case-by-case approach is still used to determine if more time is needed to detain the undocumented alien. Therefore, this Court should follow the jurisprudence set by the aforementioned circuits and determine that the case-by-case fact-dependent inquiry is the appropriate approach to ensure fairness and prevent dilatory tactics.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the United States Court of Appeals for the Second Circuit.

/S/
March 20, 2017