

In the Supreme Court of the United States

WINFIELD SCOTT, in his Official Capacity as
Director, Department of Immigration
and Customs Enforcement, *Respondent*

v.

LAURA SECORD, *Petitioner*

and

CITY OF ANGOLA, *Respondent*

v.

LAURA SECORD, *Petitioner*

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

BRIEF FOR RESPONDENT

Submitted on Behalf of Team R20

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals applied the correct standard to determine if Deputy PfiEFF had probable cause to arrest Petitioner.
2. Whether the “reasonableness test” to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens.

STATEMENT OF THE CASE

Illegal Entry into the United States. The Petitioner in this case, Laura Secord, a citizen of Canada, entered the United States illegally sometime during the winter of 2013. (R. at 2). Taking advantage of the cold weather, Petitioner walked across Lake Erie, which was frozen at the time. *Id.* With her, she brought along a pair of brass knuckles. (R. at 3). Petitioner has remained in the country unlawfully since that time.

Encounter with Law Enforcement. Deputy Barnard PfiEFF, a member of the Erie County Sheriff’s office received a call from a concerned citizen on December 21st 2015 to report suspicious activity. (R. at 2). The caller, a resident of Angola, New York, observed lights emanating from one of the summer cottages that line Lake Erie. *Id.* Upon arriving at the scene, Deputy PfiEFF observed a flickering candlelight through the uncovered window. *Id.* In the cottage, Deputy PfiEFF’s noticed a group of individuals, dressed in hooded garments, with their faces covered, gathered around a table. *Id.*

Thereafter, Deputy PfiEFF knocked on the door and announced himself as a member of law enforcement. *Id.* Looking through the uncovered window, Deputy PfiEFF saw the individuals disperse instantaneously. *Id.* At that point, Deputy PfiEFF radioed for back-up. *Id.* He then opened the unlocked door and, once again, announced himself as a member of law enforcement. *Id.* Hearing no response, Deputy PfiEFF attempted to flick the light switch, which did not turn on. *Id.*

He ordered the individuals out from hiding, and six people, including Petitioner, still disguised by their hoods, emerged from the darkness of the cottage. *Id.*

Search and Arrest. After ordering the individuals out from hiding, Deputy Pfieff performed a search for weapons and identification. *Id.* Every individual in the cottage had a New York State driver's license, except Petitioner. *Id.* By this point, back-up had arrived. (R. at 3). One of these individuals, James Fitzgibbons, initially lied to police about his permission to be in the cottage. *Id.* At first, Fitzgibbons claimed he had permission to use the cottage, which belonged to his uncle, and even produced a key to corroborate his story. *Id.* However, upon further questioning, Fitzgibbons admitted that he obtained a spare key by retrieving it from a hiding spot. *Id.* After some tracking down, Fitzgibbon's uncle told police that James did not have permission of his uncle to use the cottage "for any kind of party". *Id.* Petitioner, Fitzgibbons, and the others were arrested for criminal trespass, and transported to the Erie County Holding Center. *Id.* In addition, the police search revealed the brass knuckles belonging to Petitioner, and thus, she was also charged with criminal possession of a deadly weapon. *Id.* All but Petitioner were released as a result of her being in the country illegally. *Id.*

Trial, Conviction, and Subsequent Proceedings Below. Thereafter, Petitioner was convicted of criminal trespass and criminal possession of a deadly weapon in the fourth degree for the brass knuckles. (R. at 3). She was sentenced to prison. While in prison, Petitioner and her counsel filed for a writ of habeas corpus alleging her conviction to be erroneous because the police did not have probable cause in arresting her. *Id.* While her writ was pending, Petitioner's sentence ended. Pursuant to 8 U.S.C. § 1226 she was transferred to the custody of the Department of Homeland Security by virtue of being a criminal alien. (R. at 4). Petitioner again submitted a writ of habeas Corpus to the Western District of New York to review her detention pending removal

on the grounds that that her detention for over six months violated the Second Circuit's holding in *Lora. Id.* The District Court granted cert, overturning her conviction and ordering her release from the Department of Immigration and Customs Enforcement's ("ICE") custody. *Id.* Both the City of Angola and ICE appealed that decision. On Appeal, the Second Circuit reversed the decision of the District Court, with respect to both rulings. *Id.* On February 20th, 2017, this Court granted cert to address Petitioner's challenge to that decision. (R. at 11).

SUMMARY OF THE ARGUMENT

This is a case about reasonableness. More specifically, this is a case about the government's ability, be it national or local, to fulfill their obligations to the citizens of this country; namely, keeping us safe from those who wish to do us harm. However, the Petitioner in this case, wherefore it is undisputed that she is in this country illegally, and wherefore it is undisputed that she likes to keep deadly weapons on her person, now asks this Court to hamstring that ability of law enforcement. Thus, this case is about more than just the Petitioner. The decision by this Court will have far reaching consequences, and will forever change the destiny of our nation. Notwithstanding those momentous considerations, Respondents respectfully requests this Court to affirm the decision by the Second Circuit in its entirety for two reasons: (1) the Second Circuit applied the correct standard for determining whether the Erie County Sheriff's Department made a sufficient showing of probable cause to arrest Petitioner; and (2) the Second Circuit's adoption of the reasonableness test will protect the due process rights of undocumented immigrants because its application to the circumstances of each case will not be arbitrary, capricious, nor will it allow for the possibility that undocumented immigrants can be detained indefinitely.

The touchstone of the Fourth Amendment is reasonableness. Accordingly, before a warrant can issue, or arrest be made, the government is required to make a showing of probable cause. Typically, courts have found probable cause where the government has shown there to be a reasonable belief that a crime has been, or is in the process of being committed. All along, this Court has recognized that probable does not call for the application of rigid rules. Rather it is fluid, flexible, and involves the exercise of common sense. In turn, this Court has consistently and routinely applied the totality of the circumstances test to determine whether the government has made a sufficient showing of to make an arrest. Here, by applying the totality of the circumstances test to the facts of this case, the Second Circuit correctly held that Deputy Pfieff had probable cause to arrest Petitioner. Moreover, the Second Circuit adhered to this Court's precedent by declining to expand the already heavy burden on the government by requiring a showing of probable cause with respect to every element of a crime, including the element of intent. This contention is utterly baseless.

Similarly, the protections that the Due Process clause affords an individual should be analyzed under a flexible standard. Like the Fourth Amendment, the Due Process clause protects individuals from unreasonable government action. Where the Fourth Amendment is concerned with unreasonable invasions of privacy, so too is the Due Process clause concerned with unreasonable deprivations of either life, liberty, or property by the government. Accordingly, whether the Due Process clause prohibits a governmental deprivation will depend on the facts and circumstances in each case. The Second Circuit, in recognition of this Court's precedent, correctly overturned its own precedent, announced in *Lora*, and joined a plurality of circuits by adopting a reasonableness standard when reviewing writs of habeas corpus by undocumented aliens detained pursuant to 8 U.S.C § 1226(c). The reasonableness test ensures that

undocumented immigrants will not be unreasonably deprived of their right to liberty by the government. This standard is neither arbitrary, capricious, nor does it allow for the possibility that the government can detain undocumented immigrants indefinitely. What is more, while keeping in place all of the procedural safeguards afforded to undocumented immigrants, the reasonableness test also protects the substantive rights of undocumented immigrants under the Due Process Clause.

ARGUMENT

I. THE SECOND CIRCUIT APPLIED THE CORRECT VERSION OF THE TOTALITY OF THE CIRCUMSTANCES STANDARD BECAUSE IT ADHERES TO THE THIS COURT’S PRECEDENT THAT PROBABLE CAUSE IS A FLEXIBLE AND COMMON SENSE STANDARD

The Fourth Amendment safeguards the right of the people to be free from searches and seizures by the government that are unreasonable. *See* U.S. CONST. amend. IV. Furthermore, it provides that before any warrant is issued, there must be probable cause. *See Id.* As for warrantless searches and arrests by law enforcement officers, these too are made reasonable under the Fourth Amendment where there is probable cause to believe that a crime “has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

This Court has long recognized that probable cause cannot be reduced to a precise legal definition. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003). On several occasions this Court has echoed that probable cause is a “practical and common sense standard.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Essentially, it is a fluid concept that assesses probabilities and deals with “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Thus, probable cause cannot be “readily or even usefully reduced to a neat set of legal rules.” *Id.* at 232.

Although it cannot be exactly defined, this Court has indicated that the substance of all

probable cause definitions is a “reasonable ground for belief of guilt,” and that belief must be “particularized with respect to the person to be searched or seized.” *Pringle*, 540 U.S. at 371, (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91(1979)). This Court has stated, unequivocally, that when it evaluates whether the state has probable cause for an arrest, it has consistently looked to the totality of the circumstances. *See, e.g., Florida v. Harris*, 133 S.Ct. 1050, 1056 (2013); *Pringle*, 540 U.S. at 371; *Gates*, 462 U.S. at 232; *Brinegar*, 338 U.S. at 176. Therefore, this Court should affirm the decision by the Second Circuit, because it applied the correct standard in assessing whether there was probable cause for Petitioner’s arrest.

A. Deputy Pfieff had Probable Per the Totality of the Circumstances

Under the totality of the circumstances standard, probable cause is based on all of the available information and factors in each case, rather than any one factor. The foundation for the totality of the circumstances standard was established by this Court’s decision in *Gates*. *See Gates*, 462 U.S. at 213. In *Gates*, the police department received an anonymous letter stating that the defendants, a husband and wife, were selling drugs out of their home, and that these defendants had plans to transport drugs from Florida back to Chicago. *Id.* at 225. Based on the anonymous letter, the police department decided to pursue the tip and set up surveillance of the defendants. *Id.* at 226. The surveillance corroborated many of the details in the letter, such as the precise location of the defendant’s residence, the time these defendants would be traveling to Florida, and the type of car they would be driving. *Id.* at 227. Based on the letter and subsequent police corroboration, a warrant was issued to search the defendant’s residence and car. *Id.* at 226. On appeal, the Illinois Supreme Court concluded that a valid warrant should not have been issued based on the anonymous letter because the informant’s truthfulness and basis of knowledge had not been verified. *Id.* at 227.

On review, this Court agreed in part, that standing alone, the letter was not enough to determine that there was probable cause to believe that drugs would be found in the defendant's home or car. *Id.* However, this Court held that probable cause to search the defendant's home for alleged drug activity was in fact established by the anonymous letter describing the illegal activity, and by the independent police corroboration of the letter. *Id.* at 214. This Court rejected the previous standard that required a two-prong test to determine an anonymous "informants veracity or reliability and basis of knowledge". *Id.* at 232. Instead, this Court took into consideration all evidence gathered by law enforcement including the letter, and found that it established probable such that the search would uncover illegal narcotics. Justice Rehnquist, writing for the majority affirmed the view that, "[the] totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." *Id.* at 231. Furthermore, this Court stated, "[informant's] tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. Rigid legal rules are ill suited to an area of such diversity. One simple rule will not cover every situation." *Id.* at 232.

This Court reiterated the flexible nature of probable cause in a case concerning the trustworthiness of drug detection dogs. *See Harris*, 133 S.Ct. at 1050. In *Harris*, the respondent (defendant below) was pulled over for having expired license plates. *Id.* at 1053. Noticing that the respondent was nervous and had an open beer can, the officer asked his consent to search the truck. When the respondent refused, the officer had his narcotics dog execute a sniff test around the vehicle. The dog alerted the officer to the driver's side door handle, signaling that he smelled drugs there. The officer concluded, based primarily on the dog's alert, that there was enough probable cause to search the vehicle. *Id.* at 1054. Although the search of the vehicle did not

produce any of the drugs that the dog was specifically trained to detect, several ingredients required to make methamphetamines were found. The Florida Supreme Court held that the fact that a dog is certified and trained was not enough to establish probable cause to search the vehicle; the State needed to produce evidence of the dog's performance history. *Id.* at 1055.

On Appeal, this Court held that an inflexible set of evidentiary requirements should not have been proscribed. Rather, this Court stated, “[the] question—similar to every inquiry into probable cause—is whether *all* the facts and circumstances surrounding the dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.” *Id.* at 1058 (emphasis in original).

Similar to this Court's holding in *Harris*, when looking at all of the relevant circumstances leading up to the arrest of Petitioner, a reasonably prudent person would conclude that there was probable cause to suspect her of trespassing under the totality of the circumstances. Therefore, the Second Circuit properly held that Deputy Pfieff had probable cause to enter the summer cottage in this case.

1. Deputy Pfieff had the requisite probable cause to enter the cottage

First, the tip came on a winter night by a resident of the City of Angola who reported that there were lights coming from one of the summer cottages that lined Lake Erie. (R. at 2). Because the informant was a resident of the City of Angola and could thus be held accountable for giving false information, the resident's call to the police station to report suspicious activity was reliable. *See Navarette v. California*, 134 S. Ct. 1683, 1689 (2014) (stating that “[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity”).

Second, Deputy Pfieff's own personal observations of suspicious activity through an open cottage window would have lead a reasonable prudent person to believe that the six individuals, including Petitioner, were trespassers. Petitioner and the others were all dressed in hooded garments, and/or masks. (R. at 2). Additionally, these individuals sat around a table in a dimly lit room. The only light produced was from a candle. Furthermore, after Deputy Pfieff knocked on the cottage door and identified himself as a member of the Sherriff's department, Petitioner as well as the other hooded figures ran and hid.

2. Deputy Pfieff had the requisite probable cause to arrest Petitioner

Again, applying the totality of the circumstances standard, a reasonable prudent person in Deputy Pfieff's position would have concluded that there was probable cause to arrest Petitioner. First, after entering the cottage, Deputy Pfieff again announced that he was from the Erie Sheriff's department, at which point Petitioner and the others could have identified themselves. Instead they all remained silent, and did not proceed out of the cottage until ordered to do so. Moreover, after the Deputy conducted a pat down search for weapons and identification, Petitioner was the only individual without any form of identification. (R. at 2). She was also the only individual harboring a dangerous weapon on her person. Furthermore, when questioned, each individual suspect admitted that none of them lived in the cottage, making Deputy Pfieff's belief that they were trespassing more reasonable.

The Petitioner may argue that Deputy Pfieff ignored specific facts during his investigation, but that is not so. Indeed, it recognized that when determining probable cause law enforcement may not ignore facts that are available and undisputed. *See Baptiste v. J.C. Penney Co.*, 147 F. 3d 1252, 1259 (10th Cir. 1998). Here, it is undisputed that there were photographs of Fitzgibbon in the cottage, and that he was able to produce a key for the front door. (R. at 2). It is

also undisputed that the suspects were dressed in costumes to play Dungeons and Dragons and that the table contained snacks.

Yet, Fitzgibbon was unable to provide any contact information for his uncle when questioned. (R. at 9). When the police finally did call the uncle, no one answered. Similarly, the key that Fitzgibbon produced for the police was not his own personal key given to him by his uncle, but was a spare key left under a planter on the back patio. Here, under the totality of the circumstances, there was probable cause to arrest Petitioner for trespassing. Accordingly, this Court must affirm the Second Circuit's ruling to reinstate Petitioner's convictions.

B. This Court Has Never Required a Showing of Probable Cause with Respect to Each Element of a Crime Under the Totality of the Circumstances

Here, the dissent in the Second Circuit's decision proposes that this Court adopt a new requirement to the assessment of probable cause— "that for probable cause to exist, there must be probable cause for all elements of the crime." *Williams v. City of Alexander, Arkansas*, 772 F. 3d 1307, 1312 (8th Cir. 2014). This Court has never stated such a requirement. Although this Court has never addressed this specific issue, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court affirmatively stated that "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). Thus, this Court's precedent does not support lower courts adopting this standard. Not surprisingly, there is currently confusion and a divide among the circuit courts with respect to this issue.

The Eighth Circuit Court of Appeals explicitly requires that "for probable cause to exist, there must be probable cause for all elements of the crime, including mens rea." *City of Alexander, Arkansas*, 777 F. 3d at 1312. In *City of Alexander*, an individual had been arrested for

theft of city property, but those charges were later dismissed. *Id.* at 1310. Subsequently, this individual brought a civil suit against the chief of police, alleging violations of his Fourth Amendment rights. Under the relevant Arkansas statute, a person was guilty of theft of property when a person knowingly takes unauthorized control of another's property with the intent to deprive the owner of the property. *Id.* at 1312. Therefore, the Court held that the affidavit used in his arrest did not establish probable cause to show that the individual purposefully deprived the City of its property.

The Court's opinion in *City of Alexander* offers very little in the way of its rationale for this stringent requirement for probable cause. Instead, when adopting this standard, the court cited to a case in which a police officer disregarded exculpatory evidence that negated the mens rea required for assault. *Id.* at 1310.

In contrast, the Ninth Circuit Court of Appeal's position is that generally, police officers "do not need to have probable cause for every element of the offense, but they must have probable cause for specific intent when it is a required element." *Edgerly v. City & Cty. of San Francisco*, 599 F. 3d 946, 953 (9th Cir. 2010).

This Court should take the approach of the Fourth, Seventh and Eleventh Circuit Courts of Appeals and affirmatively state that probable cause for all elements of the offense is not required. The Eleventh Circuit Court of Appeals, in *Jordan v. Mosley*, 487 F. 3d 1350 (11th Cir. 2009), properly addressed this issue. *See Mosley*, 487 F. 3d. In *Mosley*, an individual was arrested for criminal damage to property after breaking equipment and refusing to pay for the damages. *Id.* at 1354. After the charges were dropped, this individual brought a civil action against the Deputy Sheriff that had landed his arrest, alleging that the sheriff violated his Fourth Amendment Rights. He claimed that the Deputy lacked probable cause to arrest him, because the Deputy had no

reason to believe that he had intentionally damaged the property. *Id.* at 1355. Under the applicable Georgia statute, criminal damage to property was a general intent offense, and person commits the offense of criminal damage to property if that person intentionally damages the property of another without consent. *Id.* Thus, this individual claimed that the Deputy lacked probable cause to arrest him because the officer had no reason to believe that the he *intentionally* damaged the equipment.

The Court held that the Deputy had acted as an objectively reasonable police officer and thus needed no specific evidence of intent to make the arrest. *Id.* at 1355. The court reasoned that “no police officer can truly know another person’s subjective intent.” Reasoning, “the fact remained that the equipment was damaged, and that fact can provide some evidence that the individual intended the damage.” *Id.* Thus, the court held that “no officer has a duty to prove every element of a crime before making an arrest... police officers are not expected to be lawyers or prosecutors.” *Id.* at 1355.

Our present case is similar in to the situation dealt with by the court in *Mosley*. Most statutes dealing with trespass require that a person have general intent to trespass. (*See, e.g.*, N.Y. Penal Law § 140.10, stating that a person is liable for criminal trespass in the third degree “when he knowingly enters or remains unlawfully in a building or upon real property”). In our present case, Deputy PfiEFF should not be required to provide specific evidence to show that Petitioner and the others knowingly entered the property unlawfully. Like the court in *Mosley*, this Court should hold that the act of her being in the summer cottage, which was not her property, provided some evidence of for trespassing.

Likewise, requiring that probable cause for all element to exists before an arrest is made would widely out of line with this Courts fluid and nontechnical concept of probable cause. In

determining whether there is probable cause for an arrest, this Court has explicitly rejected “rigid rules, bright line test, and mechanistic inquires in favor of a more flexible, all things considered approach.” *Harris*, 133 S.Ct. at 1055. This additional requirement that was proposed by the dissent would be the very rigid, and bright line test that this Court should reject.

Moreover, this requirement would prove to be unworkable for law enforcement officers in instances where intent is an element of a crime being committed. The Fourth Amendment balances the need to protect citizens from rash and arbitrary interferences of privacy while at the same time gives fair leeway to police officers to enforce the law to protect the community. *See Brinegar*, 338 U.S. at 176. Adopting a standard that requires a probable cause to be established for each element of an offense, including *mens rea*, would unfairly swing the balance in favor of citizen’s individual liberties. At the same time, it would essentially tie the hands of law enforcement. As the Second Circuit’s majority opinion lamented, requiring officers to have an affirmative proof of intent “would radically narrow [their] ability to use their experience and prudent judgment to assess the credibility of suspects. (R. at 7).

Therefore, this Court should affirm the decision by the Second Circuit, and hold that Deputy PfiEFF had probable cause to arrest Petitioner for criminal trespass and criminal possession of a dangerous weapon.

II. THE REASONABLENESS TEST ADOPTED BY THE SECOND CIRCUIT IN THIS CASE PROTECTS THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS BY PRECLUDING UNREASONABLY LONG PERIODS OF DETENTION FOR ALIENS SUBJECT TO REMOVAL

The Due Process Clause of the Fifth Amendment, like many portions of the Bill of Rights, protects individuals from “government overreach.” U.S. CONST. amend. V; *see United States v. La Monica*, 472 F. 2d 580, 581 (9th Cir. 1972). A plain language reading of the Due Process

Clause suggests that the government has the authority to deprive individuals of life, liberty, or property, so long as adequate procedures were followed. However, this Court's interpretation of the protections the Due Process Clause provides for has expanded over the years. Under this expanded interpretation, called substantive due process, the government may not unreasonably deprive someone of their liberty, regardless of any procedural protections available. *See Natale v. Town of Ridgefield*, 170 F. 3d 258, 263 (2d Cir. 1999) (explaining that "substantive due process is an outer limit on the legitimacy of governmental action" and will only be violated "by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority"). Nevertheless, these substantive protections are not unlimited. In turn, the rights the Due Process clause provides an individual will ultimately depend on the circumstances. *See Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

The constitution grants Congress the authority to "establish uniform rules of naturalization." U.S. CONST. art. I, § 8 cl. 4. Since the 1990's, Congress has used this broad power to enact a series of immigration reforms to "close the backdoor to illegal immigration." STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING S. 358 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6801-1. As part of its desire to step up enforcement of immigration law, Congress passed § 236(c) of the Immigration and Nationality Act, permitting the Attorney General to detain undocumented and otherwise criminal aliens pending their removal. *See* 8 U.S.C. § 1226(c) (2012). Subsequent challenges to the constitutionality of this provision have led a majority of circuits to infer a limitation on the amount of time an alien may be detained before the Due Process Clause requires a bond hearing. However, these circuits disagree on which standard to use in deciding this question.

In this case, by adopting the reasonableness test, the Second Circuit now joins the First, Third, Sixth, and Eleventh Circuit Courts of Appeals. Leaving the Ninth Circuit as the only court applying the six-month bright line standard. Under that standard, (previously adopted by the Second Circuit in *Lora v. Shanahan*, 804 F. 3d 601 (2d Cir. 2015), and subsequently overturned in this case), after the alien has been detained for six months, Due Process absolutely requires a bond hearing, regardless of “the exigencies of a particular case.” *Diop v. ICE/Homeland Security*, 656 F. 3d 221, 234 (3d Cir. 2011). However, like the Second Circuit in this case, courts adopting the reasonableness test cite the problems that the six-month approach creates. *See Chavez-Alvarez v. Warden York County Prison* 783 F. 3d 469, 476 (3d Cir. 2015) (stating that the six-month standard might unduly reward “aliens who are merely gaming the system by delaying removal with a bond hearing...[returning] us to the very situation that Congress was trying to fix”).

In Justice Atkinson’s dissent, he seemed primarily troubled by the Second Circuit’s decision to overturn its previous holding in *Lora*. (R. at 8). However, Justice Atkinson’s fears are wholly unfounded. Despite the reasonableness test doing nothing to rid undocumented aliens of the procedural protections already afforded to them, such as *Joseph* hearings, and the right to petition an Article III court for a writ of habeas corpus, the reasonableness test also protects the substantive rights of undocumented aliens as well. *See Demore v. Kim*, 538 U.S. 510, 521 n.3 (2003) (explaining that *Joseph* hearings allow detainees to avoid mandatory detention by demonstrating that he is not an alien... [or] was not convicted of the predicate crime”). Because it is neither arbitrary, capricious, nor does it allow for undocumented aliens to be detained indefinitely, the reasonableness test protects the right of undocumented aliens to be free from unreasonably long periods of detention.

A. The Protections that the Due Process Clause Affords an Individual Will Depend on the Circumstances

As an initial matter, it is important to define the protections the due process clause affords undocumented immigrants before one can determine whether the reasonableness test adequately protects their rights. It is undisputed that the protections of the due process clause extend to undocumented aliens and citizens alike. “The Fifth Amendment's Due Process Clause applies to all persons within the United States, including aliens.” *Kaur v. Ashcroft*, 388 F. 3d 734, 736 (9th Cir. 2004). However, the exact protections afforded an individual by the due process clause will not be the same in every circumstance. *See Flute v. United States*, 535 F. 2d 624, 626 (Ct. Cl. 1976) (“procedures required by this clause depend upon particular circumstances involved, precise nature of government function and type of liberty or property interest affected”).

Take, for example, the different procedural protections required by the due process clause with respect to convicted criminals facing the death penalty and those afforded to individuals facing deportation. *Compare Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“when a defendant's life is at stake, the Court has been particularly sensitive to insure (*sic*) that every safeguard is observed”) with *Sukwanputra v. Gonzales*, 434 F. 3d 627, 632 (3d Cir. 2006) (“deportation is not a criminal proceeding and has never been held to be punishment, and thus no judicial review is guaranteed by the Constitution”). If every instance of governmental deprivation required the maximum protections of the due process clause, the government could not function. On the other hand, if the due process clause only requires the bare minimum in every case, the risk of government abuse becomes too great. Thus, due to its highly contextual nature, determining the protections an individual is afforded under the due process clause requires a “flexible” analysis. *See Matthews*, 424 U.S. at 334.

In this case, the question centers around a governmental deprivation of liberty. Because the detention of aliens is fundamentally an exercise of the government’s authority to “physically restrain” these individuals it is in this context that informs the Due Process analysis. *See Kansas v. Hendricks*, 541 U.S. 346, 356 (1997). In that regard, the Due Process rights of undocumented aliens are limited in two respects.

First, by virtue of being in the country illegally, undocumented immigrants are not afforded the same protections as citizens and legal aliens. *See Demore*, 538 U.S. at 521 (“[in] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens”); *see also Rady v. Ashcroft*, 193 F. Supp. 2d 454, 458-59 (D. Conn. 2002) (holding that the mandatory detention of criminal aliens, pending removal proceeding, did not violate alien's substantive due process rights because no fundamental liberty interest was at stake where alien was not a legal permanent resident); *see also Davis v. Weiss*, 749 F. Supp. 47, 48-50 (D. Conn. 1990) (holding that undocumented aliens “have no fundamental right to bail”).

Second, this Court has repeatedly held that the protections of Due Process afforded to individuals must be balanced against important government interests. *See United States v. Salerno*, 481 U.S. 739, 747 (1987) (“the government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest”). For example, in *Hendricks*, this Court upheld the constitutionality of a Kansas statute, mandating the detention of mentally ill individuals. *See Hendricks*, 541 U.S. at 356. Stating, “[this] Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context.” *Id.* In that decision, this Court explained that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does

not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.” *Id.* Reasoning, “[there] are manifold restraints to which every person is necessarily subject for the common good ... [without which] society could not exist with safety to its members.” *See Id.* at 356-57. Thus, this Court’s previous holdings dictates that courts must weigh the interests of the public and the government, against the rights of individuals.

Accordingly, courts adopting the reasonableness test review the length of the detention from the perspective of the stated legislative purposes of § 1226(c). For example, the Third Circuit in *Chavez-Alvarez* stated, “[the] primary point of reference for justifying the alien's confinement must be whether the civil detention is necessary to achieve the statute's goals: ensuring participation in the removal process, and protecting the community from the danger that he or she poses.” *Chavez-Alvarez*, 783 F. 3d at 475. What is more, in *Diop*, that Court also stated, “[reasonableness], by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case. That being said, we note that the reasonableness of any given detention pursuant to § 1226(c) is a function of whether it is necessary to fulfill the purpose of the statute.” *Diop*, 656 F. 3d at 234; *see also Weiss*, 749 F. Supp. at 47 (finding no due process violation in detaining criminal aliens without bail because government has “weighty interest” in ensuring presence of such aliens at deportation proceedings). Thus, while undocumented aliens are protected from unreasonably long periods of detention by the Due Process Clause, courts must review their detention in light of the stated legislative purposes of Congress. Therefore, any argument that undocumented aliens have an absolute right to, at all times, be free from detention is meritless; it has no basis in this Court’s precedent or the Constitution.

B. The Reasonableness Test Prevents Arbitrary or Capricious Deprivations of Liberty and Forecloses the Possibility of Indefinite Detention for Undocumented Aliens

With the rights of undocumented immigrants put into context, it can now be answered whether the reasonableness test protects these rights. Courts defining unreasonable deprivations of liberty commonly characterize it as government action that is “arbitrary or capricious.” *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Specifically, because this case is concerned with the detention of undocumented aliens, an unreasonable deprivation of liberty will be found where the possibility of indefinite detention exists. *See Id.* (“[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem”). Thus, the reasonableness test is the quintessential safeguard against these forms of abuse by the government for three reasons: (1) the reasonableness test prevents arbitrary deprivations of liberty; (2) the reasonableness test prevents capricious deprivations of liberty; and (3) the reasonableness test forecloses the possibility that an undocumented immigrant can be detained indefinitely.

1. The reasonableness test is not arbitrary because courts conspicuously state the factors they consider when reviewing an undocumented alien’s detention

In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court, citing Blackstone, pointed out the danger that secrecy surrounding detainment creates. Stating, “confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.” *Boumediene v. Bush*, 553 U.S. at 744 (2008) (emphasis in original). Courts applying the reasonableness test extinguish that evil by unambiguously announcing the reasons they consider in determining whether an undocumented alien’s detention was unreasonable. Thus, under the reasonableness test because there are no secrets, there can be no arbitrary deprivations of liberty. Furthermore,

the reasonableness test cannot be considered arbitrary because the test is applied “with consideration and adjustment with reference to principles, circumstances, and significance.”

WEBSTER’S NEW INTERNATIONAL DICTIONARY 138 (William A. Neilson et al. eds. 2nd ed. 1941). Therefore, under the reasonableness test, the Due Process rights of undocumented aliens are protected because there is no possibility of arbitrary detention.

The First Circuit Court of Appeals in *Reid v. Donelan*, 819 F. 3d 486 (1st Cir. 2016), generally listed several factors courts weigh in making the reasonableness determination. Stating, “a court might examine, *inter alia*, the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.” *Id.* at 500.

In addition, like the Second Circuit in this case, courts adopting the reasonableness test consistently state that they consider the length of detention in light of the legislative goals of § 1226(c). (R. at 6). Namely, ensuring that undocumented alien’s participate in their removal proceeding, and protecting community safety. *See, e.g., Baker v. Johnson*, 109 F. Supp.3d 571, 586 (S.D.N.Y. 2015) (detention of alien without bond hearing did not violate his due process rights, where alien was likely removable, and therefore flight risk). In fact, several courts applying the reasonableness test have justified the ordering of bond hearing specifically because these courts consider the two-fold purpose of § 1226(c). *See, e.g., Bourguignon v. MacDonald*, 667 F. Supp.2d 175, 183 (D. Mass. 2009) (alien entitled to individual hearing to determine whether he presented flight risk or danger to the community.); *Sopo v. U.S. Attorney General*, 825 F. 3d 1199, 1220 (11th Cir. 2016) (criminal alien's detention without further inquiry into

whether it was necessary to ensure appearance at removal proceedings or to prevent risk of danger to community was unreasonable and, thus, alien was entitled to individualized bond hearing); *Soriano v. Sabol*, 183 F. Supp.3d 648, 652 (M.D. Pa. 2016) (detainee's nine-month detention during removal proceeding was unreasonable and thus he was entitled to individualized bond hearing).

Finally, one of the most important factors courts contemplate in reviewing an alien's detention is the reason for the delay, should there be a delay in the proceedings. For example, in *Diop*, the Court held that the government lacked adequate justification for delaying the deportation proceeding. *See Diop*. 656 F. 3d at 235. There, the government committed numerous errors, including errors by the presiding judge, and the failure of the government to timely obtain evidence relating to the immigrant's deportation hearing. *See Id.* Thus, because the Court found the government's excuses unavailing, it determined the detention to be unreasonable. *See Id.*

Even in instances where the delay in the removal proceedings was attributable to the alien themselves, courts applying the reasonableness test have still found the detention to be unreasonable. *See Sopo*, 825 F. 3d at 1220 (finding detention of a criminal alien to be unreasonable "although alien refused to file new asylum application form in 2012, insisted on retrieval of 2004 form, and requested continuances"); *Soriano*, 183 F. Supp. 3d at 652 (finding detainee's nine-month detention during removal proceeding unreasonable "even though part of delay stemmed from detainee's two requested continuances").

Where courts have found detentions longer than six months to reasonable, they clearly announce the reason for their decision. *See Prince v. Mukasey*, 593 F. Supp. 2d 727, 735 (M.D. Pa. 2008) (holding alien's detention during removal proceedings not to violate due process, where government's filings did not cause any unreasonable delay, and alien was "scheduled to

have individualized hearing in one month”); *Hernandez v. Sabol*, 823 F. Supp. 2d 266, 272 (M.D. Pa. 2011) (alien's approximate seven-month period of detention pending removal proceedings was not unreasonable, where there was no showing that the foreseeable period of alien's continued detention would be long or that ICE was delaying or stalling the removal proceedings); *Johnson v. Orsino*, 942 F. Supp. 2d 396, 410-11 (S.D.N.Y. 2013) (detention of deportable alien who committed drug offense was not unreasonably long in violation of due process; sole reason for alien's continued detention was his decision to appeal removal order, and circumstances suggested that alien's detention was nearing conclusion). Thus, where the government has detained an undocumented immigrant in accordance with their broad authority to enforce immigration laws, the reasonableness test ensures that the deprivation will not be arbitrary by following established guidelines, and clearly stating the reasons for their decision.

2. The reasonableness test is not capricious because courts applying this standard will not accept the government's justification for continued detention as dispositive

The dissent in this case was concerned that the government can determine for themselves whether the length of an undocumented alien's detention was reasonable. Stating, “[absent] a clear deadline, the Department of Homeland Security can keep undocumented immigrants detained at its whim, subject only to its own determination of what is reasonable under the circumstances.” (R. at 8). Interestingly, this concern gets at the heart of what the Due Process Clause forbids: capricious deprivations of liberty. Capricious is defined as “things subject to irregularity; changing apparently without regard to any law.” WEBSTER'S NEW INTERNATIONAL DICTIONARY 399 (William A. Neilson et al. eds. 2nd ed. 1941). However, Justice Atkinson's dissent overlooks two core features of the reasonableness test. Namely, that the determination of reasonableness will be applied by an independent Article III judge, without special deference to

the executive branch's determination of what is reasonable. And where a period of detention was found to be unreasonable, the burden is then placed on the government to justify continued detention. *See Diop*, 656 F. 3d at 231 (“when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute”).

Courts applying the reasonableness test often find the excuse offered by the government to be inadequate to justify continued detention. For example, in *Diop*, while refusing to adopt the six-month bright line rule, the Court nevertheless addressed the concern of capriciousness expressed by the dissent in this case and previously, the Second Circuit in *Lora*. *See Diop*, 656 F. 3d at 234. In declining to accept the government's justification for continued detention of the alien, the Court stated “[we] cannot simply rely on the government's determination of what is reasonable.” *Id.* Although the Court acknowledged that “judicial deference to the executive branch in the immigration context is of special importance” it also stated, “courts reviewing petitions for writ of habeas corpus must exercise their independent judgment as to what is reasonable.” *Id.* The Court also explained the special responsibility of the judiciary in reviewing the period of detention of an alien. Stating, “the basic federal habeas corpus statute grants the federal courts the authority to determine whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal pursuant to statutory authority.” *Id.*

In this case, Chief Judge Wechsler did not simply rely on the government's determination of what was reasonable. He inquired, independently, into the cause of the delay in the removal proceedings for Petitioner. The Court found the detention to be reasonable because the government did not engage in “dilatory tactics” or cause “unfair delay.” (R. at 6). Therefore,

because the reasonableness test is applied by an autonomous Article III judge, without special deference to the government entities enforcing § 1226(c), it prevents capricious deprivations of liberty, thereby protecting the due process rights of undocumented immigrants.

3. The reasonableness test eliminates the risk that an undocumented alien can be detained indefinitely

Without question, the possibility that an individual can be detained indefinitely without trial is a cardinal sin of the Due Process Clause. *See Ly v. Hansen*, 351 F. 3d 263, 269 (6th Cir. 2003). The dissent in this case expressed disagreement over the Court’s adoption of the reasonableness test because, in Justice Atkinson’s view, it opened the door to indefinite detention. Stating, “by abandoning the six-month bright-line test we articulated in *Lora*, the Court has effectively sentenced those facing deportation to imprisonment without end.” (R. at 8). Notwithstanding the fact that an undocumented alien has the unilateral ability to end their detention by dropping their challenge to the removal proceedings. *See Parra v. Perryman*, 172 F. 3d 954, 958 (7th Cir. 1999) (“alien could withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately”). The dissent’s argument is flawed for two reasons; (1) it fails to understand the logical operation of the reasonableness test; and (2) it ignores the critical factor of the foreseeability that the removal proceedings will be resolved in the near future that courts applying the reasonableness test consider.

According to its terms, under the reasonableness test, as the length of detention grows longer, so too does the unreasonableness of the detention. Taken to its logical conclusion, the reasonableness test will require a bond hearing to be held at some point. And, if at that point, the government cannot justify continued detention, the alien will be released.

Moreover, many courts applying the reasonableness test consider the foreseeability that the removal proceeding will conclude. Where courts have expressed doubt as to the removal

proceeding concluding sometime soon, a bail hearing will be ordered. See *Jarpa v. Mumford*, 2016 WL 5661659 at *10 (D. Md. 2016) (holding that “continued prolonged detention of alien with no endpoint in sight, was unreasonable under the Fifth Amendment's Due Process clause” and thus alien was entitled to “habeas relief of bail hearing”); *Bourguignon*, 667 F. Supp. 2d at 183 (holding that continued detention of alien was unreasonable because “no reasonable likelihood existed that issue of his removal would be finally resolved in foreseeable future” and was therefore entitled to a bond hearing before an immigration judge”). On the other hand, where courts are comfortable that the removal proceeding will be resolved in the foreseeable future, no bond hearing is necessary. See *Lovell v. I.N.S.*, 2003 WL 22282176 at *4 (E.D.N.Y. 2003) (finding that “detention without bail pending removal by the Immigration and Naturalization Service did not violate alien's substantive due process rights, since alien's removal was likely to occur in reasonably foreseeable future”); *Young v. Aviles*, 99 F. Supp. 3d 443, 452 (S.D.N.Y. 2015) (“[application] of mandatory detention provision of Immigration and Nationality Act (INA) to Jamaican alien, did not violate alien's due process rights; and there was no showing that that the proceedings would last indefinitely”). Therefore, under the reasonableness test, the possibility that an undocumented immigrant can be detained indefinitely is all but vanquished.

CONCLUSION

For the aforementioned reasons, Respondents respectfully request this Court to affirm the decision by the Second Circuit in its entirety.