Team Identification: 24

Index No.: 1-2017

In the

Supreme Court of the United States

Spring Term, 2017

Laura Secord,

Petitioner,

v.

Winfield Scott, in his Official Capacity as Director, Department of Immigration and Customs Enforcement, and City of Angola,

Respondents.

On Writ of Certiorari
To the United States Supreme Court

BRIEF FOR RESPONDENTS

Questions Presented

1. Did the Second Circuit properly apply the Harris "common sense" standard—the most recent formulation of the probable cause analysis from the Supreme Court—when determining whether Deputy Pfieff had sufficient probable cause to arrest Petitioner and her unidentified comrades?

2. Whether the "reasonableness test" to determine a time for bail hearings which has been articulated by the Second Circuit and applied by other circuits across the nation protects the due process rights of undocumented criminal aliens.

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Statement of Case

On a cold winter night—just before Christmas—on December 21, 2015, a lakeside cottage neighborhood sat quiet in Angola, New York. *Scott v. Secord*, 123 F.4th 1, 2 (2d Cir. 2016). With many cottage owners living elsewhere in the winter months, only a few residences remained occupied. *Id*. That night, a concerned citizen noticed something suspicious: light was coming from a normally unoccupied cottage. *Id*. The concerned citizen contacted the local police department to report what they witnessed, who dispatched an Erie County Sheriff's Deputy, Barnard Pfieff, to investigate the report. *Id*.

The Scene

Upon arrival, Deputy Pfieff began looking for signs of suspicious activity. *Id*. It did not take long for Deputy Pfieff to notice "several hooded or masked individuals" gathered around a table by candlelight. *Id*. Deputy Pfieff radioed his supervisor to alert her of what he saw, before proceeding to the front door of the residence—still able to see the hooded suspects through a window in the doorway. *Id*. In an attempt to "find out what [was] going on," Deputy Pfieff knocked on the door and announced his presence. *Id*. At the sound of his knock—and instead of answering the door—the six unidentified individuals fled throughout the residence. *Id.*

The Arrest

At the sight of potentially dangerous suspects fleeing from a law enforcement officer—in a dimly lit residence that is normally empty during the winter months—Deputy Pfieff called for backup. *Id*. Outnumbered six to one, Deputy Pfieff entered the residence through the unlocked front door. *Id*. His suspicions raised, Deputy Pfieff reached to turn on the lights, only to find the power had been cut off. Alone, in the dark, and outnumbered, Deputy Pfieff brandished his sidearm and ordered the suspects to show themselves. *Id*. Only at this time did the masked

suspects emerge and surrendered to Deputy Pfieff. *Id*. Petitioner—an illegal immigrant from Canada—was among the suspects and a search of her belongings revealed a set of brass knuckles. *Id.* at 1, 3. Another suspect was identified as James Fitzgibbon, who claimed to have a right to be in the residence because it was his Uncle's residence. *Id.* On the night of the incident, however, Fitzgibbon could not recall a point of contact for his Uncle, and a subsequent development in the investigation revealed that Fitzgibbon did not have permission to be in his Uncle's residence in this particular instance. *Id*. All six suspects were arrested, and subsequently convicted on charges of second-degree criminal trespass. *Id.* Petitioner was also charged and convicted of criminal possession of a deadly weapon—brass knuckles—and sentenced to one year in prison. *Id*.

Opinions Below

While serving her sentence, *Secord*, 123 F.4th at 3, Petitioner filed a habeas corpus petition with the United States District Court for the Western District of New York. *Id.* Petitioner alleged that her arrest violated the protections of the Fourth Amendment. *Id.* As this petition was pending, Petitioner was transferred to custody with Immigration and Customs Enforcement ("ICE") for deportation processing pursuant to 8 U.S.C. § 1226. *Id.* at 4. During this time, Petitioner filed a second habeas petition alleging her detention was in violation of her due process rights. *Id.* Her petition was granted and she was subsequently released. Soon after, her initial petition was also granted by the district court, throwing out her convictions. *Id.* The decisions of the district court were appealed by the City of Angola and the Department of ICE respectively, the Second Circuit Court of Appeals joined the issues for judicial economy. *Id.*

On appeal, the Second Circuit considered whether there was probable cause to support Petitioner's initial arrest and whether her detention in ICE custody violated her due process

rights. *Id.* at 6, 4.The Second Circuit applied a totality of the circumstances test to determine whether there was probable cause to support Petitioner's arrest. *Id.* at 7. Under this standard it concluded that there was in fact probable cause to arrest Petitioner. *Id.* The Second Circuit also considered the prevailing law of the Second Circuit under *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) and overruled the decision, finding there is set no bright line rule for determining the for holding a bail hearing, but that it must be held within a period reasonable under the circumstances. *Secord,* 123 F.4th at 4. As such the Second Circuit held that Petitioner should be remanded back to ICE custody for purposes of a bail hearing and her convictions reinstated. *Id.* at 4, 7. Petitioner now appeals contending the Second Circuit applied an improper standard in determining whether probable cause existed for her arrest and that the "reasonableness test" applied to determine the time for a bail hearing violated Petitioner's right to due process.

Summary of Argument

The Court of Appeals properly applied the *Harris* "common sense" standard in determining that Deputy Pfieff established probable cause to enter the residence and arrest Petitioner and her unidentified comrades. While the "totality of the circumstances" standard announced in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983), has traditionally been the standard applied in reviewing a police officer's determination of probable cause, this Court announced a new "common sense" standard in *Florida v. Harris*, 133 S. Ct. 1050, 1058, 185 L.Ed.2d 61 (2013). To be sure, this Court did not overrule the "totality of the circumstances" analysis, rather, it considers it a component of the "common sense" standard in *Harris*. What is more, under both the *Harris* "common sense" standard and the "totality of the circumstances" analysis, Deputy Pfieff established sufficient probable cause to enter the residence and arrest Petitioner and her unidentified comrades. In kind, the Court of Appeals applied the proper

standard in finding sufficient probable cause to enter the residence and arrest the Petitioner and her unidentified comrades.

Even if this Court finds that Deputy Pfieff lacked sufficient probable cause to enter and the residence and arrest the Petitioner and her unidentified comrades, the evidence obtained—the brass knuckles—and the Petitioner's arrest should be upheld because Deputy Pfieff had a "reasonable belief" that Petitioner and her unidentified comrades were in the process of "committing a crime." *U.S. v. Compton*, 830 F.3d 55, 62 (2d Cir. 2016). As such, this Court should uphold Petitioner's arrest because even if it finds that Deputy Pfieff lacked sufficient probable cause to enter and place the Petitioner under arrest.

The "reasonableness test" applied by the Second Circuit to determine a time for bail hearings complies with due process, comports with congressional intent and serves as a practical response to over-extended court systems. The governing statute, 8 U.S.C § 1226, provides that an individual may be detained for a "reasonable" amount of time without requiring a bail hearing. Here, the Second Circuit correctly held that the time Petitioner spent awaiting a bail hearing was not unreasonable. The Government itself must be afforded time to make sure that a potential release at a bond hearing will not lead to a dangerous criminal alien being allowed to flee from the Justice system prior to trial, and the government also has an interest in protecting the public from potentially criminal aliens. *Reid v. Donelan*, 819 F.3d 486, 501 (1st Cir. 2016).

Further, this application of reasonableness comports with congressional intent because assuring that illegal aliens—who have committed a crime—are not released back into society without a thorough examination of the safety and flight risks posed to the public, were driving factors behind the governing statute. *See* Letter from to Hon. James B. Comey, Jr. (Mar. 15,

2016). In kind, this Court should affirm the decision of the Court of Appeals, finding the temporary detention of Petitioner was not unreasonable.

Standard of Review

This Court reviews police determinations of probable cause *de novo* on appeal. *Ornelas v. U.S.*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663 (1996). When scrutinizing such determinations, a reviewing court should review "findings of historical fact only for clear error," and "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* Trial judges and police officers view the facts of each case "through the lens" of their experience and expertise, and "in light of the distinctive features and events of the community." *Id.* Such "background […] [and] historical facts […] [taken] together yield inferences that *deserve* deference." *Id.* (emphasis added). In kind, this Court should review this case *de novo*.

Argument

I. THE ACTIONS OF PETITIONER AND HER UNIDENTIFIED COMRADES—SCATTERING AND HIDING FROM DEPUTY PFIEFF—ESTABLISHED SUFFICIENT PROBABLE CAUSE FOR SHERIFF'S DEPUTIES TO ENTER THE RESIDENCE AND ARREST PETITIONER AND HER UNIDENTIFIED COMRADES, AND THE COURT OF APPEALS PROPERLY APPLIED THE *HARRIS* "COMMON SENSE" STANDARD.

On a cold winter night, in an area sparse in population, a concerned citizen observed suspicious circumstances in a house unoccupied during the winter months. The citizen contacted the police, who dispatched Deputy Pfieff to the scene. Upon arrival, Deputy Pfieff announced his presence and observed behavior raising concerns that criminal activity might be ongoing. In response with his authority as a police officer, Deputy Pfieff determined that he had probable cause to enter the residence and arrest Petitioner and her unidentified comrades.

An Erie County Sheriff's Deputy "has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that […] evidence of a crime is present." *Florida v. Harris*, 133 S. Ct. 1050, 1055, 185 L.Ed.2d 61 (2013)(quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535 (1983))(internal quotation marks omitted). The test for probable cause "is not reducible to precise definition or quantification," *Id.* (quoting *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795 (2003))(internal quotation marks omitted), rather "all we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 238, 103 S. Ct. 2317 (1983)) (internal quotation marks omitted). Because the acts of Petitioner and her Unknown Comrades established probable cause on the night of December 21, 2015, this Court should affirm the decision of the Court of Appeals, finding Deputy Pfieff's entry and search of the residence uniform with constitutional scrutiny.

A. The "totality of the circumstances" standard is a *component* of this Court's decision in *Harris*, and Deputy Pfieff's observations approaching the residence established sufficient probable cause, under both standards, to enter, arrest, and search Petitioner and her Unidentified Comrades.

The arc of this Court's probable cause determinations in police actions is long and bends in favor of law enforcement. *See Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964)(establishing the two-prong probable cause test); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983)(rejecting the two-prong test). Past attempts to outline a probable cause standard to a "precise definition or quantification" have been rejected. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795 (2003). This Court recognized that "[p]robable cause […] is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully reduced to a neat set of legal rules."

Harris, 133 S. Ct., at 1056, 185 L.Ed.2d 61(quoting *Gates*, 462 U.S., at 232). Because this Court does not tie itself to one particular legal "moor" when establishing a standard for determining probable cause, the Court of Appeals properly integrated the "totality of the circumstances" analysis in finding probable cause under the *Harris* standard.

i. The "totality of the circumstances" analysis is a component of the probable cause analysis announced in Harris.

This Court's enunciation of the "totality of the circumstances" analysis in the *Gates* decision was a seismic shift in this Court's review of how probable cause could be established. Until 1983, this Court operated under the *Spinelli* and *Aguilar* two-prong test, which held that information from an informant was "credible […] [and] reliable," *Aguilar*, 378 U.S. at 114-15, and that the information provided a reviewing magistrate "sufficient detail," *Spinelli*, 393 U.S. at 416, 89 S. Ct. at 589, to establish probable cause upon, instead of a mere "casual rumor." *Id*. This Court abrogated both *Spinelli* and *Aguilar* with its announcement of "totality of the circumstances" standard in *Gates*. *See Gates*, 462 U.S. at 230-31, 103 S. Ct. at 2328 ("This 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.") (internal quotation marks omitted). *See also id*. at 214, 2320 ("The elements under the two-pronged test concerning the informant's veracity, reliability, and basis of knowledge should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is probable cause to believe that […] evidence is located in a particular place.")(internal quotation marks omitted).

In *Gates*, this Court opted for the "totality of the circumstances" analysis because determining probable cause "does not deal with hard certainties, but with probabilities." *Gates*,

462 U.S. at 231, 103 S. Ct. at 2328. There, an anonymous source sent a letter to the Bloomingdale Police Department alleging that the author's neighbors were engaged in drug trafficking across state lines. *Id.* at 225, 2325. Upon further investigation by local police, and in coordination with federal agents, law enforcement discovered that the allegations in the letter were, in fact, accurate. *Id*. at 225-29, 2325-27. In signaling its desire for a less-rigid probable cause standard, this Court abandoned the previous probable cause standards announced in *Spinelli* and *Aguilar*. This Court held that the standard should not be "deal[t] with hard certainties, but with probabilities," which are the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 231, 2328. In so holding, this Court lowered the bar away from an "excessively technical" analysis of information that could establish probable cause, and towards the deferential "totality of the circumstances" standard allowing for a "balanced assessment of the relative weights of all the various indicia of reliability." *Id*. at 234, 2330.

This Court continued its path toward deference—when formulating the standard for probable cause—with its decision in *Harris,* coming thirty years after *Gates*. See also Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 Lewis & Clark L. Rev. 789, 790 (2013) (discussing this Court's increasingly undefined standard for determining probable cause). There, police officers used a K-9 Unit's "sniffing" around Harris's truck as an element in establishing probable cause to search the vehicle. 133 S. Ct. at 1054-55. But critically, this Court identified the *Gates* "totality of the circumstances" standard as only one *part* of the probable case determination. *Id.* at 1055-56 (citing multiple probable cause standards in *Brown*, 460 U.S. at 742, 103 S. Ct. 1535 and *Pringle*, 540 U.S. at 371, 124 S. Ct. 795). In doing so, this Court announced a new revision to the collective standards governing due process: common

sense. In re-affirming the holdings of *Brown*, *Pringle*, and *Gates*, this Court announced that "[i]n all events […] the question […] is whether all the facts[,] […] *viewed through the lens of common sense*, would make a reasonably prudent person think that a search would reveal […] evidence of a crime." *Id.* at 1058 (emphasis added); *see also Ornelas*, 517 U.S. at 699 (holding reviewing courts "should take care [to] […] give due weight to inferences drawn by […] local law enforcement officers"). The logical conclusion of *Harris* is that all of the prior standards for determining probable cause are all considered part of a new "common sense" standard. Indicative of this new standard, this Court has opted to apply the Harris to cases involving probable cause determinations in the wake of its 2013 decision. *See Florida v. Jardines*, 133 S. Ct. 1409, 1418, 185 L.Ed.2d 495, 495 (2013); *Kaley v. U.S.*, 134 S. Ct. 1090, 1093, 188 L.Ed.2d 46, 46 (2014).

Here, the Court of Appeals held that probable cause is a "practical and commonsensical standard that *considers* the totality of the circumstances." *Secord*, 123 F.4th at 7 (quoting *Harris*, 133 S. Ct. at 1055) (emphasis added). What is more, "[the District Court's ruling finding no probable cause] radically narrow[s] the ability of officers to use their experience and prudent judgment to assess the credibility of suspects." *Id.* Under this analysis, the Court of Appeals followed the *Harris* "common sense" standard with precision. Deputy Pfieff established sufficient probable cause when he observed hooded figures scatter at the sound of his voice, announcing his presence, and his knock on the front door of the residence. *Id*. at 2. After calling for backup and upon entry to the residence—through an unlocked door—Deputy Pfieff observed documents on a table and noticed the power was disabled. *Id.* At that point, Deputy Pfieff felt it necessary to withdraw his sidearm from its holster. *Id.* Based on the facts before the Court of

Appeals, the finding of probable cause—pursuant to the Harris "common sense" standard—was proper.

While the history of this Court's probable cause jurisprudence is long, the current standard is clear. Because this Court has opted to consider the "totality of the circumstances" examination to be included as a component of the *Harris* "common sense" standard, and because this Court has adopted *Harris* as the governing authority on probable cause determinations, the Court of Appeals placed proper reliance on the *Harris* standard when finding sufficient probable cause in this case.

ii. Deputy Pfieff's observations approaching the residence—in addition to the concerned citizen's phone call—established sufficient probable cause under both the "totality of the circumstances" standard and the Harris "common sense" analysis of review.

In applying both the *Harris* "common sense" standard—or the "totality of the circumstances" analysis from *Gates*—Deputy Pfieff established sufficient probable cause to enter and search the residence. It is clear that Deputy Pfieff had probable cause to search the residence "when the facts available to him would warrant a person of reasonable caution in the belief that […] evidence of a crime is present," *Harris*, 133 S. Ct. at 1055, 185 L.Ed.2d 61, and the question in probable cases inquiries is "whether all the facts […] viewed through the lens of common sense, would make a reasonably prudent person thing that a search would reveal […] evidence of a crime." *Id*. at 1058; *see also U.S. v. Akram*, 15-CR-113W, 2016 WL 6080275, at *8 (W.D.N.Y. 2016) (applying the *Harris* standard). Alternatively, if a court applies the "totality of the circumstances" standard, probable cause is determined by a police officer when "given all the circumstances set forth […] before him […] there is a fair probability that […] evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332. Regardless

of the standard applied by this Court, Deputy Pfieff established sufficient probable cause to enter and search the residence.

In *Harris*, a police officer observed a number of suspicious indicators that lead the officer to conduct a search of Harris' vehicle. As an initial matter, the police officer pulled over Mr. Harris for an expired license plate. 133 S. Ct. at 1053, 185 L.Ed.2d 61. On approach to the car, Harris appeared "visibly nervous," he was "shaking [and] breathing rapidly[,]" and there was an open can of beer in the car's cup holder. *Id*. The officer then retrieved his police K-9 from his patrol car that lead to the discovery of illegal narcotics. *Id*. at 1054. While the focus of this Court's inquiry was whether the police K-9 unit's alert to the possible presence of drugs constituted probable cause, the court applied the "common sense" standard all the same, *id.* at 1058, and the police officer's observations, taken together with the K-9's discovery, established sufficient probable cause for the search of Harris's vehicle.

Likewise in *Gates*, the police received a letter from an anonymous tipster alerting the authorities to the alleged involvement of a married couple trafficking illicit drugs. 462 U.S. at 225, 103 S. Ct. at 2325. The police investigated the allegations of the letter, and with the cooperation of Federal Agents, the allegations and evidence collected by the police were sufficient to support probable cause to search the Gates' car and residence. *Id.* That search revealed over three hundred pounds of marijuana and a slew of weapons. *Id*. at 227, 2326. This Court determined that the allegations in the letter—and the police department's additional discoveries—were sufficient to establish probable cause under the "totality of the circumstances" standard. In particular, this Court credited the facts learned by the police in investigating the letter "suggested" that probable cause existed. *Id*. at 243, 2335.

Under both standards, Deputy Pfieff established sufficient probable cause to enter and search the residence. Upon receipt of a call advising of suspicious activity in a location normally uninhabited during the winter months, Erie County Sherriff's Deputy Pfieff arrived on scene and confirmed what the caller advised. *Secord*, 123 F.4th at 2. On his initial approach to the residence, Deputy Pfieff observed several masked figures huddled together by a table under candlelight. *Id.* After calling in his observations, he called for backup and returned to the front door of the residence. *Id.* Upon knocking and announcing his presence, Deputy Pfieff observed the hooded figures run and hide throughout the residence. *Id.* After alerting the responding units what had happened, Deputy Pfieff opened the unlocked residence door and discovered that the power was not working. *Id*. Finding papers strewn about the table, Deputy Pfieff withdrew his sidearm and ordered the masked suspects out. *Id.*

Once backup arrived, Deputy Pfieff discovered that one of the suspects, James Fitzgibbon, was the nephew of the residence owner, and, upon contacting the suspect's uncle, discovered that Fitzgibbon did not have permission to use the residence for any type of party. *Id.* at 3. Operating under this information, Deputy Pfieff conducted a search of the residence, discovering a set of brass knuckles in the Petitioner's backpack. Id. After taking his observations and discovery subsequent to his search, Deputy Pfieff placed all six masked suspects into custody. *Id.* Stacking up Deputy Pfieff's observations and the information presented to him, there was sufficient probable cause established under both the "totality of the circumstances" and "common sense" standards in *Gates* and *Harris*. Like the observations by police officers in both cases, the actions of the Petitioner and her unidentified comrades gave Deputy Pfieff sufficient information to establish probable cause to enter and search the residence. It is clear that reviewing courts owe deference to the factual observations and background knowledge of local

law enforcement officials. *See Ornelas*, 517 U.S. at 699. In kind, Deputy Pfieff's entry to the residence—and Petitioner's subsequent arrest—were founded upon a probable cause determination that is consistent with this Court's requirements.

B. Even if probable cause had not been established, Deputy Pfieff's entry into the residence was still legally sound because he believed sufficient probable cause existed.

The Court of Appeals properly determined that Deputy Pfieff established sufficient probable cause to search and arrest the Petitioner and her unidentified comrades. Even if this Court finds that the lower court did not apply the correct standard, or, if the Deputy Pfieff did not establish sufficient probable cause, this Court should still uphold Petitioner's arrest because Deputy Pfieff reasonably believed that sufficient probable cause existed.

A police officer has "authority to [conduct] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, *regardless* of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968) (emphasis added). What is more, a police officer "*need not be* […] *certain* that the individual is armed; the issue is whether a *reasonably prudent man* in the circumstances would be warranted in the belief that his safety was in danger." *Id*. (citing *Brinegar v. U.S.*, 338 U.S. 160, 174-176, 69 S. Ct. 1302, 1311 (1949)) (emphasis added). Pursuant to the Fourth Amendment, a police officer "may conduct a brief investigatory detention as long as the officer has *reasonable suspicion* that the person to be detained is committing or has committed a criminal offense." *U.S. v. Compton*, 830 F.3d 55, 62 (2d Cir. 2016) (citing *Terry*, 392 U.S. at 22, 88 S. Ct. 1868) (emphasis added); *see also* U.S. Const. amend. IV. This Court's guidance to law enforcement officers is clear: an officer need not be certain a suspect has committed a crime, rather the officer must form a belief that the

circumstances of the situation create a reasonable suspicion that a crime has been—or is about to be—committed.

In *Terr*y, the police officer observed two suspects repeatedly walking past a store. 392 U.S. at 5-6, 88 S. Ct. at 1871-72. The officer continued to watch the suspects observe the store and have an interaction with a third man. *Id*. The officer approached the men and identified himself as a policeman. The officer subsequently performed an exterior search of the suspects' clothing finding two revolvers in the process. *Id*. at 7, 1872. This Court, employed a two-part balancing test in determining whether the officer had probable cause to justify the search and seizure: (1) "the governmental interest which allegedly justifies intrusion upon the constitutionally protected interests of the private citizen," and (2) "the specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 20-21, 1879-80. In finding sufficient probable cause for the stop, this Court credited the police officer's observations of a "series of acts, each of them perhaps innocent[,] […] but which taken together warranted further investigation." *Id*. at 22, 1880-81. This Court also found the police officer satisfied the second element of the balancing test because "regardless of whether he ha[d] probable cause to arrest the individual for a crime[,]" a police officer has "authority to [conduct] a reasonable search for weapons for the protection of the police officer." *Id*. at 27, 1883.

Here, Deputy Pfieff likewise observed suspicious activity inside the residence. *Secord*, 123 F.4th at 2. And upon knocking and announcing his presence, Deputy Pfieff watched the suspects flee from view. *Id*. What is more, the door was unlocked, and the power was cut off, leading to Deputy Pfieff to brandish his service weapon to defend himself, if necessary. *Id*. The circumstances surrounding the scene were sufficient for Deputy Pfieff to form a "reasonable

suspicion" that the Petitioner and her unidentified comrades were in the process of "committing […] a criminal offense." *Compton*, 830 F.3d at 62. Like in Terry, the search of Petitioner's belongings yielded a weapon; a set of brass knuckles. *Secord*, 123 F.4th at 3. In kind, even if this Court determines that Deputy Pfieff did not, in fact, have probable cause to enter the residence, he did have a reasonable suspicion that a crime was being committed, and believed he had probable cause to enter the residence. Thus, the search revealing the Petitioner's brass knuckles was consistent to a search based upon reasonable belief that probable cause had been established. With this in mind, this Court should affirm the decision of the Court of Appeals finding sufficient probable cause was established to enter the residence and arrest Petitioner and her unidentified comrades.

II. THE "REASONABLENESS TEST" APPLIED BY THE SECOND CIRCUIT TO DETERMINE A TIME FOR BAIL HEARINGS COMPLIES WITH DUE PROCESS, COMPORTS WITH CONGRESSIONAL INTENT, AND SERVES AS A PRACTICAL RESPONSE TO OVER-EXTENDED COURT SYSTEMS.

The Second Circuit Court of Appeals comported with the due process clause when it applied the "reasonableness test" to determine the proper time for bail hearings of undocumented aliens detained pursuant to 8 U.S.C § 1226. When resolving whether a standard applied affords proper constitutional due process rights, the issue is reviewed by this Court *de novo. U.S. v. Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993). *See also Demore v. Kim*, 538 U.S. 510, 551, 123 S. Ct. 1708, 1733 (2003). As such the standard of review to be applied to the decision of the Second Circuit in this case is also *de novo.*

Section 1226 provides the United States Government ("Government") with authority to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States. § 1226(a). Where an alien has committed a criminal offense, her detention is

mandatory under § 1226(c). This Court has upheld such detention, acknowledging that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons . . . be detained for the brief period necessary for their removal proceedings." *Demore,* 538 U.S. at 513, 123 S. Ct. at 1712. Once an alien is detained, a bond hearing must be held to determine whether the alien poses either a flight risk or a danger to the community. *See* § 1226. Detention of an alien pending this bond hearing does not violate the due process clause of the Fifth Amendment where the detention is for the limited period of his removal proceeding. *Demore*, 538 U.S.at 531, 123 S. Ct. at 1721-22. In fact, it has long been held that deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S. Ct. 977 (1896). Applying a "reasonableness test" to determine when bail hearings should be held for such detention comports with due process because it appropriately balances the risk of deprivation of liberty against the state's burden in conducting inquiry into whether release on bail is appropriate, furthermore a "reasonableness test" more adequately addresses the current political climate and burdens faced by immigration courts across the United States.

A. The reasonableness test satisfies the requirements of Due Process.

The "reasonableness test" as articulated by the Second Circuit complies with due process. The Due Process Clause prohibits arbitrary deprivations of liberty. *Zadvydas v. Davis*, 533 U.S. 678, 718, 121 S. Ct. 2491, 2513 (2001). This Court has held that such protection applies to lawful United States citizens and aliens alike. *Id.* at 693, 2500. Detention violates due process where it is indefinite or lengthy, unreasonable and unjustified. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1210 (11th Cir. 2016) (stating civil detention, including detention related to

immigration proceedings, is permissible only when there is a "special justification" that "outweighs the individual's constitutionally protected interest in avoiding physical restraint). The two principal justifications are "preventing criminal aliens from fleeing during removal proceedings," and "protecting the public from potentially dangerous aliens. *Kim v. Ziglar*, 276 F.3d 523, 531 (9th Cir. 2002), *rev'd sub nom. Demore*, 538 U.S. 510, 123 S. Ct. 1708. When considering whether detention is reasonable, a court must consider "the length of 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." *Reid*, 819 F.3d 486, 501 (1st Cir. 2016). As such, due process entitles aliens to an individualized determination as to her risk of flight and dangerousness if her continued detention becomes unreasonable or unjustified. United States Courts have repeatedly permitted detention for a *reasonable period of time* pending an alien's bail hearing in order to determine the risk of flight and/or danger posed by that alien. *See id.*

This Court has set no bright line rule as to what constitutes a permissible period of detention. *Johnson v. Orsino*, 942 F. Supp. 2d 396, 409 (S.D.N.Y. 2013). As such, there is no constitutional requirement that detention pending a bail hearing be held within an exact specified window of time. Rather, several courts have instead acknowledged the necessity for the reasonableness of the length of such a detention to be made on a case-by-case basis, for example:

> At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community. This will necessarily be a fact-dependent inquiry that will vary depending on individual circumstances. We decline to establish a universal point at which detention will always be considered unreasonable.

Diop v. ICE/Homeland Sec., 656 F.3d 221, 232 (3d Cir. 2011). Likewise, the Sixth Circuit has acknowledged a *prima facie* process for removing aliens in a time reasonably required to complete removal proceedings in a timely manner. *Ly v. Hansen*, 351 F.3d 263, 268 (6th Cir. 2003). This provides illegal aliens with a mechanism for relief if the process takes an unreasonably long time, as the detainee is still entitled to seek relief in the form of a habeas proceeding, but does not force a finding of reasonableness if a timely consideration of the illegal alien's case does not occur within precisely six-months. *See id.*

As it stands circuit courts are divided as to the express meaning of "reasonable," under *Demore*, although the question presented to this Court does not call for an express resolution of the split – this Court is called to determine whether the standard applied by the Second Circuit protects due process rights – it is important to acknowledge courts division on the issue. While the Second and Ninth Circuits have imposed a bright line test to mandating that detention is unreasonable after six-months, reasoning that constitutional avoidance requires an implicit temporal limitation. *See Lora v. Shanahan*, 804 F.3d at 614 (2d Cir. 2015), cert. denied, 136 S. Ct. 2494, 195 L. Ed. 2d 824 (2016) *overruled by Secord*, 123 F.4th 1; *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013). Other circuits have recognized the necessity of making the determination of reasonableness on a case-by-case basis. *Reid,* 819 F.3d 486, 496 (1st Cir. 2016); *Diop*, 656 F.3d at 232; *Ly v. Hansen*, 351 F.3d 263, 268 (6th Cir. 2003). As such, although a six-month limitation may be reasonable in certain circumstances, longer detentions do not violate due process as a matter of law, rather, set factors must be considered to balance the private and state interests at stake.

Applying a "reasonableness test" to determine the length of time for bail hearings satisfies the very heart of what due process entails. The "reasonableness test" articulated by the

Second Circuit Court of Appeals below requires courts to "determine whether the individual's detention has crossed the 'reasonableness' threshold, thus entitling him to a bail hearing." *Secord*, 123 F.4th at 5. In so doing, court will balance the liberty interests of the illegal alien against any threat posed by that alien to the community, or their likelihood not to appear for their removal proceedings if released on bail. *See id.* Common sense dictates that the government need be afforded an adequate amount of time to prepare its case and determine what, if any, threat or flight risk is posed by the alien. *See id.* As stated by the Second Circuit below, this approach, in practice, has proved more effective at preventing illegal aliens from being released prematurely into society and posing risks to United States Citizens. *See id.*

Applying such a balancing test necessarily provides for the weighing of state interests against the liberty interests of the illegal alien. More specifically a court must weight the risk of erroneous deprivation of liberty on the part of the illegal alien against the burden imposed by the state. *See Rodriguez*, 715 F.3d at 1136. Key to this balance is acknowledging that detention pending removal proceedings does create a risk of indefinite detention. *Reid,* 819 F.3d at 496 ("Just because the conclusion of removal proceedings may not be imminent does not mean the conclusion is not reasonably foreseeable."). It follows then, particularly where removal of an alien is foreseeable, that it would be well within due process for a court to continue to detain an illegal alien without bail where it is likely that the alien will either pose a threat to the community at large, engage in criminal activity or fail to present for her subsequent hearings and proceedings. *See Zadvydas*, 533 U.S. at 680.

The balance of such interests is not equal across all cases. In fact it is worth noting that where § 1226(c) us implicated, the deprivation of liberty question is only being applies to illegal aliens who have been convicted of a crime in the United States. § 1226(c). In light of the broad

range of crimes covered by the statute as well as the fact specific nature of these proceedings, it is inconceivable that an inquiry as to whether length of time for detention prior to a bail hearing would be the same in all cases. As such due process necessitates an individual factual determination to determine what is reasonable in each case. Even if a six-month timeframe for reasonableness is workable in some cases, the fact specific nature of these cases which may range from two-time offenders to career criminal enterprises, detention lasting longer than six-months does not, as a matter of law violate due process. *See* § 1226(c). As such the "reasonableness test" as articulated by the Second Circuit complies with due process and is a practical framework, which will allow for fact specific inquiry and detention that is tailored to the needs of each specific case.

B. Detaining aliens for a reasonable period of time fulfills Congress' intent to counteract increasing levels of crimes committed in the United States by illegal aliens.

The "reasonableness test" applied by the Second Circuit Court of Appeals comports with the purpose of § 1226. When Congress enacted § 1226 it intended to address concerns that deportable criminal aliens who were not detained would continue to engage in crime and would fail to appear for their removal hearings in large numbers. *Demore,* 538 U.S. at 517, 123 S. Ct. at 1714. When initially enacted, the purpose of permitting detention without bail was to respond to an epidemic of criminal aliens that threatened American safety. S.Rep. No. 104–48, p. 1 (1995). Faced with such concerns, it has been well accepted that "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore*, 538 U.S. at 52 (quoting *Mathews v. Diaz*, 426 U.S. 67, 78-80, 96 S. Ct. 1883, 1890-91 (1976)). As such, although detention without bail for a "reasonable" time period would not be viewed favorably of United States Citizens, where detention is of an

illegal alien who has already committed additional illegal acts on United States soil, detention for a time period adequate to assess the threat of that alien's criminal activity and potential flight is both necessary and constitutional.

Congress' interest in detaining criminal aliens has been detailed at length by this Court. In *Demore*, this Court emphasized that despite the large number of criminal aliens present in the United States, INS could not even *identify* most deportable aliens, much less locate them and remove them from the country. 538 U.S. at 520, 123 S. Ct. 1716 (emphasis in original). This Court has previously acknowledged that "deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 520-21, 1716 (citing *Zadvydas,* 533 U.S. at 713-14, 121 S. Ct. at 2511 (Kennedy, J., dissenting) (discussing high rates of recidivism for released criminal aliens), and Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). Finally, this Court thoroughly discussed the direct link between the failure to remove deportable aliens to an initial failure to detain the aliens during deportation proceedings. *Id.*

Congress' interest in detaining criminal aliens has not changed with the passage of time. These interests continue to remain a prevalent national security concern. ICE records indicate that released criminal aliens continue to pose a threat to communities as they commit additional criminal offenses upon release. *See* Letter from to Hon. James B. Comey, Jr. (Mar. 15, 2016), https://www.judiciary.senate.gov/imo/media/ doc/2016-0315%20CEG%20to%20FBI%20(Criminal%20Aliens).pdf (discussing recidivism of criminal aliens upon release); *See also* Letter

from Sarah R Saldana to Hon. Charles E. Grassley (Feb. 11, 2016), https://www.judiciary.senate.gov/imo/media/doc/2016-0211%20ICE%20to%20 CEG%20Flake%20Sessions%20(Criminal%20Aliens)_Redacted.pdf. As of 2016:

> According to Immigration and Customs Enforcement (ICE), 121 criminal aliens who were released from ICE custody between Fiscal Year 2010 and FY 2014 were subsequently charged with 135 homicides in the U.S. As of July 25, 2015, a total of 39 convictions had resulted from these charges. Of these 121 total aliens, 2 had homicide convictions prior to their release from ICE custody. . . . In addition, of the 36,007 criminal aliens released from ICE custody in FY 2013, 1,000 have been re-convicted of additional crimes in the short time since their release. These post-release convictions include assault with a deadly weapon; terroristic threats; failure to register as a sex offender; lewd acts with a child under 14; robbery; hit-and-run; criminal street gang; rape; child cruelty (possible injury/death); and conspiracy to harbor aliens within the U.S.

Letter from to Hon. James B. Comey, Jr. (Mar. 15, 2016). Recidivism after release poses grave dangers to United States communities. *See* Jessica Vaughan, Sanctuary Cities: A Threat to Public Safety (July 2015), http://cis.org/Testimony/Vaughan-Sanctuary-Cities--072315.

It is this precise form of danger to United States communities that caused Congress to enact § 1226. Detention for a reasonable amount of time without bail permits allows for a more effective implementation of ICE policies and executive orders, and to appropriately and efficiently locate deportable aliens, while maintaining a clear end to detention for aliens eligible for release.

C. The bright line rule previously applied by the Second Circuit is impractical and infeasible in light of the current burdens faced by immigration courts.

Based upon the current political climate, courts within the Second Circuit, and across the United States, have been faced with higher demands in processing illegal aliens. Although detention of these aliens without bail is not always necessary, public policy mandates that these aliens be detained until a proper determination can be made. As noted by the Second Circuit

Court of Appeals below, the six-month window to determine whether bail is appropriate is unworkable given the volume of immigration removal proceedings faced by the Department's immigration judges. *Secord*, at 6 (2nd Cir. 2017). Any administrative ease gained by a bright line rule as to what a reasonable period for detention without bail is substantially outweighed by its impracticality. *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 475 n 7 (3d Cir. 2015). Regardless of the ease with which a court may determine a reasonable period of detention under the former bright line rule, the purpose of due process is forgotten where all state interests go to the wayside simply as a result of an overly clogged immigration docket. As the Second Circuit acknowledged below, the first available judge to hear a bail request could not be scheduled until eleven months after petitioner began her detention. *Secord*, 123 F.4th at 7. Furthermore, ICE officials simply had no time to adequately prepare for petitioner's hearing. The sheer volume of cases being faced by immigration dockets across this nation pose similar challenges across the country. Therefore, where proper determinations as to whether detention without bail is reasonable due to a hard line six-month deadline for presumptive reasonableness, dangerous illegal aliens will inevitably be released into out communities without protection.

The executive branch has taken a hard stance on criminal aliens. The current administration is focused on removing deportable criminal aliens and reducing time spent in detention. *See* Criminal Alien Program, United States Immigration and Customs Enforcement, (last accessed March 19, 2017), https://www.ice.gov/criminal-alien-program. (The identification and processing of incarcerated criminal aliens, before release from jails and prisons, decreases or eliminates the time spent in ICE custody and reduces the overall cost to the Federal Government). However, U.S. immigration courts are flooded with over 500,000 pending cases. TRAC Immigration, Syracuse University, (current through Jan. 2016), http://trac.syr.edu

/phptools/immigration/court_backlog/. As was considered by the court below, areas within the Second Circuit including Buffalo, which is has close proximity to the Canadian border, is particularly burdened by a heavy immigration docket. *Secord*, 123 F.4th at 6. In light of the current political climate sweeps for illegal aliens exacerbate this problem and further aggravate this risk of releasing dangerous criminal aliens into our communities. *Id.*

This Court should affirm the reasonableness test as applied by the Second Circuit because a detention for what a court determines to be a reasonable period of time complies with due process, the test aligns with the congressional intent, and is a necessary practical response to conditions currently faced by our nations immigration court system.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals finding that the *Harris* "common sense" standard for determining probable cause was appropriate, and the application of the "reasonableness test" for determining the proper time for holding a bail hearing complied with due process, furthered congressional intent, and provides a workable alternative for overburdened courts.