

SUPREME COURT OF THE UNITED STATES
March Term 2017

No. 2017-01

LAURA SECORD,
Petitioner,

v.

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

and

LAURA SECORD,
Petitioner,

v.

CITY OF ANGOLA
Respondent.

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

BRIEF FOR RESPONDENT

Team 26

Counsel for Respondent

QUESTIONS PRESENTED

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

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STATEMENT OF THE CASE

On December 21, 2015, Deputy Pfieff received information from the police dispatch that a local resident had noticed the lights on inside a summer cottage on the edge of Lake Erie. R. at 2. It was the middle of the night in the dead of winter. *Id.* When Deputy Pfieff arrived on the scene, he saw flickering light inside the cottage and approached for a closer look. *Id.* Peering through a window, he saw several hooded and masked individuals gathered around a table illuminated only by flickering candles. *Id.* Deputy Pfieff reported these observations to his supervisor who instructed him to investigate. *Id.*

Deputy Pfieff then approached the front door of the cottage and knocked while clearly announcing himself as a police officer with the local Sheriff's Department. *Id.* When he received no reply, Deputy Pfieff went back to the window and witnessed the hooded figures inside scatter and hide. *Id.* Seeing this suspicious response, he reported to his supervisor and called for more officers to respond. *Id.* Deputy Pfieff then opened the front door and announced again that he was a police officer with the Sheriff's Department. *Id.* Again, he received no response. *Id.* He attempted to turn on the lights only to find that they would not turn on. *Id.* Deputy Pfieff then ordered everyone in the cottage to come out from hiding and finally six young adults emerged into the dim candlelight. *Id.*

Each of these six wore a costume and Deputy Pfieff searched them for weapons and identification. *Id.* He discovered that each had a New York State driver's license except Petitioner who lacked any form of identification. *Id.* When the individuals were questioned, they all admitted that none of them lived in or owned the cottage, but one of them, James Fitzgibbon, claimed he was the nephew of the owner and had permission to use it. R. at 3. Fitzgibbon offered the key to the front door to support his claim, but admitted he did not normally possess the key

and had taken this one, a spare, from a planter on the back patio. *Id.* Moreover, when questioned, Fitzgibbon was unable to provide any contact information for his uncle, who he claimed lived in Florida during the winter. *Id.* At no point during the questioning did any of the individuals explain why they were gathered or what they were doing in a cottage with only candles for illumination. *See* R. at 3, 9. All six individuals were arrested and transported to the Erie County Holding Center where they were charged with criminal trespass. R. at 3.

Following the arrest, the arresting officers conducted a neighborhood canvass that produced Fitzgibbon's uncle's contact information. *Id.* Once contacted, the uncle explained he had instructed Fitzgibbon to check on the cottage, but had not given him permission to use it. R. at 3, 9. Officers also discovered that Petitioner is a Canadian citizen who illegally immigrated into the United States in 2013. R. at 3. Petitioner and her friends were tried and convicted of criminal trespass in the second degree in the City Court of Angola. *Id.* Petitioner was also convicted of criminal possession of a deadly weapon in the fourth degree for her possession of brass knuckles found in her backpack. *Id.* She was sentenced to a year in prison for each conviction, to be served concurrently, in the Erie County Correctional Facility. *Id.*

While serving out her sentence, Petitioner contacted the Criminal Defense Legal Clinic at the University of Buffalo School of Law which helped her file a habeas corpus petition in the United States District Court for the Western District of New York. *Id.* Petitioner argued that her arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure because Deputy PfiEFF lacked probable cause to enter and arrest her.¹ *Id.* While the habeas petition was pending, Petitioner's sentence ended and she was transferred into the custody of the

¹ Only the constitutionality of Petitioner's arrest remains at issue before this Court.

Department of Homeland Security for removal proceedings in accordance with 8. U.S.C. § 1226(c) (2012) which mandates detention of aliens convicted of certain criminal offenses prior to their removal hearings. R. at 3–4.

Petitioner was held by Immigration and Customs Enforcement (“ICE”) for six months while immigration judges in the Department of Homeland Security worked diligently through a backlog of immigration removal proceedings. R. at 6. The first judge available to hear a bail request could not have been scheduled until eleven months after Petitioner began her detention. *Id.* Moreover, ICE officials did not have the time to locate witnesses, obtain statements, or prepare in any way for a bond hearing because the removal docket for cases originating in Buffalo was particularly strained due to its proximity to the Canadian border. *Id.* The Department of Homeland Security engaged in no dilatory tactics or unfair delay in its handling of Petitioner’s case and none are alleged. *Id.*

After six months of detention, the Clinic filed another habeas petition on Petitioner’s behalf, arguing that her detention by ICE violated the Due Process Clause of the Fourteenth Amendment because it extended past the six-month limit on detention set by the Second Circuit’s decision in *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). R. at 4. This petition was assigned to a different district court judge who granted the petition and ordered Petitioner’s immediate release from ICE custody. *Id.* Later, Petitioner’s petition to throw out her conviction was also granted. *Id.* The City of Angola and the Department of Homeland Security both appealed separately and the Second Circuit joined both appeals. *Id.*

Regarding Petitioner’s Fourth Amendment claims, the Second Circuit disagreed with the Petitioner and the district court that Deputy Pfieff lacked probable cause to arrest Petitioner on December 21, 2015. R. at 6. The Second Circuit rejected the district court’s determination that

nothing Deputy Pfieff learned at the scene suggested Petitioner knew she was entering the cottage without permission. *Id.* It found the district court’s probable cause standard to be “an impossible standard,” too restrictive a variation of the totality of the circumstances standard required by decisions of this Court. R. at 7. The Second Circuit examined the totality of the circumstances reasonably known to Deputy Pfieff prior to arrest, ultimately found that he had probable cause to arrest Petitioner, and reinstated Petitioner’s convictions. *Id.*

Regarding Petitioner’s release from ICE custody, the Second Circuit reversed the district court and overturned its holding in *Lora*, finding that the six-month bright line approach has proved unworkable in practice. R. at 5. Instead, the Second Circuit adopted the approach taken by the Third and Sixth Circuits which engages in a “fact-dependent inquiry requiring an assessment of all of the circumstances of any given case” to determine whether detention without an individualized hearing is unreasonable. *Id.* The Second Circuit believed that this approach would prove more effective at preventing illegal aliens from being released prematurely back into American communities. *Id.* The Second Circuit ordered that Petitioner be remanded back into ICE custody until the Department of Homeland Security could prepare evidence for a bail hearing. R at 6.

Petitioner appealed on both issues and this Court granted certiorari on February 20, 2017.

SUMMARY OF THE ARGUMENT

I. This Court should affirm the Second Circuit’s finding of probable cause because it applied the correct standard to determine whether Deputy Pfieff had probable cause to arrest. It correctly recognized that probable cause is a standard that considers the totality of the circumstances and properly rejected the district court’s more restrictive standard. The Second Circuit’s standard accords with this Court’s precedent requiring courts to look at the totality of the circumstances known to the officer at the moment of arrest. Conversely Petitioner’s preferred standard, and the standard the district court applied, imposed a heightened, undefined standard requiring direct evidence supporting a suspect’s mens rea before an officer can make an arrest. The district court’s standard would require Deputy Pfieff to have direct evidence of Petitioner’s mens rea, rather than inferring it from circumstantial evidence surrounding Petitioner’s conduct.

Applying the Court’s well-settled “totality of the circumstances” standard here, supports Deputy Pfieff’s arrest based on probable cause. The Second Circuit correctly examined only the historical facts or events that led up to the arrest. In contrast, Petitioner and the dissent in the Second Circuit placed emphasis on facts and circumstances that were either irrelevant to the probable cause inquiry or unknown to Deputy Pfieff at the time of arrest. Thus, Respondent respectfully requests that this Court affirm the Second Circuit’s holding that Deputy Pfieff had probable cause.

II. This Court should also affirm that the Second Circuit’s reasonableness test for the constitutionality of detention under § 1226(c) adequately protects the due process rights of detained aliens. The Due Process Clause affords comparatively weak protections to aliens in deportation proceedings, particularly those whose liberty interests have already been substantially diminished by criminal convictions. In the context of a § 1226(c) detention, a

detained alien's due process rights are largely determined by Congress' purpose behind mandating that detention. Although the detention's duration must be reasonable, reasonability only requires that the government not create undue and significant delays in prosecuting the detainee's removal case. It certainly does not impose a rigid, one-size-fits-all rule that all § 1226(c) detainees must receive a bond hearing within six months of detention.

Here, the Second Circuit correctly determined that Petitioner's detention was reasonable under its test. The government had not created any significant, unjustifiable delays in the run-up to a removal hearing. Instead, delays resulted from a backlogged immigration removal docket and good-faith difficulties of ICE officials in preparing for a bond hearing. Thus, Respondent respectfully requests that this Court affirm the Second Circuit's holding that Petitioner's detention did not violate the Due Process Clause.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE SECOND CIRCUIT’S “TOTALITY OF THE CIRCUMSTANCES” APPROACH TO FINDING PROBABLE CAUSE AND ITS REVERSAL OF THE DISTRICT COURT’S MORE RIGID STANDARD.

Although application of the probable cause standard varies in individual cases according to their unique facts, the standard itself has been developed extensively and is well-settled. This Court has long held that at the heart of probable cause is “a reasonable ground for belief of guilt.” *Carroll v. U.S.*, 267 U.S. 132, 161 (1925). This belief “reasonably aris[es] out of circumstances known to the seizing officer.” *Id.* at 149. “That is to say that the facts and circumstances within [the officer’s] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable cause in the belief” that a crime is bring committed. *Id.* at 162.

These considerations “are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949). For example, “a police officer may draw inferences based on his own experience in deciding whether probable cause exists.” *Ornelas v. U.S.*, 517 U.S. 690, 700 (1996). The only requirement is that the officer’s “assessment of the whole picture must yield a particularized suspicion” specific to those he is arresting. *U.S. v. Cortez*, 449 U.S. 441, 418 (1981). Consequently, “[t]he test for probable cause is not reducible to ‘precise definition or quantification.’” *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). In determining whether this standard has been met, this Court “[has] consistently looked to the *totality of the circumstances*.” *Id.* at 1055 (emphasis added). There are two principal components in a determination of probable cause: (1) the historical facts or events that led up to the arrest and (2) whether the historical facts amount to probable cause when

viewed by a reasonable police officer. *Ornelas*, 517 U.S. at 696. Here, only the second component is at issue.

We respectfully request that this Court affirm the Second’s Circuit’s reversal of the district court because the Second Circuit properly rejected the district court’s more stringent standard for probable cause and correctly applied the “totality of the circumstances” standard consistently endorsed by this Court.

A. The Second Circuit’s Standard For Probable Cause Accords With The Standard Historically Applied By This Court.

The Second Circuit correctly recognized that “probable cause is a ‘practical and commonsensical standard’ that considers ‘the totality of the circumstances.’” R. at 7 (quoting *Harris*, 133 S.Ct. at 1055). Petitioner was arrested for trespass and the Second Circuit understood that, here, probable cause depended on whether Officer Pfeiff’s belief that Petitioner was trespassing “reasonably [arose] out of circumstances known to” him at the time. *Carroll*, 267 U.S. at 161. Consequently, the Second Circuit properly evaluated the holistic impression Deputy Pfeiff formed from the reasonably trustworthy information known to him.

The Second Circuit identified “numerous circumstances that supported Deputy Pfeiff’s determination of probable cause.” R. at 7. First, the court noted that a neighbor “reported suspicious activity, out of season, at a summer cottage at the edge of a dark and frozen lake in the middle of the night.” *Id.* Deputy Pfeiff received knowledge of this reported suspicious activity through the police dispatch, a source of “reasonably trustworthy information,” and personally confirmed the veracity of the report himself when he arrived on the scene. Second and third, the court noted that Deputy Pfeiff “observ[ed] through the window that the cottage was occupied by hooded and disguised individuals” and that the occupants “scatter[ed] and hid[] when Deputy Pfeiff knocked and announced himself. *Id.* Fourth and fifth, Fitzgibbon, who

claimed to have permission to use the cottage, “had no knowledge of how to contact the owner” and “admi[tte]d that he did not possess a key to the property, but had uncovered it hidden on the patio.” *Id.* Deputy Pfieff garnered information related to both of these circumstances through his own interactions and questioning of Fitzgibbon. Each of these circumstances was one “within [Deputy Pfieff’s] knowledge and of which [he] had reasonably trustworthy information,” either through the police dispatch, his own perception, or his questioning of Fitzgibbon. *Carroll*, 267 U.S. at 161. After considering “[a]ll of those circumstances,” the Second Circuit found that Deputy Pfieff could infer that Petitioner and her friends were trespassing and found it impossible to hold as a matter of law that Deputy Pfieff lacked probable cause. *Id.* (emphasis added).

Therefore, the Second Circuit’s standard perfectly aligns with the one espoused by this Court in its jurisprudence addressing probable cause. The Second Circuit first considered Deputy Pfieff’s knowledge of the facts and circumstances at the time and then evaluated the “totality of those circumstances” in reaching its conclusion that Deputy Pfieff acted with probable cause. *R.* at 7. Taking seriously this Court’s admonition that probable cause should serve as a measure of “reasonable and prudent men, not legal technicians,” *Brinegar*, 338 U.S. at 175, the Second Circuit rightly declined to inquire into Deputy Pfieff’s specific knowledge concerning each element of criminal trespass. In contrast, Petitioner’s preferred standard, applied by the district court below, goes too far by imposing a heightened, undefined standard requiring direct evidence supporting a suspect’s mens rea.

B. The District Court’s Standard Requires Too Much By Requiring More Than An Officer’s Reasonable Inferences And Inquiring Into His Or Her Knowledge Of The Suspect’s Culpability.

Petitioner would have this Court adopt the district court’s approach and hold that Deputy Pfieff lacked probable cause, because “nothing Deputy Pfieff . . . learned at the scene suggests

that [Petitioner] or the others knew or should have known they were entering the cottage against the true owner's will." R. at 6. Moreover, the district court believed that "[a]s far as Deputy PfiEFF knew . . . the group had the permission of Fitzgibbon's uncle to use the cottage for their gathering" and that this "knowledge . . . vitiated the probable cause the Deputy asserted to arrest the suspects on the charge of trespass." R. at 6–7. There are two flaws in the district court's standard for probable cause and its application.

First, the Second Circuit noted correctly that "[t]he District Court's decision sets an impossible standard for arresting officers" because "[i]t undercuts their ability to arrest subjects in the absence of direct, affirmative proof of intent." R. at 7. For example, "[t]he District Court determined that nothing Deputy PfiEFF . . . learned at the scene suggests that Secord or the others *knew or should have known* they were entering the cottage against the true owner's will." R. at 6 (emphasis added). Thus, under the district court's standard for probable cause, Deputy PfiEFF needed to have direct evidence of Petitioner's mens rea, rather than inferring it from circumstantial evidence surrounding Petitioner's conduct, before he could have probable cause to arrest. This is far more than what the "totality of the circumstances" standard requires.

This Court in *Brinegar* made clear that considerations made by officers in determining probable cause "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, *not legal technicians*, act." 338 U.S. at 175 (emphasis added). Yet the district court's standard would force officers to adopt the mantle of legal technicians every time they make arrests. Only legal technicians would know the exact culpability requirement for the suspected crime and then be able to evaluate whether a particular suspect has that requisite culpability. This Court has said that "we cannot expect every police officer to know the details of frequently complex penalty schemes" and that "[a]n officer on the

street might not be able to tell” the difference between “jailable” and “fine-only offenses.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 348 (2001). Expecting officers to analyze culpability before making arrests would ask even more. This Court’s precedent requires only that an arresting officer’s belief “reasonably aris[es] out of circumstances known to the seizing officer,” not that it be based on information allowing the officer to infer the suspect’s mens rea.

Furthermore, this Court has held that it is reasonable for an officer to infer a suspect’s knowledge from a particular case’s circumstances without direct, affirmative proof of it. *See Pringle*, 540 U.S. at 366. The *Pringle* court faced a situation where the defendant was the front passenger in a car with two other suspects. *Id.* at 368–72. At issue was whether it was reasonable for the officer to infer that the defendant, although sitting in the front, “had knowledge of, and exercised dominion and control over, the cocaine” that was found behind the back-seat armrest.” *Id.* The Court held that it was reasonable and that the officer had probable cause to arrest despite having no direct proof that the defendant had knowledge of the cocaine. *Id.* at 372. The situation here is similar. Although Deputy Pfieff had no direct proof that Petitioner knew she had no permission, he could reasonably infer that she did based on the totality of the circumstances (e.g., that she hid when he knocked, the time and setting, etc.).

Second, the District Court’s argument that “[a]s far as Deputy Pfieff knew . . . the group had the permission of Fitzgibbon’s uncle” and that this “knowledge . . . vitiated the probable cause the Deputy asserted to arrest the suspects on the charge of trespass” ignores key language in this Court’s probable cause standard. R. at 6–7. This key language is that officers need only consider “*reasonably trustworthy* information” when forming probable cause. *Carroll*, 267 U.S. at 162 (emphasis added). Any indication that the group had the permission of Fitzgibbon’s uncle came from Fitzgibbon himself, hardly “trustworthy information” given his impending arrest. R.

at 3. Furthermore, the district court analyzes Fitzgibbon’s claim in isolation, ignoring the fact that Fitzgibbon “had no contact information for the uncle” who supposedly gave him permission.

Thus, the district court incorrectly applied a more stringent standard for probable cause that added a culpability element for police officers to consider, required an officer to credit information that was not “reasonably trustworthy,” and ultimately failed to base its findings on the totality of the circumstances. The Second Circuit properly reversed.

C. Applying The Correct Standard Here Supports The Second Circuit’s Finding Of Probable Cause.

When this Court’s well-settled “totality of the circumstances” standard is applied here, it supports Deputy Pfieff’s arrest based on probable cause. In applying this standard, it is critical to consider only “the historical facts or events that *led up to* the arrest.” *Ornelas*, 517 U.S. at 696 (emphasis added). *See also Pringle*, 540 U.S. at 371–72 (court examining events leading up to arrest); *Brinegar*, 338 U.S. at 165–66 (same); *Carroll*, 267 U.S. at 160–61 (same). Furthermore, the events are to be “viewed from the standpoint of an objectively reasonable police officer.” *Ornelas*, 517 U.S. at 696.

i. *Viewing the historical facts and events that led up to the arrest from Deputy Pfieff’s perspective supports probable cause for Petitioner’s arrest.*

The facts are not in dispute. Deputy Pfieff showed up at the cottage following a report from a neighbor that lights were on at a summer cottage during the winter in the middle of the night. R. at 7. After Deputy Pfieff arrived and peeked inside a window, he “observed several hooded or masked individuals, gathered around a table in the gloom of [] candlelight.” R. at 2. When he knocked and identified himself as a police officer, “he observed the hooded figures scatter and hide.” *Id.* Upon entering, Deputy Pfieff saw “drawings and other documents on the table” “[i]n the dim light from the candles.” *Id.* It was only after announcing himself again and

ordering those inside to come out that six young adults emerged. *Id.* Deputy Pfieff then searched them for weapons and identification and all had driver's licenses except Petitioner. *Id.* Deputy Pfieff also questioned them which prompted Fitzgibbon to claim that he was the nephew of the owner and had permission to use the cottage. *Id.* Upon further questioning, however, Fitzgibbon was unable to provide contact information for his uncle and ultimately admitted that he'd retrieved the key for the cottage from a planter on the patio. *Id.* It was at this point that Deputy Pfieff arrested them all for trespass.

Given these facts, Deputy Pfieff's belief that Petitioner and her friends were trespassing "reasonably ar[ose] out of circumstances known to" him at the time. *Carroll*, 267 U.S. at 161. Learning that a summer cottage, usually closed in the winter, is being used in the dead of night, observing its hooded and masked inhabitants running and hiding upon hearing a police officer announce himself, and hearing that one suspect claims to have permission, but no knowledge of how to contact the owner, are exactly the types of "facts and circumstances within [an officer's] knowledge and of which they had reasonably trustworthy information" that are "sufficient in themselves to warrant a man of reasonable cause in the belief" that a trespass is being committed. *Id.* at 162. Furthermore, as Deputy Pfieff was a member of the local sheriff's office, he was free to draw "inferences based on his own experience" with local summer cottages in the middle of the night during winter in "deciding whether probable cause exists." *Ornelas*, 517 U.S. at 700. Because Deputy Pfieff's considerations need not be "technical and are "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," the standard for probable cause was satisfied here. *Brinegar*, 338 U.S. at 175.

- ii. *The dissent in the Second Circuit focuses on facts that were unknown to Deputy PfiEFF or irrelevant to his belief that Petitioner was trespassing.*

The crux of the dissent’s argument is that several “open and obvious facts should have told Deputy PfiEFF these young people were having quiet, peaceful, and law-abiding fun.” R. at 10. These facts are that: (1) Petitioner and her friends believed they had the owner’s permission to use the house, (2) the hooded individuals were playing a board game (3) the hooded individuals were dressed in costumes as witches and ghouls, and (4) there were Doritos, other snacks, and soda on the table. *Id.* These facts—facts the dissents claims were “left out from the majority’s decision”—do not vitiate Deputy PfiEFF’s probable cause. R. at 8.

As discussed previously, the Second Circuit properly disregarded the dissent’s first fact. Deputy PfiEFF had neither the ability nor the obligation to know whether Petitioner believed she had permission to enter the cabin. The dissent emphasizes that Fitzgibbon told Deputy PfiEFF he had permission from his uncle and there were pictures of Fitzgibbon with his family in the cottage. R. at 9. Yet Deputy PfiEFF had no reason to take Fitzgibbon’s claim at face value, particularly when Fitzgibbon did not know his uncle’s contact information. R. at 3. Moreover, the record is devoid of any evidence that Deputy PfiEFF saw the pictures of Fitzgibbon before arrest, especially when the cottage was lit by a single candle. Even if he had seen them, the family pictures fail to establish that Fitzgibbon had permission to enter the cabin with his friends on that night under such suspicious circumstances. While the dissent may believe that Petitioner genuinely believed she had permission to enter the cottage, there is no basis for retroactively forcing this same belief onto Deputy PfiEFF and treating it as a fact he must have inferred from the circumstances. In addition, it is worth noting that Petitioner was ultimately *convicted* of criminal trespass in the second degree, indicating that a unanimous jury found that she *did know* she did not have permission. R. at 3.

Regarding the remaining facts, the dissent places unwarranted emphasis on Petitioner and her friends playing a game of Dungeons and Dragons (“D&D”) in the cabin and “having quiet, peaceful, and law-abiding fun.” R. at 8–10. There are two problems here. First, there is nothing in the record suggesting that Deputy PfiEFF or any other police officer should have reason to recognize when they are interrupting a game of D&D. Again, in evaluating probable cause only the “facts and circumstances within [an officer’s] knowledge” are relevant, *Carroll*, 267 U.S. at 162, and the “officer may draw inferences based on *his own* experience.” *Ornelas*, 517 U.S. 700. It is inappropriate to impute a reviewing judge’s idiosyncratic knowledge of board games onto the officer.

Second, the fact that Petitioner was “having quiet, peaceful, and law-abiding fun” is irrelevant. R. at 10. Regardless of what Petitioner was doing in the cottage, an officer on the scene could reasonably believe that Petitioner broke the law when entering the cottage. At most, the fact that Petitioner and her friends were playing D&D may lower the probability in a reasonable officer’s mind that something nefarious is at hand. But benign activity is not mutually exclusive of illegal trespass. For example, a student band that breaks into their school’s music room to practice is guilty of trespass. Even a bible study group that sneaks into a church at night to recite verses in a holier space is guilty of trespass. Thus, even after seeing the costumes and the snacks on the table, Deputy PfiEFF could reasonably believe Petitioner and her friends were trespassing as he “views the facts through the lens of his police experience and expertise.” *Ornelas*, 517 U.S. at 699. Thus, the Second Circuit properly determined that the facts emphasized by the dissent did not vitiate Deputy PfiEFF’s probable cause.

II. THIS COURT SHOULD AFFIRM THAT THE SECOND CIRCUIT'S REASONABLENESS TEST ADEQUATELY PROTECTS THE DUE PROCESS RIGHTS OF DETAINED ALIENS.

The Due Process Clause affords comparatively weak protections to aliens in deportation proceedings, particularly those whose liberty interests have already been substantially diminished by criminal convictions. Under 8 U.S.C. § 1226(c) (2012), aliens who have committed certain criminal offenses are subject to mandatory detention after serving their criminal sentences and pending their removal proceedings. In the context of a § 1226(c) detention, a detained alien's due process rights are largely determined by Congress' purpose behind mandating that detention. Although the detention's duration must be reasonable, reasonability only requires that the government not create undue and significant delays in prosecuting the detainee's removal case. It certainly does not impose a rigid, one-size-fits-all rule that all § 1226(c) detainees must receive a bond hearing within six months of detention.

Accordingly, we respectfully request that this Court affirm the Second Circuit's reversal of the district court because the Second Circuit properly determined that ICE's detention of Petitioner for longer than six months without a bond hearing was reasonable given ICE officials' good faith efforts to prepare for a hearing.

A. The Due Process Clause imposes minimal restrictions on enforcing immigration law against nonresident aliens.

Immigration law exists at an intersection of the federal government's most essential functions. Federal government policy towards aliens "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)). Accordingly, Congress' power over immigration, particularly its authority to remove criminal aliens from the country, is

extremely broad. While aliens undoubtedly enjoy due process protections under the Fifth Amendment, this Court has “firmly and repeatedly endorsed” that Congress may constitutionally craft rules applicable to aliens that would be unconstitutional if applied to citizens. *Demore v. Kim*, 538 U.S. 510, 522 (2003); *see also Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Mathews*, 426 U.S. at 79–80.

Detention serves a particularly important role in immigration enforcement. The power to detain aliens in connection with removal is part of Congress’ “considerable authority over immigration matters.” *Zadvydas v. Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting). Deportation proceedings “would be in vain if those accused could not be held in custody.” *Demore*, 538 U.S. at 523. As a result, the constitutional requirements governing reasonable detention differ substantially between aliens and citizens. The Constitution permits aliens to be detained for prolonged periods of time without individualized determinations of future dangerousness or flight risk. *Id.* at 524–26; *id.* at 541 (Souter, J., dissenting) (“The Court’s approval of lengthy mandatory detention can therefore claim no justification in national emergency or any risk posed by Kim particularly.”). Instead, Congress may deny bail to detainees “by reference to [a] legislative scheme” that treats entire classes of aliens as threats. *Carlson v. Landon*, 342 U.S. 524, 541, 543 (1952). Aliens are entitled to individualized determinations of whether they fall into the class that Congress has legislated for, but “[t]he particularization and individuation need go no further than this.” *Reno*, 507 U.S. at 313–14.

Congress’ broad authority over immigration matters and the importance of detention to immigration law enforcement limit the protections afforded aliens by the Due Process Clause. This Court has already confirmed the constitutionality of § 1226(c)’s mandatory detention for aliens convicted of certain crimes. *See Demore*, 538 U.S. at 531. Congress acted well within its

authority when it crafted a legislative scheme that denied bail to these criminal aliens as a class. Similarly, any detention duration requirements derived from the Due Process Clause will be products of the diminished due process protections afforded aliens in deportation proceedings.

- B. Detention of aliens without a bond hearing under § 1226(c) is reasonable under the Due Process Clause as long as continued detention does not result from significant, unjustifiable delays caused by the government before a removal hearing.

The proper test for the reasonability of an alien's continued detention under § 1226(c) is a fact-dependent inquiry requiring assessment of any given case's circumstances in light of the statute's basic purpose. *See Reid v. Donelan*, 819 F.3d 486, 497 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 223 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003). It is well-established that "detention during deportation [i]s a constitutionally valid aspect of the deportation process. *Demore*, 538 U.S. at 523. Given Congress' broad powers to control immigration, the constitutional protections afforded detainees by the Due Process Clause depend upon Congress' chosen statutory scheme. This Court made that explicit in *Zadvydas*, emphasizing that courts "should measure reasonableness primarily in terms of the statute's basic purpose." 533 U.S. at 699. There, the Court held that a challenged detention was unconstitutional because continued detention following issuance of a removal order "no longer b[ore] a reasonable relation" to the government's removal interest when removal was not immediately foreseeable. *Id.* at 690, 702.

Demore confirmed that statutory purpose is the cornerstone of the reasonableness inquiry. There, this Court held that the challenged detention was constitutional because "[s]uch detention necessarily serve[d] the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings." *Demore*, 538 U.S. at 528. In characterizing *Zadvydas* as "materially different," the opinion emphasized purposive differences between § 1226(c)

“detention[s] pending a determination of removability” and the “post-removal-period detention” at issue in *Zadvydas. Demore*, 538 U.S. at 528–29.

Section 1226(c)’s basic purpose is to remedy immigration authorities’ “wholesale failure” to “deal with the increasing rates of criminal activity by aliens.” *Id.* at 518. Critically, the major perceived cause of this failure was the Attorney General’s “broad discretion” to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings.” *See id.* (reviewing the text and legislative history of § 1226(c)). By mandating that the Attorney General take into custody any aliens deportable because of committing certain crimes, § 1226(c) ensures those aliens will be present at their removal proceedings and not on the loose in their communities. *Id.* at 519. Accordingly, the statute’s purpose is more nuanced than a general effort to protect public safety and ensure aliens appear for removal proceedings. *See Reid*, 819 F.3d at 497. While mandatory detention undoubtedly prevents flights and protects the public, § 1226(c)’s statutory purpose more narrowly seeks to achieve those aims by specifically *denying* bond hearings to a class of aliens who may pose special threats. *See id.* at 499.

Accordingly, individualized findings of flight risk or dangerousness should be irrelevant to determining whether detention is reasonable. The “animating force” behind § 1226(c) was avoidance of excessively individualized bail decisions under the Attorney General’s discretion. *Id.* at 497; *Demore*, 538 U.S. at 518. Incorporating individual danger and flight risk considerations into the analysis of every § 1226(c) detention’s reasonability would subvert Congress’ intent to legislate the categorical and mandatory treatment of an entire class of criminal aliens. Even worse, the Executive Branch discretion that Congress sought to preclude with § 1226(c) would be replaced by the discretion of inexperienced judges making decisions pertaining to specific detainees without considering those decisions’ effects on broader

immigration enforcement. Moreover, incorporating those considerations would collapse the distinction between the Due Process Clause's reasonability requirement and the bond hearing inquiry. Bond hearings already include such flight and danger considerations; the reasonableness inquiry that determines whether a bond hearing is necessary should not duplicate that analysis.

Given § 1226(c)'s purpose, courts evaluating the reasonableness of an alien's detention should narrowly focus on whether the government has created significant, unjustifiable delays in the run-up to a removal hearing. In general, continued detention under § 1226(c) "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528. To determine whether continued detention would fail to advance this purpose, judges only need to consider whether the government has acted in a manner that reflects a lack of interest in removal. For instance, unreasonable delays may be evidenced by frivolous government extension requests, repeated government errors necessitating delayed hearing dates, or signs that the government is not actively engaged in prosecuting the removal case. In contrast, delays caused by a detainee's own extension requests or the inevitable expansion and contraction of the immigration judge's caseload support the reasonability of continued detention. These types of delays reveal nothing about the government's commitment to pursuing speedy removal.

C. The Due Process Clause does not require that § 1226(c) detainees receive a bond hearing after six months of detention.

Petitioner asks this Court to adopt an arbitrary six-month detention limit when assessing the reasonability of an alien's detention. This 'length of detention' test would strip the due process inquiry of any pragmatism, simultaneously handicapping Executive Branch enforcement of immigration laws and undermining important procedural protections for detainees.

Predictably, the justifications for such an impractical test depend upon major misunderstandings of this Court's precedent.

- i. A six-month rule improperly intrudes on Executive Branch enforcement of immigration laws and undermines detainees' procedural protections.*

The unique context of federal immigration policy does not release the government from constitutional limits, but it warrants judicial caution in crafting tools for detecting constitutional violations. As noted, federal government policy towards aliens “is vitally and intricately interwoven with” many sensitive government duties. *Mathews*, 426 U.S. at 81 n.17. Awareness of this complex interweaving has led this Court to view judicial deference to Executive Branch enforcement decisions as being “of special importance” because such immigration matters involve “especially sensitive political functions that implicate questions of foreign relations.” *Negusie v. Holder*, 555 U.S. 511, 517 (2009). When alien detentions are challenged, “review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to ‘speak with one voice’ in immigration matters.” *Zadvydas*, 533 U.S. at 700.

The coalescence of these important factors in immigration detention decisions makes adoption of a rigid ‘length of detention’ test inappropriate and dangerously intrusive. When judges intervene in such circumstances, they should employ tools that enable them to consider the full range of circumstances that may be relevant to detention decisions. A singular focus on the length of duration prevents consideration of potential difficulties collecting evidence, public safety concerns, or unique foreign policy situations. Rather than serving as a means to understand Executive Branch motivations for detention, this test conceals immigration enforcement's complexity. It also enables a potentially crippling form of abuse against the

system. If courts do not look beyond detention duration to consider the alien's role in causing delay, it will encourage criminal aliens to raise frivolous objections and string out proceedings in the hopes of a federal court finding the delay unreasonable. While judicially manageable standards are valuable where appropriate, simplification of the judge's task cannot serve as an excuse to ignore Congress's dictates or handcuff the Executive Branch's immigration enforcement.

Moreover, a 'length of duration' test threatens to produce worse outcomes for many detainees. Delays do not result exclusively from government mistake and delay. In *Diop*, over six months passed between a detainee receiving his initial Notice to Appear and the immigration judge's first ruling solely because of the detainee's repeated requests to reset proceedings in order to seek counsel. *See* 656 F. 3d at 223–24. Such cases reveal that lengthy detentions often result from efforts of the detained alien and the immigration courts to guarantee aliens fair procedural protections. A rigid one-size-fits-all rule for reasonable detention length, therefore, raises the troubling prospect that detained aliens may be denied the time necessary to adequately prepare for their bond or removal hearings.

ii. *A six-month rule cannot be reconciled with this Court's precedent.*

The circuit courts that have adopted a six-month 'length of detention' test for unreasonableness point to this Court's decision in *Zadvydas* for support—a decision arising from circumstances that threatened far more daunting detention lengths. *See Lora*, 804 F.3d at 615 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060, 1077–78 (9th Cir. 2015). In *Zadvydas*, aliens who had *already completed* removal proceedings and received removal orders were kept in custody because no other countries would accept them. 533 U.S. at 684–86. As a result, the intended interim detention between removal proceeding and deportation stretched into an

“indefinite term of imprisonment.” *Id.* at 695. In contrast, § 1226(c) concerns detention prior to and pending a determination of removability. The *Zadvydas* Court explicitly identified such detentions as having an “obvious termination point” at the alien’s removal proceeding. *Id.* at 697. Relative to the risk present in cases of post-removal order detention, this obvious termination point substantially reduces the risk of § 1226(c) detentions evolving into indefinite detentions.

Even confronted with the more troublesome scenario presented in *Zadvydas*, this Court declined to adopt a bright line rule requiring bond hearings after six months of detention. It merely observed that after six-months, *if* an alien “provide[d] good reason to believe that there is no likelihood of removal in the reasonably foreseeable future,” the government must “respond with sufficient evidence to rebut that showing.” *Id.* at 701. Two features of this test plainly undermine Petitioner’s attempt to characterize it as a one-size-fits-all ‘length of detention’ test. First, the *Zadvydas* test relates to the achievability of the statutory purpose of reasonable removal, not individual determinations of public safety or flight risk. It is, therefore, an obvious error to conflate the inquiry that *Zadvydas* requires six months after issuance of a removal order with a bond hearing. Second, the government’s obligation to justify continued detention only arises if a detainee presents evidence that removal is unlikely. The conditional nature of this requirement underscores that length of detention, by itself, does not give rise to constitutional problems after six months. Even under the *Zadvydas* test, an alien could continue to be detained beyond that point, without a bond hearing, if he failed to provide good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future.

Finally, only a statutory purpose-focused interpretation of *Zadvydas* can survive *Demore*’s implicit rejection of a rigid six-month rule. In *Demore*, this Court declined to mention any specific time thresholds, even though the case involved a detainee whose detention had

already lasted over six months. 538 U.S. at 530. Instead, the opinion considered other factors like the detainee's request for continuances. *Id.* While length of detention may affect the detention's reasonability, time is not an independently dispositive factor. *Zadvydas* and *Demore* make clear that considerations of statutory purpose form the cornerstone of Due Process reasonability analysis in the immigration context. *See infra* II.B. Therefore, detention does not automatically become unreasonable after six months without a bond hearing.

D. The Second Circuit correctly determined that Petitioner's detention was reasonable.

The Second Circuit properly concluded that Petitioner's continued detention was reasonable in light of § 1226(c)'s purpose. The court determined that the government had not created any significant, unjustifiable delays in the run-up to a removal hearing. Instead, delays resulted from a backlogged immigration removal docket and good-faith difficulties of ICE officials in locating witnesses and obtaining statements. R. at 6. Therefore, even though Petitioner's detention exceeded six months, the Second Circuit's reasonableness test appropriately protected her due process rights.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the Second Circuit's decision and hold that the Second Circuit applied the correct probable cause standard, properly rejecting the standard used by the district court. Accordingly, the Respondent respectfully requests this Court affirm the Second Circuit's finding that Deputy Pfieff had probable cause to arrest the Petitioner.

In addition, the Respondent respectfully requests that this Court affirm that the Second Circuit's reasonableness test appropriately protects the due process rights of aliens detained under § 1226(c). Accordingly, the Respondent respectfully requests this Court affirm the Second Circuit's remanding of Petitioner to ICE custody to await a removal proceeding.

Respectfully submitted,

Counsel for Respondent