

IN THE SUPREME COURT OF THE UNITED STATES

LAURA SECORD, *Petitioner*

v.

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

Index No. 1-2017

and

LAURA SECORD, *Petitioner*

v.

CITY OF ANGOLA, *Respondent*.

TEAM 28 - RESPONDENT BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
QUESTIONS PRESENTED.....	iii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	6
I. The Second Circuit Applied the Correct Standard to Determine if Deputy Pfieff had Probable Cause to Arrest Petitioner Because They Looked at the Totality of Circumstances, Applied Common Sense, and Because a Reasonably Prudent Person Could Determine that There was Probable Cause that a Crime Had Been Committed.....	7
A. Courts have made clear that the totality of circumstances must be taken into consideration when determining probable cause.....	7
B. Common sense must be used when considering probable cause.....	9
C. There is probable cause when a reasonably prudent person can determine that a crime was committed.....	10
II. “The Reasonableness Test” Protects the Due Process Rights of Undocumented Aliens During the Pre-Removal Mandatory Detention Period Stipulated in 8 U.S.C. § 1226.....	11
A. Because the issue of immigration policy has long been left to the legislative and executive branches, and because 8 U.S.C. 1226 is reasonably tailored to a stated purpose of public concern, courts should give strong deference to the Government’s actions.....	13
B. Because certain classes of aliens give rise to public concerns, and because Congress reserves the right to address these concerns, pre-removal mandatory detention is not considered a Due Process violation.....	14
C. Unlike the “Bright Line Rule,” the “Reasonableness Test” ensures that courts evaluate the nuanced circumstances pertaining to the Government’s exercise of Section 1226(c), and is therefore better suited to protect the Due Process rights of undocumented aliens.....	16

i. Because the “Reasonableness Test” evaluates whether the Government’s use of Section 1226(c) fits within the purpose of the statute’s recognized aim, it protects the Due Process rights of criminally convicted undocumented aliens.....	16
ii. Because the “Bright Line Test” provides a blanket deference to the Government’s actions under Section 1226(c) for a period of six months, the method would end up creating a greater risk of Due Process violations.....	18
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Carlson v. Landon</i> , 342 U.S. 524, 528-529 (1952).....	15
<i>Chavez-Alvarez v. Warden York County Prison</i> , 783 F.3d 469, 474 (3rd Cir. 2015).....	6, <i>passim</i>
<i>City of Los Angeles v. Alameda Books, Inc.</i> , 535 U.S. 425 (2002).....	13, 18
<i>Demore v. Kim</i> , 538 U.S. 510, 528 (2003)	13, 14, 15
<i>Diop v. ICE/Homeland Security</i> , 656 F.3d 221, 234 (3rd Cir. 2011)	12
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977).....	13, 18
<i>Florida v. Harris</i> , 133 S.Ct. 1050, 1055 (2013)	6, 7, 8, 10
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	6, 9, 10
<i>Lora v. Shanahan</i> , 804 F.3d 601, 616 (2d Cir. 2015)	5, 6, 12, 18
<i>Ly v. Hansen</i> , 351 F.3d 263, 271-72 (6th Cir. 2013)	17, 18
<i>Maryland v. Pringle</i> , 540 U.S. 366 (2003)	7, 8
<i>Matthew v. Diaz</i> , 426 U.S. 67, 78-79 (1976)	14
<i>Neguisse v. Holder</i> , 555 U.S. 551, 533 (2009).....	13
<i>Parra v. Perryman</i> , 172 F.3d 954, 958 (1999)	13, 14
<i>Reid v. Donelan</i> , 819 F.3d 486, 500 (1st Cir. 2016).....	17, 19
<i>Rodriguez v. Robbins</i> , 715 F.3d 1127, 1133 (9th Cir. 2013)	12
<i>Zadvydas v. Davis</i> , 533 U.S. 678, 669 (2001)	12

Statutes

8 U.S.C. § 1226.....	5, 6, 11, 13
----------------------	--------------

QUESTIONS PRESENTED

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

Respondent Answer: Yes.

Petitioner Answer: No.

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.

Respondent Answer: Yes.

Petitioner Answer: No.

INTRODUCTION

Probable cause is determined through a subjective standard that takes into consideration the totality of circumstances. The Supreme Court has continuously rejected a bright-line rule approach. When an officer is determining whether or not he has probable cause to make an arrest he also looks at the totality of circumstances. In this case, Petitioner was dressed in a disguise, sitting in a candlelit cottage that was supposed to be vacant during the winter. A neighbor had called the police and had reported suspicious activity. When Deputy PfiEFF knocked on the door and entered the cottage, announcing his role as a deputy, the Plaintiff hid. These are all things that would lead a reasonably prudent officer to believe that a crime may have been committed. These circumstances also gave the Deputy probable cause to arrest the Petitioner.

Once the Petitioner was arrested, the “reasonableness-test” does protect the Petitioner’s Due Process rights when determining a time for her bail hearing. The reasonableness-test considers the unique circumstances and fact-dependent nature of each case. The reasonableness-test takes individual circumstances into consideration and uses those circumstances to balance the Government’s interests with the detainee’s liberty interests. The Government interest is quite important in this case because the Government’s goal is to protect society from undocumented aliens that may pose a risk of danger to society on a whole. The Government’s actions reasonably fit the public concern Congress sought to address, and therefore judicial deference to its position should be granted. The Government’s actions follow the need for a reasonableness test because it allows them to consider each individual’s situation and make a determination based on both the individual’s right to a timely bail hearing and the protection of society as a whole. This protects both society and the Petitioner’s Due Process rights.

STATEMENT OF FACTS

Laura Secord, Petitioner was a Canadian citizen who illegally came to America from Toronto. *Scott v. Secord* 123 F.4th 1 (2nd Cir. 2016). Petitioner found a group of people she met at a shelter while she was living in Toronto. *Id.* at 8. Petitioner and this “family” played Dungeons and Dragons together once a week at the shelter. *Id.* At some point, in 2012, Petitioner found a bigger group of people to play Dungeons and Dragons with online. *Id.* Petitioner accessed the internet at the shelter and the library. *Id.* It was through the online gaming that Petitioner found a group of Dungeons and Dragons players who lived in Buffalo, New York. *Id.* Petitioner became close to this particular group and decided to emigrate to Buffalo in 2013. *Id.* In 2013, the winter was unusually cold and Lake Erie froze over. Petitioner illegally made her way to Fort Erie where she crossed the frozen Lake Erie into the United States. *Id.* Petitioner acquired a set of brass knuckles during her time in Toronto that she brought with her when she illegally entered the United States. *Id.* Once in the United States, Petitioner connected with the Dungeons and Dragons player from Buffalo and began to regularly meet up at their homes to play games. *Id.*

Petitioner then had an issue with law enforcement in December of 2015. In December, Petitioner’s friends decided that it would be fun to play a Dungeons and Dragons game someplace “spooky” to celebrate the Winter Solstice. *Id.* One of Petitioner’s Dungeons and Dragons’ friends, James Fitzgibbon, offered the use of his uncle’s cottage in Angola (45 minutes south of Buffalo) for their game. *Id.* at 8-9. The cottage was empty due to the fact that Fitzgibbon’s uncle was in Florida for the winter. *Id.* at 9. Fitzgibbon was not allowed to have parties or people over at this cottage. *Id.* He was only given access to the cottage to check on it

for his uncle while his uncle was on vacation in Florida. *Id.* His uncle told Fitzgibbon expressly to not have any parties. Fitzgibbon's uncle was concerned about insurance liability. *Id.*

Ignoring the fact that none of the group had confirmed with Fitzgibbon's uncle that this party was okay, the group decided that they were going to dress up for their Winter Solstice game and stopped at a Party City on the way up to the cottage. *Id.* The group also stopped to get pop and snacks because they were planning on spending the whole evening at the cottage. *Id.* Once they arrived at the cottage, Fitzgibbon let the group in through the front door, using a key he retrieved from the patio. *Id.* Although Fitzgibbon was not expressly allowed to throw a party at the cottage, Fitzgibbon's uncle was relying on him to check on the property once every week or so. *Id.* Fitzgibbon was unable to locate the switch for the electricity once inside, so the group lit candles to light the cottage. *Id.*

The group who was now dressed in the costumes they had picked up from Party City then began to play their game and were soon focused on the Dungeons and Dragons at hand. *Id.* It was at this point that that Deputy PfiEFF knocked on the door. The Deputy was dispatched to the cottage after a concerned resident reported unusual activity at a cottage that is usually closed for the winter. *Id.* After observing people in unusual clothing gathered around a candle-lit table, the Deputy radioed his Sergeant who told the Deputy to "Go find out what's going on." *Id.* at 2. The Deputy went back to the cottage and knocked on the door, identified himself as a member of the Sheriff's Department, and peered through the window. *Id.* Petitioner and her friends hid upon hearing a knock on the door. *Id.* The Deputy used his portable radio to report what he had seen and called for other officers to respond. After using his radio, the Deputy entered through the unlocked front door, announcing that he was from the Sheriff's Department once again. *Id.* He ordered Petitioner and her friends out from hiding while he un-holstered his weapon. *Id.* Once

Petitioner and her friends came out from their hiding spots, the Deputy ordered all of them to get on the ground with their hands up. *Id.* The Deputy searched Petitioner and her friends for weapons and identification, finding New York licenses or other identification on everyone except Petitioner, who only had cash on her person. *Id.*

By the time the Deputy had found that identification the other officers had arrived. *Id.* at 3. During questioning Petitioner and her friends told the officers that none of them lived in the cottage, but that one of the friends' uncle did. *Id.* Once Fitzgibbons was pressed he admitted that he did not actually have his own key to enter the cottage, but had used the spare key from outside. *Id.* Fitzgibbons was unable to remember his uncle's contact information at the time and the whole group of Petitioner and her friends were arrested and transported to the Erie County Holding Center. *Id.* The whole group was charged with criminal trespass and Petitioner was also charged with possession of a deadly weapon when her brass knuckles were found in her backpack. *Id.* Petitioner's friends were released on their own recognizance, but Petitioner was held due to her immigration status. *Id.* Petitioner was tried and convicted of both charges (criminal trespass and possession of a deadly weapon in the fourth degree after admitting the brass knuckles were hers) in the City Court of Angola. Petitioner was sentenced to a year in prison for each charge to be served concurrently a correctional facility in New York. *Id.*

While Petitioner was serving her time she contacted the Criminal Defense Legal Clinic at the University of Buffalo School of Law. Student attorneys there, under the watch of a supervising attorney, filed a habeas corpus petition claiming that Petitioner's arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure because, the group claimed, Deputy PfiEFF lacked probable cause to come into the cottage and arrest her. *Id.* While the petition was pending, Petitioner's sentence was up and she was immediately

transferred into the Department of Homeland Security for deportation proceedings, in accordance with 8 U.S.C. § 1226. *Id.* at 3-4. Petitioner was kept by the Immigration and Customs Enforcement (ICE) office for six months. *Id.* at 4. At that point, the law students filed another habeas corpus petition for Petitioner, this time the students argued that Petitioner's detention had gone on longer the bright line of six months the court set in *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). *Id.* That second habeas petition was granted, and the District Court ordered Petitioner's immediate release from ICE. *Id.* The petition to vacate her convictions was also granted. The City of Angola and ICE appealed separately, and the court joined the appeals. *Id.* The Second Circuit reversed the District Courts' determinations, finding that the bright line rule was improvident and impractical, and ordered Petitioner to be remanded back into ICE custody. *Id.* at 4-6.

ARGUMENT

The Supreme Court has held that probable cause is a “practical and commonsensical standard” that considers “the totality of the circumstances.” *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). In this case, Deputy Pfieff evaluated the total circumstances surrounding the situation in question and found that there was probable cause to make the arrest of Petitioner and her friends. The Supreme Court has repeatedly rejected a bright-line rule surrounding the determination of probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983) finding that a case-by-case standard is much easier to apply.

The second issue this Court faces is whether the “Bright Line Rule” or a “Reasonableness Test” is better suited to protect Due Process rights of criminally convicted undocumented aliens in regards to pre-removal mandatory detentions without an individualized hearing (set by 8 U.S.C. § 1226). Under a “Bright Line Rule,” an undocumented alien cannot be detained without a bond hearing for longer than six months. *Lora v. Shanahan*, 804 F.3d 601, 614 (2nd Cir. 2015). Under a “Reasonableness Test”, the court seeks to balance public and congressional concerns against the Due Process rights of undocumented aliens. *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 474 (3rd Cir. 2015). Given the historic deference to the Executive and Legislative Branch in matters of immigration, and the unique circumstances that each case presents, Respondents, Winfield Scott and City of Angola, request the Court uphold the United States’ Court of Appeals for the Second Circuit’s ruling on mandatory release. Respondents request the Court find that the “Reasonableness Test” is best suited to protect the Due Process rights of undocumented aliens.

I. The Second Circuit Applied the Correct Standard to Determine if Deputy Pfieff had Probable Cause to Arrest Petitioner Because They Looked at the Totality of Circumstances, Applied Common Sense, and Because a Reasonably Prudent Person Could Determine that There was Probable Cause that a Crime Had Been Committed.

A. Courts have made clear that the totality of circumstances must be taken into consideration when determining probable cause.

First, the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Petitioner because they looked at the totality of circumstances. The proper standard to determine probable cause has been applied when a court looks at the totality of circumstances surrounding the arrest. In *Florida v. Harris*, 133 S. Ct. 1050 (2013), the court looked at the totality of circumstances surrounding a K-9 Unit sniff and alert test that led to the arrest of one, Mr. Harris. In that case the court looked at the amount of training that the officer and K-9 went through, how long ago the dog went through training, and the reliability of the dog during previous drug checks. The Court held that the dog successfully completing two recent drug-detection courses and maintaining his proficiency through weekly training exercises, viewed alone, that training record—with or without the prior certification—sufficed to establish the dog’s reliability. *Id.* at 1058. The Court in *Harris*, put a lot of emphasis and weight into the training and experience of the officer and dog.

The Court in *Maryland v. Pringle*, 540 U.S. 366 (2003), also puts an emphasis on looking at the totality of the circumstances in regards to finding probable cause. The Court in *Pringle* held that “to determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to” probable cause” *Id.* at 371. In *Pringle*, Pringle was one of the men riding in a car in the early hours of the morning. There was a large amount of rolled-up cash in the glove compartment directly in front of Pringle. Five

plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. During questioning, none of the men confessed ownership to either the drugs nor the money. The court in *Pringle* found an “entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.” *Id.* at 371-372. Therefore, a reasonable officer could have concluded that there was probable cause to believe Pringle was guilty of the crime committed through looking at the totality of the circumstances. *Id.* at 372.

In this case, like in both *Florida v. Harris*, and *Maryland v. Pringle*, *supra*, the Second Circuit looked at the totality of the circumstances to determine that there was probable cause. The neighbors reported suspicious activity. This involved people being inside a cottage that is usually empty during the winter, the cottage was dark, save for a few candles, Deputy Pfieff saw that the people inside of the cottage were masked and not dressed in normal street clothes, Deputy Pfieff identified himself as a police officer more than once and still the occupants in the cottage hid upon Deputy Pfieff entering the cottage, Fitzgibbon could not figure out how to get a hold of his supposed uncle who had “given him permission” to have a party inside of the cottage, Fitzgibbon did not have his own key and did not know how to turn the lights inside of the cottage on, Fitzgibbon’s uncle told the officers that Fitzgibbon was not given permission to be in the cottage to throw a party, and upon asking for identification the officers discovered that Petitioner was an immigrant who had illegally entered the United States of America. The totality of these circumstances was taken into consideration when the Second Circuit determined that Deputy Pfieff had probable cause to arrest Petitioner. Because the court took this into consideration, the correct standard was used in determining whether or not Deputy Pfieff had probable cause.

B. Common sense must be used when considering probable cause.

Second, the Second Circuit applied the correct standard in determining that Deputy PfiEFF had probable cause when arresting Petitioner because the court applied common sense. “The task of the issuing magistrate is simply to make a practical, *common-sense* decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 214 (1983) (emphasis added.) In *Gates*, the police “received an anonymous letter which included statements that respondents, husband and wife, were engaged in selling drugs; that the wife would drive their car to Florida on May 3 to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and that respondents presently had over \$100,000 worth of drugs in their basement.” The police acted on this tip and arranged for surveillance of the defendants. The police used the information found to get a search warrant for the defendants’ residence. *Id.* at 213. Upon appeal, the Court found that even standing alone, the facts obtained through the independent investigation of Detective Mader and the DEA at least suggested that the defendants were involved in drug trafficking. The Court looked at the totality of circumstances and found that in addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs. This finding regarding Florida, along with the investigation of the detective and the DEA, allowed the Court to use *common-sense* and come to the conclusion that there was probable cause in this situation.

In this case, Deputy PfiEFF took the totality of circumstances stated above (reported suspicious activity, masked figures, hiding at the announcement of police, the inability to produce contact information for the cottage owner, discovery of an illegal immigrant, etc.) and applied his common-sense as a police officer finding that there was probable cause to arrest

Petitioner. The Second Circuit then used its own common-sense to determine that Deputy PfiEFF had probable cause to make an arrest. The Second Circuit used the correct standard when determining if Deputy PfiEFF had probable cause to arrest Petitioner because the used common-sense.

C. There is probable cause when a reasonably prudent person can determine that a crime was committed.

Third, the Second Circuit applied the correct standard when determining whether Deputy PfiEFF had probable cause to arrest Petitioner because a reasonably prudent person could determine that there was probable cause that a crime had been committed. When the court takes into consideration that a reasonably prudent person could determine there was probable cause that a crime had been committed, the correct standard has been applied in determining whether probable cause existed to make an arrest. “In testing whether an officer has probable cause to conduct a search, all that is required is the kind of “fair probability” on which “reasonable and prudent [people] act.”” *Illinois v. Gates*, 462 U.S. 213 (1983). The Court in *Florida v. Harris* 133 S. Ct. 1050, 1052-1053 (2013) also held that “the court should then consider all the evidence and apply the usual test for probable cause—whether all the facts surrounding the alert, viewed through the lens of common sense, *would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.*” (emphasis added.) In *Harris*, after looking at the totality of circumstances (that the K-9 involved in the search had successfully completed more than one training program, that the dog alerted during the first search, and that it was possible that drug residue was on the door handle when the dog alerted during the second search even though no drugs were found) the Court found that a *reasonably prudent person could think that a search would reveal contraband or evidence of a crime.*

In this case, Deputy Pfieff assessed the situation and the totality of circumstances and thought that a search would reveal evidence of a crime. Deputy Pfieff is a reasonably prudent person, or has not been found to be unreasonable. The fact that a neighbor reported suspicious activity at a cottage is usually vacant during the winter and that Deputy Pfieff observed disguised individuals sitting in candlelight in said candle along with the individuals hiding when the deputy announced that he was law enforcement is enough for a reasonably prudent person to think that a search would reveal evidence of a crime. The Second Circuit took this information into consideration, finding that Deputy Pfieff is a reasonably prudent person who could have thought that a search would lead to evidence. Because of that, the Second Circuit applied the correct standard when determining if Deputy Pfieff had probable cause to arrest the Petitioner.

The Second Circuit used the correct standard in determining that Deputy Pfieff had probable cause when arresting Petitioner because they looked at the totality of circumstances, applied common sense, and because a reasonably prudent person could determine that there was probable cause that a crime had been committed. Because Deputy Pfieff had probable cause, the arrest is valid, and it so follows that the brass knuckles were constitutionally found as well.

II. “The Reasonableness Test” Protects the Due Process Rights of Undocumented Aliens During the Pre-Removal Mandatory Detention Period Stipulated in 8 U.S.C. § 1226.

Petitioner’s claim fails because a “Bright Line Rule” is not best suited to protect the Due Process rights of undocumented aliens like Petitioner. The Immigration and Nationality Act (8 U.S.C. § 1226) states that an alien – who is convicted of a crime for which a sentence of one year or longer may be imposed – may be arrested or imprisoned again, “when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation.” Immigration and Nationality Act, 8 § 1226 (2016). Eight U.S.C. § 1226(c) (“Section 1226(c)”)

further states that the Attorney General may release said alien for various reasons – one being that “the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.” 8 § 1226(c) (2016).

In cases like Petitioner’s, all circuits agree that the statute does not endorse the belief that an undocumented alien within the United States can be subjected to indefinite and permanent detention. *Zadvydas v. Davis*, 533 U.S. 678, 669 (2001); *Lora v. Shanahan*, 804 F.3d 601, 614 (2nd Cir. 2015). To protect Due Process rights, courts therefore read into the statute that some reasonable limit exists on the amount of time an individual can be detained without a bail hearing. *Id.*; *Id.*

To determine what is a reasonable limit, many courts employ the “Reasonableness Test” over the “Bright Line Rule.” Courts have employed the “Reasonless Test” because it is a fact-based based method that seeks to weigh the interests of the government against the burden to an alien’s liberty. *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 474 (3rd Cir. 2015).

A “Bright Line Rule”, in contrast, would state that “the government’s statutory mandatory detention should be limited to a six-month period, subject to a finding of flight risk or dangerousness. *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013). Unlike “The Reasonableness Rule,” the “Bright Line Rule” is a one-size-fits all approach that does not consider the unique circumstances and fact-dependent nature of each case. *Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3rd Cir. 2011).

Given (1) the constitutional deference to the legislative and executive branches in immigration proceedings; (2) that public concerns can influence the breadth of Due Process claims available to undocumented aliens; (3) that the “Reasonableness Test” seeks to determine

the point where an alien's pre-removal mandatory detention can no longer reasonably be considered to be in furtherance of public concerns, but is instead an arbitrary exercise of Government action; and (4) that the one-size-fits-all "Bright Line Rule" may end exacerbating the risk of Due Process violations, the "Reasonableness Test" is the best tool – in the case of pre-removal detention hearings – to protect the Due Process rights of undocumented and criminally convicted aliens, like Petitioner.

A. Because the issue of immigration policy has long been left to the legislative and executive branches, and because 8 U.S.C. 1226 is reasonably tailored to a stated purpose of public concern, courts should give strong deference to the Government's actions.

In the case of Petitioner's criminal conviction and subsequent mandatory detention, courts should presumptively favor the position of the Government. If a statute that delegates authority to the executive branch is reasonably tailored to a legitimate purpose, courts are more likely to grant judicial deference to the Government if its actions reasonably fit that purpose.

Neguisse v. Holder, 555 U.S. 551, 533 (2009).

In regards to Section § 1226(c), Congress possessed evidence suggesting that discretionary release of aliens prior to their removal hearings would increase the chances of deportable criminal aliens skipping their hearings and remaining in the United States unlawfully. *Demore v. Kim*, 538 U.S. 510, 528 (2003). The Court therefore found that the mandatory detention clause, if interpreted to be limited to a reasonable amount of time, was reasonably tailored to addressing this public concern. *Id.* at 531. Because the legislature is better positioned to evaluate data, the judiciary gave deference to the legislature's interests. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002); *See Fiallo v. Bell*, 430 U.S. 787 (1977).

It is a pattern that has been extended to the Government's execution of immigration laws. For example, in *Parra v. Perryman*, a Mexican citizen was convicted of sexual assault. *Parra v.*

Perryman, 172 F.3d 954, 958 (1999). The Mexican citizen was a criminal alien. Congress' purpose in crafting the statute was addressing the public interest in curbing the high flight rate of criminal aliens. *Id.* Because the actions of the state – the detention of the criminally convicted undocumented alien – reasonably fit within the purpose of the statute, judicial deference to the Government's position was granted. *Id.* The court made no individualized inquiry into whether the undocumented alien in this case was a flight risk or a danger to society. *Id.*

In the case of Petitioner, the Court should find that the Government's actions reasonably fit the public concern Congress sought to address, and therefore judicial deference to its position should be granted. Petitioner was found trespassing on another's property with "several hooded or masked individuals." The City of Angola arrested her for these crimes, and possession of a deadly weapon. Like the Government's actions in *Parra v. Perryman*, the Government's actions in the detention of Petitioner, a criminally convicted undocumented alien, reasonably fits within the statute's purpose. And therefore, given legislature's unique capacity to address issues like immigration, judicial deference to the Government's actions should be granted.

B. Because certain classes of aliens give rise to public concerns, and because Congress reserves the right to address these concerns, pre-removal mandatory detention is not considered a Due Process violation.

As a criminally convicted undocumented alien, Petitioner falls under a discrete class of aliens which have a circumscribed set of Due Process claims, separate from other classes of aliens and citizens. The Due Process clause protects individuals against unlawful or arbitrary personal restraint or detention. *Demore v. Kim*, 538 U.S. 510, 532 (2003). In this sense, every individual within the United States is protected by the Due Process clause.

However, what constitutes as unlawful or arbitrary detention can shift depending on an alien's ties to the United States. *Demore*, 538 U.S. at 526; *Matthew v. Diaz*, 426 U.S. 67, 78-79 (1976). If Congress crafts a statute that addresses a pressing public concern, if such concerns can

be reasonably addressed by mandatory detention without individualized hearings, and if such detentions can be found to be limited in duration, courts are more likely to find that these instances of mandatory detention do not violate the Due Process Clause. *Id.*

For example, in 1952, several aliens challenged the government's right to detain without providing individualized bail hearings. *Carlson v. Landon*, 342 U.S. 524, 528-529 (1952). These aliens were detained because they had participated in communist activities. *Id.*, at 531-532. Congress crafted a statute to deport aliens participating in communist activities because at the time, there was a pressing public concern regarding communists' propensity towards the use of force and violence to accomplish political aims. *Id.*, at 541. Because the use of mandatory detention reasonably addressed this public concern, the Court found that the denial of individual hearings did not violate the Due Process Clause. *Id.*, at 543. In these instances, the Court determined that the Due Process claims available to a select class of aliens could differ from other classes. Such legislation was not a violation of Due Process.

Like Congress in 1952, the Congress today crafted Section 1226(c) in order to combat a pressing public concern. Congress crafted the statute to tackle our "wholesale failure" to address the increasing rates of criminal activity by aliens. *Demore v. Kim*, 538 U.S. 510, 518 (2003). Mandatory detention without individualized hearings helps curb this public concern because it helps ensure that flight risks are present at their hearings and are not at large in our community. *Demore v. Kim*, 538 U.S. 510, 519 (2003). Just as how the statute's mandatory detention clause in *Carlson v. Landon* reasonably addressed the public concerns that communists were a continuing danger to society, mandatory detention here helps reasonably address the public concern that criminally convicted aliens will flee instead of facing the court. *Demore v. Kim*, 538 U.S. 510, 531 (2003). Therefore, in the instances criminally convicted and undocumented aliens,

the Court determined that the Due Process claims that this class of aliens can make during the pre-removal mandatory detention process differs from other classes.

C. Unlike the “Bright Line Rule,” the “Reasonableness Test” ensures that courts evaluate the nuanced circumstances pertaining to the Government’s exercise of Section 1226(c), and is therefore better suited to protect the Due Process rights of undocumented aliens.

The “Reasonableness Test” acknowledges that while the Due Process claims that undocumented aliens can make during pre-removal mandatory detention differs from other classes of aliens and citizens, some undocumented aliens present a greater flight risk than others. It therefore acknowledges that while the detention of an undocumented alien for seven months might be justified in one instance, it may not be justified for even three months in another. Unlike the “Reasonableness Test,” a “Bright Line Rule” acknowledges and addresses none of these nuanced concerns. Given this, the “Reasonableness Test” is best suited to protect the Due Process rights of criminally convicted undocumented aliens.

i. Because the “Reasonableness Test” evaluates whether the Government’s use of Section 1226(c) fits within the purpose of the statute’s recognized aim, it protects the Due Process rights of criminally convicted undocumented aliens.

Petitioner’s interests in maintaining her Due Process rights, rights shaped by public interests underlying Section 1226(c), are best protected if courts adopt the “Reasonableness Test.”

The purpose of the “Reasonableness Test” is to assess whether the Government’s continued detention of an alien stems from the public concerns that underlie Section 1226(c). *See Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 473-474 (3rd Cir. 2015). As a result, it is forces courts to determine whether continued detention can be reasonably believed to be in furtherance of the public concerns Congress sought to address or if it is an arbitrary

exercise of Government power¹. *Id.* Furthermore, because courts have found that limiting an alien's claim to an individualized hearing does not violate Due Process if Government action fits within the former category, this judicial review ensures that Due Process rights of undocumented aliens are not violated Section 1226(c). *Id.*, at 475.

For example, a Mexican citizen once appealed his mandatory detention without an individualized bond hearing under Due Process grounds because he had been stuck in detention since June 5, 2012. *See Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 470-471 (3rd Cir. 2015). He sat in detention facilities for ten months before appealing his due process. *Id.*, at 472. The court reviewed whether the government's continued detention of an alien stemmed from public concerns underlying Section 1226(c). To do so the court reviewed the overall length of detention. *Id.*, at 477. Given the length of time this alien had been detained, the Court expected that a ten-year detention would have provided ample time to provide evidence more in line with demonstrating him to be a flight risk. *Id.*, at 477. While deference to public concern would be granted if the time detained was shorter, the sheer length of time gave an expectation that the Government had many opportunities to make a more individualized assessment of the alien's flight risk. *Id.* The only argument that the Government presented, was that the alien's detention was due to his decision to appeal his removal order. *Id.*, at 475. As a result, the court found that the detention was not reasonably related to the public concerns that Congress sought

¹ To determine whether the detention period has reached a point where it can be considered an arbitrary exercise of power, courts typically review, but are not limited to, (1) the overall length of detention; (2) if the detention period is longer than the criminal sentence that which resulted in an undocumented alien's current status; (3) the reasonable foreseeability of removal or hearing; (4) if authorities are acting promptly to advance interests; and (5) if undocumented alien is seeking to make bad faith attempts to slow procedural process. *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2013); *See Also Chavez-Alvarez*, 783 F.3d 469 (3rd Cir. 2015).

to address, and instead constituted a punishment for exercising a legal right. The Mexican citizen was granted a hearing bail hearing. *Id.*, at 478. Thus, the “Reasonableness Test” protected this alien’s Due Process rights.

In the case at bar, Petitioner’s Due Process rights would also best be protected by the “Reasonableness Test.” To assess whether the Government’s continued detention of Petitioner are reasonably related to the public concerns that underlie Section 1226(c), the Court should evaluate the circumstances surrounding Petitioner’s detention. Such an evaluation may or may not track one of the five tools listed in the footnote above.

Note, however, that unlike the alien’s ten year detention period in *Chavez-Alvarez v. Warden York County Prison*, Petitioner’s six month detention was significantly shorter. Therefore, unlike with the Mexican Citizen in *Chavez-Alvarez v. Warden York County Prison*, the Government should not be required to provide more individualized assessment of the alien’s flight risk. Such action would run against the previously acknowledged judicial deference to the legislature in matters of addressing pressing public concerns in the field of immigration. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) ; *See Fiallo v. Bell*, 430 U.S. 787 (1977).

- ii. **Because the “Bright Line Test” provides a blanket deference to the Government’s actions under Section 1226(c) for a period of six months, the method would end up creating a greater risk of Due Process violations.**

The Bright Line test, as noted before, affords a bail hearing to an undocumented alien after a period of six months. *Lora v. Shanahan*, 804, F.3d 601, 616 (2015). The purpose behind the rule is to emphasize a uniform administration. *Id.*, at 615. However, this presents its own set of problems that undercut the Due Process rights of undocumented aliens.

The removal docket in Buffalo, like many others, are particularly strained. In many instances, it may be well established within the community that it would be impossible to provide a hearing within six months. The Government could easily end up placing aliens in detention, knowing full well that the removal process will never take another step forward, and that the aliens will simply be afforded bond after six months. The detention would essentially be jail time, with no expectation that the individual will actually receive a removal hearing. In such an instance, the Government's actions run the risk of not being reasonably related to the public concerns Congress' sought to address in crafting Section 1266(c).

Under the "Reasonableness Test," if there is no foreseeable possibility of a hearing, the court could review whether this violates Due Process. *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016). Under the "Bright Line Test," the court could not.

CONCLUSION

For the foregoing reasons, the City of Angola and Department of ICE ask that the Court rule in favor of Respondent's Brief on the Merits regarding probable cause and pursuant to Rule 24 of the Rules of the Supreme Court of the United States.