No. 1-2017

IN THE

Supreme Court of the United States

———————

LAURA SECORD,

Petitioner,

v.

WINFIELD SCOTT, ET AL.

Respondent.

———————

On Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

———————

BRIEF FOR RESPONDENTS

———————

TEAM 30

Counsel for Respondents
March 20, 2017

QUESTIONS PRESENTED

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

2. Whether the "reasonable test" to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The relevant opinion of the United States Court of Appeals for the Second Circuit appears in the Record on pages 1 – 10. The Order granting the Petition for Writ of Certiorari to the Supreme Court of the United States appears on the Record at page 11.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution states that people have the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

The Fifth Amendment to the United States Constitution states that people have the right not to "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATUTES INVOLVED

8 U.S.C. § 1226(c)(2), titled "Apprehension and Detention of Aliens," states:

(c) Detention of criminal aliens

> **(2) Release**
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General 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. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

STATEMENT OF THE CASE

On December 21, 2015, a resident of Angola, New York called the local police department to report suspicious activity inside one of the summer cottages along the shore of Lake Erie. R. at 2. Deputy Pfieff, arrived and observed that the cabin, despite having electricity, was lit only by candlelight, and there were several hooded individuals inside. *Id.* The deputy knocked on the door, announcing himself as an officer, and all of the occupants scattered within the cottage. *Id.* Entering through an unlocked door, the deputy again announced his presence, and six young adults emerged, including Petitioner Laura Secord. *Id.* It was later discovered that Secord is an illegal alien from Canada. *Id.*

Deputy Pfieff proceeded to interview all suspects, and none of them lived in the cottage. R. at 3. One of the individuals, James Fitzgibbon, the nephew of the owner, claimed that he had permission to use the cottage. *Id.* However, the deputy discovered that Fitzgibbon retrieved a spare key from underneath a flower pot, and could not provide contact information for his uncle, who was in Florida for the winter. *Id.* Regarding the gathering, Fitzgibbon told his cohorts that his uncle would be "cool with it," as long as they "didn't mess the place up." R. at 9.

All suspects were arrested and charged with criminal trespass, and a subsequent search of Petitioner's backpack revealed a pair of brass knuckles. R. at 3. As a result, Petitioner was also charged with possession of a deadly weapon. *Id.* In the following week, a canvass of the neighborhood produced Fitzgibbon's uncle's contact information. *Id.* The uncle told police that his nephew did not have permission to use the cottage for any kind of party. *Id.*

Secord was convicted of both crimes and sentenced to one year in prison. *Id.* After released from prison, after serving her one-year sentence for her criminal convictions, she was immediately transferred to ICE custody for six months. R. at 4. After Secord filed a habeas

corpus petition she was ordered released from ICE's custody. *Id.* However, the Second Circuit reversed the District Court's decision and found that the brief detention that was caused by no fault of the government, as an immigration judge was not available for an additional five months, was reasonable. *Id.* In doing so the Second Circuit overruled its prior decision to adopt a bright line test of reasonableness, as it found it to be "improvident and impractical." *Id.*

SUMMARY OF THE ARGUMENT

This Court should apply the traditional "totality of the circumstances" standard for probable cause to determine if the arresting officer had probable cause to arrest Secord. The heightened probable cause standard employed by the District Court is inconsistent with the long-standing totality of the circumstances standard, which allows officers to use circumstantial evidence, in concert with their training, experience, and judgment to draw reasonable conclusions. Further, if officers are forced to credit suspects' stories, many suspects would escape detention and prosecution by simply asserting their innocence. Under the totality of the circumstances standard, the deputy clearly had probable cause to arrest. Even if the heightened standard is applied, the deputy still had sufficient probable cause.

This Court should adopt the reasonableness approach as opposed to a bright line approach for determining the reasonable length of an illegal alien's detention awaiting a removal hearing. Such an approach is more feasible than a bright line approach. The reasonableness approach also properly applies precedence set out by this Court. Additionally, even if this Court thought the bright line approach provides a better policy, it should not adopt it as such policy determinations are to be left to the legislature. Secord's detention in this case was reasonable no matter what approach this Court decides to adopt.

ARGUMENT

I. THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD TO DETERMINE IF THE ARRESTING OFFICER HAD PROBABLE CAUSE TO ARREST SECORD AND CORRECTLY FOUND THAT SUFFICIENT PROBABLE CAUSE EXISTED.

A. The Second Circuit was correct in applying the traditional "totality of the circumstances" standard to determine if the arresting officer had probable cause to arrest Secord.

It is well-established under this Court's Fourth Amendment jurisprudence that probable cause to arrest exists if "at the moment the arrest was made . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that an offense has been or is being committed. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). In evaluating probable cause, a court "deal[s] with probabilities" and "[t]hese [probabilities] 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. United States*, 338 U.S. 160, 175 (1949).

This Court has described the probable cause standard as "practical and common-sensical." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Admittedly imprecise, probable cause "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in [a probable cause] decision." *Illinois v. Gates*, 462 U.S. 213, 235 (1983). In evaluating probable cause, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar*, 338 U.S. at 175.

In a probable cause determination, all incriminating circumstances must be considered together, and a "divide-and-conquer analysis" is contrary to the totality of the circumstances standard, and is therefore prohibited. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). When looking at the specific elements of a crime, several circuits agree that "there must be probable cause for all elements of the crime, including *mens rea*." *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014). Although probable cause requires a reasonable ground for belief of guilt, the evidence necessary to support a finding of probable cause is less than the evidence necessary to support a conviction. *Gates*, 462 U.S. at 235.

When an officer is conducting a probable cause determination, all facts and circumstances must be considered, and "the officer 'cannot simply turn a blind eye toward potentially exculpatory evidence.'" *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007) (quoting *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999)). Officers are free to "weigh the credibility of witnesses in making a probable cause determination," but "they may not ignore *available and undisputed* facts." *Baptiste v. J. C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998) (emphasis in original). By considering potentially incriminating or exculpating facts and circumstances, the totality of the circumstances standard requires the officer to take into account the "whole picture" to determine if probable cause exists. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

In the case at bar, the Second Circuit was correct in applying the traditional totality of the circumstances standard to determine if the arresting officer had probable cause to arrest Secord. The totality of the circumstances standard is well-established, consistent with this Court's precedent, and has withstood the test of time. The Second Circuit noted that under the heightened standard employed by the District Court, arresting officers would be unable to arrest

suspects without clear, affirmative proof of a suspect's intent. R. at 7. This Court has never held that, under the totality of the circumstances standard, probable cause cannot be found absent direct evidence of a suspect's intent. If that were the case, many suspects would escape detention and prosecution by simply asserting their innocence.

Requiring such affirmative proof of a suspect's intent under the heightened probable cause standard employed by the District Court flies in the face of the totality of the circumstances standard. The very purpose of employing a totality of the circumstances approach is to avoid bright-line rules are not appropriate in highly fact-intensive situations, such as probable cause determinations. This Court has consistently rejected bright-line tests in its probable cause line of cases, *Gates*, 462 U.S. at 235, and requiring affirmative proof of a suspect's intent would result in an artificial line being drawn. The totality of the circumstances standard allows for the suspect's intent to be taken into account—whether incriminating or exculpatory—but also allows for this intent to be weighed against every other fact or circumstance surrounding the investigation.

The Second Circuit aptly characterized the District Court's decision as creating "an impossible standard for arresting officers." R. at 7. Under the District Court's heightened probable cause standard, a probable cause determination will fail absent affirmative proof of the suspect's intent. Arresting officers do not always uncover affirmative evidence of a suspect's intent throughout the course of an investigation, so circumstantial evidence of culpability garnered through a totality of the circumstances is critically important to the administration of justice. In making a probable cause determination, officers at the scene of an investigation are in the best position to interview suspects and witnesses, and weigh the credibility of those individuals. Employing the standard used by the District Court cripples the officer's ability to

use his or her training, experience, and judgment to weigh the credibility of suspects and determine if probable cause for an arrest exists.

Many aspects of the law involve competing interests, and the probable cause standard is no exception. On one side, law enforcement necessitates a standard where officers will not be overburdened by requirements that are impractical and unrealistic when working to keep the public safe. On the other side, citizens have an interest not to be subjected to arbitrary and illegal searches and seizures in violation of the Fourth Amendment. The totality of the circumstances standard for probable cause strikes the balance between these two competing interests. For decades, the totality of the circumstances standard has been described as nontechnical, practical, and rooted in reasonableness. *See Harris*, 133 S. Ct. at 1055; *Hunter*, 502 U.S. at 228; *Brinegar*, 338 U.S. at 175. Under this standard, officers can—and must—take all facts and circumstances into account when making a probable cause determination. This allows for the administration of justice while simultaneously protecting the public by keeping officers within certain boundaries. Considering the foregoing, the Second Circuit was correct in applying the traditional totality of the circumstances standard to determine if the arresting officer had probable cause to arrest Secord.

B. Applying the "totality of the circumstances" standard to the facts of this case, the Second Circuit was correct in finding sufficient probable cause existed for the arrest of Secord.

When an appellate court conducts a probable cause review under the totality of the circumstances standard, a court looks at whether a reasonably prudent person would believe a crime has been or is being committed, "giving substantial latitude [to the arresting officer] in interpreting and drawing inferences from factual circumstances." *Fisher v. Wal-Mart Stores,*

Inc., 619 F.3d 811, 817 (8th Cir. 2010) (quoting *United States. v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997)).

If an officer makes an arrest based on then-existing probable cause, "[a] valid arrest . . . is not vitiated if the suspect is later found innocent." *Criss v. Kent*, 867 F.2d 259, 262 (6th Cir. 1988). "As probable cause is determined 'at the moment the arrest was made,' any later developed facts are irrelevant to the probable cause analysis for an arrest." *Amrine v. Brooks*, 522 F.3d 823, 832 (8th Cir. 2008) (quoting *United States v. Rivera*, 370 F.3d 730, 733 (8th Cir. 2004)); *see also Sennett v. United States*, 667 F.3d 531, 537 (4th Cir. 2012) ("The existence of probable cause, however, is assessed based on the circumstances known to the officers at the time of the search or arrest."). Further, "[p]robable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters." *Gramenos v. Jewel Cos.*, 797 F.2d 432, 439 (7th Cir. 1986).

When an officer interviews an arrestee, "[a] suspect's satisfactory explanation of suspicious behavior is certainly a factor which law enforcement officers are entitled to take into consideration in making the determination whether probable cause to arrest exists." *Criss*, 867 F.2d at 263. Importantly, however, an officer "*is under no obligation to give any credence* to a suspect's story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." *Id.* at 263 (emphasis added). When an officer is interviewing a suspect, any "innocent explanations for . . . odd behavior cannot eliminate the suspicious facts from the probable cause calculus." *Sennett*, 667 F.3d at 536 (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)).

If an officer is presented "with conflicting information that cannot be immediately resolved . . . he may have arguable probable cause to arrest a suspect." *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011). Although "it is usually not possible for an officer to be certain about a suspect's state of mind" when the crime was committed, the officer "need not rely on an explanation given by the suspect." *Id.* at 524. Instead, when determining whether a suspect possessed the state of mind for the crime, "[a]n officer can rely on 'the implications of the information known to him.'" *Id.* (quoting *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989)).

In an investigation—no matter how short—leading up to an arrest, "[t]here is no constitutional or statutory requirement that before an arrest can be made the police must conduct a trial." *Gramenos*, 797 F.2d at 439 (quoting *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974)); *see also Borgman*, 646 F.3d at 523 ("[A]n officer need not conduct a 'mini-trial' before effectuating an arrest although he cannot avoid 'minimal further investigation' if it would have exonerated the suspect." (quoting *Kuehl v. Burtis et al.*, 173 F.3d 646, 650 (8th Cir. 1999))). Importantly, "[o]nce an officer has established probable cause on every element of a crime, he need not continue investigating to test the suspect's claim of innocence." *Beauchamp v. City of Noblesville*, 320 F.3d 733, 745-46 (7th Cir. 2003).

In the case at bar, Secord was arrested and charged with criminal trespass and criminal possession of a dangerous weapon. Under the foregoing circuit precedent applying the totality of the circumstances standard for probable cause, it is clear that Deputy Pfieff and the other arresting officers had probable cause to arrest Secord. Under New York state law, "[a] person is guilty of criminal trespass in the second degree when, in pertinent part, he knowingly enters or remains unlawfully in a dwelling." *Ligon v. City of New York*, 925 F. Supp. 2d 478, 490 (S.D.N.Y. 2013) (internal quotation and citation omitted). "A person enters or remains

unlawfully in or upon premises when he is not licensed or privileged to do so." *Id.* "[A] person is licensed or privileged to enter private premises when he has obtained the consent of the owner or another whose relationship to the premises gives him authority to issue such consent." *Id.* The burden rests on the prosecution to prove "the absence of such license or privilege." *Id.*

Under the totality of the circumstances standard for probable cause, all of the facts and circumstances in this case must be considered together, at the time of the crime. Under *Arvizu*, considering the facts in isolation from one another in a "divide-and-conquer analysis" is strictly prohibited. *Arvizu*, 534 U.S. at 274. Deputy Pfieff responded to a call for suspicious activity in late December at a summer cottage located on the shores of a dark and frozen Lake Erie. When the deputy arrived, he observed that the cabin, despite having electricity, was lit only by candlelight, and several hooded individuals were inside. Although these facts are suspicious enough, Deputy Pfieff wanted to confirm his suspicions that these individuals were indeed trespassing.

When the deputy announced himself as a law enforcement officer, the individuals dispersed within the cottage instead of coming to the door. This Court has held that, [h]eadlong flight . . . is the consummate act of evasion" and although "[i]t is not necessarily indicative of wrongdoing . . . it is *certainly suggestive of such*." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (emphasis added). These preceding facts alone may be enough to support a finding of probable cause. However, in an effort to conduct a thorough investigation, the deputy interviewed the suspects when they emerged from hiding. When speaking with the cottage occupants, the deputy also discovered that the suspects were harboring an illegal alien from Canada, the Petitioner in this case.

Perhaps the most important part of this interview was the discussion with Fitzgibbon about whether the individuals had permission to be there. When interviewed by Deputy Pfieff, Fitzgibbon claimed that his uncle had given him permission to use the cottage. If true, this would provide Fitzgibbon a license or privilege to be in the cottage. However, Fitzgibbon could not provide the contact information for the uncle, and admitted to retrieving the cottage key from under a flower pot. In fact, Fitzgibbon's uncle was contacted a couple days later, and the uncle said Fitzgibbon did not have permission to use the cottage for any kind of party.

However, this fact is not needed for there to be a finding of probable cause in this case. When an officer interviews a suspect, the officer may take a suspect's assertion of innocence into account, but the officer is under no obligation to take the suspect at his or her word before making an arrest, provided that there is already established probable cause for every element of the crime. If officers were forced to credit suspects' statements of innocence, suspects would too often escape arrest and prosecution.

In reality, officers are often uncertain as to a suspect's state of mind, but rely on the information available to them using their training and experience. That is exactly what Deputy Pfieff did in this case. If not established earlier, probable cause to arrest was established when Fitzgibbon could not provide his uncle's contact information and admitted to not possessing a key, but retrieving it from under a flower pot. Not providing his uncle's contact information suggests that Fitzgibbon did not want the police contacting his uncle to verify his story. Further, not having a key to the cottage suggests the Fitzgibbon did not have permission to enter, but instead happened to know where a key was kept. When probable cause was established for each element of the crime, Deputy Pfieff was under no obligation to further investigate the suspects' innocence or conduct a "mini-trial."

Reviewing the totality of the circumstances at the time, the deputy believed Fitzgibbon did not have permission to be present in the cottage, and neither did the other suspects. The District Court concluded that, as far as Deputy Pfieff knew, "the group had the permission of Fitzgibbon's uncle to use the cottage for their gathering." R. at 6. This is only true if the deputy was forced to credit the suspects' statements of innocence, and under the circuit precedent discussed earlier, that is simply not the standard.

Finigan v. Marshall is instructive to the case at bar. In *Finigan*, a suspect was arrested after she entered her former home. *Finigan v. Marshall*, 574 F.3d 57, 60 (2d Cir. 2009). Geneva Finigan was separated from her husband pending divorce, moved out of the marital home, and although the locks were changed, Finigan entered to remove some items without her husband's knowledge when her husband was away. *Id.* When confronted by an officer, Finigan said she had legal title to the residence, was removing some of her property, and that "her divorce attorney told her she could do so." *Id.* The officer made no inquiries into Finigan's alleged innocence, placed Finigan under arrest, but ultimately released her without charging her with a crime. *Id.*

The Second Circuit held that there was probable cause to arrest Finigan for criminal trespass, as she no longer resided at the premises, her husband changed the locks, her husband was away, she entered and removed property, and a neighbor did not know how Finigan entered the premises. *Id.* at 62. Finigan argued that her belief that she had a right to enter the premises defeated a finding of probable cause. *Id.* at 63. The Second Circuit disagreed, holding that an officer need not "negate any defense before an arrest." *Id.* "[E]ven if the total sum of evidence here might not persuade a jury to convict for criminal trespass because of Finigan's belief in her right of entry, '[o]nce officers possess facts sufficient to establish probable cause, they are

neither required nor allowed to sit as prosecutor, judge or jury.'" *Id.* (quoting *Krause*, 887 F.2d at 372). "Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." *Id.* (quoting *Krause*, 887 F.2d at 372).

Just as the officer in *Finigan* was not required to negate Geneva Finigan's defense before making an arrest, Deputy Pfieff was not required to negate the suspects' defense of having permission to be in the cottage that night. The officer in *Finigan* made even less of an effort than Deputy Pfieff to investigate, and the Second Circuit found adequate probable cause to arrest in *Finigan*. When both the officer in *Finigan* and Deputy Pfieff possessed sufficient facts to establish probable cause for every element of the crime, both arrests were justified at that moment. This Court has aptly noted that an officer's "lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

Under the totality of the circumstances standard, the arrest of Secord for criminal trespass was properly supported by probable cause, and the conviction should stand. Because the arrest was proper, the brass knuckles in Secord's possession were properly discovered pursuant to a valid search incident to arrest. *See United States v. Robinson*, 414 U.S. 218, 235 (1973). Therefore, the conviction for criminal possession of a dangerous weapon should also stand.

C. Even applying the heightened probable cause standard used by the District Court, Secord's arrest is sufficiently supported by probable cause.

The heightened probable cause standard employed by the District Court requires police to automatically credit a suspect's assertion of innocence in the absence of direct evidence to the contrary. Even applying this overreaching standard, Secord's arrest was sufficiently supported by probable cause. Fitzgibbon's uncle told the police that his nephew did not have permission to use the cottage for any kind of party. The police did not learn of this until a couple of days after

the arrest, as they had to canvass the neighborhood to obtain the uncle's contact information. This would have been direct evidence contrary to the suspects' asserted innocence, but it came too late, as probable cause determinations are made using what is known to the police at the time of the arrest.

However, there is other direct evidence available that negates the Fitzgibbon's assertion that he and his cohorts had permission to use the cottage. Before entering, Fitzgibbon told his friends that his uncle would be "cool with it," as long as they "didn't mess the place up." This direct evidence cuts against Fitzgibbon's asserted innocence, as it suggests that Fitzgibbon would not have permission from his uncle to have five other individuals in the cottage for a party. Having six individuals in a cottage participating in a role-playing, dress-up game with snacks, beer, and pop certainly poses a risk of "messing the place up." The direct evidence of Fitzgibbon's statement, paired with his subsequent actions, negates his asserted innocence that he had permission to be there. Even applying the heightened standard for probable cause used by the District Court, there was still sufficient probable cause to arrest Secord and all others present in the cottage. Therefore, the convictions should stand applying this standard as well.

II. THE COURT SHOULD AFFIRM THE SECOND CIRCUIT'S DECISION TO REMAND THE DEFENDANT TO ICE CUSTODY, AS SHE HAS NOT BEEN DETAINED FOR AN UNREASONABLE TIME PENDING HER REMOVAL PROCEEDINGS.

Mandatory detention of illegal aliens convicted of certain crimes is necessary, absent minor exceptions, pending removal proceedings. 8 U.S.C.S. §1226(c) ("§1226(c)"). Over a decade ago, this Court held that mandatory detention of an illegal alien is permissible under §1226(c). *Demore v. Hyung Joon Kim*, 538 U.S. 510, 531 (2003). In so holding, this Court recognized that the Fifth Amendment Due Process Clause applies to illegal aliens. *Id.* at 523. However, "when the Government deals with deportable aliens, the Due Process Clause does not

require it to employ the least burdensome means to accomplish its goal." *Id.* at 528.

Congress has determined that not forcing mandatory detention of illegal aliens convicted of crimes pending their removal hearings would "lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Id.* Thus detention of such individuals is necessary to serve the purpose of §1226(c), which is to prevent deportable aliens from fleeing pending their removal hearings and to protect the citizens of the United States. *Id.* This Court has held that mandatory detention of this class of illegal aliens is permissible so long as the detention is not unreasonably long. *Id.*

Today, this Court has the opportunity to explain what a "reasonable" time is under §1226(c). The answer is that it depends on the facts and circumstances of each individual case. While this Court has not previously addressed the issue of what a reasonable length of detention is under §1226(c), several circuits have decided the issue. However, the way the circuits have decided "reasonableness" depends on what approach it adopts. There are two primary approaches. *See Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). The approaches are known as either the "reasonableness approach" or the "bright line approach." *Id.*

The "reasonableness approach" focuses on a case-by-case inquiry. *Diop*, 656 F.3d at 234. Under this approach an illegal alien has the opportunity to make a habeas corpus petition when he or she believes their detention is unreasonable. *Hoang Minh Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003). The Court then determines whether the detention is reasonable using numerous factors. *Sopo v. United States AG*, 825 F.3d 1199, 1217-18 (11th Cir. 2016). This test recognizes that there are practical issues, especially in the area of dealing with the abundance of illegal aliens, making a bright line approach not feasible. *Hoang Minh Ly*, 351 F.3d at 271.

The "bright line approach" on the other hand ignores these practical issues. Instead this test requires that once a person has been detained awaiting removal for merely six months, a bail hearing is required unless there is one available in the near future. *Rodriguez*, 804 F.3d at 1077. Six circuits have decided to adopt one of these two approaches. *See Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop*, 656 F.3d at 22; *Hoang Minh Ly*, 351 F.3d at 267; *Sopo*, 825 F.3d at 1199; *Rodriguez*, 804 F.3d at 1060. Of the circuits that have decided this issue, the vast majority of them chose the reasonableness test for a number of reasons. The First, Third, Sixth, Eleventh, and as of the lower court's decision in this case, the Second Circuit have adopted the Reasonableness test. *See Reid*, at 819 F.3d 486; *Diop*, 656 F.3d at 22; *Hoang Minh Ly*, 351 F.3d at 267; *Sopo*, 825 F.3d at 1199. This leaves the Ninth Circuit as the sole circuit that still uses the bright line approach. *Rodriguez*, 804 F.3d at 1060.

A. <u>This Court should adopt the reasonableness test that the vast majority of circuits have adopted to determining reasonable time for detention.</u>

i. The reasonable test is more practical than the bright line approach given real world problems.

Thousands of illegal immigrants to the United States are locked up at any given time, awaiting the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. *Rodriguez*, 804 F.3d at 1065. Even the Ninth Circuit recognizes that ICE is overrun with removing illegal aliens. The court in *Rodriguez* recognized that "in 2014, [ICE] removed 315,943 individuals, many of whom were detained during the removal process." *Id.* Additionally the court noted that "according to the most recently available statistics, ICE detains more than 429,000 individuals over the course of a year, with roughly 33,000 individuals in detention on any given day. *Id.*

There are many practical issues that occur that make a bright line approach impractical.

Hoang Minh Ly, 351 F.3d at 271. Immigration judges are not always available, as evidenced by the case at bar where an immigration judge was not available until eleven months after the illegal alien was transferred to ICE's custody. "[H]earing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the Immigration Judge's caseload warrant." *Id.*

One of the two circuits to adopt the bright line approach realized that it is simply impractical, given large dockets, to judge "reasonableness" based on a bright line six-month presumption of reasonableness. The Second Circuit had previously adopted the bright line approach. *Lora*, 804 F.3d at 615. However, in less than two years, it quickly realized that it had made a mistake when it found that decision to be "improvident and impractical" and joined the vast majority in adopting the "reasonableness" test in this case. In doing so the court noted the high illegal immigration population, particularly given its close proximity to the Canadian border. In this particular case, an immigration judge was not even available for eleven months from the time the detention started, through no fault of the government. The immigration judge's docket was simply over crowded due to the large amount of illegal immigrants. Secord and similarly situated illegal aliens should not benefit simply because of the immigration judge's large docket sheet.

ii. The reasonableness test more readily applies to this Court's precedent in *Demore* and *Zadvydas*.

The courts that have adopted the bright line approach have looked past the primary lessons of this Court's precedence on this issue, and instead focus on superficial similarities. *Reid*, 819 F.3d at 496. The two foundational cases that have established that mandatory detention of illegal aliens is permissible so long as such detention is not unreasonably long under

§1226(c) are *Zadyvdas* and *Demore*. *Zadvydas v. Davis*, 533 U.S. 678, 683-84 (2001); *Demore*, 538 U.S. at 529-30.

In *Zadvydas v. Davis*, the Court dealt with detention of an illegal alien *after* the illegal alien has already been ordered removed. *Zadvydas*, 533 U.S. at 678. *Zadvydas* considered the detention of two aliens that were ordered removed. *Id.* at 683. Both aliens could not be removed due to international problems. *Id.*

The Court ultimately held that mandatory indefinite detention is unconstitutional and held that illegal aliens ordered removed could only be held for a reasonable time. *Id.* The Court observed that where "detention's goal is no longer practically attainable, detention no longer "bears [a] reasonable relation to the purpose for which the individual [was] committed. *Id.* at 690. The Court stated that the purpose of the statute is to assure the alien's presence at the moment of removal. *Id.* at 699. However, in cases such as *Zadyvdas*, where actual removal is unforeseeable due to international issues, the purpose of detention is practically unattainable. *Id.* at 700. Therefore, the Court went on to hold that after six months of detention, pending actual removal, where actual removal is virtually unattainable, the prolonged detention is most likely unreasonable and does not serve its intended purpose. *Id.* at 701.

Demore, however, recognized that unlike the statute involved in *Zadyvdas*, §1226(c) does provide a definite termination point, a removal hearing, which is not subject to the same international issues as the statute involving actual removal. *Demore*, 538 U.S. at 529-30. The Court also found that §1226(c) properly serves its purpose in the vast majority of cases. *Id.* at 528. That purpose being to ensure high-risk illegal aliens appearance at their removal proceedings. *Id.* Therefore, the Court held that mandatory detention of such individuals is proper, so long as the hearings are held within a reasonable time, making no mention of any six-

month presumption. *Id.* at 531-34.

The courts that have adopted the bright line approach have looked past the primary lesson of *Zadvydas* and ignore *Demore*. *Reid*, 819 F.3d at 496; *Sopo*, 825 F.3d at 1217. In adopting the bright line approach, the courts focus primarily on the fact that *Zadvydas* happened to use a six-month presumption. *Rodriguez*, 804 F.3d at 1077. However, they overlook why the Court came to such a conclusion, and why that conclusion does not apply to cases under §1226(c), as clearly illustrated in *Demore*. *Sopo*, 825 F.3d at 1217.

In *Zadvydas*, the primary concern was making sure that prolonged detentions were still serving their intended purposes, and "the secondary six-month rule was predicated on there being no foreseeable hope of removal." *Reid*, 819 F.3d at 496. The statute in *Zadyvdas* did not serve its intended purpose as applied to the illegal aliens in that case as removal was practically unobtainable, which gave rise to the court adopting the secondary rule requiring a bail hearing at six months. *Id.* There is not the same concern with §1226(c) and therefore this Court should not apply the same general rule. "Taken together, *Zadvydas*, *Demore*, and the inherent nature of the 'reasonableness' inquiry weigh heavily against adopting a six-month presumption of unreasonableness." *Id.* at 497.

iii. Even if this Court found that there are good policy reasons for adopting a bright line test, it should not do so as policy concerns are the job of the legislature.

The Government does not concede that a bright line test would make a better policy. However, even if this Court had such an opinion, it should resist any temptation as deciding what is the best policy is a job better suited for the legislature. *Reid*, 819 F.3d at 497. Of course any reasonableness test has certain practical implications compared to a bright line test. However, overall, it is the most appropriate test given the situation. The First Circuit, in adopting the

reasonable test, acknowledged certain disadvantages to the "reasonable" period approach. *Id.*

The court recognized these concerns and concluded that the "reasonableness" test is still the proper approach. *Id.* at 499–502. The court found it "inappropriate" to "import the 6-month presumption from *Zadvydas* into a statute where individualized reasonableness review remains feasible given the current state of the law. The court also found that the policy concerns should be left for the legislature to decide, not the court. *Id.* The legislature, primarily in the area of immigration, is better suited to make such policy decisions.

Therefore, this Court should adopt the "reasonableness" test because it is more feasible, it better applies this Court's precedence, and any policy decisions regarding a bright line rule should be left to the Legislature.

B. <u>The Detention of Secord was reasonable under the reasonable test.</u>

The reasonableness of any given detention pursuant to §1226(c) is a function of whether it is necessary to fulfill the purpose of the statute. *Diop,* 656 F.3d at 234. The purpose of the statute being to ensure illegal aliens categorized as high-risk flight risks show up for their removal hearings. *Demore,* 538 U.S. at 528. At a certain point detention becomes unreasonable when the government is not promptly moving towards such a goal. *Sopo,* 825 F.3d at 1217.

When a person has been detained beyond certain thresholds, the detention is more likely to be deemed unreasonable. *Id.* Detentions that last past the one year mark have an increasing risk of being unreasonable and usually require a court to determine whether the government is still promptly moving toward its goal of processing illegal aliens' detention hearings. *Id.* To determine when a detention has past the reasonableness threshold a court must engage in a fact dependent inquiry. *Leslie v. AG of the United States*, 678 F.3d 265, 269 (3d Cir. 2012).

The fact-dependent inquiry must take into account delay caused by errors which

necessitated appeals as well as the extent to which continuances or other delays favorable to the alien have lengthened the period of detention. *Id.* Courts have also recognized a nonexclusive list "reasonableness" factors to help guide the courts in judging reasonableness of detentions pursuant to1226(c). *Sopo*, 825 F.3d at 1217-18. The guiding factors consist of: (1) the amount of time that the alien has been detained without a bond hearing; (2) the reasons why the illegal alien's proceedings have become protracted; (3) whether it will be possible to remove the alien after there is a final order of removal; (4) whether the alien's immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable; and (5) whether the facility for immigration detention is meaningfully different from a penal institution. *Id.*

In *Sopo*, the court gave guidance on how the first two factors should be applied. *Sopo*, 825 F.3d at 1217. In examining the first factor, the length of detention, the court found that detentions that last past the one-year threshold are the most likely to be found to be unreasonable, depending on the circumstances of the case. *Id.* The court also found that detentions of six months or less are almost never unreasonable. *Id.*

In looking at the second factor, the reason for the detention, the *Sopo* Court stated that a court should look to see who was at fault for the delay – the government or the illegal alien. *Id.* at 1218. While a person should not be punished for seeking legal remedies, or because of undue delay on the part of the government caused by administrative errors and the like, the government should not suffer because a person pursues frivolous actions to slow the removal process in hopes of being released based on the length of their detention. *Leslie*, 678 F.3d at 269.

In *Chavez-Alvarez* the court gave further guidance on the additional factors courts use when the court found a detention of over a year to be unreasonable. *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 477 (3d Cir. 2015). While the court ultimately found the

detention to be unreasonable after it passed the one-year threshold, it stated that the detention was most likely reasonable up past the six-month point. *Id.* The court found that up to the six-month threshold, neither party was at fault for the length of the detention, and everything was moving swiftly. *Id.* However, as the detention continued, the alien raised valid concerns and properly pursued legal action. *Id.* at 477-78. The court found that as the detention continued, the length became unreasonable after it passed a year of incarceration. *Id.* The court stated that the government should have anticipated the complexities of the issues that were properly raised by the alien and planned accordingly, and the alien should not be punished for bringing such actions. *Id.* The court also found that the government had sufficient time to evaluate the alien's risk of flight or danger to the community. *Id.* at 477.

In looking at the facts and circumstances and applying the factors to Secord's detention, it's clear that the length of the detention was reasonable. The detention did not and would not have reached the one-year mark that courts such as *Chavez Alvarez* say would most likely be unreasonable. The detention lasted for only six months and an immigration judge was available at the eleven-month mark. This is much shorter than the length of the detentions in cases such as *Chavez-Alvarez* that lasted well over a year. The detention was also right below the six-month threshold that *Sopo* said would almost always be reasonable.

The delay was also of no fault of the government. Here, the first available immigration judge to hear the case was not available until eleven months from the beginning of the detention, through no fault of the government. The only reason for the delay was the heavy caseload of the immigration judge, not any administrative errors. The government should not be punished because there are too many illegal aliens that need to be removed. Similarly the people of the United States should not be put in danger by releasing illegal aliens that Congress has already

determined as high risk for flight and recidivism due to overcrowded immigration dockets.

The other factors also favor the government, as actual detention was possible once an order was issued. Unlike situations such as *Zadvydas* where actual removal was not possible because of international conflicts between nations, and an alien not having citizenship in the country to be removed, the United States does not have any problems removing individuals back to Canada and we know that Secord is a citizen of Canada. Therefore, removal was possible once an order was issued. The detention also did not exceed the time that Secord spent in prison for her convictions. She was incarcerated for a year and was only detained by ICE for six months.

In addition to the specific guiding factors, other circumstances favor the government. In *Chavez-Alvarez* the court found that by the time the alien's detention reached the one-year mark, the government had sufficient time to determine the alien's flight risk and potential danger to the community. Here, however, the government did not have the time to evaluate Secord's potential flight risk and danger to the community. Releasing Secord under these conditions potentially puts Americans at risk and is unfair to the government.

Therefore, applying the reasonableness test, ICE's detention of Secord was reasonable, as the length of the detention was only for six months, was caused by no fault of ICE, removal is possible once a final order is issued, the detention was much shorter than the time she spent incarcerated for the crimes she committed, and ICE did not have enough time to evaluate the detainees potential for flight and danger to the community.

C. Even under the bright line test the detention of Secord was still reasonable as an end was in sight.

Courts that recognize the Bright Line Test rest their decisions on reasonableness on a presumption that if a detention under §1226(c) lasts more than six months and has no end in site,

it is unreasonable to detain undocumented aliens without an individualized bond hearing at that point. *Rodriguez,* 804 F.3d at 1077. The courts find detention to be "prolonged," and therefore unreasonable, when "it has lasted six months and is *expected to continue more than minimally beyond six months*." *Id.* (emphasis added). At that point, the courts believe that "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decision maker is substantial." *Id.* at 1078.

In recognizing that after six months, detentions are most likely unreasonable, the Court in *Rodriguez* was mindful of how long it takes to host an illegal immigrant's removal proceeding. The Court noted that individuals spend "on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years." *Id.* at 1072. The court also noted that "in some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement." *Id.* at 1072.

While it is conceded that the detention lasted six months, the government urges this Court to focus on the second half of the test, where the detention is *expected to continue more than minimally beyond six months.* Here, in only five months from the time the District Court improperly released Defendant from ICE's custody, there was an immigration judge that was available to hold a bail hearing. This means at most Secord would have been detained pursuant to §1226(c) for eleven months. The five-month period still would have resulted in Secord potentially being released well short of the average alien. As recognized in *Rodriguez*, the average detained alien awaiting removal proceedings is over 400 days. The length of Secord's detention was therefore not unreasonable as it was expected to only continue minimally beyond

six months.

Therefore, this Court should adopt the reasonable test for numerous reasons. Applying the reasonableness test, it is clear that the length of the detention was reasonable in this case. However, even if this Court were to adopt the bright line approach, the detention was still reasonable as it was not going to last much longer than six months compared to the average illegal alien.

CONCLUSION

For the foregoing reasons, this Court should affirm the United States Court of Appeals for the Second Circuit's decision that the deputy had probable cause to arrest Secord, and the length of her detention pending removal proceedings was reasonable.

Respectfully Submitted,

Counsel for Respondents