No. 1-2017

In The
Supreme Court of the United States
February Term 2017

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 THE RESPONDENT – TEAM 4

QUESTIONS PRESENTED

1. Whether, the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Laura Secord, when it applied "the totality of the circumstances test" and there were multiple indications that Laura Secord was trespassing; and

2. Whether, the Second Circuit correctly applied the "reasonableness test" to determine a time for a bail hearing, where Secord had been detained for committing deportable crimes and posed a flight risk and whether, the "reasonableness test" protected Secord's Due Process rights.

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OPINIONS BELOW

In 2015, the City of Angola Court found Laura Secord ("Petitioner") guilty of criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree. R. at 1. Thereafter, Petitioner filed a habeas corpus petition in the United States District Court for the Western District of New York while in custody in the Erie County Correctional Facility in Alden, New York challenging her state law convictions. R. at 1, 3. Subsequently, Petitioner filed a second habeas corpus petition in the same court while in custody in the Immigration and Customs Enforcement ("ICE") regional office challenging her detention. R. at 1, 4. The district court granted both petitions. R. at 4. In 2016, the City of Angola and ICE filed timely appeals in the Court of Appeals for the Second Circuit. R. at 4. The Second Circuit consolidated the appeals for judicial economy. R. at 4. The Second Circuit reversed and remanded Petitioner to the custody of ICE. R. at 4; *Secord v. Scott*, 123 F.4th 1, 4 (2d Cir. 2016). Petitioner filed a timely appeal to this Court. R. at 11. Certiorari was granted on February 20, 2017, on two questions. R. at 11.

JURISDICTION

The jurisdictional statement is waived pursuant to Rule III(b)(v) of the Wechsler National Criminal Moot Court Competition Rules.

STATUTES AND CONSTITUTIONAL PROVISIONS

1. The Fourth Amendment of the United States Constitution states, in pertinent part "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.
2. The Fifth Amendment to the United States Constitution states, in pertinent part, "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

3. The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

4. 8 U.S.C. § 1226(a) states:

a. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
   1. may continue to detain the arrested alien; and
   2. may release the alien on—
      A. bond . . . or
      B. conditional parole; but
   3. may not provide the alien with work authorization . . . unless the alien is lawfully admitted for permanent residence or otherwise would . . . be provided such authorization.

5. 8 U.S.C. § 1226(c)(1)(A), (C) & (c)(2) states:

(c) Detention of criminal aliens.
   1. The Attorney General shall take into custody any alien who—
      A. is deportable by reason of having committed any offense covered in 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

      * * *

      C. is deportable under 8 U.S.C. § 1227(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence [sentenced] to a term of imprisonment of at least 1 year, or

      * * *

   2. The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, 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

During the unusually cold winter of 2013, Petitioner, a Canadian citizen, decided to illegally emigrate to the United States ("U.S."). R. at 2, 8. Petitioner illegally entered the U.S. by walking across the completely frozen Lake Erie to avoid U.S. immigration officials. R. at 2, 8. Petitioner remained illegally in the U.S. working various jobs in the foodservice industry. R. at 2.

On December 21, 2015, in the middle of the night, a resident of Angola, New York noticed lights inside one of the summer cottages that line Lake Erie. R. at 2, 7. Because said cottages are usually closed for the winter, the resident called the local police department to report the suspicious activity. R. at 2. Deputy Barnard Pfieff ("Deputy Pfieff"), of the Erie County Sheriff's Office, was dispatched to the scene. R. at 2. Upon his arrival at the cottage, he identified flickering candle light inside the property that was supposed to be unoccupied. R. at 2.

Deputy Pfieff approached the cabin, looked inside a window, and observed several hooded and masked individuals gathered around a table in the gloom of candlelight. R. at 2. He reported what he observed to his supervisor, Sergeant Slawter, who replied, "Go find out what's going on." R. at 2. Deputy Pfieff knocked on the front door and identified himself as a member of the Sheriff's Department. R. at 2. Thereafter, he observed, the unlawful occupants scatter and hide, by looking through a window in the door. R. at 2. Deputy Pfieff informed his supervisor what transpired and requested other officers to respond. R. at 2. Deputy Pfieff then opened the unlocked door and again informed the unlawful occupants that he was from the Sheriff's Department. R. at 2. He heard no response and the unlawful occupants continued to remain hidden. R. at 2. Deputy Pfieff noticed a light switch in the entryway and attempted to turn on the lights, but they did not turn on. R. at 2. In the dim candlelight, he noticed drawings and documents on the table. R. at 2. Deputy Pfieff un-

holstered his sidearm and commanded the unlawful occupants to come out from hiding. R. at 2.

Six young and disguised adults emerged, including Petitioner. R. at 2. Deputy Pfieff ordered all of them to the floor, with their hands above their heads. R. at 2. To ensure his own safety, he proceeded to search them for weapons and identification. R. at 2. All the unlawful occupants had identification, except Petitioner, who had only cash on her person. R. at 2.

Shortly thereafter, the other sheriff deputies arrived on scene. R. at 3. The unlawful occupants admitted no one present lived in the cottage. R. at 3. James Fitzgibbon ("Fitzgibbon"), however, was the nephew of the true property owner. R. at 3. Fitzgibbon had permission check the cottage on a weekly basis while his uncle, the lawful property owner, was in Florida. R. at 3, 9. However, Fitzgibbon's uncle had explicitly told Fitzgibbon that he did not have permission to use the cottage for any kind of party. R. at 3, 9. Contrary to his uncle's only instruction, the unlawful occupants brought costumes, snacks, beer, and pop for their party. R. at 9.

Fitzgibbon admitted that he did not possess a key to gain entry, but that he had uncovered a key from under a planter. R. at 3, 7. Fitzgibbon had no contact information for the uncle in Florida and did not know how to turn on the electricity to the cabin. R. at 3, 7, 9. The uncle's contact information was later discovered through a neighborhood canvass. R. at 3.

Petitioner and her fellow partygoers were arrested and later charged and convicted with criminal trespass in the second degree in the City Court of Angola. R. at 3. Additionally, during a routine administrative search, a pair of brass knuckles was found in Petitioner's backpack which she had acquired in Canada for personal protection. R. at 3, 9. Resultantly, the Petitioner was also charged with possession of a deadly weapon. R. at 3. Petitioner, after admitting that the brass knuckles were hers and that she had illegally brought them with her when she illegally entered the U.S., was also convicted of criminal possession of a deadly weapon in the fourth degree. R. at 3. Petitioner was sentenced to a year in the Erie County Correctional Facility in Alden, New York for

the two convictions, to be served concurrently. R. at 3.

Petitioner filed a habeas corpus petition challenging her state law convictions. R. at 3. While that petition was pending, Petitioner's criminal sentence ended. R. at 1. Petitioner was immediately transferred to the custody of the Department of Homeland Security ("DHS") for deportation proceedings. R. at 4. Petitioner remained in ICE custody for six months, until the Petitioner filed yet another habeas corpus petition. R. at 4.

SUMMARY OF ARGUMENT

The Fourth Amendment of the U.S. Constitution protects individuals from "unreasonable searches and seizures." This Court has held that a warrantless arrest is constitutional when a misdemeanor is committed in the presence of an officer and is supported by probable cause. This Court has stressed that a "totality of the circumstances" test must be used to determine whether an officer had objectively reasonable probable cause to arrest an individual.

Under New York law, an individual may be charged with misdemeanor criminal trespass if the individual enters or remains unlawfully in a premise. Entering or remaining unlawfully has been interpreted to mean that the individual is not licensed or privileged to be in the premise. Lack of permission can be established by circumstantial evidence, including, but not limited to, an eyewitness account of the crime. Here, Petitioner entered and remained unlawfully in the cottage. Petitioner mistakenly relied on Fitzgibbon's assurance that her presence was lawful. R. at 3, 6, 9. Petitioner knew, or should have known, that her presence in the cottage was unlawful. And any authority that Petitioner believed Fitzgibbon had vanished by his non-possession of a key, his lack of knowledge of how to turn on the electricity in the cabin, and the fact that when confronted by Deputy Pfieff all occupants, including Petitioner and Fitzgibbon, fled and hid. R. at 3, 7, 9.

The Second Circuit also correctly applied the "totality of the circumstances" test when it held that—a neighbor reporting suspicious activity, out of season, at a summer cottage at the edge

of a dark and frozen lake in the middle of the night; Deputy Pfieff's observations that the cottage was occupied by hooded and disguised individuals, gathered by dim candlelight; upon Deputy Pfieff identifying himself as an officer of the law, numerous times, the unlawful occupants fled and hid; Fitzgibbon's admission that he did not possess a key to the property, but had uncovered it hidden on the patio; Fitzgibbon's uncle's admission, which Fitzgibbon acknowledged, that Fitzgibbon did not have permission to use the cottage as claimed; and the unlawful occupants were harboring an illegal alien—all indicated that under the "totality of the circumstances" test Deputy Pfieff had objectively reasonable probable cause to arrest Petitioner. R. at 2, 3, 7, 8, 9. Therefore, this Court should affirm the judgment of the Second Circuit and uphold Petitioner's convictions.

Additionally, the Second Circuit correctly applied the "reasonableness test" to determine a time for Petitioner's bail hearing. Under 8 U.S.C. § 1226(c), the length of time the government may hold an illegal alien is determined by applying the "reasonableness test" on a case-by-case basis. Utilizing the "reasonableness test" to determine a time for a bail hearing does not violate an alien's Due Process rights. The circuits are split on whether to apply the "reasonableness test" on a case-by-case basis or a six-month bright line rule.

Some courts require a fact-dependent inquiry assessing all the circumstances of any given case to determine whether detention without an individualized bond hearing is unreasonable. Under this framework, the immigration court must implement a fact-dependent inquiry on a case-by-case basis. The court may consider whether the alien: poses a danger to the safety of other persons or property; is likely to appear for scheduled proceedings; and has family and community ties in the area. Additionally, a weighing of the goals of the statute are compared to the alien's liberty and whether any delays were caused by the government or by the alien.

Here, Petitioner is a citizen of Canada, not a LPR. R. at 1. Petitioner illegally emigrated by crossing a frozen lake to gain access into the U.S. thereby purposefully avoiding custom officials.

R. at 2, 8. Petitioner has no family ties in the U.S., nor does she have strong community ties to Buffalo. R. at 8. Petitioner has worked various unstable foodservice jobs over the last two years. R. at 8. Additionally, criminal trespass of a dwelling at night and criminal possession of a dangerous weapon are severe in nature. Therefore, this Court should affirm the judgment of the Second Circuit and uphold Petitioner's convictions.

ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY APPLIED THE "TOTALITY OF THE CIRCUMSTANCES" TEST TO ESTABLISH PROBABLE CAUSE.

Deputy Pfieff did have probable cause to arrest Petitioner. Therefore, this Court should affirm the judgment of the Second Circuit. The touchstone of a constitutional arrest is encapsulated in the Fourth Amendment. The Fourth Amendment is applicable to the States by the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961). The Fourth Amendment clearly protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has held that a warrantless arrest for a misdemeanor is constitutional if it is committed in the officer's presence and is supported by probable cause. *See United States v. Watson*, 423 U.S. 411, 424 (1976); *see also Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

This Court has held that "[p]robable cause exists where the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (internal quotation and citation omitted). Courts are instructed to use a "totality of the circumstances" test to determine if probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

The probable cause test is not reducible to "precise definition or quantification." *Maryland*

v. Pringle, 540 U.S. 366, 371 (2003). This 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). And "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable cause] decision." *Gates*, 462 U.S. at 235. All that this Court has required for a probable cause determination is the kind of "fair probability" on which "reasonable and prudent [people,] not legal technicians, act." *Id.* at 238, 231 (internal quotation marks omitted). Additionally, this Court has emphasized that probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Furthermore, "[o]nce the jury has resolved any disputed facts . . . the ultimate determination of whether the officer's conduct was objectively reasonable is to be made by the court." *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003). The standard of review for a determination of probable cause is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

A. Fitzgibbon Did Not Have The Authority To Provide A License Or Privilege To Petitioner To Enter Or Remain In The Cabin.

Fitzgibbon did not have the authority to provide a license or privilege to Petitioner to enter or remain in the cabin. Therefore, this Court should uphold the judgment of the Second Circuit. In New York, an individual commits criminal trespass in the second degree "when he [or she] knowingly enters or remains unlawfully in a dwelling." N.Y. Penal Law § 140.15. "A person 'enters or remains unlawfully' in or upon premises when he [or she] is not licensed or privileged to do so." *Id.* § 140.00(5). "In general, 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." *People v. Graves*, 76 N.Y.2d 16, 20 (1990). Absent a license or privilege, a person will be deemed to have entered or remained unlawfully on the premises. N.Y.

Penal Law § 140.00. Circumstantial evidence can establish an absence of a license or privilege to enter. *People v. Quinones*, 173 A.D.2d 395, 396 (1991). Such circumstantial evidence can be based on information provided by an eyewitness, unless the circumstances would raise a doubt as to the veracity of the eyewitness. *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) (citing *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995)). Therefore, the question becomes whether the facts known to the arresting officer, at the time of the arrest, objectively provided probable cause to support the arrest. *Ackerson v. City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012).

To satisfy the New York statute, an individual must possess a "license or privilege" to enter a private premise. Permission can be obtained by the consent of the owner or another whose relationship to the premises gives him authority to issue such permission. Here, none of the occupants obtained consent from the true property owner—Fitzgibbon's uncle. R. at 3. Every trespasser admitted that none of them resided at the cottage. R. at 3. Here, the trespassers relied on Fitzgibbon's assurance that his uncle would be "cool with it" if they "didn't mess the place up." R. at 9. Therefore, the trespassers relied on Fitzgibbon's relationship to the premises, namely that it was his uncle's cottage, to obtain the required permission to be on the premise lawfully. R. at 3.

In *Graves*, the court held that entry through deception is the same as entry without license or privilege. Like the defendant in *Graves*, who had obtained permission to enter the apartment through the deception of a codefendant, here too, Petitioner obtained permission to enter the cottage through the deception of Fitzgibbon, a codefendant. R. at 3. Fitzgibbon, personally and individually, had the authority to enter the premises to "check on the property every week or so." R. at 9. However, Fitzgibbon did not have the authority to invite others into the cottage—both Fitzgibbon and his uncle acknowledged that he was "not to have parties." R. at 3. Fitzgibbon's lack of authority renders Petitioner's claim, that she was allowed on the property, meritless.

In *Quinones*, the defendant claimed that his presence was lawful because he was in his

friend's house, or that he was looking for someone. However, the court determined that the circumstantial evidence—the defendant entered by a fire escape while the tenant was sleeping—dispelled the defendant's statements. Like the defendant in *Quinones*, here, Petitioner's statement that she had permission to be on the premises because Fitzgibbon authorized her presence should be dispelled because of the overwhelming circumstantial evidence to the contrary. R. at 3.

Additionally, in *Curley* the court held that circumstantial evidence furnished by an eyewitness may be enough to establish probable cause, unless the veracity of the eyewitness can be called into question. Here, there was an eyewitness report of suspicious activity. R. at 2. Furthermore, no challenge has been made as to the veracity of the local resident who made the report. Therefore, this Court should hold that there is sufficient circumstantial evidence proving that Petitioner did not have permission to be lawfully on the premises. Accordingly, Deputy Pfieff did have objectively reasonable probable cause to arrest the Petitioner.

The Petitioner may contend that prosecuting one for even simple trespass under section 140.05, requires that such person "knowingly" entered the premises without license or privilege and therefore, a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass. *People v. Basch*, 36 N.Y.2d 154, 159 (1975) (internal citations omitted). However, this Court should find this argument unpersuasive. "One does not acquire immunity from prosecution for trespass by closing one's eyes to reality and stubbornly asserting an 'honest belief' to remain where one is not privileged to be; rather, a defense is stated only when one acts in good faith in an honest but mistaken belief that one's continued occupation of the premises is not unlawful." N.Y. Penal Law § 140.00; *see also People v. Weiss*, 276 N.Y. 384, 389 (1938); *People v. Marrero*, 69 N.Y.2d 382, 391 (1987).

Here, although Petitioner may have honestly, albeit mistakenly, believed that Fitzgibbon originally had the requisite authority to grant a license or privilege to enter the cabin, this apparent

authority quickly vanished as the events of the night progressed. R. at 3. When a situation starts as unambiguous, but subsequent events create ambiguity, all apparent authority no longer exists. *United States v. Purcell*, 526 F.3d 953, 964 (6th Cir. 2008); *see also United States v. Nayyar*, No. 09 CR. 1037, 2016 WL 6836350, at *7 (S.D.N.Y. Nov. 18, 2016).

Petitioner's reliance on Fitzgibbon's assurance that his uncle would be "cool with it" is the *only* indication of a license or privilege being granted. R. at 9. However, contrary to the findings of the district court, there are multiple indications that Petitioner knew, or should have known, that she was entering the cabin against the true owner's will. First, Petitioner noticed that Fitzgibbon did not possess a key—he had to retrieve it from its hidden location under a planter upon arrival. R. at 3, 7. This should have raised Petitioner's suspicions. Second, upon entering the premises, Fitzgibbon did not know how to turn the power on in the cabin—another strange occurrence that should have elevated Petitioner's suspicions. R. at 9. Finally, after hearing the knock at the door, all the occupants, including Petitioner and Fitzgibbon, fled. R. at 2. This final act of fleeing clearly demonstrates that Petitioner knew that they were not allowed to be on the premises.

This Court in *Wardlow* held that "unprovoked flight is simply not a mere refusal to cooperate." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Fleeing, "by its very nature, is not 'going about one's business'; in fact, it is just the opposite." *Id.* Therefore, this Court has already determined that the Fourth Amendment allows "officers confronted with such flight to stop the fugitive and investigate further [and] is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." *Id.*

Here, Deputy Pfieff knocked on the door, identified himself as an officer, and then noticed the occupants of the cabin flee and hide. R. at 2. Deputy Pfieff then entered the cabin and again identified himself as a member of the Sheriff's Department, however the occupants remained in hiding. R. at 2. Only after Deputy Pfieff commanded the individuals, with his gun drawn, to come

out of hiding did they cooperate. R. at 2. Although in isolation, this event is not enough to be dispositive of a probable cause determination, adding it to the "totality of the circumstances" that Deputy Pfieff knew at the time of the arrest indicates that it was objectively reasonable to conclude that he did have the requisite probable cause to make the arrest. Because Deputy Pfieff did have probable cause to make the arrest, this Court should affirm Petitioner's convictions.

B. The Second Circuit Correctly Found That Deputy Pfieff Had Probable Cause To Arrest Petitioner Under The "Totality Of The Circumstances" Test.

The Second Circuit correctly applied the "totality of the circumstances" test to find that Deputy Pfieff had objectively reasonable probable cause to arrest Petitioner. Therefore, this Court should affirm the Second Circuit's ruling. In *Finigan,* the Second Circuit used the "totality of the circumstances" test to hold that sufficient probable cause existed to make an arrest. *Finigan v. Marshall*, 574 F.3d 57, 62 (2d Cir. 2009). In *Finigan*, at the time of the arrest, Deputy Sheriff Marshall knew: there was a report of a burglary at the premises; Geneva Finigan did not reside at the residence; there was a divorce proceeding pending between Geneva and Robert Finigan; Robert had changed the locks; Robert was away; Geneva had entered the premises; and a neighbor, who was watching the house for Robert, had no idea how Geneva had entered the premises. *Id.* The court in *Finigan* concluded that it was evident from the neighbor's statements, and from Geneva's own statements that her entry to the premises was based on her own asserted legal rights, and that Robert had not authorized her entry into the premises. *Id.* Therefore, the Court held that Deputy Sheriff Marshall had probable cause to arrest Geneva for criminal trespass. *Id.*

Here, the facts are very similar to those in *Finigan* and this Court should hold that Deputy Pfieff did have probable cause to arrest Petitioner. Like the defendant in *Finigan*, here Deputy Pfieff received a report of suspicious activity, out of season, at a summer cottage at the edge of the dark and frozen lake in the middle of the night. R. at 2. Additionally, like the defendant in *Finigan*,

here, all the individuals charged with trespass, including Petitioner, did not reside at the cabin and openly admitted this to Deputy Pfieff. R. at 3. Similar to the property owner in *Finigan* who had changed the locks, here, Fitzgibbon did not have access to the cabin and had to retrieve a key to gain access. R. at 3. Furthermore, like the true property owner in *Finigan* who was away, here, the true property owner, Fitzgibbon's uncle, was also away and Fitzgibbon had no contact information for his uncle. R. at 3, 9.

Similarly, like the defendant in *Finigan* who entered the premises, here too, Petitioner entered the premises. R. at 2. Also like the defendant in *Finigan*, who was not authorized by the actual owner of the property to occupy the premises, here too, Fitzgibbon admitted that his uncle did not give him permission to use the cabin as Fitzgibbon originally claimed and Fitzgibbon was explicitly instructed not to have any parties. R. at 3. Finally, in *Finigan*, the eyewitness who called in the suspicious activity had no idea how the defendant entered the premises, here too, the caller reported the suspicious activity but had no idea how the individuals entered the premises. R. at 2.

Additionally, here, when Deputy Pfieff peered through the window he saw the cabin was occupied by hooded and disguised individuals. R. at 2. Moreover, the individuals fled and hid when Deputy Pfieff identified himself as an officer. R. at 2, 7. Petitioner was the only individual without identification on her person, further raising Deputy Pfieff's objectively reasonable suspicion. R. at 2. Lastly, here, the individuals were harboring an illegal alien in the premises. R. at 1, 2.

Unlike in *Finigan* where the parties were once married, here, there was never a marital relationship between the parties. However, this de minimus difference does not alter the outcome of the "totality of the circumstances" test, or this Court's proper determination that probable cause existed in this case applying the "totality of the circumstances" test. Similar to the defendant in *Finigan* where no single event decidedly answered the question of probable cause, here too, only assessing the "totality of the circumstances" clearly establishes that Deputy Pfieff had the requisite

probable cause to make the arrest. Therefore, this Court should hold similarly to the court in *Finigan* and find that Deputy Pfieff, like Deputy Sheriff Marshall in *Finigan*, did have the requisite probable cause to make an objectively reasonable lawful arrest of Petitioner. Accordingly, this Court should uphold the decision of the Court of Appeals for the Second Circuit.

Opposing counsel may argue that Petitioner, and all other individuals, indicated that they had Fitzgibbon's assurance that his uncle would be "cool" with their use of the cabin. R. at 9. Moreover, opposing counsel may claim Petitioner communicated this alleged privilege to use the premises and this communication vitiated the probable cause that Deputy Pfieff had to arrest her. However, this Court should not be persuaded by this argument. In *Fama*, the Second Circuit determined that "[t]he fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause." *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985). And "an officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause." *Panetta v. Crowley*, 460 F.3d 388, 396 (2d Cir. 2006).

In *Curley*, the Second Circuit held that "when a purported assault victim who was visibly injured told a police officer that Curley had assaulted him, the officer had probable cause to arrest Curley, despite Curley's conflicting account." *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir.2001). The *Curley* Court said that:

> [O]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest. . . . [T]he arresting officer does not have to prove plaintiff's version wrong before arresting him. Nor does it matter that an investigation might have cast doubt upon the basis for the arrest.

Id. (internal quotation marks and citations omitted).

The Second Circuit has also held that "[o]nce officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through

a weighing of the evidence." *Panetta v. Crowley*, 460 F.3d 388, 396 (2d Cir. 2006) (citing *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989)).

Here, Petitioner, and her companions, provided Deputy Pfieff with an alternate explanation for their presence in the premises. R. at 3. However, like the defendant in *Curley*, here too, the officer, Deputy Pfieff, had probable cause for the arrest based on the "totality of the circumstances." Therefore, Petitioner's explanation did not vitiate Deputy Pfieff's probable cause determination. Because the Secord Circuit correctly applied the "totality of the circumstances" test and correctly determined that Deputy Pfieff did have probable cause to arrest Petitioner, this Court should affirm the decision of the Second Circuit and uphold Petitioner's convictions.

II. UNDER 8 U.S.C. § 1226(C), PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE COURT UTILIZED THE "REASONABLENESS TEST" TO DETERMINE A TIME FOR A BAIL HEARING.

The Second Circuit correctly applied the "reasonableness test" to determine a time for Petitioner's bail hearing. Under 8 U.S.C. § 1226(c), the length of time the government may hold an alien is determined by applying the "reasonableness test" on a case-by-case basis. Using the "reasonableness test" to determine a bail hearing does not violate an alien's Due Process rights.

This is a case of first impression for this Court. The circuits are split on whether to apply the "reasonableness test" on a case-by-case basis or a six-month bright line rule. *See Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 473 (3d Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233-34 (3d Cir. 2011); *Lora v. Shanahan*, 804 F.3d 601, 614-15 (2d Cir. 2015). Determining whether 8 U.S.C. § 1226(c)(1) necessitates the "reasonableness test" on a case-by-case basis or a six-month bright line is a matter of statutory interpretation. The standard of review for statutory interpretation is *de novo*. *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013).

The Fifth Amendment Due Process Clause provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The protections

afforded by the Fifth Amendment are extended to all persons in the U.S., not just citizens. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Procedural due process requires that the government follow fair procedures before depriving a person of life, liberty, or property. U.S. Const. amend. V. When the government deprives a person of those interests, procedural due process requires the government afford the person notice, an opportunity to be heard, and a decision made by a neutral decision-maker. *Id.* Due process, however, is flexible and calls for such procedural protections as the situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Procedural due process may be challenged if an illegal alien is detained by the government for an unreasonable time. *Chavez-Alvarez*, 783 F.3d at 473. An alien may be arrested and detained pending removal proceedings. 8 U.S.C. § 1226(a). Under these circumstances, the Attorney General may detain the arrested alien, or may release the alien on bond, or conditional parole. *Id.* However, the Attorney General shall take into custody an alien who is convicted of offenses found within 8 U.S.C. §§ 1182(a), 1227(a)(2)(A)-(D), and 1227(a)(4). 8 U.S.C. § 1226(c)(1). Under these circumstances, the Attorney General may release the alien only if the alien falls within a narrow exception related to witness protection. 8 U.S.C. §1226(c)(2). The witness protection exception is not applicable in the instant case. This release, however, is also conditioned on the alien's flight risk and the severity of the crimes they committed. 8 U.S.C. § 1662(c)(2). It is not disputed that Petitioner was subject to mandatory detention under 8 U.S.C. § 1226(c). What is disputed, however, is the length of time the government may hold an illegal alien under 8 U.S.C. § 1226(c).

To determine the meaning of a statute, courts may look to its plain meaning, the statute in its entirety, the legislative history, and precedent established in case law. This Court must first look to the plain meaning of the statute. *Scialabba v. De Osorio*, 134 S.Ct. 2191, 2228 (2014). Here, looking to the plain meaning of the statute, the length of time an alien may be detained remains ambiguous. Thus, courts may also conduct a contextual analysis to determine the meaning of the

statute. *Scialabba*, 134 S.Ct. at 2228. In fact, a statutory provision must be interpreted with reference to its context within the statute because a seemingly ambiguous term is clarified when read within the context of the statute. *Id.* Again, here, looking at 8 U.S.C. § 1226(c) within the context of the statute in its entirety, the length of time an alien may be detained remains ambiguous.

If after plain meaning analysis the language is still ambiguous, then courts should look to the legislative history. *Scialabba*, 134 S.Ct. at 2228. The legislative history indicates Congress adopted 8 U.S.C. § 1226(c) to strengthen and streamline deportation proceedings. *Diop*, 656 F.3d at 231. Congress indicated such individuals should be detained pending deportation. *Id.* This Court has recognized that in the exercise of Congress's broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. *Chavez-Alvarez*, 783 F.3d at 473 (citing *Demore v. Hyung Joon Kim*, 538 U.S. 510, 521 (2003)). Furthermore, applying "reasonable presumptions and generic rules" to groups of aliens—for purposes of due process—can be consistent with the idea that aliens can be treated differently. *Id.* Thus, while the legislative history of 8 U.S.C. § 1226(c) is unambiguous as to the Congress's intent, it nonetheless remains ambiguous as to the length of time the government may detain an alien.

Courts may also look to case law. Utilizing the "reasonableness test" on a case-by-case basis to determine a time for bail hearings is supported by case law. The Supreme Court most recently addressed 8 U.S.C. 1226(c) in 2003 in *Demore*. In *Demore*, Hyung Joon Kim, a legal permanent residence ("LPR"), was convicted of first-degree burglary and petty theft with priors. *Demore*, 538 U.S. at 513. The Immigration and Naturalization Service ("INS") charged him with being deportable and detained him pending his removal hearing. *Id.* Kim filed a habeas corpus action challenging 8 U.S.C. § 1226(c) on the ground that his detention violated due process because INS had made no determination that he posed either a danger to society or a flight risk. *Id.* at 514.

This Court has found that Congress was "justifiably concerned that deportable criminal

aliens, who are not detained, continue to engage in crime and fail to appear for their removal hearings in large numbers." *Id.* Furthermore, this Court stated this "may require that persons . . . be detained for the brief period necessary for their removal proceedings." *Id.* at 513. Thus, this Court held that "[detention] during removal proceedings is a constitutionally permissible part of that process." *Id.* at 518. This Court noted, however, that detentions must be reasonable. *Id.* at 513. And for a detention to be reasonable, it must be for a brief period-of-time. *Id.* This Court, however, declined to define the meaning of "a brief period-of-time."

Justice Kennedy, in his concurrence, distinguished between delays caused by INS versus delays caused by the alien. *Id.* at 529. Furthermore, Justice Kennedy distinguished between a LPR and an undocumented, illegal alien, stating that "a lawful permanent resident . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532. Nowhere in his concurrence did he address whether undocumented, illegal aliens are entitled to the same protections as LPRs.

Stemming from *Demore*, the Third Circuit called for a fact-dependent inquiry requiring an assessment of all the circumstances of any given case to determine whether detention without an individualized bond hearing is unreasonable. *See Diop*, 656 F.3d at 234; *see also Chavez-Alvarez*, 783 F.3d at 471. Under this framework, immigration courts must determine whether an individual's detention has crossed the reasonableness threshold, thus entitling her to a bail hearing. *Id.*

In 2011, in *Diop*, the Third Circuit held that the "reasonableness test" should be applied on a case-by-case basis to determine a time for bail hearings. *Diop*, 656 F.3d at 234. In *Diop*, Cheikh Diop ("Cheikh") was twice convicted of a crime involving moral turpitude. *Id.* at 223. Subsequently, he was taken into custody by the DHS and charged with removability. *Id.* Cheikh was detained without bond under 8 U.S.C. §1226(c). *Id.* at 224. Cheikh obtained counsel and challenged the Government's case for removal. Cheikh was held for nearly three years. *Id.* at 227.

During that time, Cheikh's case meandered through the administrative and judicial review process, from immigration judges to the Board of Immigration Appeals ("BIA"), and to numerous various courts. *Id.* Subsequently, Cheikh filed a petition for a writ of habeas corpus against ICE, DHS, and others in federal district court. *Id.* at 225.

The Third Circuit adopted the "reasonableness test" to determine a time for a bail hearing. *Id.* at 234. The court declined to adopt a "one-size-fits-all approach" or "establish a universal point at which detention will always be considered unreasonable." *Id.* at 233-34. Instead, the court implemented a "fact-dependent inquiry that will vary depending on individual circumstances." *Id.* at 232. The court found that 8 U.S.C. § 1226(c) "implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community." *Id.* at 231.

The court reasoned that an immigration court must "judge the reasonableness of a detention during the removal process by 'tak[ing] into account a given individual detainee's need for more or less time, as well as the exigencies of a particular case.'" *Id.* at 234. Furthermore, the court explained that "reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all the circumstances of any given case." *Id.* Therefore, applying these concepts to the facts in *Diop*, and weighing the goals of the statute against the personal costs to Cheikh's liberty, the court concluded that his nearly three-year detention was unconstitutional. *Id.*

While the background facts of *Diop* are similar to the instant case, here, Petitioner's detention was for a vastly less significant amount of time. In *Diop*, Cheikh was detained for nearly three years. Here, Petitioner was detained for six months, which is in line with standard detention times for similar litigation proceedings. R. at 4; Dep't of Justice, *FY Statistics Yearbook 2015*, Executive Office for Immigration Review, (March 4, 2017), at *A4, A5, R2,

https://www.justice.gov/eoir/page/file/fysb15/download. Furthermore, unlike Cheikh, here, Petitioner does not have strong family or community ties to Buffalo. R. at 2. Finally, criminal trespass of a dwelling at night and criminal possession of a dangerous weapon are severe crimes. Therefore, applying the "reasonableness test" in *Diop* and weighing the goals of the statute against Petitioner's liberty, Petitioner's detention of six months was constitutional.

In *Chavez-Alvarez*, the Third Circuit affirmed its position in *Diop* holding that the "reasonableness test" should be applied on a case-by-case basis to determine a time for bail hearings. *Chavez-Alvarez*, 783 F.3d at 471. In *Chavez-Alvarez*, Jose Juan Chavez-Alvarez ("Jose") entered the U.S. as a citizen of Mexico and later adjusted his status to a LPR. *Id.* He married a U.S. citizen, but divorced. *Id.* He had two sons who are U.S. citizens. *Id.* In 2000, while serving in the U.S. Army, he was convicted of a number of crimes and was sentenced to eighteen months imprisonment. *Id.* He served thirteen months in prison and was released on February 4, 2002. *Id.* Ten years later, on June 5, 2012, ICE agents arrested Jose and charged him with removability. *Id.* Jose was detained without bond under 8 U.S.C. §1226(c). *Id.* Jose obtained counsel and challenged the Government's case for removal. Jose went through a gamut of immigration proceedings spanning just under two years. *Id.*

Reviewing the facts of the case, the Third Circuit affirmed its adoption of the "reasonableness test" to determine a time for a bail hearing. *Id.* The court reasoned "[t]he primary point of reference for justifying the alien's confinement must be whether the civil detention is necessary to achieve the statute's goals [which are] ensuring participation in the removal process, and protecting the community from danger that he or she poses." *Id.* at 475 (citing *Demore*, 538 U.S. at 528).

The court acknowledged that due process requires courts to recognize that "at a certain point—which may differ case by case—the burden to an alien's liberty outweighs a mere

presumption that the alien will flee and/or is dangerous." *Id.* at 475. At this tipping point, the government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness—more is needed to justify the detention as necessary to achieve the goals of the statute. *Id.* This tipping point, however, must be determined by the "reasonableness test" on a case-by-case basis. The court found that "[b]y its very nature, the use of a balancing framework makes any determination on reasonableness highly fact-specific." *Id.* at 474. Applying the "reasonableness test" to the facts in *Chavez-Alvarez*, the court held that two years was an unreasonable amount of time to be held without a bond hearing. *Id.* at 477. The court supported this conclusion given that Jose's removal was grounded in crimes that happened many years before ICE detained him and given Jose's strong family and community ties. *Id.*

While the background facts of *Chavez-Alvarez* are similar to the instant case, here, Petitioner's detention was for a vastly less significant amount of time. In *Chavez-Alvarez*, Jose was detained for two years. Furthermore, Jose married a U.S. citizen, had two U.S. citizen sons, and served in the U.S. Army. Here, Petitioner was detained for only six months, which is in line with standard detention times for similar litigation proceedings. *FY Statistics Yearbook 2015* at *A4, A5, R2. Additionally, Petitioner does not have any family ties, nor any strong community ties to Buffalo. R. at 2. Finally, the crimes of criminal trespass of a dwelling at night and criminal possession of a dangerous weapon are severe in nature. Therefore, applying the "reasonableness test" of *Chavez-Alvarez*, it can be determined that the government did not cross the tipping point by detaining Petitioner for only six months, and therefore, Petitioner's detention was constitutional.

Contrarily, the Second Circuit adopted a bright line rule where the government's authority to detain an alien under 8 U.S.C. § 1226(c) is limited to a six-month period. *See Lora*, 804 F.3d at 614-615. In *Lora*, the Second Circuit held that a six-month bright line rule should be applied to determine a time for bail hearings. *Lora*, 804 F.3d at 614-615. In *Lora*, Alexander Lora

("Alexander"), a LPR, entered the U.S. at seven years old. *Id.* at 607. For the next nineteen years, Alexander lived continuously in Brooklyn, New York where he had a large family network, including: a U.S. citizen fiancée; a chronically-ill U.S. citizen mother; a LPR father; a U.S. citizen brother and sister; and two sons that he supported. *Id.* During the nearly two decades that Alexander had spent in this country, he created strong community ties by attending school and working in grocery stores to support himself and his family. *Id.*

Between July 2009 and July 2010, Alexander was arrested, charged, and found guilty of several offenses relating to drug possession. *Id.* Alexander was sentenced to five years of probation with no imprisonment. He did not violate any of the conditions of his probation. *Id.* Over three years into his five-year probation term, ICE agents arrested Alexander during a raid and he was charged with removability. *Id.* He was detained without bond under 8 U.S.C. §1226(c). *Id.* Alexander obtained counsel and challenged the Government's case for removal.

The Second Circuit in *Lora* adopted the bright line six-month approach to determine a time for a bail hearing. *Id.* at 614-615. The court did so for four reasons. *Id.* First, the court believed the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention. *Id.* Second, the pervasive inconsistency and confusion exhibited by district courts in the Second Circuit when asked to apply the "reasonableness test" on a case-by-case basis weighed for adopting an approach that affords more certainty and predictability. *Id.* Third, while a case-by-case basis might be workable in circuits with comparatively small immigration dockets, the Second Circuit has been disproportionately burdened by a surge in immigration, appeals, and a corresponding surge in the sizes of their immigration dockets. *Id.* at 616. With such large dockets, predictability and certainty are considerations of enhanced importance. *Id.* Finally, without a bright line six-month rule, endless months of detention can have real-life consequences for immigrants and their families. *Id.*

Lora is factually distinguishable from the instant case to such an extent that Petitioner's reliance on it is inappropriate. *Lora* dealt with a LPR. Furthermore, in the nearly two decades Alexander: legally resided in the U.S.; married an American citizen; had American children; attended school; and established himself in the workforce. Alexander established strong family and community ties to the U.S., specifically to Brooklynn, New York. Here, Petitioner is not a LPR. She is a citizen of Canada. R. at 1. Petitioner decided to emigrate to the U.S. and chose to do so illegally by crossing a frozen lake to gain access into the U.S. thereby avoiding customs officials. R. at 2. Additionally, Petitioner has no family ties in the U.S., nor does she have strong community ties to Buffalo. R. at 2. Petitioner has worked in various jobs over the last approximately two years. R. at 2. Petitioner has little to no stability in her job, community, nor family in the U.S. R. at 2. Finally, criminal trespass of a dwelling at night and criminal possession of a dangerous weapon are severe crimes. *Lora*, if applicable at all, applies to LPRs only. To apply the *Lora* standard to illegal aliens would disregard the vast difference between undocumented, illegal aliens and LPRs. As such, *Lora* is distinguishable to such an extent that reliance on it is inappropriate. Therefore, the six-month bright line rule should not be adopted by this Court.

Finally, while hearings guard against mistake, deter arbitrary action, and allow the claimant to participate in proceedings affecting their liberty, there is a strong public policy argument for applying the "reasonableness test" on a case-by-case basis to determine a time for bail hearings. First, many aliens have no ties to the community and pose a flight risk. *Diop*, 656 F.3d at 232. Second, aliens convicted of serious crimes may take advantage of being released on bail. In the early 1990s, more than twenty percent of deportable criminal aliens, once released, failed to appear for their removal hearings. *Demore,* 538 U.S. at 519. Before 1996, significant numbers of aliens convicted of serious crimes were taking advantage of their release on bond as an opportunity to flee, avoid removal, and commit more crimes. *Chavez-Alvarez*, 783 F.3d at 473 (citing *Demore*,

538 U.S. at 518-519). Mandatory detention serves the purpose of preventing deportable aliens from fleeing before or during their removal proceedings. This increased the chance that, if ordered removed, the aliens will be successfully removed. *Demore*, 538 U.S. at 528.

Third, removal proceedings are typically brief, lasting approximately forty-seven days in eighty-five percent of cases in which aliens are mandatorily detained. *Lora*, 804 F.3d at 604 (citing *Demore*, 538 U.S. at 529). In the remaining fifteen percent of cases, in which aliens appeals the decision of the Immigration Judge to the BIA, appeals take an average of four months, with a median time that is slightly shorter. *Id.* Fourth, aliens may use the system to purposefully delay their inevitable removal proceedings beyond six-months. *Chavez-Alvarez*, 783 F.3d at 475. Under the bright line rule, these aliens would be released from custody without question.

Finally, mandatory detention will not disrupt immigration court dockets. Despite a perceived increase in immigration matters, there has actually been a decrease in immigration proceedings and an increase in immigration court productivity over the last several years. From 2014 to 2015 the Buffalo Immigration Court experienced a sixty-nine percent decrease in court matters received *and* a twenty percent increase in completed court matters. *FY Statistics Yearbook 2015* at *A4, A5. At a national level, from 2014 to 2015, immigration courts across the U.S. experienced a seventeen percent decrease in removal cases *and* an eight percent increase in completed cases. *Id.* at *R2. Therefore, there is a strong public policy argument for applying the "reasonableness test" on a case-by-case basis to determine a time for bail hearings.

CONCLUSION

For all the foregoing reasons, the City of Angola and ICE respectfully request this Court uphold the judgment of the Second Circuit.

Respectfully Submitted,

Dated: March 20, 2017 *Counsel for Respondent—TEAM 4*