SUPREME COURT OF THE UNITED STATES

LAURA SECORD, Petitioner
v.
WINFIELD SCOTT, in his Official Capacity as
Director, Department of Immigration and
Customs Enforcement, Respondent

and
LAURA SECORD, Petitioner
v.
CITY OF ANGOLA, Respondent

No. 1-2017
February 20, 2017
Case below: 123 F.4th 1 (2nd Cir.2016)

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Team 6

Questions Presented

I. Did the Second Circuit apply the correct standard in determining that Deputy Pfieff had probable cause to arrest Ms. Secord?

II. Whether the case-by-case reasonableness test, which allows courts to examine the individual circumstances of each detainee to determine a time for bail hearings, protects the Due Process rights of criminal aliens.

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STATEMENT OF THE CASE

The Petitioner, Ms. Secord, is a Canadian citizen who illegally entered the United States in the winter of 2013. *R-2*. Bypassing U.S. Customs and Border Protection Points of Entry, Ms. Secord illegally walked across a frozen Lake Erie to enter the United States. *Id*. Before Ms. Secord entered the country, she spent a considerable amount of time living on the streets and hitchhiking. *R-8*. While in the United States, she worked in various foodservice positions. *R-2*. She also connected with a group of friends in the Buffalo area through a game called "Dungeons and Dragons." *R-8*. The group met often to play in their homes or apartments. *Id*.

On December 21, 2015, James Fitzgibbon, one of Ms. Secord's "Dungeons & Dragons" friends, volunteered his uncle's cottage in Angola for a game night. *R-2*. To celebrate the arrival of Winter Solstice, they clothed themselves as wizards, dwarves, and other characters. *R-9*. When they arrived at the cottage, Mr. Fitzgibbon let the group in through the front door, using a key he found on the patio. *R-3*. Mr. Fitzgibbon apparently had some difficulty figuring out how to turn on the electricity to the cottage, so the group lit some candles instead. *R-9*. Shortly after arriving at the cottage, the group grew immersed in the game. *Id.*

Some time that night, a resident of the neighborhood noticed lights on inside the cottage and called the police to report the suspicious activity. *R-2*. Deputy Barnard Pfieff, from the Erie County Sheriff's Office, responded to the call. *Id*. When he arrived at the cottage, Deputy Pfieff noticed the flickering candle light inside the property, and stepping closer, looked through one of the windows. *Id.* He reported seeing several people, masked or hooded, crowded around a table. *Id.* Deputy Pfieff returned to his patrol vehicle to contact his supervisor, and after reporting his observations, his supervisor instructed him to "Go find out what's going on." *Id*.

Deputy Pfieff again approached the cottage, knocked on the door, and identified himself as a member of the Sheriff's Department. *Id*. He peered through a nearby window and watched as the figures scattered and hid throughout the cottage. *Id.* Deputy Pfieff reported the activity to his supervisor, called for backup, and entered the property through the unlocked door. *Id*. He once again informed the individuals that he was from the Sheriff's Department, but heard no response. *Id.* Reaching for a light switch, Deputy Pfieff attempted to turn the lights on, but to no avail. *Id.* He then un-holstered his sidearm and ordered the group to come out from hiding. *Id.*

Six adults emerged, including Ms. Secord. *Id*. All were disguised in some way or another. *Id*. Deputy Pfieff ordered all of them to the floor, with their hands above their heads. *Id.* He searched each of them and, except for Ms. Secord, everyone had a New York State driver's license or other identification. *Id.* Upon questioning, Mr. Fitzgibbon claimed he was the nephew of the cottage's owner and had permission to use the cottage, since he was taking care of it while for the season. *R-3.* He showed Deputy Pfieff where he found the key to the property on the patio. *Id.* He also indicated that Fitzgibbon's family pictures were located within the cottage. *R-9.* When Deputy Pfieff asked for contact information for Fitzgibbon's uncle, Fitzgibbon could not produce any. *R-3*. Later, Deputy Pfieff discovered the uncle's number and attempted to make contact, however, there was no answer when he called. *R-9.*

Ms. Secord and her friends were arrested and subsequently convicted of criminal trespass. *R-3*. Ms. Secord was also convicted of felony possession of a deadly weapon, since arresting officers found brass knuckles on her person. *Id*. She was sentenced to a year in prison for the two convictions, which she served concurrently. *Id*. Upon the conclusion of her criminal sentence, Ms. Secord was immediately transferred into the custody of the Department of Homeland Security (DHS) to initiate deportation proceedings, in accordance with 8 U.S.C. §

1226. *R-4*. Six months later, Ms. Secord filed a habeas petition in district court. The court released her from ICE detention and dismissed her convictions. *Id*. The City of Angola and the U.S. Department of Immigration and Custom Enforcement (ICE) appealed and the Second Circuit subsequently reversed both district court decisions and remanded Ms. Secord back into ICE detention, where she currently remains awaiting deportation proceedings. *R-4*.

SUMMARY OF THE ARGUMENT

For over two centuries, the Supreme Court has articulated and applied the same standard for probable cause. Despite some alteration in the language of the standard, over time, it has seen little, if any, substantive changes. Lower courts, including the Second Circuit Court of Appeals, have adhered to this Court's precedent.

In its analysis, the Second Circuit embraced this Court's understanding that probable cause is a flexible, common-sense standard, requiring a totality-of-the-circumstances approach, and echoed this Court's distaste for rigid rules, bright-lines tests, and mechanistic inquiries in probable cause determinations. Through this standard, the Second Circuit ruled that probable cause exists when the facts of a case lead a reasonable person to believe that a crime, or evidence of a crime, exists. Under this criteria, the Second Circuit determined that probable cause existed at the time of Ms. Secord's arrest.

However, even if the Second Circuit applied the wrong standard in its probable cause determination, under the correct standard, Ms. Secord's arrest would still be justified. Although this Court has firmly held to the "totality-of-the-circumstances" approach, it has also held that probable cause determinations based on a mistake of fact, must be reasonable to support a finding of probable cause. A reasonable officer in Deputy Pfieff's position would have concluded that Ms. Second was committing a crime. As such, even if Deputy Pfieff was

mistaken about certain facts during the arrest, any mistake was reasonable and would support a finding of probable cause.

Prior precedent from the Second Circuit required ICE officials to hold a bail hearing, pending the disposition of an illegal immigrant's case, within six-months of arrest. However, in analyzing the present action, the Second Circuit overruled its own precedent, requiring a "reasonableness test" to determine the time for bail hearings. Because each criminal alien's removal proceeding raises a unique set of facts and issues, it is unwise to set a bright-line standard to determine when detention becomes unreasonable.

The reasonable case-by-case approach adheres more closely to legal precedent than the "bright-line" approach. See *Zadvydas,* 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003). After finding that civil detention of criminal aliens was constitutional in *Zadvydas*, this Court in *Demore* "foreclosed the ability of lower courts to adopt a firm six-month rule" to determine when detention became unreasonable. *Reid*, 819 F.3d at 491–92. (citing *Demore*, 538 U.S. at 530-31 & n.15) Together, *Zadvydas* and *Demore* preclude the adoption of a six-month presumption of unreasonableness. *Id.* 497.

Reflecting this understanding of the law, a majority of circuit courts have adopted the reasonable case-by-case analysis over the bright-line test. Under the reasonable case-by-case analysis, the Petitioner's habeas petition should be denied and she should remain in ICE detention until the conclusion of removal proceedings.

Moreover, adopting a bright-line standard would go against the intent of Congress when they passed Section 1226(c). With the enactment of Section 1226(c), Congress sought to end the high recidivism rate of criminal aliens and protect public safety. S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). Under a bright-line time limitation, criminal aliens would be eligible for

automatic release after six-months leading to an increased threat in public safety. Accordingly, the Respondents respectfully ask the Court to affirm the lower court and adopt the reasonable case-by-case approach to determine the reasonable detention for criminal aliens.

ARGUMENT

I. PROBABLE CAUSE EXISTED AT THE TIME OF MS. SECORD'S ARREST

In determining whether probable cause existed at the time of Ms. Secord's arrest, the Second Circuit embraced this Court's holding in *Florida v. Harris* (2013). Using the *Harris* standard, the Second Circuit concluded that probable cause did exist at the time of Ms. Secord's arrest. Petitioner seeks to challenge the standard used by the Second Circuit. However, the legal precedent articulated by the *Harris* Court, and adopted in the Second Circuit's opinion, parallels the long-standing criterion for determining the existence of probable cause. Indeed, for over two centuries, the Supreme Court's standard for determining probable cause has seen little, if any, changes. Thus, the Second Circuit not only relied on the correct standard, but correctly determined that probable cause did exist at the time of Ms. Secord's arrest. Yet, even if this Court were to determine that the Second Circuit incorrectly applied the wrong standard, the correct standard would produce the same result; Deputy Pfieff's determination of probable cause sustained Ms. Secord's arrest. For these reasons, Respondent asks this Court to affirm the lower court's judgment.

A. The Supreme Court Has Consistently and Firmly Held to the Same Standard for Determining Probable Cause for Over Two Centuries

The Constitution declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … but upon probable cause …." U.S. Const. amend. IV. Over two centuries ago, this Court articulated a precise definition for the term "probable cause." Chief Justice Marshall wrote, "Probable cause means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion." *Locke v. U.S.*, 11 U.S. 339, 344 (1813). In the years to follow, this Court would sustain that definition. See e.g., *The Palmyra*, 25 U.S. 1, 5 (1827); *The*

Thompson, 70 U.S. 155, 162 (1865); *Carroll v. U.S.*, 267 U.S. 132, 161 (1925); *Illinois v. Gates*, 462 U.S. 213, 234 (1983); & *Heien v. North Carolina*, 135 S.Ct. 530, 537 (2014).

By the late 1800's, lower courts had diverted from the language of the original definition. In *Stacey v. Emery*, the Court noted two definitions arising from separate state supreme courts. "Mr. Justice Washington … defines probable cause in these words: 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the part is guilty of the offense with which he is charged.'" *Stacey v. Emery*, 97 U.S. 642, 645 (1878) (quoting *Munn v. Dupont*, 3 Wash. 37 (1891)). "Chief Justice Shaw defines it in similar language: 'Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty.'" *Id*. (quoting *Ulmer v. Leland*, 1 Me. 135 (1820). Despite the states' diversion from Chief Justice Marshall's original language, this Court preserved the meaning of the definition articulated in *Locke* as an accurate standard for "probable cause."

Then, nearly 50 years after *Stacey*, the Supreme Court recognized a definition penned by the Supreme Court of Pennsylvania in *McCarthy v. De Armit*. After reviewing a variety of state supreme court definitions for probable cause, the Pennsylvania court explained, "The substance of all the definitions is a reasonable ground for belief of guilt." *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881). This Court repeated and adopted this collective standard in its opinion in *Carroll v. U.S.* (1925) and continued its use in *Brinegar v. U.S.* (1949) and *Maryland v. Pringle* (2003).

Since then, the Court has "reiterated that the probable-cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 124 S.Ct. 795, 799-800 (2003) (quoting *Illinois v. Gates*, 462, U.S. 213 (1983) & *Brinegar v. U.S.*,

338 U.S. 160 (1949) (See also *Ornelas v. U.S.*, 517 U.S. 690 (1996) & *U.S. v. Sokolow*, 490 U.S. 1 (1989) (internal quotations omitted)). Indeed, the Court has found the standard "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances" (*Pringle*, 124 S.Ct. at 800 (citing *Gates*, 462 U.S. at 232)). In more modern legal precedent, the Court continues to "[reject] rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). Historically, the definition of probable cause remains relatively the same as when it was first penned by Chief Justice Marshall. Modern courts, like the Second Circuit, continue to apply this same standard.

B. The Second Circuit Applied the Correct Standard to Determine Probable Cause

Probable cause, as explained by this Court, is a "flexible, common-sense standard." *Harris*, 133 S.Ct. at 1053 (quoting *Gates*, 462 U.S. at 213). "All we have required, is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Id.* at 1055 (quoting *Gates*, 462 U.S. at 238). In the present case, the Second Circuit relied on the *Harris* Court's articulation of the probable cause standard and determined Deputy Pfieff had probable cause to arrest Ms. Secord. This Court's legal precedent indicates that the Court of Appeals not only relied on the correct standard, but also came to the correct conclusion.

In *Florida v. Harris*, this Court held that an officer had probable cause to search a suspect's truck after a well-trained drug-detection dog alerted to the presence of drugs within the vehicle. *Id.* at 1059. In *Harris*, a K-9 Officer in Liberty County, Florida was on a routine patrol with Aldo, a German shepherd trained to detect certain narcotics (methamphetamine, marijuana, cocaine, heroin, and ecstasy). *Id.* at 1053. During his patrol, the officer pulled over a vehicle with an expired license plate. *Id*. When he approached the driver's-side door, the officer noted the

driver was "visibly nervous, unable to sit still, shaking, and breathing rapidly." *Id*. (internal quotations omitted). The officer requested permission to search the vehicle, but the defendant denied the request. *Id.* Thereafter, the officer retrieved Aldo from the patrol car and walked him around the defendant's vehicle for a "free air sniff." *Id.* at 1053–54. Aldo alerted on the driver's-side door handle, signaling that he smelled drugs there. *Id.* at 1054. The defendant was taken into custody and later charged with possessing illegal, controlled substances. *Id.*

While out on bail, the defendant had another run-in with the same K-9 Officer, when the officer pulled the defendant over for a broken brake light. *Id.* Aldo again sniffed the defendant's vehicle, and again alerted at the driver's-side door handle. *Id.* The officer conducted a search of the vehicle, but on this occasion discovered nothing of interest. *Id*.

During criminal proceedings, the defendant moved to suppress the evidence found in his vehicle, arguing that "Aldo's alert had not given [the officer] probable cause for a search." *Id.* The defendant chose not to contest the quality of Aldo's training, but instead, focused on Aldo's expired certification and his performance in the field, particularly the two stops of the defendant's vehicle. *Id.* Defendant's theory claimed Aldo's performance in the field, and his expired certification, was sufficient evidence to question the reliability of Aldo's alert that produced the probable cause necessary to permit a search of the defendant's vehicle. *Id*. The trial court denied the defendant's motion to suppress, and the case's vertical trajectory through appeal placed it before the Florida Supreme Court, and finally before this Court. *Id.* at 1054–55.

This Court held the officer had sufficient evidence to make a probable cause finding, and thus the search of the defendant's vehicle was proper. *Id.* at 1059. According to the Court's analysis, "A police officer has probable cause to conduct a search when the facts available to [him] would warrant a [person] of reasonable caution in the belief that contraband or evidence of

a crime is present." *Id.* at 1055 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (alterations in original) (internal quotations omitted)). The Court criticized the Florida Supreme Court's decision, which held that "unless the state introduces comprehensive documentation of [Aldo's] prior 'hits' and 'misses' in the field, an alert cannot establish probable cause. *Id.* According to the Florida court, "No matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause." *Id.* This Court characterized this evaluation as the "antithesis of a totality-of-the-circumstances analysis." It censured the Florida Supreme Court's determination for creating a "strict evidentiary checklist, whose every item the State must tick off" before establishing the existence of probable cause. *Id*.

Justice Kagan, writing for the unanimous Court, supported the use of a "totality-of-the-circumstances" approach in determining probable cause, and noted that the Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id.* at 1055. Indeed, Justice Kagan clarified, "All we have required is the kind of 'fair probability' on which 'reasonable prudent [people,] not legal technicians, act.'" *Id.* (quoting *Gates*, 462 U.S. at 238).

The facts of the present case, admittedly, are entirely different from the unique facts recorded in *Harris*. A drug-detection dog was never involved in Ms. Secord's arrest. Yet, any discrepancy between the facts of the case before the Court, and the facts in *Harris*, are irrelevant. What is relevant is the legal precedent the appeals court relied on in determining the existence of probable cause at the time of Ms. Secord's arrest.

The *Harris* Court ruled, "A police officer has probable cause to conduct a search when the facts available to [him] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present." *Id*. In its discussion, the *Harris* Court relied

significantly on the opinion issued in *Illinois v. Gates*. In *Gates*, police followed an anonymous tip indicating that a husband and wife would be traveling home from Florida in a car loaded with drugs, and arrested the couple when they arrived at their Illinois home. *Gates*, 462 U.S. 213. Some $100,000 worth of drugs were found in the couple's trunk. *Id.* On appeal, both the Illinois Appellate Court and the Illinois Supreme Court affirmed the trial court's judgment to deny the couple's motion to suppress. *Id.* Each court relied on a "two pronged test" established by *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *U.S.*, 393 U.S. 410 (1969), requiring the State to demonstrate 1) the informant's "basis of knowledge," and 2) the "veracity" or the "reliability" of the informant's report. *Id*.

On final appeal, this Court reversed the rulings of the state courts. The *Gates* Court abandoned the "two-pronged test" articulated in *Aguilar* and *Spinelli*, adopting a "totality of the circumstances" approach in its place. *Id.* at 214. The intended effect was to create a "flexible, easily applied standard" that would better accommodate public and private interests under the Fourth Amendment. *Id.* The *Gates* opinion itself, traced the definitions and varied standards for probable cause as far back as *Locke v. U.S.*, asserting that a "totality of the circumstances" approach conformed more closely to the ideals expressed in the earliest days of the Supreme Court, and echoed through generations of Court opinions on the matter. *Id.* at 234. Legal precedent established by *Gates* provided the foundation on which the *Harris* court built its interpretation and analysis of probable cause determination.

Thus, while the facts of any given case will vary regarding the existence of probable cause, and certainly the facts between the case before the Court and the facts contained in *Harris* are an excellent demonstration, divergence of the factual basis in probable cause determinations here, cannot support the assertion that the Second Circuit applied the wrong standard. The line of

legal precedent, as explained above, creates a genealogy of instruction by which courts rely to determine the existence of probable cause. The *Harris* opinion is squarely within the judicial bloodline that established the standard for probable cause conceived in *Locke*, and passed-down from generations to the modern day. The Second Circuit was correct to adopt that standard and conclude Deputy Pfieff had probable cause to arrest Ms. Secord.

C. Even if the Second Circuit Applied the Wrong Standard, the Correct Standard Would Support a Finding of Probable Cause

The Second Circuit's probable cause determination relied on a "practical and commonsensical standard" that considered "the totality of the circumstances." *R-7*. It then listed multiple facts that, in its opinion, supported a finding of probable cause. The majority's relatively brief analysis on the issue of probable cause, however, came under sharp criticism from the dissent.

In her dissenting opinion, Justice Atkinson enumerated facts from the case absent in the majority's opinion. *R-8,9*. These facts, she argued, proved that "no reasonable officer could find he had probable cause to arrest Secord," and that Secord was simply among "a group of friends playing a board game in a spooky, out-of-the-way location as a lark." *R-9,10*. In support of her determination, Justice Atkinson relied on a line of notable probable cause cases, including *Hunter v. Bryant*, 502 U.S. 224 (1991), and *Maryland v. Pringle*, 540 U.S. 366 (2003). "The touchstone of any probable cause analysis," wrote Justice Atkinson, "is whether there exists 'a reasonable ground for belief of guilt,'" and that guilt "must be particularized with respect to the person to be searched or seized." *Id.* (quoting *Pringle*, 504 U.S. at 371). Notably, though, both the majority's and the dissent's opinions accept and employ a "totality-of-the-circumstances" approach in determining the existence of probable cause. The dispute, then, is how the parties apply the law to the given facts.

The majority opinion relied heavily on the suspicious activity Deputy Pfieff observed during his initial contact at the cottage. Of note, the majority discussed how Fitzgibbon and his friends scattered and hid when Deputy Pfieff first knocked on the door, how Fitzgibbon, although claiming possession of the property, had no knowledge of how to contact the owner, and how Fitzgibbon admitted not having a key to the property, but that he found one hidden on the patio. *R-7*. All these circumstances, the majority indicated, made it "impossible" to determine as a matter of law that Deputy Pfieff lacked probable cause to arrest Secord and the others. *Id.*

In contrast, Justice Atkinson's dissent highlighted other facts that she asserted could not give rise to probable cause. These included the terror the group experienced when Deputy Pfieff first knocked on the cottage door, causing them to hide from the deputy, the pictures of Fitzgibbon's family throughout the cottage, and Fitzgibbon's attempt to show the deputy where exactly the cottage key was located. *R-9.*

These seemingly contradictory facts suggest that while each party analyzed the events under an "all-things-considered" approach, the conclusions each party reached differed. The majority supported Deputy Pfieff's probable cause determination, but Justice Atkinson asserted the deputy was mistaken about critical facts that would undercut such a finding. Therefore, the standard necessary to determine probable cause in this case, is whether Deputy Pfieff made a reasonable or unreasonable mistake of fact before Ms. Secord's arrest.

In *Heien v. North Carolina*, this Court held that an officer's reasonable mistake of law could support a finding of probable cause. 135 S.Ct. 530, 540 (2014). The officer in *Heien* followed the defendant's car after the officer observing the driver of the vehicle looking "very stiff and nervous." *Id.* at 534. When the officer noticed one of the defendant's vehicle's brake lights was broken, he pulled the vehicle over. *Id.* The officer explained to the defendant that as

long as his license and registration "checked out," he would receive only a warning ticket for the broken brake light. *Id.* During his conversation with the defendant, the officer noticed odd behavior and asked the defendant if he would consent to a search of the car. *Id*. The defendant agreed and during the search, the officer found a bag of cocaine. *Id.*

The Court's analysis recognized that "searches and seizures based on mistakes of fact can be reasonable." *Id.* at 536. "But reasonable men," the Court continued, "make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion." *Id.* When the officer in *Heien* stopped the defendant for one faulty brake light, the Court noted, he understood the law required that both brake lights be operative. *Id*. at 540. This understanding formed the basis (albeit a faulty one) of the officer's probable cause determination *Id.* In actuality, the law in North Carolina did not require that both brake lights be operative. *Id.* Yet, due to the statute's ambiguous language, the Court found that it was "objectively reasonable for [the officer] to think that [the defendant's] faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop." *Id.*

The present case fits squarely within the scope of the Court's ruling in *Heien*. Although the officer in *Heien* formed a probable cause determination based on a mistake of law, and Deputy Pfieff's determination was based on a mistake of fact, this Court has held that "reasonable mistakes of law, like those of fact, could justify a certificate of probable cause." *Id*. at 532 (citing *U.S. v. Riddle*, 5 Cranch 311(1809)). It also noted, "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials …." *Id.* at 536 (quoting *Brinegar*, 338 U.S. at 160). Here, Deputy Pfieff was presented with evidence that might indicate Fitzgibbon's story "checked out." During his conversation with

Fitzgibbon, Deputy Pfieff was told that pictures of Fitzgibbon's family were located in various places within the cottage. *R*-9. However, the record does not suggest whether Deputy Pfieff investigated this claim or viewed any such pictures. Regardless, this claim, when weighed against the mountain of evidence indicating Ms. Secord and the group were trespassing on the property, is insufficient to claim Deputy Pfieff made a probable cause determination based on an unreasonable mistake of fact.

The facts listed by the majority illustrate how a reasonable officer in Deputy Pfieff's situation would reach the same conclusion regarding the existence of probable cause. When Deputy Pfieff first arrived at the cottage, he observed flickering candle light inside the darkened property. *R-2*. Peering inside, he saw several hooded or masked individuals, gathered around a table in the gloom of the candlelight. *Id*. Although the dissent claims that Deputy Pfieff should have known these individuals were playing a board game at the kitchen table of the cottage and were dressed as witches and ghouls, this claim is entirely misguided. *R-10*. It would have been a visual impossibility for Deputy Pfieff, under the lighting conditions of the property at the time, to have ascertained such details while peering through the cottage window. Candlelight was the only source of light within the property. *R-2*. Hundreds of candles would have been necessary to properly illuminate and reveal the details Justice Atkinson believes were readily observable.

Justice Atkinson's account of the facts also points to Fitzgibbon's admission that he could not figure out how to turn on the electricity to the cottage. *R-9*. This would explain the quality of lighting, or lack thereof, in the cottage at the time. It would not explain, though, how Fitzgibbon could claim he was caring for the cottage, and yet not know how to power up the property. It follows, then, that even though Fitzgibbon's uncle owned the cottage, it would have been reasonable for Deputy Pfieff to suspect that Fitzgibbon and his friends were not welcome at

the cottage. Notable among the facts from that night is Fitzgibbon's failure to recall his uncle's number. *R-3,9*. Indeed, the majority states that Fitzgibbon simply "had no contact information for the uncle." *R-3*. Who, then, was Fitzgibbon supposed to call while taking care of the cottage if he needed assistance or encountered a serious problem? No facts, at the time of the arrest, could adequately verify the claims Fitzgibbon made to Deputy Pfieff regarding the ownership of the cottage and Fitzgibbon's alleged permission to be on the property. Certainly, a reasonable officer in Deputy Pfieff's position would have concluded that Fitzgibbon and his friends, including Ms. Secord, were trespassing on the property.

Thus, even if Deputy Pfieff was mistaken as to the fact that the property indeed belonged to Fitzgibbon's uncle, and the uncle had authorized Fitzgibbon to be on the property, Deputy Pfieff's mistake was reasonable. It should be noted as well, that even if Fitzgibbon had permission to be on the property, his uncle left explicit instructions to "not have any parties." *R-9*. Although an episode of Dungeons and Dragons among friends is relatively unexciting and uneventful when compared with collegiate keg parties occurring across the nation, a game party is a party nonetheless. Fitzgibbon's uncle instructed his nephew to avoid any parties for insurance liability reasons. *Id.* Even a simple game among friends could result in an accident. Fitzgibbon was aware of his uncle's request and went beyond the scope of his permission to be on the property the moment his hooded and cloaked friends walked through the door.

For these reasons, Respondents request this Court find Deputy Pfieff's mistake of fact was reasonable under the circumstances in the night in question, and hold that the facts presented evidence a finding of probable cause.

II. THE CASE-BY-CASE REASONABLENESS TEST ENSURES PUBLIC SAFTEY AND PROTECTS THE DUE PROCESS RIGHTS OF CRIMINAL ALIENS

Each criminal alien's removal proceeding raises a unique set of facts and issues, therefore adopting a bright-line time limitation to determine the reasonableness of the detention would be unwise. See *Reid,* 819 F.3d at 496. Accordingly, the Respondent's ask the Court to adopt the lower court's holding that the reasonable case-by-case approach to determine a time for bail hearings protects the Due Process rights of undocumented aliens for the following reasons.

First, the reasonable case-by-case analysis adheres more closely to this Court's legal precedent than the "bright-line" approach. *Zadvydas,* 533 U.S. at 678; *Demore*, 538 U.S. at 510. First, the *Zadvydas* Court found that criminal alien civil detention was constitutional, 533 U.S. at 702, then the *Demore* Court "foreclosed the ability of lower courts to adopt a firm six-month rule by. . .declin[ing] to state any specific time limit in a case involving a detainee who had already been held for approximately six-months." *Reid*, 819 F.3d at 491–92. (citing *Demore*, 538 U.S. at 530-31 & n.15) In other words, taken together, *Zadvydas* and *Demore* preclude the adoption of a six-month presumption of unreasonableness. *Id.* at 497.

Moreover, a majority of circuit courts have adopted the reasonable case-by-case analysis to determine when detention becomes unreasonable. Under this approach, the Petitioner's habeas petition must be denied and she should remain in detention until removal proceedings conclude.

Lastly, adopting a bright-line standard would be inconsistent with the legislative intent of Section 1226(c) of the Immigration and Nationality Act (or the "Act"). In passing the statute, Congress sought to hedge the high recidivism rate of criminal aliens and protect public safety. S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). Criminal aliens, under a bright-line time limitation, would be eligible for automatic release after six-months. This would result in an increased threat to public safety and a strain on Department of Homeland Security resources. Accordingly, the

Respondent(s) respectfully ask the Court to affirm the lower court and adopt the reasonable case-by-case approach to determine the reasonable detention for criminal aliens.

A. The Reasonable Case-By-Case Approach Adheres to Existing Legal Precedent

Because it is more in line with this Court's precedent, a majority of circuits have adopted the reasonable case-by-case approach over the bright-line six-month test to determine when criminal alien detention becomes unreasonable. Moreover, when applied to the instant case, the reasonable case-by-case approach would require the denial of the Petitioner's habeas petition and her return to ICE detention pending removal proceedings.

1. The reasonable case-by-case analysis adheres more closely to legal precedent than the "bright-line" approach

In two seminal cases, this Court has evaluated the constitutionality of prolonged immigration detention. *Zadvydas*, 533 U.S. 678 (2001); *Demore*, 538 U.S. 510 (2003). In *Zadvydas*, two criminal aliens awaiting removal challenged the Government's ability to indefinitely detain a removable alien under § 1231 of the Act. 8 U.S.C. § 1231(a)(6). The aliens home countries refused them re-entry after they received a removal order resulting in indefinite detention. *Id.* at 684. The *Zadvydas* Court recognized that the Government had a legitimate interest in keeping a detainee in custody to ensure they were available to be removed. 533 U.S. at 683. Because indefinite detention, at some point, may present Due Process concerns, the *Zadvydas* Court ruled that criminal aliens awaiting removal could seek habeas relief after their detention exceeded the "period reasonably necessary to secure removal." *Id.* at 682. Because the Court recognized criminal aliens are afforded Fifth Amendment Due Process rights, it was established that six-months was the "presumptively reasonable" period of detention to warrant judicial review for criminal alien's facing indefinite detention. *Id*. at 701.

Two years later, in *Demore v. Kim*, the Court evaluated the constitutionality of Section

1226(c) of the Act, which requires the mandatory detention of certain criminal aliens and does not address the possibility of bond hearings. The alien in *Denmore* argued that the mandatory detention requirement violated Due Process because it allowed INS to detain an alien indefinitely without finding that the alien was a danger to the community or a flight risk pending a removal hearing. *Id.* at 514. The Court held that detention under Section 1226(c) was not unconstitutional for the "limited period of . . . removal proceedings." *Id.* at 531. In his concurrence, Justice Kennedy agreed that due process had been satisfied, but stated that constitutional concerns might arise if an alien's detention became "unreasonable or unjustified." *Id.* at 532 (*Kennedy, J., concurring*). Significantly, the *Demore* Court took no issue with detention under Section 1226(c) that had already lasted more than six-months; and ultimately, the Court declined to set a bright-line rule defining what constituted unreasonable detention. *Id.* at 531.

When read together, *Zadvydas* and *Demore "*foreclose the ability of the Court to adopt a six-month presumption of unreasonableness." *Reid v. Donelan,* 819 F.3d 486, 497 (1st Cir. 2016). Although, the *Zadvydas* Court established six-months as the "presumptively reasonable" period of post-removal detention, this bright-line rule was fact specific to detainees who have already received removal orders and who were facing detention with no foreseeable end. 533 U.S. at 720. Acknowledging not every alien facing removal would be released after six-months, the Court held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. If there was "no significant likelihood of removal in the reasonably foreseeable future," the government would then be required to "respond with evidence sufficient to rebut that showing." Reid, 819 F.3d at 497 (citing *Zadvydas*, 533 U.S. at 720). If the government could demonstrate a reasonably foreseeable termination point, the detention would continue. *Id*. In sum, "the six-

month rule was predicated on there being no foreseeable hope of removal," as the confinement at issue in *Zadvydas* was "indefinite." *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1214 (11th Cir. 2016) (analyzing the Court's primary holding in *Zadvydas*).

Furthermore, the *Demore* Court, when faced with a similar question as in the instant case, "declined to state any specific time limit in a case involving a detainee who had already been held for approximately six-months," and engaged in a factual inquiry to determine reasonable detention. *Id.* (See *Denmore,* 538 U.S. at 532). In doing so, the *Demore* Court "foreclosed" the argument that a court "should adopt a firm six-month rule." *Reid*, 819 F.3d at 497. In his concurrence, Justice Kennedy, the deciding vote for the majority, engaged in a factual inquiry to determine if detention was unreasonable. *Denmore,* 538 U.S. at 532-33. Specifically, the factors he evaluated included: 1) the reason for "delay. . .in deportation proceedings," and whether 2) "the detention [was to] facilitate deportation, or to protect against risk of flight or dangerousness." *Id*. This provides additional support for the adoption of the reasonable case-by-case approach that utilizes a multi-factor test.

Furthermore, it should be noted that historically, "[r]easonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011). Adopting a bright-line approach would be inconsistent with the reasonableness standard utilized by this Court in *Demore*. 538 U.S. at 532-33.

2. **A majority of circuits have adopted the case-by-case standard**

In the wake of *Zadvydas* and *Demore*, six circuit courts of appeals have examined at what point does Section 1226(c) criminal alien detention, without a bond heading, become unreasonable. In total four courts, the First, Third, Sixth, and Eleventh Circuits, have adopted the

case-by-case approach to determine unreasonableness. Whereas, two courts, the Second and Ninth Circuits have defined this limited period as six-months. However, in the instant case, the Second Circuit abandoned the six-month bright-line approach leaving the Ninth Circuit as the sole purveyor of this standard.

In defining a reasonable time limit for pre-removal detention, "courts [should] examine the facts of each case to determine whether there has been unreasonable delay in concluding removal proceedings." *Hoang Minh Ly v. Hansen,* 351 F.3d 263, 271 (2003). Under this approach, "detainee[s] must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the 'reasonableness' threshold, thus entitling him to a bail hearing." *Reid,* 819 F.3d at 495.

Utilizing the multi-factor test to determine unreasonableness, a recent case in the Eleventh Circuit articulated several factors that ought to be considered after a detainee has filed a habeas petition with the district court. *Sopo*, 825 F.3d at 1213. Factors suggested for consideration included: (1) "the amount of time that the criminal alien has been in detention without a bond hearing" and (2) "why the removal proceedings have become protracted." *Id*. at 1213. Other courts have looked at additional factors including (3) "whether it will be possible to remove the criminal alien after there is a final order of removal; (4) whether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable; and (5) whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention." *Chavez-Alvarez v. Warden York Cty. Prison,* 783 F.3d 469, 478 (3d Cir. 2015); *Ly*, 351 F.3d at 271. Of course, a court's reasonableness analysis may extend beyond the factors listed above as each case raises a unique set of facts and issues.

3. **The Petitioner's Habeas Petition Should Be Denied.**

Applying the factors that have been considered by lower courts to the instant case, the Court should conclude that the Petitioner's detention has not been unreasonable. First, the Petitioner has only been detained by ICE for a total of six-months. *R-4*. Accordingly, her civil immigration detention has not exceeded the time she spent in prison for her criminal offenses as her concurrent sentence lasted only one year. *Id*. Further, it is extremely difficult to determine in the instant case "whether it will be possible to remove the [Petitioner] after there is a final order of removal" due to her prior transient history. *R-8*. The Petitioner, Ms. Secord, is an individual who, unfortunately, at times has been homeless and has drifted from place-to-place. *Id*. Despite a lack of financial resources, she has managed to hitchhike and illegally enter the country by walking across Lake Erie. *R-2*. From her past behavior, it's reasonable to assume that the Petitioner is a flight risk who has shown she is capable of going to great lengths to break the law and flee out-of-state to avoid deportation. Consequently, once she is released, it may be extremely difficult for ICE agents to locate her to enforce a final removal order.

In summary, *Zadvydas* and *Demore* preclude the adoption of a six-month presumption of unreasonableness. This has been recognized by a majority of circuits that have decided similar questions as presented in the instant case. Under the reasonable case-by-case test, the Petitioner should have her habeas petition denied and should return to ICE detention.

B. Adopting a Six Month Bright-Line Approach Would Be Inconsistent with the Intent of Section 1226(C) and Would Threaten Public Safety

In an effort to ensure public safety, Congress sought to hedge the release of criminal aliens with the passage of Section 1226(C) of the Act. S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). Adopting a six-month bright-line rule would undermine the purpose of the statute and

provide criminal aliens the opportunity for automatic release every six-months, presenting a legitimate threat to public safety.

1. Congress passed Section 1226(C) to protect public safety by preventing the release of criminal aliens.

Congress passed Section 1226(C) in response to a "wholesale failure of [ICE] to deal with increasing criminal aliens." *Demore*, 538 U.S. at 518. Congress noted that the release of criminal aliens had given rise to a "serious and growing threat to public safety." S. Rep. at 1. Specifically, Congress was alarmed with the high recidivism rate of criminal aliens who had been released from ICE detention awaiting deportation proceedings. *Id*. Reflecting these growing concerns, Section 1226(C) allows ICE to detain any alien who "(B) is deportable by reason of having committed any offense covered in [the] section…" or who "(C) is [eligible for] deportation under [the] section. . .on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year. . . ." 8 U.S.C § 1226.

Adopting the six-month bright-line rule would result in consequences Congress sought to prevent with the enactment of Section 1226(c). The six-month bright-line approach allows criminal aliens the opportunity for automatic release into society after six-months of detention. As such, criminal aliens are likely to reoffend and flee the government's efforts to enforce removal orders after release.

2. Release of criminal aliens remains a serious threat to public safety.

Refusing to adopt a bright-line rule, the *Demore* Court understood that criminal aliens continued to reoffend and flee at alarming rates. One study cited in the Court's decision stated that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before . . . deportation. . ." 538 U.S. at 518.

Evidence collected since 2003, the year *Demore* was decided, demonstrates that criminal

alien recidivism and flight risk concerns continue today. The Department of Justice's Executive Office for Immigration Review (EOIR) calculated that 9,343 out of 28,061, or 33%, of removal orders in 2013 were entered *in absentia*. 2013 EOIR Statistic Yearbook at 3. Allowing criminal aliens the potential of automatic release every six-months could lead to an increase in removal orders being entered *in absentia*, forcing ICE agents to have to re-apprehend the alien to enforce the final removal order, resulting in an unnecessary strain on limited agency resources.

Furthermore, although the exact statistics are not publicly released, one recent study conducted by the Boston Globe found that the recidivism rate was approximately 30% among 323 criminal aliens released from immigration custody in the New England area[1]. Additionally, information provided by ICE to Senator Grassley, provided important data about criminal aliens released from ICE custody. For example, 121 aliens released from ICE custody between 2010 and 2014 were charged with 135 homicides in the U.S. Also, of the 36,007 criminal aliens released form ICE custody in 2013, 1,000 were re-convicted of additional crimes shortly after their release. These crimes included assault with a deadly weapon, terroristic threats, lewd acts with a child under 14, rape, child cruelty, and conspiracy to harbor aliens within the U.S.[2] In addition to being a flight risk, criminal aliens released by ICE clearly continue to pose a serious threat to public safety and national security.

3. Petitioner is a flight risk and a threat to public safety.

Under the bright-line six-month approach, the Petitioner would presumptively be released, allowing her to flee and create a threat to public safety. Having been convicted of

[1] Maria Sacchetti, Criminal Aliens Reoffend at Higher Rates than ICE Has Suggested, Boston Globe, June 4, 2016.
[2] Letter from Senator Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, to the Hon. James B. Comey, Jr., Director, The Federal Bureau of Investigation (Mar. 15, 2016).

felony deadly weapon procession and criminal trespass, Ms. Secord's criminal history demonstrations she is not beyond engaging in illegal activities and posing a threat to public safety. *R-2*. Moreover, she has also proven that, despite a lack of financial resources, she is a flight risk who is capable of going to great lengths to break the law and flee out-of-state to avoid deportation. *Id*. The Petitioner is the exact type of criminal alien Congress intended to protect the public from with the passage of 1226(C).

In sum, Congress passed 1226(C) with the intent to protect public safety by preventing the release criminal aliens who often reoffend, committing violate crimes, and recidivate. *Id*. As reflected in the criminal alien statistics provided by ICE, the public safety threat posed by criminal aliens remains a legitimate concern today. Adopting a six-month bright-line rule in the instant case would potentially allow for the automatic release of criminal aliens that are a threat to public safety.

CONCLUSION

For the foregoing reasons, the Respondents respectfully ask the Court to affirm.