Brief on the Merits

No. 1-2017

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term 2017

LAURA SECORD,

Petitioner,

v.

WINFIELD SCOTT, in his Official Capacity as Director, Department of Immigration and Customs Enforcement, and CITY OF ANGOLA,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 8

QUESTIONS PRESENTED

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

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

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The order of the United States District Court for the Western District of New York is unreported and not contained in the Record on Appeal. The order of the United States Court of Appeals for the Second Circuit is reported as *Secord v. Scott*, 123 F. 4th 1 (2d Cir. 2016), and is contained in the Record on Appeal, hereinafter (R. 1-10).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Due Process Clause of the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

STATEMENT OF THE CASE AND FACTS

Petitioner is a Canadian citizen who illegally crossed Lake Erie and entered the United States some time during the winter of 2013. (R. 2). On December 21, 2015, Petitioner and five other individuals were arrested and subsequently charged for criminal trespass. (R. 3). Petitioner was also charged with possession of a deadly weapon after police conducted a search incident to legal arrest. *Id.* Petitioner was further detained due to her illegal immigration status. *Id.* On the evening of December 21, the local police department was dispatched to look into a suspicious activity report from a concerned neighbor. (R. 2). The neighbor reported seeing lights in one of the summer cottages on Lake Erie, which typically closed during the winter months. *Id.* Deputy Pfieff of the Erie County Sheriff's department reported to the location and identified candlelight

inside the property along with hooded and masked individuals gathered around a table. *Id.* Following this observation, he radioed his on-call supervisor to report the activity, and the supervisor told Deputy Pfieff to "[g]o find out what's going on." *Id.* After this exchange with his supervisor, Deputy Pfieff again approached the cottage, knocked on the front door, and identified himself as an officer. *Id.* The hooded and masked individuals immediately scattered at the announcement of police presence. *Id.* Deputy Pfieff once again radioed his supervisor and relayed this information, and requested additional officers. *Id.* Deputy Pfieff then opened the unlocked door, again announced his presence, and heard no response. *Id.* Deputy Pfieff attempted to turn on the lights, but they failed to work, so he was observing the premises by candlelight. *Id.*

Once Deputy Pfieff twice announced his presence and entered the cottage, he ordered those who had hid to come out. *Id.* Six adults came out of hiding, and Deputy Pfieff searched the individuals for weapons and identification. *Id.* At this time, other officers had arrived. (R. 3). Petitioner was found to be in possession of brass knuckles, which she admitted were hers. *Id*. While none of the masked individuals claimed to live in the cottage, James Fitzgibbon alleged he was the nephew of the owner and had "permission to use the cottage." *Id.* However, Mr. Fitzgibbon did not have a key to the cottage, and had to retrieve a spare from the back porch. *Id.* Fitzgibbon had no contact information for his uncle. *Id*. At that time, Deputy Pfieff placed all the individuals under arrest. *Id*. Later in the week, a neighbor identified the owner of the cottage and supplied his contact information; the owner was, in fact, Mr. Fitzgibbon's uncle but stated "his nephew did not have permission to use the cottage for any kind of party." *Id.* Petitioner was tried and convicted of criminal trespass in the second degree in the City Court of Angola, as well as criminal possession of a deadly weapon in the fourth degree. *Id.* Petitioner was sentenced to a year in prison for the two convictions, to be served concurrently. *Id.* During Petitioner's sentence, she filed a habeas

corpus petition in the United States District Court for the Western District of New York, seeking to vacate her convictions. *Id.* While this petition was pending, her sentence ended and she was immediately transferred to the custody of the Department of Homeland Security for deportation proceedings in accordance with 8 U.S.C. § 1226. (R. 4). Petitioner remained in Immigration and Customs Enforcement (ICE) detention for six months until another habeas petition was filed on Petitioner's behalf, arguing that her detention had gone past the bright line set out in *Lora v. Shanahan*, 804 F. 3d 601, 616 (2d Cir. 2015). *Id.* This habeas petition was granted, and the District Court ordered her immediate release from ICE custody. *Id.* Later, Petitioner's earlier habeas petition was also granted. *Id.* The Second Circuit reversed the District Court's findings and remanded Petitioner back into ICE custody. *Id*.

SUMMARY OF THE ARGUMENT

The Second Circuit applied the correct standard in determining whether Deputy Pfieff had probable cause to arrest the Petitioner. First, Deputy Pfieff had a right to be at the cottage based on the report of suspicious activity from the neighbor. Second, Deputy Pfieff had reasonable suspicion there was criminal activity afoot in the cottage and took the appropriate steps in assessing the situation by reaching out to his supervisor and announcing his presence twice before entering the cottage. Deputy Pfieff had probable cause to arrest the Petitioner after entering the cottage, because there was no evidence that any of the six individuals owned or otherwise had permission to be in the cottage. Upon arresting the individuals, Deputy Pfieff acted reasonably in conducting a search incident to legal arrest and confiscating the deadly weapon Petitioner had in her possession. The correct standard was applied as a whole when considering the totality of the circumstances: the neighbor's report of suspicious activity, Deputy Pfieff's observation through the window that the cottage was occupied by hooded and disguised individuals, the occupants

hiding at the announcement of the officer's presence, the nephew's inability to provide contact information for the owner of the cottage, and the nephew's admission that he did not possess a key to the property.

The Second Circuit did not err in holding that the Petitioner's detention does not violate her due process rights, and in promulgating a fact-dependent approach to determine whether her detention is unreasonable. Because illegal aliens' presence in this country is unlawful, the rights that they accumulate during their unlawful presence convey only the most attenuated entitlement to constitutional protection. The mandatory detention requirement of 8 U.S.C. § 1226(c) is the product of Congress's close scrutiny of the actual consequences of allowing release of criminal aliens. Because Congress enacted Section 1226(c) in the exercise of its plenary power to direct the removal of unwelcome aliens from the United States, because the legislative record compiled by Congress concretely demonstrated the widespread problem of flight and recidivism among criminal aliens, and because detention under Section 1226(c) applies only to aliens who have committed specified crimes and lasts only during the limited duration of the alien's removal proceedings, Section 1226(c) satisfies due process. Under the fact-dependent approach, the district court would engage in a fact-dependent inquiry, weighing the circumstances of each individual case to determine whether continued detention is unreasonable. This approach best effectuates legislative intent to protect the security of the United States and its citizens, without running afoul of criminal aliens' limited due process rights.

I. THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD TO DETERMINE IF DEPUTY PFIEFF HAD PROBABLE CAUSE TO ARREST PETITIONER.

Deputy Pfieff had sufficient probable cause in his arrest and seizure of Petitioner because he had reasonable suspicion that there was criminal activity afoot in the cottage. Based on the

totality of the circumstances, there was sufficient probable cause to enter for the following reasons: the suspicious activity report from the neighbor, Deputy Pfieff's knowledge that the cottages were often closed and unoccupied during the winter time, the hooded and masked individuals who hid when police presence was announced, the presumed nefarious documents on the table, the dim, candle-lit room, and the nephew's failure to produce a key or to contact the owner of the cottage, his uncle.

Deputy Pfieff's actions were proper, and the Second Circuit properly upheld them. First, Deputy Pfieff had a duty to approach the cottage based on the report of suspicious activity, and therefore was properly located on the property. Second, Deputy Pfieff had reasonable suspicion that criminal activity was afoot based on the suspicious activity report, his observations upon arriving at the cottage, and the hooded and masked individual's response upon announcement of police presence. Lastly, Deputy Pfieff had probable cause to arrest because the individuals scattered and hid when he announced his presence, and were subsequently unable to show they were not criminally trespassing onto the property.

The probable cause inquiry is a mixed question of law and fact, and is subject to a de novo standard of review. *Benn v. Kissane*, 510 Fed. Appx. 34, 37 (2d Cir. 2013). The Supreme Court has held that "as a general matter, determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). "The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: '[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or

is not violated.'" *Ornelas*, 517 U.S. at 696–97 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982)).

A. Deputy Pfieff had a right to be at the cottage based on a suspicious activity report from the neighbor.

Suspicious activity was reported by the neighbor who described seeing light within the cottage even though it was off-season time and the cottages near the lake were normally closed, which gave rise to Deputy Pfieff's reasonable suspicion. The Second Department of the Supreme Court of New York has held that a report of suspicious activity considered within a totality of the circumstances test is sufficient to find reasonable suspicion of a criminal act. *People v. Thomas*, 599 N.Y.S.2d 852, 852 (1993). "The radio transmission providing a report of suspicious activity, coupled with a civilian witness's description of the defendant's location, and the defendant's suspicious actions, coupled with [the officer's] observation of the defendant who matched the description, gave rise to a reasonable suspicion that a crime had been committed." *Id.*

Additionally, Deputy Pfieff, as a police officer, has a duty to investigate complaints and security concerns. The ethical code of the International Association of Chiefs of Police provides that an officer's "fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent . . . against violence or disorder; and to respect the constitutional rights of all to liberty, equality and justice." International Association of Chiefs of Police, Code of Ethics (1957). By responding to the call for suspicious activity, Deputy Pfieff was acting within the code of ethics to "safeguard lives and property." *Id*.

B. There was reasonable suspicion for Deputy Pfieff to believe there was criminal activity afoot in the cottage.

Deputy Pfieff had reasonable suspicion to believe there was criminal activity afoot in the cottage when he approached, and in response, took reasonable steps in assessing the situation and

his subsequent actions. "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification . . . The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or 'hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000).

1. Deputy Pfieff took reasonable steps to assess the situation at the cottage by reaching out to his supervisor and announcing his presence before entering.

Deputy Pfieff was dispatched to the summer cottages around Lake Erie for a report of suspicious activity. (R. 2). Though the cottages usually closed for the winter, upon arriving, he observed flickering candlelight through the window. *Id.* When Deputy Pfieff approached the cottage's window, he observed hooded, masked individuals, and immediately returned to his vehicle to report his findings to his on-call supervisor. *Id.* His sergeant told him to "[g]o find out what's going on." *Id.* He again made a radio report after knocking on the front door of the cottage. *Id.*

Deputy Pfieff acted reasonably upon approaching the cottage and seeking the advice of his on-call supervisor. He did not make any rash decisions during the course of his investigation, and continually corresponded with his supervisor as to his observations in real time. In particular, before knocking on the door of the cottage, Deputy Pfieff contacted his supervisor about the best way to move forward, and after knocking on the door and observing the individuals scatter to hide, Deputy Pfieff once again radioed his supervisor to relay information and requested other officers respond. (R. 2). These actions evidence Deputy Pfieff's objectiveness in assessing the situation, and his ability to determine criminal activity was afoot with the guidance of his supervisor.

Deputy Pfieff acted reasonably in assessing the situation at the cottage, then twice announcing his presence before entering. The Supreme Court has held that an officer may enter a

home without a warrant if the officer has an exigent circumstance for entering. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006). "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Id.* (citing *Scott v. United States,* 436 U.S. 128, 138 (1978)) (emphasis added).

In *Brigham City, Utah v. Stuart*, the police officers verbally announced their presence at the property in question after responding to a noise complaint and witnessing an altercation. *Brigham City*, 547 U.S. at 401. When the occupants of the home did not cease fighting or respond, the officers entered the home and again announced their presence. *Id.* Likewise, Deputy Pfieff knocked on the door and announced his presence after viewing the occupants of the cottage through the window: dressed in masks and hoods, gathered around a table with only candlelight, reviewing what appeared to be suspicious documents. (R. 2). When the individuals scattered and hid at his announcement, Deputy Pfieff opened the unlocked door and again announced his presence. *Id.* Not until Deputy Pfieff ordered the individuals out of hiding did the individuals, including Petitioner, respond to his requests. *Id.* While there was no physical altercation within the cottage as in *Brigham City*, there was certainly suspicious activity afoot, and the individuals inside avoided and ignored the police officer's announcements and requests. Therefore, Deputy Pfieff's actions were clearly reasonable, because he twice made himself known to the individuals in the cottage, he was corresponding with his supervisor regarding the situation, and was investigating the suspicious activity based on a reasonably objective belief that criminal trespass was occurring at the cottage.

Moreover, after announcing his presence, Deputy Pfieff "observed the hooded figures scatter and hide upon hearing his voice and knocking." (R. 2). As the Supreme Court found in

Illinois v. Wardlow, nervous and evasive behavior is a "pertinent factor in determining reasonable suspicion." *Wardlow,* 528 U.S. at 124. Wardlow fled after a caravan of police arrived in a high crime area. *Id.* at 121-22. Likewise, here, the hooded individuals inside the cottage scattered and hid at Deputy Pfieff's announced and physical presence. (R. 2). Further, these suspiciously clad individuals demonstrated nervous and evasive behavior almost immediately upon discovery. *Id*. Coupled with a reasonable expectation that these cottages should be empty or abandoned during the off-season months, in addition to the other factors discussed *supra*, Deputy Pfieff not only had a reasonable suspicion to enter the cottage, but to further investigate. His decision to enter the cottage then led to probable cause to arrest when the hooded individuals failed to explain how they entered the cottage or prove their authority to use the residence.

C. Deputy Pfieff had probable cause to arrest Petitioner.

Upon entering the cottage, Deputy Pfieff had probable cause to arrest the hooded individuals, including the Petitioner, because they were unable to explain how they came to be inside the cottage or who had given them permission to use it. The Supreme Court has held that probable cause is a "practical and commonsensical standard" that considers "the totality of the circumstances." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Probable cause must be supported by more than a mere suspicion, but does not require the same "standard of conclusiveness and probability as the facts necessary to support a conviction." *United States v. Dunn*, 345 F.3d 1285, 1290 (11th Cir. 2003); *see also People v. Bigelow*, 66 N.Y.2d 417, 423 (1985); *Adams v. Williams*, 407 U.S. 143, 149 (1972) (probable cause does not require the same type of specific evidence as would be needed to support a conviction). Here, on the totality of the circumstances, Deputy Pfieff had probable cause to subsequently arrest the occupants.

1. The existence of probable cause is viewed from the standpoint of a reasonably objective police officer.

Deputy Pfieff had more than sufficient probable cause to enter the cottage and subsequently arrest the unlawful occupants. "'Probable cause' for a warrantless arrest requires the existence of facts and circumstances which, when viewed together, would lead a reasonable person possessing the expertise of the arresting officer to conclude that an offense has been or is being committed." *People v. Guo Fai Liu*, 271 A.D.2d 695, 696 (2000). The totality of the circumstances on which Deputy Pfieff relied included the neighbor who reported suspicious activity, Deputy Pfieff's observation that the cottage was occupied by hooded, disguised individuals, the occupants hiding at the officer's presence, and the nephew's inability to provide contact information for the owner of the cottage and his admission that he did not possess a key to the property. (R. 7). These circumstances are sufficient to lead a reasonably objective officer to conclude an offense has been or is being committed. Moreover, "[p]robable cause to arrest for trespass [does] not require proof beyond a reasonable doubt of all the elements of that crime." *People v. Tinort*, 709 N.Y.S.2d 511, 512 (2000).

Deputy Pfieff had probable cause to arrest for criminal trespass when the nephew, who claimed to be watching the cottage for the winter, was unable to produce a key in his possession or provide contact information for the uncle to state he had permission for the six individuals to be there. The statutory elements of criminal trespass include proving the defendants did not have actual ownership of the property and notice against trespass. N.Y. Penal Law § 140.15. On the record, the six individuals did not have actual ownership of the property and were unable to prove any permission to use the cottage. The observations Deputy Pfieff made were sufficient to conclude that an offense had been or was being committed in the cottage; hence, he had probable cause to arrest.

Contrary to the dissenting argument from the Second Circuit, after-the-fact knowledge of facts should not—and is not—a probable cause consideration. *Fitzgerald v. Santoro*, 707 F.3d 725, 730–31 (7th Cir. 2013). The facts were not reasonably known to Officer Pfieff at the time, and cannot retroactively be used against him in assessing his probable cause determination. "Importantly, the reasonable belief must be based on actual knowledge the officers had at the time of the entry, rather than on knowledge acquired after the fact." *Id.* (citing *United States v. Jenkins*, 329 F.3d 579, 581 (7th Cir. 2003)). Therefore, the fact the group was playing a game is not a proper consideration.

D. Petitioner was properly detained and searched, because a search incidental to a lawful arrest is proper.

"Probable cause to arrest exists 'when the [arresting officers] have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that (1) an offense has been or is being committed (2) by the person to be arrested.'" *United States v. Ceballos*, 812 F.2d 42, 50 (2d Cir. 1987). In determining whether probable cause existed, a court must consider "the facts available to the officer at the time of the arrest," and examine the totality of the circumstances. *United States v. Herron*, 18 F. Supp. 3d 214, 221 (E.D.N.Y. 2014). Under this doctrine, where police officers have probable cause to effect a custodial arrest, they may search the suspect without a warrant incident to that arrest. *Id.* (holding that a lawful custodial arrest establishes the authority to search the person). So long as the initial custodial arrest is based on probable cause, authority to conduct such a search incident to that arrest does not hinge on the probability that weapons or evidence will be discovered. *Id.* at 223. Here, Deputy Pfieff lawfully arrested Petitioner and had the authority to subsequently search Secord incident to that arrest.

First and foremost, Petitioner's arrest was based on the circumstances of the situation, which provided the basis for probable cause to arrest the occupants. Moreover, upon entering the cottage and questioning the individuals, Deputy Pfieff found that they did not know how to contact the owner and did not possess a key to enter the cottage. The record is silent as to the location of Petitioner's identification and backpack (containing the brass knuckles); however, at the time of her arrest, it was proper for Deputy Pfieff to conduct a search of the items within her grab area. A search "can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *Stoner v. California*, 376 U.S. 483, 486 (1964); s*ee also Preston v. United States*, 376 U.S. 364 (1964).

Even if the backpack was not within the immediate vicinity to arrest, the backpack would be subject to the inevitable discovery doctrine because it would be searched upon her arrival at the police station. "The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992). Had the search not occurred under the search incident to arrest doctrine, the brass knuckles would inevitably have been found once Petitioner entered the police station.

1. Even if Secord was only detained and not arrested, the officer can properly search for purposes of officer safety and contraband that is recognizable by touch but not detailed manipulation.

"[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and . . . dangerous, where . . . he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter . . . dispel[s] his reasonable fear for his own or others' safety, he is entitled for the protection of

himself and others . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). "The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 21.

Deputy Pfieff's search was conducted initially for identification and weapon purposes, which meets the requirements for a *Terry* search. Deputy Pfieff could reasonably fear for his own safety as he was alone in the cottage with six adults, who were all hooded and masked in such a manner that made it difficult to view their bodies, especially in dim candlelight. (R. 2). Therefore, even if the search incident to arrest would not be considered proper here, Deputy Pfieff's search is reasonable for officer safety reasons.

E. Petitioner does not have standing to challenge the alleged illegal entry.

Petitioner is not the owner of the cottage, nor did she have authority from the owner to assert the owner's rights or to refuse entry; as such, Petitioner has no standing. "Standing is a threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits of a particular dispute." *Eastview Properties, Inc. v. Town of Chester Planning Bd.*, 138 A.D.3d 838, 838 (N.Y. App. Div. 2016). In general, the person challenging a search (or the fruits of a search) must have a legitimate expectation of privacy in the area searched. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (passengers in a car they neither owned nor leased could not challenge a search of the interior of the car). While *Rakas* applied to the search of a vehicle, this holding has been extended to apply to the home as well. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998). In *Carter*, the Court held that the Fourth Amendment textually suggests that the protection against unreasonable search and seizure only applies to people in "their" own houses. *Id.* at 89. Here, Secord and the other occupants of the cottage were not the owner of the property. In fact, the owner

of the property explicitly stated to police officers that "his nephew did not have permission to use the cottage." (R. 3). Therefore, Secord cannot assert a challenge to illegal entry when she is not the owner of the cottage nor did she have permission to enter the cottage from the owner.

Therefore, Petitioner was correctly convicted for criminal trespass and possession of a deadly weapon under the standard applied by the Second Circuit. Deputy Pfieff had a right to enter the cottage as he had reasonable suspicion that criminal activity was afoot, and he also properly arrested Petitioner as there was probable cause to do so when the individuals were unable to identify any right to be in the cottage. Moreover, he acted within the law and within his duties by investigating reports of suspicious activity, conducting searches for officer safety, and arresting those committing criminal activity.

II. MANDATORY DETENTION UNDER 8 U.S.C. § 1226(C) IS PERMISSIBLE AS LONG AS DUE PROCESS IS AFFORDED, AND THE FACT-DEPENDENT APPROACH SAFEGUARDS BOTH THE RIGHTS OF ALIENS AND THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES.

The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Simultaneously, however, the Supreme Court has also repeatedly recognized that detention during deportation proceedings is a "constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). "Deportation proceedings would be vain if those accused could not be held in custody." *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *see also Reno v. Flores*, 507 U.S. 292, 305-306 (1993); *Zadvydas*, *v. Davis*, 533 U.S. 678, 697 (2001) (Kennedy, J., dissenting) ("Congress' power to detain aliens in connection with removal . . . is part of the Legislature's considerable authority over immigration matters"). The fact-dependent approach, utilized to determine when prolonged detention is unreasonable, safeguards both the rights of aliens and the national security interests of the United States and its

citizens. Therefore, this Court should affirm the ruling of the lower court, and find that § 1226(c) and the individualized, fact-dependent approach do not violate the due process rights of undocumented aliens.

The Fourth Circuit has held that the right to be free from restraint pendente lite is not "so fundamental as to require strict scrutiny" of detention under § 1226(c). *Welch v. Ashcroft*, 293 F. 3d 213, 221 (4th Cir. 2002). In *United States v. Salerno*, the Court stated that it could not "categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be . . . fundamental.'" 481 U.S. 739, 751 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In *Zadvydas*, 533 U.S. at 689, the Court described the importance of the freedom from imprisonment, but explicitly refrained from characterizing it as a fundamental right. *See also Flores*, 507 U.S. at 303. Therefore, the proper standard of review is rational basis, which requires (1) that detention be reasonably related to legitimate governmental interests, and (2) that the detention be a non-punitive, regulatory measure. *Welch*, 293 F. 3d at 221. The authority to detain aliens during immigration proceedings has been well-established; thus, § 1226(c) is a permissible regulatory measure. *See, e.g., Wong Wing*, 163 U.S. at 235. "Detention is necessarily a part of deportation procedures. Otherwise, aliens . . . would have opportunities to hurt the United States during the pendency of deportation proceedings." *Carlson v. Landon*, 342 U.S. 524, 538 (1952).

The policy judgments that Congress made when it enacted § 1226(c) are within its plenary power over the admission and expulsion of aliens and deserve judicial deference. Even when detention is at issue, this Court has upheld the use of a categorical approach in the immigration context, subject to only deferential judicial review. See *Flores,* 507 U.S. at 292; *Carlson,* 342 U.S. at 524. Congress enacted § 1226(c) in light of increasing rates of criminal activity and recidivism

by aliens: after being identified as deportable, but not detained, 77% of criminal aliens were arrested at least once more; nearly half were arrested multiple times before their deportation proceedings began. Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Congr., 1st Sess., 54, 52 (1989). According to the Court in *Demore*, "Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Demore*, 538 U.S. at 519, citing Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996), App. 46. More than 20% of deportable criminal aliens failed to appear for their removal hearings once released from detention, and one out of four criminal aliens "absconded prior to the completion of . . . removal proceedings." 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. 33–34, 36 (Aug. 1, 2000); *see also* S. Rep. 104-48, p. 2 (1995). The Court in *Demore* found that Congress was extremely concerned that "even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight" before removal proceedings could be completed. *Demore*, 538 U.S. at 520. Therefore, § 1226(c) is reasonably related to legitimate governmental interests: (1) protecting national security by eliminating the possibility of recidivism during the pendency of removal proceedings and (2) ensuring attendance of criminal aliens at removal hearings and disallowing aliens from absconding before completion.

To ensure adequate due process protections throughout the permissible detention process, there must not be an "unreasonable delay" by the government in "pursuing and completing deportation proceedings." *Demore*, 538 U.S. at 528, *J. Kennedy, concurring*. Courts are split as to

what constitutes a reasonable detention period. While the Second and Ninth Circuits have previously adopted a bright-line six-month approach, as noted below, that has "proved unworkable in practice." (R. 5). The First, Third and Sixth Circuits have instead utilized a fact-dependent inquiry "requiring an assessment of all of the circumstances of any given case" to determine whether detention without an individualized hearing is unreasonable. *Diop v. ICE/Homeland Security*, 656 F. 3d 221, 234 (3d Cir. 2011); *see also Chavez-Alvarez v. Warden York Cty. Prison*, 783 F. 3d 469, 475 n. 7 (3d Cir. 2015); *Reid v. Donelan*, 819 F. 3d 486, 498 (1st Cir. 2016) (the "individualized approach adheres more closely to legal precedent than the extraordinary intervention" of the rigid six-month rule).

Furthermore, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). "This Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522; *see also Zadvydas*, 533 U.S. at 718 (2001) ("the liberty rights of the aliens . . . are subject to limitations and conditions not applicable to citizens"); *Flores*, 507 U.S. at 305-306; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). As the Court noted in *Zadvydas*, the due process protection to which a removable alien is constitutionally entitled "may vary depending upon [the alien's] status and circumstance." 533 U.S. at 694. Therefore, the Petitioner's detention during her removal proceedings is constitutionally permissible, and if the Court finds that a hearing is necessary to determine whether or not her detention is reasonable, the fact-dependent approach articulated by the Second Circuit below adequately provides the limited due process protections she is due.

A. Petitioner's detention during removal proceedings is a constitutionally valid aspect of the removal process to ensure the congressional goals of national security and aliens' appearance at removal hearings are met.

The Supreme Court has held that detention during removal proceedings, *even without* an individualized hearing, is a constitutionally permissible act necessary to protect national security interests. In *Demore*, 538 U.S. at 510, the Supreme Court considered a challenge to § 1226(c) nearly identical to the Petitioner's. After being convicted of burglary/theft, the respondent in *Demore* was detained, and challenged his detention on the grounds that it violated due process because he had not been determined to be a danger to society or a flight risk. *Id*. The Court held that while the Fifth Amendment applies to aliens, detention is a constitutionally valid aspect of the deportation process "even where . . . aliens challenge their detention on the grounds that there has been no finding that they are unlikely to appear" for proceedings. *Id*. at 511. Contrasting the case before it with the earlier *Zadvydas* decision, the Court found that while the aliens in *Zadvydas* challenged detention after final deportation orders, the respondent in *Demore* was being detained pending removal proceedings, and there, "detention necessarily serves the purpose of preventing aliens from fleeing prior to or during such proceedings." *Id*. at 512.

Furthermore, detention is permissible even without an individualized finding of dangerousness or risk of flight. *Carlson*, 342 U.S. at 524. In *Carlson*, the Supreme Court considered a challenge to the detention of aliens who were deportable because of participation in Communist activities. *Id*. at 530. The aliens in that case challenged their detention on the grounds that there had been no finding that they were flight risks or dangerous; indeed, in one case, there had been a specific finding of *non*-dangerousness. *Id*. at 531-32, 543. Even so, the Court held that they were not entitled to be released because detention was a necessary part of the deportation process and, therefore, the denial of bail was permissible as part of Congress' legislative intent. *Id*.

at 541. Here, the goals of ensuring national security are the same as those at stake in *Carlson.* Congress enacted § 1226(c) to uphold national security interests in light of increasing rates of criminal activity and recidivism by aliens, as discussed *supra*. As the Second Circuit opined below, "[w]hile Secord may not, at first blush, appear to be a danger to society, we cannot stand by and allow our decision to open the floodgates to terrorists." (R. 6).

The Supreme Court has implicitly indicated that the continued detention of inadmissible or criminal aliens during removal proceedings would be permissible. *Zadvydas*, 533 U.S. at 699. The Court held that the challenged post-removal detention statute, 8 U.S.C. § 1231(a)(6), "implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id*. at 689. The deciding factor was the Court's concern that the statute would otherwise authorize "indefinite, perhaps permanent, detention", and it therefore held that the statute authorized detention only as long as removal is reasonably foreseeable. *Id*. at 699. The Court expressly distinguished detention under § 1226(c) from detention under § 1231(a)(6), ruling that "post-removal-period detention, *unlike detention pending a determination of removability*, has no obvious termination point." *Id*. at 697 (emphasis added).

Here, § 1226(c) does not raise a similar constitutional concern, because it expressly includes an "obvious termination point" as it only applies during the pendency of an alien's removal proceedings. Indeed, the Petitioner in this case has been detained for a mere six months at the present time (R. 4), well within a reasonable time period with a foreseeable end under *Zadvydas* and *Demore*. Because § 1226(c) limits detention to the removal proceedings period, it ensures attendance at hearings as well as availability for deportation at the end of those proceedings if removal is ordered. Therefore, the Petitioner's detention under § 1226(c) is analogous to post-

order detention when removal is reasonably foreseeable, which this Court found free from constitutional doubt in *Zadvydas*. *Id*. at 699.

B. If the Court finds it necessary to utilize the fact-dependent approach, that method adequately protects the Petitioner's due process rights, which are in any case abridged due to her illegal entry and further criminal acts.

An alien who is in the United States illegally and who commits additional crimes during her unlawful stay, like the Petitioner, is not likely to obey the requirements of the law if released into the community, or likely to voluntarily appear for removal proceedings. Section 1226(c) therefore is particularly justified as applied to the Petitioner. A fact-dependent approach would satisfy the limited due process requirements necessary in this case, to determine whether or not her detention has been unreasonable.

Notably, the Petitioner in this case—like the petitioners in *Johnson* and *Luna-Aponte*—has already been adjudicated guilty on not one, but two offenses: criminal trespass and possession of a deadly weapon, for which she served one year in prison. (R. 3). *See*, *e.g., Johnson v. Orsino*, 942 F. Supp. 2d 396 (S.D.N.Y. 2013); *Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y. 2010). The Petitioner admitted the brass knuckles were hers, and the dangerous nature of the weapon is undisputed; her conviction for this offense is a crime of violence and thus an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) for purposes of deportation under § 1226(c). *See Henry v. Immigration and Customs Enforcement*, 493 F. 3d 303 (3d Cir. 2007) (criminal possession of a weapon was an aggravated felony for deportation purposes). The Petitioner was additionally convicted of criminal trespass, which is also an aggravated felony; *see United States v. Venegas-Ornelas*, 348 F. 3d 1273 (10th Cir. 2003). Moreover, the predicate for the determination of dangerousness, like the predicate for her removability, is a conviction that was obtained in court with full criminal process. See *Welch*, 293 F.3d at 223-224 ("[P]rior convictions as a basis for

regulatory detention require fewer due process safeguards" because it has been "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.") (quoting *Jones v. United States,* 526 U.S. 227, 249 (1999)); *see also* S. Rep. No. 104-48 at 3 ("[C]riminal aliens have already been afforded all the substantial due process required under our system of criminal justice."). A fact-dependent inquiry, therefore, would grant the Petitioner even broader due process, far beyond what is minimally required. *Zadvydas*, 533 U.S. at 693.

Furthermore, the Petitioner has been detained for a mere six months, as her detention under § 1226(c) did not begin until she completed her one-year sentence for multiple criminal convictions. (R. 4). Courts have routinely held that the detention of criminal aliens, for far greater time periods, is not a violation of due process. *See*, *e.g., Johnson*, 942 F. Supp. 2d at 396 (a fifteen-month detention period was not unreasonable where the alien was a flight risk); *Luna-Aponte*, 743 F. Supp. 2d at 194 (more than three years of detention was permissible where the detention was not unreasonable or unjustified, and deportation was still reasonably foreseeable) *Adler v. U.S. Dept. of Homeland Security*, 2009 WL 3029328 *1 (S.D.N.Y. September 22, 2009) (more than a year of detention was not unreasonable where the government had not caused the delay and the primary justification for detention—limiting flight risk—remained relevant); *Andreenko v. Holder*, 2010 WL 2900363 *4 (S.D.N.Y. June 25, 2010) (thirteen months of detention was not unreasonable where it had not been shown that it would continue to last indefinitely and was partially attributable to the alien's own appeals).

When the Second Circuit originally articulated the bright-line six-month approach, in *Lora v. Shanahan*, it considered the facts surrounding an alien who was found not to be a flight risk or danger to the community because he had lived in the United States for 25 years, attended school, worked to support his family (all U.S. citizens), and had been convicted of minor drug charges.

804 F. 3d 601, 616 (2d Cir. 2015). Here, by contrast, the Petitioner had been in the country for less than two years when she was arrested for trespassing and possession of a dangerous weapon. (R. 1). She has a part-time job and some online friends (R. 8), but has not shown sufficient community ties, unlike the petitioner in *Lora* who was the sole caretaker of his young son, had established himself as hard-working employee and student for over 25 years of residency, was engaged to a U.S. citizen, and provided for his chronically-ill U.S. citizen mother. *Lora*, 804 F. 3d at 606. From the facts presented, the Petitioner is clearly not similarly situated, and her circumstances do not align with those found in *Lora* used to justify a six-month rule. Her detention is not unreasonable under a long line of Supreme Court precedent. *See, e.g., Reno*, 507 U.S. at 292; *Carlson*, 342 U.S. at 524. "Taken together, *Zadvydas*, *Demore*, and the inherent nature of the 'reasonableness' inquiry weigh heavily against adopting a six-month presumption of unreasonableness." *Reid*, 819 F. 3d at 498.

The Petitioner's "detention is clearly neither indefinite nor potentially permanent like the detention held improper in *Zadvydas;* it is, rather, directly associated with a judicial review process that has a definite and evidently impending termination point." *Soberanes v. Comfort*, 388 F. 3d 1305, 1311 (10th Cir. 2004). As the Seventh Circuit explained in *Hussain v. Mukasey*, "[T]he principle of *Zadvydas* does not require release *pending* judicial review of the removal order . . . judicial review of removal orders takes only a limited amount of time and if there is hardship to the petitioner the court can agree to expedite the proceeding." *Hussain v. Mukasey*, 510 F. 3d 739, 742 (7th Cir. 2007). Even under the fact-dependent approach, judicial review would still apply to alleged unreasonable actions, granting further constitutional safeguards. While the dissent in the record below argues that this approach would allow ICE to keep aliens "detained at its whim, subject only to its own determination of what is reasonable," this concern is misplaced. (R. 8). As

the Second Circuit noted on the record below, in instances where unreasonable detention is alleged, an alien "must file a habeas petition . . . and the district courts must then adjudicate the petition to determine whether the . . . detention has crossed the "reasonableness" threshold." (R. 5), citing *Lora v. Shanahan*, 804 F. 3d 601, 614 (2d Cir. 2015). Clearly, ICE would not be able to keep undocumented immigrants detained at its own whim, nor would it be applying its own determination as to what is reasonable under each case's circumstances—the district courts would function as a proper check-and-balance on the detention system.

Additionally, the Petitioner could end her detention at any point by withdrawing her challenges. "[She] has the keys in [her] pocket. A criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs." *Parra v. Perryman*, 172 F. 3d 954, 958 (7th Cir. 1999). The Petitioner has failed to show that there is no significant likelihood of removal in the reasonably foreseeable future, and the onus is on her to provide evidence that there is no such likelihood before "the Government must respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Respondents