

NO. 19-\_\_\_\_\_

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In the  
Supreme Court of the United States

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ILMA ALEXANDRA SORIANO NUNEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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SUPREME COURT PRESS



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**QUESTION PRESENTED**

Whether a non-citizen defendant, granted unsecured bail, whom immigration officials have failed to take into custody during the statutory 10-day period under the BRA, should be released notwithstanding any immigration orders of detention lodged against her?

**LIST OF PROCEEDINGS BELOW**

United States Court of Appeals for the Third Circuit

Case No. 18-2341

*Ilma Alexandra Soriano Nunez, Appellant, v. United States of America, Appellees.*

Decision Date: July 2, 2019

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United States District Court for the Eastern District of Pennsylvania

Case No. 5:18-cr-00040-001

*Ilma Alexandra Soriano Nunez, Appellant, v. United States of America, Appellees.*

Decision Date: May 10, 2018

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## **PETITION FOR WRIT OF CERTIORARI**

Ilma Soriano Nunez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.



## **OPINIONS BELOW**

The opinion of the Third Circuit is reported at 928 F.3d 240 and reprinted in the appendix to this petition at App.1a. The decision of the District Court for the Eastern District of Pennsylvania denying petitioner's request that she be released from detention is unreported but reprinted in the appendix to this petition at App.13a.



## **JURISDICTION**

The judgment of the Court of Appeals was entered on July 2, 2019. (App.1a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the Fourth, Fifth, and Eighth Amendments to the United States Constitution, 18 U.S.C. § 3142(d) and 18 U.S.C. § 3145(c). The text of these provisions is set out in the appendix at App.35a.



## STATEMENT OF THE CASE

### A. Factual and Procedural Background

Petitioner, who was granted pre-trial release pursuant to the Bail Reform Act, (BRA) but then taken into custody pursuant to an Immigration and Customs Enforcement (ICE) detainer (App.30a, 31a), moved the District Court to order her release or in the alternative to dismiss the indictment, which charged her with passport fraud, making a false representation of United States citizenship, using a false social security number, and producing a state driver's license not issued for her use.

The United States District Court for the Eastern District of Pennsylvania denied her motion, and Petitioner appealed the decision to the United States Court of Appeals for the Third Circuit on June 15, 2018.

On July 2, 2019, more than one year later, the Third Circuit held that the Court of Appeals had jurisdiction to review the District Court's denial of Petitioner's motion for pretrial release but lacked jurisdiction to review the motion to dismiss the indictment. (App.1a) The Court of Appeals also held that Petitioner's release order pursuant to the BRA did not mandate her release from her detention by ICE pending removal proceedings.

Despite the plain language of the BRA at 18 U.S.C. § 3142(d) (App.35a-36a), the Court of Appeals cited four other reasons for why the Bail Reform Act did not mandate her release. Specifically, the Court reasoned that: (1) the statute acts as a

notice provision to give other agencies an opportunity to take custody of a defendant before a release order is issued; (2) the BRA applies to federal criminal proceedings, and detention decisions by immigration are subject to different statutory frameworks; (3) detention for removal purposes does not infringe on an Article III court's role in criminal proceedings; and (4) that nothing in the BRA or the Immigration and Nationality Act (INA) gives a court authority to require the Executive to choose which laws to enforce. *United States v. Soriano Nunez*, 928 F.3d 240, at 246-247 (3rd Cir. 2019).

During the pendency of her appeal to the Third Circuit, the District Court on several motions by the Petitioner continued the trial date to allow the Court of Appeals to render a decision prior to the termination of the criminal proceedings below.

On August 22, 2019, after losing her appeal, Petitioner gave the District Court notice of her intent to change her plea, and on September 04, 2019, Petitioner pled guilty to the indictment.

## **B. Statutory and Regulatory Background**

The plain language of 18 U.S.C. § 3142(d), states that other than during the ten-day pretrial detention period for non-citizens so ICE can take them into custody, non-citizens are to be treated the same as other pretrial criminal defendants under the BRA.

Specifically, section 3142(d)(2) of the BRA spells out what should happen when the United States wishes to simultaneously detain a defendant for separate

criminal and immigration proceedings. The statute allows for a 10-day period in which the Government can decide to either continue with a criminal prosecution or have the person taken into custody by immigration officials.

“If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, *notwithstanding* the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings . . .” 18 U.S.C. § 3142(d)(2) (emphasis added).

Additionally, under 18 U.S.C. § 3145(c), appeals from a release or detention order are to be determined promptly. Although “promptly” is undefined in the statute and it appears that little to no case law exists regarding its definition, a regular reading of the word would indicate some amount of time less than a year.



## REASONS FOR GRANTING THE WRIT OF CERTIORARI

The D.C. Circuit and the Sixth Circuit have agreed with the Third Circuit in concluding that no conflict exists between the BRA and the INA. *United States v. Vasquez-Benitez*, 919 F.3d 546 (D.C. Cir. 2019), *United States v. Veloz Alonso*, 910 F.3d 266 (6th Cir. 2018). Facially there is no split amongst these three Circuits. However, the decision by the Circuit Court in this case as applied creates a split with the 10th Circuit in *United States v. Ailon-Ailon*, 875 F.3d 1334 (10th Cir. 2017).

The Third Circuit’s holding will have a chilling effect on the district courts below, when a defendant with an ICE detainer applies for bail. Essentially, the Court’s decision allows the Executive to issue a detainer and defeat any attempt by a defendant to be released before trial, making the BRA and the statutory procedures for obtaining pre-trial release meaningless for defendants with an ICE detainer lodged against them. This conflicts with the 10th Circuit’s decision in *Ailon-Ailon*, where the Court held that a detainer and the threat of involuntary removal by ICE was insufficient to deny pre-trial release. *Ailon-Ailon*. at 1338.

Moreover, the impediment created by the Executive’s ability to block a defendant’s release with a mere detainer raises Constitutional concerns of excessive bail under the 8th Amendment, unreasonable seizure of the defendant by the Executive under the 4th Amendment, and deprivation of defendant’s liberty without due process under the 5th Amendment.

### **Mootness**

As of the filing of this Petition, Mrs. Soriano Nunez is no longer being held in pre-trial detention, likely making the issue in this case, regarding the conflict between the BRA and INA, moot. However, this case falls under at least one exception to mootness, the “capable of repetition yet evading review” exception.

This doctrine applies only in exceptional situations, where the following two conditions are met: (1) the challenged action in its duration is too short to be fully litigated prior to expiration; and (2) there is reasonable expectation that the same

complaining party will be subject to the same action again. *Murphy v. Hunt*, 455 U.S. 478, at 482.

Here the conflict between the BRA and INA only lasts as long as the pre-trial period. Indeed the “determined promptly” requirement of 18 U.S.C. § 3145(c) would indicate the Legislature’s acknowledgment of the brevity of the pre-trial time period.

The pre-trial phase in this case was 20 months in duration, which although lengthy was principally due to the appeal lasting 12 months. In contrast, the sentencing guideline range for this case is only 10-16 months of incarceration, also indicative of finite nature of the pretrial phase of this type of immigration related criminal prosecution.

Additionally, while this defendant may not be subject to the same action again, certainly similarly situated defendants will be subject to this action by the Executive branch as non-citizens now account for more than 64 percent of all federal arrests. *Immigration, Citizenship, and the Federal Justice System*, Bureau of Justice Statistics, U.S. Department of Justice (August 22, 2019). In sum, mootness should not preclude this Court’s review.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature of Jose C. Campos.

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