No. _____

In The
Supreme Court of the United States

ILMA ALEXANDRA SORIANO NUNEZ,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether section 3142 (d)(2) of the Bail Reform Act (BRA), 18 U.S.C. § 3141 *et seq.* prevents the United States Department of Homeland Security from civilly detaining a criminal defendant after she has been granted pretrial release and the Government has failed to detain her during the statutory 10-day period?

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Third Circuit

Case No. 20-1032

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

Decision Date: November 2, 2020

United States Court of Appeals for the Third Circuit

Case No. 18-2341

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

Decision Date: July 2, 2019

United States District Court for the Eastern District of Pennsylvania

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

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

Decision Date on Motion to Dismiss: May 10, 2018

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PETITION FOR A 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 District Court's opinion denying the motion to dismiss the indictment is unreported but reprinted in the appendix to this petition (App.1a). The Third Circuit's decision denying release from detention is reported at 928 F.3d 240 and reprinted in the appendix to this petition (App.18a). The opinion of the Third Circuit denying the appeal of the motion to dismiss is unreported but reprinted in the appendix to this petition (App.30a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 2020. 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, the Bail Reform Act of 1984 (BRA), 18 U.S.C. § 3141, et seq., 18 U.S.C. § 3142 (d)(2), the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, and 8 U.S.C. § 1226 (a) The text of these provisions is set out in the appendix. (App.40a)

STATEMENT OF THE CASE

A. Factual and Procedural Background

On February 1, 2018, Petitioner was indicted and charged with passport fraud, falsely representing to be a United States citizen, Social Security fraud, production of a fraudulent identification document, and aiding and abetting. (App.2a)

On February 7, 2018, a Magistrate Judge held a detention hearing and ordered Petitioner temporarily detained pursuant to 18 U.S.C. § 3142(d) to allow Immigration and Customs Enforcement (ICE) 10 days to take her into custody for removal proceedings. ICE lodged a detainer against Petitioner on February 13, but did not take her into custody. On February 20, a second Magistrate Judge revisited the issue of pretrial detention and determined that, under the BRA, 18 U.S.C. § 3141, et seq, Defendant should be released on unsecured bail. (App.2a)

On February 28, 2018, the District Court, after an appeal by the United States, affirmed the Magistrate Judge's order that Petitioner be released from custody on

unsecured bail pursuant to the BRA. Petitioner was not in fact released, but rather she was kept in detention by ICE pursuant to the immigration detainer lodged against her. (App.2a – App.3a)

Petitioner subsequently moved the District Court to order her release or in the alternative to dismiss the indictment. (App.3a) The District Court denied her motion,(App.17a) and Petitioner appealed the decision to the United States Court of Appeals for the Third Circuit on June 15, 2018.

On July 2, 2019, the Third Circuit in *Soriano Nunez I* 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.22a). The Court of Appeals also held that the District Court's release order pursuant to the BRA did not mandate her release from her detention by ICE. (App.29a)

Mrs. Soriano Nunez later pled guilty to the federal charges, was sentenced, and appealed the denial of the motion to dismiss to the Third Circuit. (App.30a) On November 2, 2020, the Third Circuit in *Soriano Nunez II* affirmed the District Court's denial of the motion to dismiss the indictment, reasoning that their holding in *Soriano Nunez I* was binding on the parties. (App.34a)

B. Statutory and Regulatory Background

In general, under the INA, the U.S. Department of Homeland Security ("DHS") "may" detain any individual it believes to be removable "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226 (a).

Under the BRA there is a presumption favoring release. Congress has permitted pretrial detention in carefully limited instances only. *United States v. Salerno,* 481 U.S. 739, 755 (1987).

Section 3142(d)(2) of the BRA by its plain language lays out what should happen when the United States wishes to simultaneously detain a defendant for separate criminal and immigration proceedings. There is 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).

The relevant section of the BRA was passed in 1984, while Section 1226 (a) of the INA become effective much later in 1996. Congress in passing this section of INA understood the meaning of the BRA, with its presumption for release and temporary detention structure for immigrants found in Section 3142 (d)(2). In fact, Congress was silent regarding these provisions of the BRA when it created Section 1226 (a) of

the INA. Accordingly, it can be inferred that Congress intended to allow the BRA to function as usual after the passage of this provision of the INA. *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.")

REASONS FOR GRANTING THE WRIT

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).

The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). See also *United States v. Great N. Ry.*,

343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."). Here the Circuit Court went too far by interpreting section 3142 (d)(2) as something other than what it's plain language states. Simply put the section states that if the immigration authorities fail to detain during the 10-day period then the BRA controls notwithstanding any law regarding detention under the INA.

Moreover, the reasoning that section 3142 (d)(2) is simply a notice provision undermines the Circuit Court's conclusion that ICE's actions were permissible. Petitioner agrees that section 3142 (d)(2) acts as a notice provision. However, a notice provision is, by design, created to put another party on notice that their rights or interests may be affected. In this case it is not difficult to see what rights or interests of ICE that will be affected. "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). In other words, ICE will lose their ability to detain the individual if they do not act within the 10-day period.

To date, six other Circuit Courts of Appeals have agreed with the Third Circuit that no conflict exists between the BRA and the INA when a defendant is civilly detained after pre-trial criminal release. *United States v. Baltazar-Sebastian*, 2021 WL 912733 (5th Cir. 2021), *United States v. Barrera-Landa*,

964 F.3d 912 (10th Cir. 2020), *United States v. Lett*, 944 F.3d 467 (2d Cir. 2019), *United States v. Pacheco-Poo*, 952 F.3d 950 (8th Cir. 2020), *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). However, in none of these six cases was Section 3142(d)(2) ever invoked, clearly distinguishing them from *Soriano Nunez I.*

In each of those cases, the defendants argued for a broader principal that the BRA superseded the INA with respect to detention generally. By contrast, the Petitioner here bases her argument that there is a procedurally narrow method that prohibits civil detention during pre-trial release and it is plainly laid out in 18 U.S.C.§ 3142(d)(2).

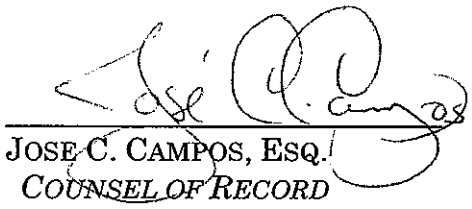
The Executive Branch in this case chose not to detain Petitioner during the 10-day statutory timeframe, giving up their right to do so under the INA. The proper remedy for the Petitioner's pre-trial civil detention in contravention to the BRA should be dismissal of the indictment.

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.

CONCLUSION

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

Respectfully submitted,



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