No. 21-

In the Supreme Court of the United States

MELECIA BALTAZAR-SEBASTIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bail Reform Act (BRA), 18 U.S.C. § 3142(b), authorizes Article III courts to order individuals released from pretrial detention if they are neither a flight risk nor a danger to the community. In this case, as in many others, the executive branch declined to release petitioner as an Article III court had ordered. Instead, executive branch officials kept her in detention and changed the claimed statutory basis for her detention to immigration detention pursuant to the Immigration and Nationality Act (INA), 18 U.S.C. § 1226(a).

The questions presented are:

1. Whether it violates the separation of powers for executive branch officials to keep a person in civil detention on the basis of factual findings that necessarily conflict with the factual findings of an Article III court.

2. Whether the BRA prohibits the United States from transferring a person into INA custody following a BRA release order except pursuant to 18 U.S.C. § 3142(d).

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *United States* v. *Baltazar-Sebastian*, No. 20-60067 (5th Cir.) (appeal from December 19, 2019 order in No. 3:19-cr-00173-CWR-FKB-1), opinion vacating October 15, 2019 order of release issued March 10, 2021, and order denying timely petition for rehearing *en banc* entered April 13, 2021.
- *United States* v. *Baltazar-Sebastian*, No. 3:19-cr-00173-CWR-FKB-1 (S.D. Miss.), order of release entered October 15, 2019, order denying government's motion for reconsideration entered December 19, 2019, and order granting unopposed motion for stay pending appeal entered April 28, 2021.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 990 F.3d 939. The opinion of the district court (App. 14a-41a) is reported at 429 F. Supp. 3d 293.

JURISDICTION

The court of appeals entered judgment on March 10, 2021, App. 1a, and denied rehearing *en banc* on April 13, 2021, App. 42a-43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of 18 U.S.C. § 3142 and 8 U.S.C. § 1226 are reproduced in the appendix.

STATEMENT OF THE CASE

For more than two centuries, it has been settled that, under the separation of powers, "'Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch,' for to do so would make a court's judgment merely 'an advisory opinion in its most obnoxious form.'" *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1332 (2016) (Roberts, C.J, dissenting) (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). By way of this prohibition "[t]he separation of powers * * * safeguards individual freedom." *Id.* at 1330 (citing *Bond* v. *United States*, 564 U.S. 211, 223 (2011)). For "[a]s Hamilton wrote, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Ibid.* (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961)).

The prohibition on executive branch review of Article III judgments extends beyond second-guessing their

legal judgments. It also bars the review of certain facts, known as "fundamental" or "jurisdictional" facts. *Crowell* v. *Benson*, 285 U.S. 22, 63 (1932); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 297 (2017). Congress may not "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." *Crowell*, 285 U.S. at 56. "That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." *Id.* at 57. This rule of judicial finality as to questions of jurisdictional fact "reflects a deeply held conviction that judges * * * must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984).

This case represents a particularly egregious violation of that separation of powers precept. The facts are stark. Petitioner was brought before a magistrate judge to determine whether she warranted civil detention pending her criminal trial under the Bail Reform Act (BRA). Pet. App. 2a. There are only two grounds for such detention: (1) a risk of flight or (2) a danger to the community. The United States had a full and fair opportunity to make the case that she was one or the other. But the government did not even try to establish that she was a danger to the community. *Id.* at 79a. And the government's only witness on risk of flight was a special agent with the investigative arm of Immigration and Customs Enforcement (ICE) whose only basis for

claiming she was a flight risk was that she had "ties" to Guatemala. *Ibid.* In contrast, petitioner put on two witnesses and introduced voluminous evidence that she has deep roots in her community, including that her three children and three young grandchildren live near her home in Mississippi. *Id.* at 93a-95a, 103a-06a. The court credited petitioner's evidence, holding that she had proven by clear and convincing evidence that she was not a flight risk or a danger to the community, and ordered her released. *Id.* at 38a.

But the United States did not release her. *Id.* at 18a. Instead (and instead of appealing the magistrate judge's decision, *ibid.*) the United States kept petitioner in custody and simply changed its claimed legal basis for her detention from pretrial detention to immigration detention under the Immigration and Nationality Act (INA), 18 U.S.C. § 1226(a).

But both forms of detention—pretrial detention and immigration detention—are forms of *civil* detention that may *only* take place if a person is shown to be a flight risk or a danger to the community. See 18 U.S.C. § 3142(b) (BRA); *Nielsen* v. *Preap*, 139 S. Ct. 954, 960 (2019) (INA). Petitioner had just proven at her BRA hearing that she was neither. The only way the United States could continue to detain petitioner was by determining, as a matter of fact, and directly contrary to the district court's determination, that petitioner *was* in fact a flight risk.

This was a question of jurisdictional fact that the separation of powers barred the executive branch from reexamining. Freedom from detention "lies at the heart" of the liberty interest that the Due Process Clause protects. *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001). The ultimate factual determination that results in detention must be made by a judge, and it must be respected by the executive branch. Indeed, that is the premise of the constitutional promise of the writ of habeas

corpus. See *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring). The promise of habeas corpus would mean little if, after the judge rejected the king's explanation for a person's detention, he could just conjure up a new explanation and continue the detention. See *ibid.*

The scheme at issue is unprecedented in the history of the United States. Never before has this Court permitted the executive branch to take a person into detention on grounds that directly contravene a contrary judicial finding. The government's actions in this case were tantamount to a person proving he is in fact a United States citizen and thereby winning a lawsuit for wrongly denying a passport under 8 U.S.C. § 1503(a) only to be arrested by ICE agents and taken into § 1226(a) custody while leaving the courthouse.

Congress never could have intended the BRA and INA work this way. The very structure of the BRA shows this to be true. The BRA permits judges to impose numerous requirements on criminal defendants as conditions of their release. A judge can order a defendant to post a large multi-thousand dollar bond, to start or continue an education program, to continue or actively seek employment, to get medical or psychiatric treatment, to get substance abuse counseling, to submit to home confinement, or, as in this case, to remain within the jurisdiction. 18 U.S.C. § 3142(c)(1)(B)(i)-(xiv). These are all common conditions of release: they are expressly enumerated in the BRA as potential conditions and are pre-printed on the BRA release order form. Yet, under the government's reading of the statute the government can freely nullify those conditions and immediately take a person into immigration detention hundreds or even thousands of miles away from the jurisdiction in which her criminal trial is pending, as it did in this case.

Moreover, the BRA has a specific provision, § 3142(d), that sets the conditions for transferring individuals to other forms of detention. The government has little use for § 3142(d) because it requires a threshold determination that an alien is a flight risk or a danger to the community. So instead the United States has read the provision out of the statute, routinely transferring individuals directly to ICE custody even when they have proven, as petitioner did in this case, that they are *not* flight risks and *not* dangers to the community, on the theory that the INA authorizes such transfers without regard to the limitations in § 3142(d).

This case is an ideal vehicle to decide the important questions it presents. The separation of powers violation is flagrant, and it implicates the fundamental relationship between the judiciary and the other branches. The statutory question is independently important given the sheer number of individuals affected by the interplay of these two statutes. This scheme interferes with the ability of immigrants to prepare for and present their defense in their criminal trials, and it invites systematic abuse of immigration detention and disrespect for the federal judiciary. The Court should grant certiorari to clarify that the separation of powers bars the executive branch from revisiting jurisdictional fact determinations made by Article III courts.

A. Legal Background

1. Freedom from detention "lies at the heart" of the liberty interest that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690; *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992); *United States* v. *Salerno*, 481 U.S. 739, 750 (1987). Given the seriousness of noncriminal detention, in its nearly two-and-a-half-century history, this Court has recognized a vanishingly small number of grounds for prolonged noncriminal detention, the two most important of which are: (1) that a person poses a risk of flight, or

(2) that a person poses a danger to himself or to the community. Those are the only two justifications ever recognized by this Court for mandatory quarantines, civil commitment of the mentally ill, and—most importantly for purposes of this petition—pretrial detention and immigration detention. See, *e.g.*, *Zadvydas*, 533 U.S. at 690 (prolonged immigration detention); *Salerno*, 481 U.S. at 750 (pretrial detention); *Addington* v. *Texas*, 441 U.S. 418, 432-33 (1979) (civil commitment).

2. The Bail Reform Act of 1984 embodies these constitutional restrictions on the government's authority to detain an individual who has not been convicted. The BRA prohibits pretrial detention unless the detention is necessary (1) to protect against the risk of flight or (2) to protect the community from danger.

As the BRA reflects, bail has long been "basic to our system of law." *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971). The Judiciary Act of 1789 "unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail." *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951) (citing 1 Stat. 73, 91). "This traditional right to freedom before conviction," this Court has explained, "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Ibid.* Absent this right, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Ibid.*

The BRA's provisions thus favor pretrial release over pretrial detention. A "judicial officer *shall order* the pretrial release" of a person charged with a federal crime, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b) (emphasis added). The judge must order the person released on personal recognizance, on an unsecured bond, or, if

necessary, "subject to the least restrictive further condition, or combination of conditions, that [the judge] determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(a), (c). Only if the judge finds, after a hearing, that no condition or combination of conditions can meet that standard may the judge order detention. § 3142(e)(1).

The BRA also provides a specific procedure through which the executive branch may transfer a noncitizen involved in criminal proceedings to immigration detention. Section 3142(d) provides, in relevant part, that if the judicial officer determines that a person is not a U.S. citizen and "such person may flee or pose a danger to any other person or the community," then the judicial officer shall order the temporary detention of such person in order for the attorney for the government to notify the "the appropriate official of the Immigration and Naturalization Service." 18 U.S.C. § 3142(d). This temporary detention may not exceed 10 days. *Ibid.* "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." *Ibid.*

3. The executive branch's authority to engage in immigration detention is similarly constrained by constitutional principles. This Court has recognized only two legitimate grounds for immigration detention: to "prevent[] deportable *** aliens from fleeing prior to or during their removal proceedings," *Demore* v. *Kim*, 538 U.S. 510, 528 (2003), and to "protect[] the community" from "specially dangerous" aliens, *Zadvydas*, 533 U.S. at 690-91, 699.

As relevant here, the INA provides that all aliens (other than those with certain criminal convictions) "may" be detained "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The Department of Homeland Security, an agency within the executive branch, is charged with deciding whether to detain the alien or release them on bond or on conditional parole. § 1226(a)(1)-(2). The Department has delegated that authority to U.S. Immigration and Customs Enforcement (ICE). See 6 U.S.C. § 251.

Pursuant to federal regulations, an ICE officer makes an initial custody determination upon arrest. See 8 C.F.R. § 236.1(c)(8). If the noncitizen demonstrates that she is neither a flight risk nor a danger to the community, the ICE officer may release the noncitizen on bond or other conditions of release. *Ibid.* The noncitizen may later seek review of the initial bond determination by an Immigration Judge ("IJ") at a bond hearing. § 1236.1(d)(1); accord *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847 (2018). Thereafter, the noncitizen may appeal the IJ's determination to the Board of Immigration Appeals ("BIA"). See 8 C.F.R. §§ 1236.1(d)(3), 1003.1(b)(7). The BIA is part of the Executive Office for Immigration Review, an office within the Department of Justice.

B. Factual Background

At the time of the events in this case, petitioner Melecia Baltazar-Sebastian was a 50-year-old immigrant from Guatemala. ROA.461, 483; see also Pet. App. 82a. For a quarter of her life—for more than a decade—she had been a resident of Morton, Mississippi. ROA.483. She is a devoted Catholic. *Ibid.* She had attended Mass every Sunday at the church of St. Martin de Porres in Morton for at least the preceding twelve years. *Ibid.* Her pastor wrote a letter to the court explaining that she is a "good woman" who "works and helps" the church. *Ibid.* (letter from Fr. Roberto Mena). She has no criminal

record or criminal history. ROA.486-87. "[N]ot even a traffic ticket." ROA.564; Pet. App. 112a..

On August 7, 2019, federal agents raided seven chicken plants across Mississippi, rounding up hundreds of their immigrant workers. See C.A. Appellee Brief at 16. More than 600 ICE agents surrounded the plants and apprehended more than 680 allegedly undocumented workers. *Id.* at 16-17. The raids were closely coordinated with the U.S. Attorney for the Southern District of Mississippi, who trumpeted the raids as "the largest single-state immigration enforcement operation in our nation's history." *Id.* at 17.

The raids resulted in the immediate detention of hundreds of workers. *Ibid.* Men and women were walked from the plants with their hands zip-tied behind their backs and were taken away on buses. *Ibid.* The raids were conducted on the first day of school, and arrestees with children had to attempt to arrange for their care while in custody. *Ibid.* Two months after the raid, 300 people remained detained at two ICE centers in Louisiana. *Id.* at 17-18. As of November 2019, the U.S. Attorney was prosecuting 119 of the workers for federal crimes ranging from stealing U.S. citizens' identities to falsifying immigration documents. Pet. App. 17a & n.3; see C.A. Appellee Brief at 18. And as of November 2019 no charges had been brought against the companies involved in the raids or their executives. See C.A. Appellee Brief at 18.

On the day of the raids, Ms. Baltazar-Sebastian worked at Koch Foods Inc., ROA.461, the largest chicken plant in Morton, employing more than 1,000 people. See C.A. Appellee Brief at 18. Agents arrested 243 employees at Koch's Morton plant that day, more than at any other facility the agents raided. *Ibid.* Ms. Baltazar-Sebastian was one of those employees.

C. Procedural Background

1. On August 8, 2019, ICE booked Ms. Baltazar-Sebastian into a detention facility in Jena, Louisiana, nearly 200 miles from Morton. ICE administratively detained her pursuant to 8 U.S.C. § 1226(a), pending a determination on her removability. ROA.193, 374-75. The government served Ms. Baltazar-Sebastian with a notice to appear in removal proceedings on August 13, 2019. ROA.391-96.

On August 20, 2019, the U.S. Attorney for the Southern District of Mississippi indicted Ms. Baltazar-Sebastian on one count of misusing a Social Security number in violation of 42 U.S.C. § 408(a)(7)(B). ROA.291-92. The Jena facility then turned Ms. Baltazar-Sebastian over to the U.S. Marshals for arrest and prosecution. ROA.36, 193. She was arraigned, pleaded not guilty, and requested a detention hearing under the BRA.

On September 3, 2019, a magistrate judge held a detention hearing to determine Ms. Baltazar-Sebastian's eligibility for pretrial release. ROA.4. The government did not allege that Ms. Baltazar-Sebastian posed a danger to the community, ROA.462, so the only question was whether she was a flight risk. At the hearing, Ms. Baltazar-Sebastian presented ample evidence that she was not. Pet. App. 17a-18, 93a-95a, 103a-06a. Among other ties to the community, she has three children and three young grandchildren, all in Mississippi. ROA.555-56; Pet. App. 93a-95a, 103a-06a. Her youngest daughter was 17 years old and had entered the United States as an unaccompanied minor in 2016. ROA.550-51. To obtain custody of her, Ms. Baltazar-Sebastian signed a sponsorship agreement with the federal government. She agreed, among other things, to provide for her daughter's care, safety, and well-being and to ensure that she attends school and all future immigration proceedings. ROA.536-42; see also ROA.464. Her immigration attorney

confirmed that Ms. Baltazar-Sebastian, a single parent, remains closely involved with her daughter's education and legal proceedings. ROA.546-47; see also ROA.465.

The government offered no rebuttal to any of this evidence. The only government witness was a special agent with the investigative arm of ICE. The agent had no personal knowledge of Ms. Baltazar-Sebastian's arrest and had never spoken to her. ROA.524-25. The government claimed she was a flight risk based solely on her "ties" to Guatemala, but the agent admitted that he did not know if she still has family there. ROA.529.

After hearing all the evidence, the magistrate judge ordered Ms. Baltazar-Sebastian released on a $10,000 unsecured bond. ROA.31, 565. The judge found that Ms. Baltazar-Sebastian posed no risk of flight or non-appearance. ROA.564-65. Accordingly, the judge ordered the executive branch to release Ms. Baltazar-Sebastian on bond subject to specific conditions, including that she "remain in the Southern District of Mississippi at all times during the pendency of these proceedings unless special permission is obtained from the Court." Pet. App. 17a. The government did not seek review of the judge's order. *Id.* at 18a; see 18 U.S.C. § 3145(a), (c).

2. But Ms. Baltazar-Sebastian was not released. Pet. App. 18a. Instead, the executive branch transferred her from the Southern District of Mississippi back to the Jena detention center. *Ibid.* "For an extended period of time, [Ms.] Baltazar-Sebastian's whereabouts were unknown to her daughter and her attorney." *Ibid.* During that time Ms. Baltazar-Sebastian "was not able to communicate with her attorney about her case." *Ibid.*

The government continued to detain Ms. Baltazar-Sebastian in Louisiana for another two weeks. On September 13, 2019, Ms. Baltazar-Sebastian appeared before an immigration judge, where she requested a continuance of her removal proceedings to obtain an

attorney, and her hearing was rescheduled. ROA.377-79, 384, 387, 398.

On September 25, 2019, the United States filed a motion for a writ of habeas corpus ad prosequendum to ensure that Ms. Baltazar-Sebastian would be present at a hearing in her criminal case. Pet. App. 18a. The district court granted the writ the same day. ROA.39-40. Counsel for Ms. Baltazar-Sebastian then moved to set aside the writ and to clarify her client's conditions of release. Pet. App. 18a. "Counsel argued that because [Ms.] Baltazar-Sebastian had been released on bond by the Magistrate Judge, her continued detention by ICE was unlawful." *Ibid.*

At a hearing on October 15, 2019, Ms. Baltazar-Sebastian asked the Court to enforce the magistrate judge's release order. *Ibid.* The court granted the request and promised a detailed written order. *Ibid.* The United States moved for reconsideration shortly thereafter. *Ibid.* The court held another hearing on November 18, 2019, this time with representatives from the U.S. Attorney's Office, Main Justice, and ICE. *Id.* at 18a-19a. At that hearing, the government conceded that "the people at ICE and the people who are prosecuting her can talk to one another, and the ICE proceedings can begin at the conclusion of any criminal proceedings." ROA.153. The district court issued a memorandum opinion and order denying the government's motion for reconsideration. Pet. App. 14a-41a. The government appealed.

3. The Fifth Circuit reversed the district court's enforcement order. Pet. App. 1a-13a. After determining that it had appellate jurisdiction, *id.* at 3a-6a, the court addressed the government's argument that pretrial release under the BRA does not preclude pre-removal detention under the INA, holding that the BRA and INA "do not conflict," as a matter of statutory interpretation,

because "the BRA and INA concern separate grants of Executive authority and govern independent criminal and civil proceedings." *Id.* at 8a. The court also disagreed with the district court's reading of ICE's regulations, which provide that "an alien shall not depart the United States 'if [her] departure would be prejudicial to the interests of the United States.'" *Id.* at 10a (quoting 8 C.F.R. § 215.2(a)).

The court of appeals summarily rejected Ms. Baltazar-Sebastian's principal argument on appeal: that ICE's detention after an Article III judge had ordered her release violated the separation of powers. See C.A. Appellee Brief at 27-46. Without analysis, the court of appeals stated that it had "consider[ed], and reject[ed]," the argument as "lack[ing] merit." Pet. App. 12a. The court of appeals likewise summarily rejected as "meritless" Ms. Baltazar-Sebastian's argument that ICE's detention of her in facilities in Louisiana, more than 200 miles away from her criminal proceedings in Jackson, Mississippi, violated her constitutional right to a fair trial. *Ibid.*

Ms. Baltazar-Sebastian timely petitioned for rehearing en banc, which the court of appeals denied on April 13, 2021. *Id.* at 42a-43a.

4. On remand, Ms. Baltazar-Sebastian and the executive branch, represented by the Department of Justice, stipulated that Ms. Baltazar-Sebastian's criminal and immigration proceedings should be stayed pending the outcome of this petition. *Id.* at 60a-63a. The district court entered an order to that effect on April 28, 2021. See D. Ct. Dkt. (text-only docket entry).

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary importance: whether the executive branch can disregard the factual findings of an Article III court. This Court's

resolution of the questions presented is urgently required. The scheme the court of appeals sanctioned is without precedent in American history. And this case presents the ideal vehicle for resolving the questions presented: The government has stipulated to a stay of all criminal *and* immigration enforcement proceedings pending the outcome of this petition for certiorari, ensuring the case will not become moot. Pet. App. 60a-68a.

If the jurisdictional fact doctrine enunciated in *Crowell*, 285 U.S. 22, still has any force, it must mean that the executive branch cannot disregard an Article III court's finding on a question that determines something as crucial to a person's constitutional rights as whether that person warrants detention. This case is merely one of hundreds, perhaps thousands, in which the United States has done exactly that, ignoring BRA release orders and holding immigrants in detention sometimes hundreds or thousands of miles from the place of their criminal trial. The Court frequently grants certiorari in cases raising separation of powers questions even when there is no conflict among the courts of appeals. The executive branch's flagrant nationwide disregard for a bedrock separation of powers principle similarly warrants this Court's intervention even in the absence of a circuit conflict.

The decision below not only jeopardizes the fundamental right to liberty of thousands, it threatens the judiciary's ability to operate as an independent branch rather than an adjunct whose factual determinations are merely a data point the executive branch considers before reaching its own opposite factual conclusions. This Court should grant review.

I. The Decision Below is Erroneous

The executive branch's disregard of the factual findings of an Article III court on a question of

jurisdictional fact violates the separation of powers. And the BRA and INA do not to permit it in the first instance.

A. The Separation of Powers Prohibits the Executive Branch from Flouting an Article III Court's Factual Findings

1. The core of the authority of Article III courts is the power to enter judgments in cases and controversies that are final and conclusive on the parties. For if final judicial determinations in particular cases could be overturned by executive action, federal courts would be rendered "mere boards of arbitration whose judgments and decrees would be only advisory." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

Consequently, this Court has recognized since *Hayburn's Case* that "revision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts." 2 U.S. (2 Dall.) 408, 410 n. (1792) (opinion of Wilson and Blair, JJ., and Peters, D.J.); see also *id.* (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances * * * be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested.").

That essential requirement of the separation of powers has been repeatedly affirmed on many occasions, in many ways, over many years. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995); *Chicago & Southern*, 333 U.S. at 113 ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1874) (similar); *Gordon* v. *United States*, 117 U.S. 697, 700-04 (1864) (judgments of Article III courts are "final and conclusive upon the rights of the

parties"); see also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) (similar).

2. A fundamental corollary is that the executive branch must give force and effect to the jurisdictional fact determinations that support an Article III court's judgment. Thus, this Court held in *Crowell* that the executive branch has no power to disregard an Article III court's "final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." 285 U.S. at 56. Permitting the executive branch to "oust the courts" of such "determinations of fact" "would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts" because "finality as to facts becomes in effect finality in law." *Id.* at 57. As a result, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.* at 60; see Redish & Gohl, *supra*, 59 Ariz. L. Rev. at 297.

Applying this principle, this Court has held, for example, that the question whether a person is a citizen of the United States is an "essential jurisdictional fact" that an Article III court must decide. *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (cited in *Crowell*, 285 U.S. at 60). It has also repeatedly held that federal courts must have independent authority to determine, as a matter of fact, whether speech is protected by the First Amendment. *Bose Corp.*, 466 U.S. at 499-511 (collecting cases). This "reflects a deeply held conviction that judges * * * must exercise such review in order to preserve the precious

liberties established and ordained by the Constitution." *Id.* at 510-11.

3. The requirement that judges must be the final arbiters of the facts on which the constitutional rights of individuals depend follows inescapably from the fundamental differences between executive branch officers and Article III judges. Officers of the executive branch are part of one of the two "political branches"—they answer to the President—and they are prone to "hurried judgment * * * in the often competitive enterprise of ferreting out crime." *United States* v. *Leon*, 468 U.S. 897, 914 (1984). In contrast, Article III, by design, shields judges from political concerns and calls on them to focus on the needs of the cases and parties before them. Once an Article III judge has made a factual finding that a person is ineligible for civil detention because she poses no danger to the community and no risk of flight, our Constitution demands that the executive branch give the judgment full "faith and credit." *Chicago & S. Air Lines*, 333 U.S. at 113. This doctrine applies most forcefully in this case: If the executive branch had sought to contest these facts in separate *judicial* proceedings, principles of collateral estoppel would have precluded the executive branch from relitigating them. See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 403 (1940) (holding that collateral estoppel runs against the government).

4. There is no doubt that in this case that an ICE officer disregarded the district court's factual findings under the BRA. An ICE officer *must* release an alien if the alien can "demonstrate" that she is not a flight risk or a danger to the community. 8 C.F.R. § 236.1(c)(8); *accord Nielsen*, 139 S. Ct. at 959-60 (citing *In Re Guerra*, 24 I. & N. Dec. 37 (B.I.A. 2006)). At the time she was taken back into ICE custody following her BRA hearing petitioner had done just that—she had just demonstrated

that she was neither a flight risk or a danger to the community to the satisfaction of an Article III court. That should have precluded the ICE officer from making a contrary factual finding.

5. To be sure, *Crowell* and *Ng Fung Ho* arose in postures where the question was whether to *defer* to the factual determinations of an executive branch agency in a later judicial proceeding, whereas in this case the question is whether the executive branch agency is obliged to defer to the factual findings of the Article III court in an earlier one. But the principle is the same in both directions. In fact, the separation of powers violation is *more* egregious when the executive branch refuses to honor a court's factual judgment.

An illustrative case is *United States* v. *Waters*, 133 U.S. 208 (1890). In *Waters* the United States district attorney for the eastern district of Arkansas tried twenty two criminal jury trials, securing a conviction in each, and the court in each case awarded him a $30 counsel fee—effectively a bonus—under "section 824 of the Revised Statutes." *Id.* at 209. That statute provided that "when an indictment for crime is tried before a jury, and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, *in proportion to the importance and difficulty of the cause, not exceeding thirty dollars*." *Id.* at 210-11 (emphasis added). When the district attorney submitted the claim for his fees to the treasury department, however, the treasury officers forwarded his request to the Attorney General who reduced his aggregate counsel fees by $320. *Id.* at 209. The Attorney General claimed a different source of statutory authority for reducing fee awards, namely, "section 368 of the Revised Statutes" which granted him "general supervisory powers over the accounts of district attorneys." *Id.* at 214.

This Court held that the Attorney General was quite wrong. Once a court made the factual determination that a case was sufficiently "important" and "difficult" to warrant the full $30 bonus that determination "was not subject to the re-examination and reversal of the attorney general." *Id.* at 213-14. The statute authorizing the Attorney General to exercise "general supervisory powers over the accounts of district attorneys" did not change that. *Ibid.*

This case is just like *Waters*. Courts were authorized to award counsel fees pursuant to one statute; the attorney general claimed he had authority to reduce the fees pursuant to another. See *id.* at 214-16. This Court held that because *in substance* his reduction in the fees operated to review and reverse the factual findings of a district court, it was "unauthorized by law." *Id.* at 215. The situation here is the same. Petitioner was ordered released pursuant to one statute, the executive branch claims it can continue to detain her pursuant to another. But *in substance* it cannot make that determination without reviewing and reversing the factual findings of an Article III court, in direct contravention of the separation of powers.

6. Were there any doubt that the scheme in this case is unconstitutional, the fact that it is wholly unprecedented would eliminate it. "[S]ometimes 'the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent'" for the action in question. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 549 (2012) (quoting *Free Enter. Fund*, 561 U.S. at 505). There is no historical precedent for a scheme like this one. The executive branch has never before been permitted to continue a person's civil detention on grounds that the person is dangerous or a flight risk notwithstanding a just-issued release order under

another statute predicated on a finding that the person is neither.

The executive branch's disregard of an Article III court's factual findings in this case was utterly unprecedented and inconsistent with the role of courts in finally deciding facts critical to the protection of constitutional rights. It violated the separation of powers.

B. The BRA and INA Bar the Transfer of Pretrial Detainees Directly to ICE Custody Except Pursuant to 18 U.S.C. § 3142(d)

A reasonable interpretation of the BRA and INA is available in this case that avoids the separation of powers concerns above. The statutes can be interpreted to provide that the executive branch cannot transfer a noncitizen to § 1226(a) ICE detention following a BRA release order except pursuant to § 3142(d). That reading honors the text, structure, and purposes of the two statutory schemes and avoids requiring the Court to issue a constitutional holding in this case.

1. The BRA nowhere explicitly authorizes the executive branch to transfer pretrial detainees to ICE custody when those detainees are ordered released by a district court. Quite the opposite, the BRA requires their "release[]." 18 U.S.C. § 3142(a).

The fact that, except in the circumstances outlined in § 3142(d) and (e), the BRA requires a person's "release" could—and should—be the end of this case. Release from custody is a physical act, not a metaphysical act. "There can be little question about the meaning of the word 'release' in the context of imprisonment." *United States* v. *Johnson*, 529 U.S. 53, 57 (2000). "It means '[t]o loosen or destroy the force of; to remove the obligation or effect of; hence to alleviate or remove; * * * [t]o let loose again; to set free from restraint, confinement, or servitude; to set at liberty; to let go.'" *Id.* (quoting *Webster's New*

International Dictionary 2103 (2d ed. 1949)). "As these definitions illustrate, the ordinary, commonsense meaning of release is to be freed from confinement." *Id.* "To say respondent was released while still imprisoned diminishes the concept the word intends to convey." *Id.*

Moreover, accepting transfer to ICE as a form of BRA "release" results in irreconcilable conflicts between the statutes. Pretrial release orders are commonly conditioned on a person's commitment to the criminal court that he will start or continue an education program, continue or actively seek employment, get medical or psychiatric treatment, get substance abuse counseling, or submit to home confinement. Transfer to ICE custody causes a person released under the BRA to violate those conditions of release, creating a direct conflict with the BRA.

2. Additionally, this is not a case where Congress was unaware that the two statutes would interact. The opposite is true. The BRA in 18 U.S.C. § 3142(d) explicitly authorizes transfers to ICE custody, showing that Congress knew how to authorize transfers to ICE custody when it intended to authorize them.

Moreover, permitting immediate transfers to ICE custody makes § 3142(d)'s elaborate scheme for transferring detainees to ICE insignificant if not entirely superfluous. "[O]ne of the most basic interpretive canons" is "that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). If Congress had intended to permit the executive branch freely to transfer any noncitizen at any time from pretrial custody to immigration custody regardless of whether a court deemed her a flight risk or a danger to the community, it would not have specifically created a 10-day

judicially supervised transfer scheme for noncitizens who pose a flight risk or a danger to the community.

3. The most glaring problem with permitting immediate transfer to ICE custody following BRA release orders is that it effectively transforms all BRA release orders for noncitizens like Ms. Baltazar-Sebastian into mere advisory opinions with no substantive effect. An entire category of BRA release orders do not result in release. From the perspective of the detainee they mean nothing at all. That is fundamentally inconsistent with Article III. Article III courts "do not sit to decide hypothetical issues or to give advisory opinions." *Princeton Univ.* v. *Schmid*, 455 U.S. 100, 102 (1982) (per curiam); *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

In addition to avoiding grave constitutional problems, reading the BRA and the INA to require that the custody determination be made only one time eliminates the need for an intrusive inquiry into whether ICE detention is "pretextual." Multiple courts of appeals have read into the BRA an implicit restriction on ICE's authority—namely, that ICE cannot sidestep the BRA by detaining a defendant pursuant to the INA "for the sole purpose of ensuring [the alien's] presence for criminal prosecution." *United States* v. *Soriano Nunez*, 928 F.3d 240, 245 (3d Cir. 2019); see also *United States* v. *Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019); *United States* v. *De La Pena-Juarez*, 214 F.3d 594, 598 (5th Cir. 2000) (adopting similar "ruse exception" for the Speedy Trial Act).

While these intrusive, motive-based inquiries are necessary absent any other safeguard, they have no textual basis in the statute. The better reading of the statutes establishes the BRA hearing as the sole hearing at which a custody determination is made, eliminating the need to scrutinize the motives of executive branch

officials. The government's interpretation of the BRA and INA as creating a motive-based safety valve lacks any textual hook in the statute and leads to needlessly prolonged detention and redundant judicial and administrative proceedings.

Given the specific, carefully reticulated provisions set forth in the BRA for making transfers to ICE custody, the BRA should be read to prohibit immediate transfer to ICE custody when a person is ordered released under the BRA except pursuant to § 3142(d). That reading honors the statutes' text and avoids the grave separation of powers issue in this case.

II. The Question Presented Is Recurring and Nationally Important

A. The Decision Below Implicates Fundamental Separation-of-Powers Issues

The importance of the question presented cannot be overstated. The case presents a fundamental constitutional question at the heart of the separation of powers. To the Framers, the separation of powers was "the absolutely central guarantee of a just Government." *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). James Madison made this clear on the floor of the First Congress, stating: "[I]f there is a principle in our constitution * * * more sacred than another, it is that which separates the legislative, executive, and judicial powers." 1 Annals of Cong. 604 (1789); see *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 695 (2015) (Roberts, C.J., dissenting).

The reason the Framers cherished this principle above others is simple: "The separation of powers * * * safeguards individual freedom." *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, C.J., dissenting). "As Hamilton wrote, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and

executive powers.'" *Id.* "Liberty" is therefore "*always* at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (emphasis added); see also *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2202 (2020) (the separation of powers is a "structural protection[] against abuse of power" and "critical to preserving liberty").

By separating the executive, legislative, and judicial powers, the Framers sought to ensure that "no man or group of men will be able to impose its unchecked will." *United States* v. *Brown*, 381 U.S. 437, 443 (1965). The separation of powers thus works to secure "the people's rights," *United States* v. *Morrison*, 529 U.S. 598, 616 n.7 (2000), and the Framers viewed that separation as "the absolutely central guarantee of a just Government," *Morrison*, 487 U.S. at 697 (1988) (Scalia, J., dissenting).

Accordingly, "[p]reserving the separation of powers is one of this Court's most weighty responsibilities." *Wellness Int'l Network*, 575 U.S. at 696 (Roberts, C.J., dissenting). To that end, the Court frequently grants certiorari in cases raising separation of powers questions even when there is no conflict among the courts of appeals. See, *e.g.*, *Bank Markazi*, 136 S. Ct. 1310; *Free Enter. Fund*, 561 U.S. 477; *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367 (2004); *Freytag* v. *Comm'r*, 501 U.S. 868 (1991).

This case warrants the same treatment. As explained, the decision below permits the executive branch to disregard the judgment of an Article III court. Worse, it permits this encroachment on the judicial function in cases involving the most precious liberty of all—the right to be free from detention. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting) (freedom from unauthorized Executive detention lies at "[t]he very core of liberty secured by our Anglo–Saxon system of separated powers"); *Williamson*

v. *United States*, 184 F.2d 280, 282-83 (2d Cir. 1950) (Jackson, J., in chambers) (detention without criminal conviction is the most significant incursion on individual liberty, "fraught with danger of excesses and injustice"). Safeguarding the separation of powers is especially critical where an individual's bodily freedom is directly at stake. *Cf. PHH Corp.* v. *CFPB*, 839 F.3d 1, 5 (D.C. Cir. 2016) (Kavanaugh, J.) ("The U.S. Government's executive power to enforce federal law against private citizens—for example, to bring criminal prosecutions and civil enforcement actions—is essential to societal order and progress, but simultaneously a grave threat to individual liberty.").

The fact that several other courts of appeals agree with the outcome below (see Pet. App. 8a) is all the more reason for this Court to intervene. Today, in a majority of the regional circuits, the executive branch can deprive an individual of her liberty even after an Article III judge has determined that she should be free. Most of the courts that have blessed this conduct have done so without considering the precise question presented here. Yet future panels will be either bound by those courts' decisions or unlikely to depart from them as a practical matter. This case illustrates the problem: Ms. Baltazar-Sebastian's principal argument on appeal was that detention by the executive branch under these circumstances violated the separation of powers. The issue was one of first impression in the Fifth Circuit, see Pet. App. 8a, yet the panel rejected her claim in a *single* paragraph that relied almost exclusively on the decisions of other courts of appeals, see *id.* at 12a. Absent this Court's review, lower courts will likely continue to summarily reject the separation of powers claim and allow the executive branch to continue intruding on "[t]he very core of liberty" the Framers sought to protect. *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting).

B. The Questions Presented Have Enormous Practical Significance

The decision below directly affects thousands of individuals each year and the threatens the liberty of far more.

1. The sheer number of recent cases where the government has flouted a BRA release order shows that the questions presented are frequently recurring and profoundly important. The tally of cases also reveals deep disagreement between the federal district courts, which frequently have issued orders enforcing BRA release orders as conclusive,[1] and the courts of appeals, which

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[1] See *United States* v. *Camacho-Porchas*, 2021 WL 2138799, at *1 (D. Ariz. May 26, 2021); *United States* v. *Ferreira-Chavez*, 2021 WL 602822, at *1 (D. Idaho Feb. 12, 2021); *United States* v. *Alvarado-Velasquez*, 322 F. Supp. 3d 857 (M.D. Tenn. 2018); *United States* v. *Lutz*, 2019 WL 5892827, at *1 (D. Ariz. Nov. 12, 2019); *United States* v. *Rangel*, 318 F. Supp. 3d 1212 (E.D. Wash. 2018); *United States* v. *Veloz-Alonso*, 2018 WL 4940692, at *3 (N.D. Ohio Oct. 12, 2018), *rev'd*, 910 F.3d 266 (6th Cir. 2018); *United States* v. *Vasquez-Benitez*, 2018 WL 8963450, at *1 (D.D.C. Sept. 26, 2018), *rev'd*, 919 F.3d 546 (D.C. Cir. 2019); *United States* v. *Garcia*, 2018 WL 3141950 (E.D. Mich. June 27, 2018); *United States* v. *Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017); *United States* v. *Ventura*, 2017 WL 5129012, at *3 (E.D.N.Y. Nov. 3, 2017); *United States* v. *Galitsa*, 2016 WL 11658188 (S.D.N.Y. July 28, 2016); *United States* v. *Blas*, 2013 WL 5317228, at *6 (S.D. Ala. Sept. 30, 2013); *United States* v. *Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1174 (D. Or. 2012); *United States* v. *Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009); *United States* v. *Montoya-Vasquez*, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009); *cf. United States* v. *Urbina-Escoto*, 2020 WL 6147024, at *1 (W.D. Wash. Oct. 20, 2020); *United States* v. *Ramirez-Arenas*, 2019 WL 2208529, at *1 (D. Colo. May 22, 2019); *United States* v. *Rincon-Meza*, 2019 WL 2208734, at *1 (W.D. Wash. May 22, 2019); *United States* v. *Maradiaga*, 2020 WL 2494578, at *1 (N.D. Cal. May 14, 2020); *United States* v. *Alzerei*, 2019 WL 2642824, at *1 (D. Mass. June 27, 2019); *United States* v. *Soufan*, 2019 WL 1672418, at *1 (D.V.I. Apr. 17, 2019); *United States* v. *Villatoro-Ventura*, 330 F. Supp. 3d 1118 (N.D. Iowa 2018).

have not.[2] That so many of the judicial officers directly responsible for making bail determinations and supervising criminal cases have condemned this executive-branch practice signals its immense concrete importance to judicial administration.

2. The volume of cases raising the questions presented reflects the immense number of individuals in petitioner's position. At the end of fiscal year 2020, there were over 3,000 individuals in ICE or CBP detention with pending criminal charges. ICE, *ICE Detention Statistics FY2020*, https://bit.ly/3zuC3pZ. And each year, hundreds if not thousands of aliens subject to immigration detention are ordered released by Article III courts. Available statistics on pretrial release significantly underestimate the problem because—tacitly accepting that the executive branch can simply ignore release orders—the Administrative Office of the U.S. Courts does not count individuals released into ICE custody as having been "released." Thomas H. Cohen et al., *Examining Federal Pretrial Release Trends Over the Last Decade*, Fed. Probation J., Sept. 2018, at 6 tbl. 1, https://bit.ly/3kAyf0j.

These figures do not account for the staggering number of individuals subject to ICE detainers, of which ICE issued 120,000 in 2020 alone. ICE, *Fiscal Year 2020 ICE Enforcement and Removal Operations Report* 18, https://bit.ly/2Y7FSns. The government's position is that, if anyone subject to an ICE detainer is charged with a crime, a BRA hearing is meaningless—any release order can be immediately overridden. In fact, it has become common for aliens not to seek bail at all, knowing that they

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[2] *United States* v. *Pacheco-Poo*, 952 F.3d 950, 953 (8th Cir. 2020); *United States* v. *Barrera-Landa*, 964 F.3d 912, 919 (10th Cir. 2020); *United States* v. *Lett*, 944 F.3d 467, 471 (2d Cir. 2019); *United States* v. *Soriano Nunez*, 928 F.3d 240, 247 (3d Cir. 2019); *United States* v. *Veloz-Alonso*, 910 F.3d 266, 270 (6th Cir. 2018); *United States* v. *Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019).

will be immediately transferred to ICE custody. See Lena Graber & Amy Schnitzer, Nat'l Immigration Project, *The Bail Reform Act and Release from Criminal and Immigration Custody For Federal Criminal Defendants* 1 (2013), https://bit.ly/2XXdnZp.

3. Detaining individuals released from criminal custody interferes with their ability to adequately prepare for and present their defense. This case is only one of many stark examples. In one recent case, ICE's detention caused a defendant "to miss two court dates scheduled as preliminary hearings." *United States* v. *Lutz*, 2019 WL 5892827, at *4 (D. Ariz. Nov. 12, 2019). This delay in turn "resulted in a violation of Fed. R. Crim. P. 5.1, which requires that a preliminary hearing be held within 14 days after a defendant's initial appearance if the defendant is in custody." *Ibid.* Another court expressed similar frustration, dismissing an indictment when the defendant's "detention out of district * * * imposed substantial barriers to his ability to effectively consult with his court appointed counsel and present a defense to the charges he faces." *United States* v. *Rangel*, 318 F. Supp. 3d 1212, 1219 (E.D. Wash. 2018). A major purpose of pretrial release is to enable defendants and their counsel to mount a meaningful defense; the scheme ratified below allows the government to flout that policy.

4. More broadly, the decision below invites systematic abuse of immigration detention and circumvention of judicial decisions.

The government's interpretation of these statutes invites the government to take individuals into pretextual immigration custody when they fail win a pretrial bond hearing. Some courts have tried to mitigate the absurdity through anti-circumvention rules—holding, for example, that the executive branch cannot transfer a defendant to immigration custody with the "inten[t] to secure his appearance in the criminal case." *Lett*, 944 F.3d at 473.

These *mens rea* rules are unadministrable, and it does not appear that any court has applied them to order release from immigration custody. Regardless, forbidding pretextual detention does not solve the separation of powers violation that results every time the executive branch fails to treat a judge's factual determination as conclusive.

These problems extend beyond the immigration context. Under the logic of the decision below, Congress could form an Especially Dangerous Persons Agency to take individuals granted bail in criminal proceedings into civil custody, in order to ensure that persons who are "especially dangerous," in the agency's view, are not released into the community. In response to an order by a criminal court that transfer to this agency's custody violates the criminal court's release order—because the criminal court determined that the person posed no danger to the community as a condition of granting bail in the first place—the agency would point to the decision below, which holds that administrative agencies have no obligation to respect findings of Article III courts even in cases where the United States was a party. Thwarting a release order requires little more than turning over the cell key to a different jailer. That system destroys our system of checks and balances and threatens the individual liberty of every person.

III. This Case is an Excellent Vehicle

This case is an ideal vehicle for the Court to address the question presented. The question was pressed below, fully briefed, and was passed on by the court of appeals. The court of appeals suggested that there might be an issue of "waiver" in this case, but that is obviously incorrect given that Ms. Baltazar-Sebastian is the *appellee*.

As it comes to the Court, this case presents the separation of powers question cleanly and squarely: if

ICE lacked the authority to disregard the Article III court's factual findings it had no lawful grounds to take petitioner into § 1226(a) custody, period. Additionally, because the United States has stipulated to stay all criminal and immigration proceedings against Ms. Baltazar-Sebastian pending the outcome of this case, there is no risk of the case becoming moot before the Court could issue a decision on the merits.

Nor would further percolation benefit the Court in resolving the question presented in the extraordinary circumstances presented here. As explained above, the courts of appeals have reflexively denied separation of powers challenges to ICE's practice, and many of the circuits have already weighed in. Additional opinions from other courts of appeals denying separation of powers challenges will add little to this Court's consideration of the issue.

In any event, even outside the circumstances of this case, the Court routinely grants review in cases presenting significant separation-of-powers issues in the absence of a conflict between the courts of appeals. See pp. 25-26, *supra*. The same treatment is warranted here.

The need for the Court's review is particularly acute because of the vulnerability of the thousands of people this ongoing and egregious separation of powers violation affects. The longer the question presented remains unresolved, the more families will be torn apart by § 1226(a) detention that the executive branch had no authority to undertake. Such an ongoing extraordinary infringement on the individual liberty of thousands warrants the Court's intervention at the earliest opportunity; this case presents an ideal opening for the Court to do so. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should granted.

Respectfully submitted.

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