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## Jail By Another Name: ICE Detention of Immigrant Criminal Defendants on Pretrial Release

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JAIL BY ANOTHER NAME:  
ICE DETENTION OF IMMIGRANT CRIMINAL  
DEFENDANTS ON PRETRIAL RELEASE

*Kerry Martin*★

*This Article assesses the legality of an alarming practice: Immigration and Customs Enforcement (ICE) routinely detains noncitizen criminal defendants soon after they have been released on bail, depriving them of their court-ordered freedom. Since the District of Oregon’s decision in United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167 (D. Or. 2012), a growing group of federal courts has held that when ICE detains federal criminal defendants released under the Bail Reform Act (BRA), it violates their BRA rights. These courts have ordered that the government either free the defendants from ICE custody or dismiss their criminal charges. This Article agrees with and expands on this interpretation of the BRA. Focusing on the BRA’s plain text and legislative history, it argues that the BRA confers a “right to remain released” pending trial, which ICE detention infringes. It then debunks the leading counterarguments to this BRA interpretation. It also explores constitutional arguments for the right to remain released and their implications for federal and state criminal defendants.*

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## INTRODUCTION

On August 8, 2012, Enrique Alvarez-Trujillo was driving through the Portland, Oregon metropolitan area, where he had lived and raised a family for the past eighteen years, when he got pulled over.<sup>1</sup> The police officer determined that Enrique was driving with a suspended license and arrested him. He was booked on state charges and released—but because Enrique is not a citizen, the story doesn't end here.

Nineteen days later, agents from Immigration and Customs Enforcement (ICE) arrested him. The ICE agents determined that Enrique had been deported in 1993 and had allegedly reentered the U.S. soon after without authorization. ICE then reinstated Enrique's nearly two-decade-old deportation order, but instead of immediately deporting him, they referred him to the U.S. Attorney's Office for criminal prosecution for illegal reentry. The USAO obliged, so ICE transported Enrique to the U.S. District Court in Portland to face federal criminal charges.

Like many criminal defendants, Enrique exercised his right to a detention hearing. At the hearing, Enrique's friends and family testified to his tremendous character, work ethic, and community ties. Finding neither flight risk nor danger to society, Magistrate Judge John Acosta ordered him released pending trial. This would give Enrique the opportunity to be back with his family and community as he prepared for his upcoming cases.

ICE arrested him again the next day. They took him to an immigration detention center in Tacoma, Washington, 150 miles away, where he would remain for over two months.

Was this legal?

No, said Judge Michael H. Simon of the District of Oregon. In *United States v. Trujillo-Alvarez*, Judge Simon held that ICE may not detain a federal defendant who has been granted pretrial release.<sup>2</sup> Citing the Bail Reform Act of 1984 (hereinafter the BRA), Simon ruled that:

[I]f a judicial officer determines under the BRA that a particular defendant must be released pending trial because that defendant does not present a risk of either flight or harm, and the government has chosen not to appeal that determination, the Executive Branch may no longer keep that person in

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1. These facts are drawn from the "Factual Background" section of *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170-72 (D. Or. 2012).

2. *Id.*

physical custody. To do so would be a violation of the BRA and the court's order of pretrial release.<sup>3</sup>

Judge Simon reasoned that the BRA granted defendants who had been ordered released a right not to get detained again by the government. He found that after a judge ordered U.S. Marshals to release a person, the BRA could not allow ICE to re-arrest that person. Noting that both detaining agencies are within same branch of government—the federal executive branch, with the Marshals within the Department of Justice and ICE within the Department of Homeland Security—Judge Simon ruled that the executive branch's re-detention of Enrique violated the BRA irrespective of ICE's ostensibly different motive for detention: deportation. To stop the ongoing violation of the BRA, Judge Simon gave the executive branch two options: either it could release Enrique from ICE custody, or it could dismiss his criminal charges.

Since then, more federal judges have published opinions agreeing with the *Trujillo-Alvarez* decision.<sup>4</sup> They have ruled that ICE violates the BRA by detaining BRA-released defendants, and they have ordered the government to choose between detention and prosecution. Model motions and orders have been drafted to facilitate the release or charge-dismissal of detainees in these circumstances.<sup>5</sup> And as of 2020, without an appeals court decision standing for the same principle, *Trujillo-Alvarez* remains the leading case recognizing this BRA violation<sup>6</sup> prompting at

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3. *Id.* at 1170.

4. *See, e.g.*, *United States v. Veloz-Alonso*, No. 1:18-CR-464, 2018 WL 4940692 (N.D. Ohio Oct. 12, 2018), *rev'd by* 910 F.3d 266 (6th Cir. 2018); *United States v. Vasquez-Benitez*, No. 18-275, 2018 WL 8963450 (D.D.C. Sept. 26, 2018), *rev'd by* 919 F.3d 546 (D.C. Cir. 2019); *United States v. Galitsa*, No. 17-CR-00324 (VEC), 2016 WL 11658188 (S.D.N.Y. July 28, 2016); *United States v. Vazquez*, No. A-18-CR-273 RP, 2018 WL 3599593 (W.D. Tex. July 27, 2018); *United States v. Garcia*, No. 18-CR-20256, 2018 WL 3141950 (E.D. Mich. June 27, 2018), *abrogated by* 910 F.3d 266 (6th Cir. 2018); *United States v. Rangel*, 318 F. Supp. 3d 1212 (E.D. Wash. 2018); *United States v. Boutin*, 269 F. Supp. 3d 24 (E.D.N.Y. 2017); *United States v. Ventura*, No. 17-CR-418 (DLI), 2017 WL 5129012 (E.D.N.Y. Nov. 3, 2017); *see also In re Sealed (J.B.G.)*, 335 F. Supp. 3d 224 (D.P.R. 2018) (applying the same logic to BRA-detained witnesses).

5. 5 WEST'S FEDERAL FORMS, DISTRICT COURTS—CRIMINAL § 82:85.30, Westlaw (database updated May 2020) (Motion to reconsider detention order—If detention based on immigration “detainer”); *id.* § 82:85.70 (Proposed order if immigration takes custody of criminal defendant).

6. *See, e.g., Boutin*, 269 F. Supp. 3d at 26 (“[T]his issue has not been addressed by the Second Circuit Court of Appeals or any other circuit court, but other district courts that have addressed this issue are in accord.”).

least one judge to refer to the basic release-or-dismiss framework as “the Trujillo-Alvarez reasoning.”<sup>7</sup>

In the years since this happened to Enrique, many others have ended up in similar situations: granted pretrial release in a criminal case, only to end up in ICE detention. In fact, it has become so common that some immigrants do not seek bail at all, fearing that they will be immediately transferred to ICE custody.<sup>8</sup> By detaining noncitizens who make bail, ICE deprives them of their right to bail, plain and simple.

This is one of the many ways our criminal justice system treats noncitizens more harshly. Department of Justice data shows that in 2018, 64 percent of all federal arrests were of noncitizens, mostly for immigration crimes.<sup>9</sup> Immigrant defendants are “far more likely to be incarcerated and sentenced for longer periods” in federal court than U.S. citizens, and this “punishment gap” is even wider in areas that have recently experienced a “larger influx” of immigrants.<sup>10</sup> Some of these defendants are sent to “all-foreign prisons,” where conditions are considerably worse than prisons holding U.S. citizens.<sup>11</sup> And, of course, immigrants of color are subject to the same racial disparities that all people of color face in the criminal justice system.

Under the Trump Administration, the treatment of noncitizen criminal defendants has only gotten worse. More people are getting caught in the crossfire between the Department of Justice’s (DOJ) “zero-tolerance” policy (directing U.S. Attorneys to criminally prosecute all cases of illegal entry and reentry)<sup>12</sup> and the Department of Homeland Security’s (DHS) expansion of immigrant detention (including a minimum

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7. *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1139 (N.D. Iowa 2018).

8. 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) (“[N]oncitizen defendants who do make bail are often transferred to immigration custody instead of being released. This practice is so common that some noncitizens do not seek bail because they fear such a transfer.”).

9. Andrew R. Calderón & Weihua Li, *Why Are the Feds Arresting More Non-Citizens?*, MARSHALL PROJECT (Aug. 23, 2019), <https://www.themarshallproject.org/2019/08/23/why-are-the-feds-arresting-more-non-citizens>.

10. Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 827, 840-42 (2014).

11. See generally Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379 (2019).

12. Press Release, Dep’t of Justice, Attorney Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>; Memorandum from the Attorney Gen. to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

“bed quota” of around 34,000 detainees per day)<sup>13</sup> and its maximum enforcement of immigration laws.<sup>14</sup> ICE continues to detain defendants in the midst of criminal proceedings, despite the obvious impediments that such detention places on those proceedings and federal regulations that clearly deem a criminal defendant’s departure from the country “prejudicial” to the United States’ interests.<sup>15</sup> In the Administration’s overzealous efforts to both prosecute and deport immigrants, it has locked DOJ and DHS in an escalating “turf battle”<sup>16</sup> with no end in sight—and with immigrants as collateral damage.

On top of these disparities, depriving noncitizens of the right to bail adds fuel to the fire of immigrants’ rights. But a growing number of immigrants who were detained by ICE while released on bail have gotten judges to intervene. Citing *Trujillo-Alvarez*, these judges have ordered the executive branch to make up its mind between prosecution and deportation.<sup>17</sup>

Who exactly is affected by *Trujillo-Alvarez*? It is every federal criminal defendant whom a magistrate would deem releasable, but ICE would deem detainable. It is immigrants from all over the world—though they strongly skew non-white.<sup>18</sup> They are parents, spouses, children. They

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13. Department of Homeland Security Appropriations Act, Pub. L. No. 111–83, 123 Stat. 2142, 2149 (2010) (“[F]unding made available under this heading shall maintain a level of not less than 33,400 detention beds.”); *see also* OFFICE OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC’Y, OIG–14–116, ICE’S RELEASE OF IMMIGRATION DETAINEES 6 (2014) (“[C]ongressional appropriations language requires that ICE ‘shall maintain a level of not less than 34,000 detention beds.’ ICE tracks compliance with the congressional mandate by measuring its ‘average daily population.’”); Jennifer Chan, *Immigration Detention Bed Quota Timeline*, NAT’L IMMIGRANT JUST. CTR. (Jan. 13, 2017), <https://www.immigrantjustice.org/staff/blog/immigration-detention-bed-quota-timeline>.

14. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (2017) (“I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.”).

15. 8 C.F.R. § 215.3 (2003) (“The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States . . . (g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States.”).

16. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1180 (“It is not appropriate for an Article III judge to resolve Executive Branch turf battles.” (quoting *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1112 (D. Minn. 2009))).

17. *See* note 5, *supra*.

18. *See Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> (listing the following ten countries as having the most “Detained Immigrants by Country of Origin”: Mexico, El Salvador, Honduras, Guatemala, Haiti, Ghana, Dominican Republic, Nigeria, Jamaica, and Bangladesh); *see also* Jeremy Raff, *The ‘Double Punishment’ for Black Undocumented Im-*

have come in contact with the federal criminal justice system—many times for no crime other than reentering the country. Sometimes for small misdemeanors or more serious crimes. In the criminal proceeding, they have proven to a magistrate that they are safe and settled citizens of their communities, even if they are not citizens of the country. They have been ordered released. And then they have been detained again by ICE. It is this group of unlucky people that *Trujillo-Alvarez* protects.

At this stage—when a BRA-released defendant has been re-detained by ICE—it is safe to say that nearly anyone would want one of the outcomes of the *Trujillo-Alvarez* reasoning: release from ICE custody or dismissal of criminal charges. Some people want to be released so that they can be with their families and friends, or keep working and earning money, or work more closely with their lawyers to build better cases in criminal and immigration court. Others see deportation as a certainty and just want to move through the process quickly without languishing in detention or facing criminal prosecution. Some even prefer to return to criminal custody, so that they can at least accrue time towards their federal sentence.<sup>19</sup> In any case, the *Trujillo-Alvarez* reasoning helps protect the person's rights and preserve their dignity.

With its increased use, *Trujillo-Alvarez* has also faced increased scrutiny. Two federal circuit courts of appeals and several federal district courts have published opinions disagreeing with the premise that ICE detention violates the BRA.<sup>20</sup> They offer counter-explanations of the BRA, which grant almost unchecked detention powers to ICE. These contrary cases have been decided under the shadow of a U.S. Supreme Court that has consistently reaffirmed its expansive view of ICE's detention authority, most recently in *Jennings v. Rodriguez*<sup>21</sup> and *Nielsen v. Preap*.<sup>22</sup> Mean-

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*migrants*, ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/> (“Although only 7 percent of non-citizens in the U.S. are black, they make up 20 percent of those facing deportation on criminal grounds.”).

19. The motivations listed in this paragraph are based on the author's observations and conversations with staff while interning at Detroit's Federal Defender Office in Summer 2018.

20. *United States v. Vasquez-Benitez*, 919 F.3d 546, 552-53 (D.C. Cir. 2019); *United States v. Veloz-Alonso*, 910 F.3d 266, 270 (6th Cir. 2018); *United States v. Alzerei*, No. CR 19-10124-DJC, 2019 WL 2642824, at \*9 (D. Mass. June 27, 2019); *United States v. Rincon-Meza*, No. CR19-0062-JCC, 2019 WL 2208734 (W.D. Wash. May 22, 2019); *United States v. Ramirez-Arenas*, No. 19-CR-00035-CMA-1, 2019 WL 2208529, at \*15 (D. Colo. May 22, 2019); *United States v. Soufan*, No. CR 2019-27, 2019 WL 1672418 (D.V.I. Apr. 17, 2019); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1143 (N.D. Iowa 2018).

21. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

22. *Nielsen v. Preap*, 139 S. Ct. 954 (2019).



while, as influential as *Trujillo-Alvarez* has been, no appellate court has ever agreed with its central holding as of this writing. It is vulnerable.

Case law has provided strong precedent for two questions similar to the question presented in *Trujillo-Alvarez*. First, it is well established that when ICE has detained *and deported* a criminal defendant, the prosecution may not go forward.<sup>23</sup> Prosecutors will not pursue criminal charges in absentia against deportees—though they may reinstate the charges if the deportee returns to the U.S. and is apprehended again. Second, it is increasingly clear that immigration status or an ICE detainer cannot alone justify denying someone pretrial release (or a detention hearing altogether) under the BRA.<sup>24</sup> Flight, the reasoning goes, has to involve an element of volition; therefore, being detained or deported against the defendant's will cannot constitute a flight risk for purposes of denying bail. This argument had gained traction before *Trujillo-Alvarez* was decided, and many cases since have taken it as a given.<sup>25</sup>

But even if immigration status cannot be cited to deny bail, can immigrant detention be used to deprive someone of their right to bail? And even if prosecutors cannot prosecute someone deported by ICE, should they be authorized to prosecute someone detained by ICE? *Trujillo-Alvarez* answers these questions in the negative.

Without the *Trujillo-Alvarez* reasoning, though, any detainable immigrant released on bail could be immediately re-detained by ICE and subjected to simultaneous criminal and deportation proceedings—on immigration courts' fast-paced "detained docket," no less.<sup>26</sup> Their only

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23. See, e.g., *United States v. Lutz*, No. CR-19-0692TUC-RM (BGM), 2019 WL 3253194 (D. Ariz. July 19, 2019); *United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128 (M.D. Fla. 2015).

24. See, e.g., *United States v. Adomako*, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) (one of the earliest cases holding that a defendant "is not barred from release because he is a deportable alien"); *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) ("The risk of nonappearance referenced in . . . [18 U.S.C.] § 3142 has to involve an element of volition."); *United States v. Montoya-Vasquez*, No. 4:08CR3174, 2009 WL 103596, at \*5 (D. Neb. Jan. 13, 2009) (defining a flight risk as a defendant who "would fail to appear by virtue of his own volition, actions and will"); *United States v. Castro-Inzunza*, No. 12-30205, 2012 WL 6622075 (9th Cir. July 23, 2012); *United States v. Ailon-Ailon*, 875 F.3d 1334, 1335 (10th Cir. 2017); *United States v. Brown*, No. 4-15-cr-102, 2017 WL 3310689, at \*4 (D.N.D. July 31, 2017) (reasoning that because "Congress affirmatively extended to alien persons the same protections it affords citizens under the Act . . . the court would violate the Bail Reform Act if it detained defendant based only on the fact he is an alien and ICE has filed a detainer.").

25. See note 24, *supra*.

26. See, e.g., *Special Considerations When Representing Detained Applicants for Asylum, Withholding of Removal and Relief Under the Convention Against Torture*, National Immigrant Justice Center (August 2019), <https://immigrantjustice.org/media/308/download> at 18 ("Unlike non-detained asylum cases, cases that are on the detained docket move much

chance of release would be through an immigration bond hearing, which has a required minimum \$1,500 bond and which is not available to anyone convicted of certain crimes, nor to anyone with a prior removal order, like Enrique.<sup>27</sup> Their best chance of getting their charges dropped would be by getting deported. If ICE could simply detain any noncitizen defendant who is released under the BRA, the fact that said defendant was granted bail in the first place is inconsequential.<sup>28</sup>

In sum, the interpretation of the BRA as granting defendants a right to remain released is crucial to the liberty of thousands of noncitizen criminal defendants. The *Trujillo-Alvarez* reasoning could grant immigrants an equal right to bail. But it is under attack and must be protected, particularly by criminal defense lawyers in federal court.

This Article assesses the legality of ICE's routine detention of noncitizen criminal defendants upon their release from pretrial detention. Part I focuses on the BRA's plain text and the cases interpreting it, arguing that the BRA confers a "right to remain released" pending trial, which ICE detention infringes. It endorses the "release-or-dismiss" orders that many judges have issued, contending that the government must either release defendants from ICE custody or dismiss their criminal charges when it has violated their BRA rights. Part II debunks the leading counterarguments to this BRA interpretation, including those contained in the first appellate decisions addressing the issue.<sup>29</sup> Part III turns to the BRA's legislative history, finding support in the history for the BRA interpretation previously described. Finally, Part IV turns to the constitutional implications of ICE detaining immigrants released on bail, outlining the strongest constitutional arguments for federal and state criminal defendants.

## I. THE RIGHT TO REMAIN RELEASED

This Part introduces what this Article will refer to as the "right to remain released," which protects federal defendants released pending trial

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more quickly, usually resolving about two months after the initial master calendar hearing.").

27. 8 U.S.C. § 1226(a), (c) (2018).

28. Eric Brickenstein, *Making Bail and Melting Ice*, 19 LEWIS & CLARK L. REV. 229, 245 (2015) ("Cases such as *Adomako* and *Trujillo-Alvarez* represent a critical development in protecting alien defendants' rights under the BRA. Other rights-protecting court decisions, such as refusing to consider an immigration detainer in the bail calculus, are essentially meaningless if courts permit ICE to flout release orders by detaining alien defendants for the purpose of delivering them to trial.").

29. *United States v. Veloz-Alonso*, 910 F.3d 266 (6th Cir. 2018); *United States v. Vasquez-Benitez*, 919 F.3d 546, 552-53 (D.C. Cir. 2019).

under the Bail Reform Act from being detained by ICE. This right attaches to the individual until they are convicted, plead guilty, or have their charges dismissed. ICE detention violates this right by requiring that the defendants either be released from ICE custody or have their criminal charges dismissed.

A. *The Bail Reform Act, Section 3142(d)*

The right to remain released is rooted in a specific provision of the BRA, 18 U.S.C. § 3142(d). The provision reads, in relevant part:

(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.—If the judicial officer determines that—

(1) such person . . .

(B) is not a citizen of the United States or lawfully admitted for permanent residence . . . and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten [business] days . . . and direct the attorney for the Government to notify . . . the appropriate official of the [Department of Homeland Security]. *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.*<sup>30</sup>

The italicized sentence—which at least one court has referred to as “the operative sentence” of this BRA provision<sup>31</sup>—is the BRA’s declaration that orders of pretrial release supersede a defendant’s detainability and deportability. It is the BRA’s “acknowledg[ment of] the potential for the two paths,” prosecution and deportation, “to intersect.”<sup>32</sup> And its meaning is clear: “if the BRA applies, statutes governing detention related to immigration proceedings do not.”<sup>33</sup>

30. 18 U.S.C. § 3142(d) (2018) (emphasis added).

31. *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1139 (N.D. Iowa 2018).

32. *United States v. Vasquez-Benitez*, No. CR 18-275, 2018 WL 8963450, at \*2 (D.D.C. Sept. 26, 2018), *rev’d by* 919 F.3d 546 (2019).

33. *United States v. Rangel*, 318 F. Supp. 3d 1212, 1218 (E.D. Wash. 2018).

The primary function of section 3142(d) is to carve one of the BRA's carefully limited exceptions to the norm of pretrial release<sup>34</sup>: temporary detention to permit deportation.<sup>35</sup> With section 3142(d), the sole BRA provision referencing immigration,<sup>36</sup> “‘Congress chose not to exclude removable aliens from consideration for release or detention in criminal proceedings,’ but instead set forth ‘specific procedures to be followed when a judicial officer determines that a defendant is not a citizen of the United States or lawfully admitted for permanent residence.’”<sup>37</sup> Section 3142(d) is the BRA's olive branch to ICE,<sup>38</sup> giving the agency two weeks to take custody of a certain category of defendants: immigrants who are neither citizens nor lawful permanent residents and who fit one of the standard criteria for detainability (i.e. flight risk or danger to the community).<sup>39</sup> If ICE fails to take advantage of this two-week opportunity, then the BRA mandates that these noncitizen defendants be treated under the BRA like all other persons charged with an offense.<sup>40</sup> Thus, if a magistrate orders the defendants released under the BRA, they must actually be released, “notwithstanding the applicability of other provisions of law,” including immigration law.<sup>41</sup> They may not be re-detained—even by ICE for the purpose of deportation—if their prosecution is to proceed.<sup>42</sup>

ICE violates noncitizens' right to remain released all the time. There is a somewhat reasonable explanation for this: when read alone, the text of the Immigration and Nationality Act (INA) appears to allow,

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34. See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

35. See 18 U.S.C. § 3142(d). The full title of this section is “Temporary Detention to Permit Revocation of Conditional Release, Deportation, or Exclusion.”

36. See *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1174 (D. Or. 2012) (“[T]he BRA expressly refers to persons who are not citizens of the United States in only one portion of the BRA[:] Section 3142(d) . . .”).

37. *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (quoting *United States v. Santos-Flores*, 794 F.3d 1088, 1090-91 (9th Cir. 2015)).

38. Note that when the Bail Reform Act was amended in 1984, the agency to which this provision would have applied was the Immigration and Naturalization Service (INS).

39. 18 U.S.C. § 3142(d).

40. *Id.*

41. *Id.*

42. See *Trujillo-Alvarez*, 900 F. Supp. 2d at 1170 (“[I]f a judicial officer determines under the BRA that a particular defendant must be released pending trial . . . the Executive Branch may no longer keep that person in physical custody.”); *United States v. Blas*, No. CRIM. 13-0178-WS-C, 2013 WL 5317228, at \*3 (S.D. Ala. Sept. 20, 2013) (“[O]nce the Secretary opts for prosecution over deportation—as is clear in this case—and invokes the jurisdiction of this Court, this Court has priority or first standing and administrative deportation proceedings must take a backseat to court proceedings until the criminal prosecution comes to an end.”).

or even require, that ICE detain certain immigrants, not excluding those who have been released on bail. Some courts have described this as a “conflict between the Bail Reform Act . . . and the Immigration and Nationality Act.”<sup>43</sup> This conflict of statutes plays out like this: Certain provisions of the INA allow or require that immigrants be detained pending deportation.<sup>44</sup> But if these immigrants are federally prosecuted and granted bail under the BRA, the BRA requires their release “notwithstanding” the INA’s mandates.<sup>45</sup> It is over this conflict that the “turf battle” between DOJ and DHS has developed.<sup>46</sup>

*Trujillo-Alvarez* and its progeny are the judiciary’s navigation of this conflict. They show the government the only two ways of complying with both statutes at once: dismissal of charges, or release from detention.<sup>47</sup>

### B. Release-or-dismiss Orders

The BRA does not specifically state how a court should react if ICE violates a defendant’s right to remain released. But courts have identified the two possible responses that logically follow: either ICE can release the defendant, or prosecutors can drop their charges.<sup>48</sup> The government can either *stop the violative action* by releasing the defendant from ICE custody, or *remove the condition that makes the action violative*, by ending the criminal prosecution and the BRA right that it confers. Since *Trujillo-Alvarez*, courts ruling on the issue have consistently given the government its pick

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43. See, e.g., *United States v. Boutin*, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017).

44. 8 U.S.C. § 1226(c) (2018) (dictating that the government “shall take into custody any alien who” is inadmissible or removable on crime- or terrorism-related grounds); 8 U.S.C. § 1231(a)(1)-(2) (requiring that “when an alien is ordered removed,” the individual be removed “within a period of 90 days,” and that “[d]uring the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . . or deportable.”).

45. 18 U.S.C. § 3142(d).

46. *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1112 (D. Minn. 2009); *Trujillo-Alvarez*, 900 F. Supp. 2d at 1180; *United States v. Ailon-Ailon*, 875 F.3d 1334, 1339 (10th Cir. 2017); see also *United States v. Tapia*, 924 F. Supp. 2d 1093, 1098 (D.S.D. 2013) (“[O]ne arm of the Executive, wishing to prosecute this defendant criminally, is arguing that he is likely to flee based on the possible actions of a different arm of the same Executive.”).

47. See note 5, *supra*.

48. See note 5, *supra*; see also FED. R. CRIM. P. 48 (“Dismissal . . . (a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint.”).

between these two options,<sup>49</sup> issuing what this Article will refer to as “release-or-dismiss” orders. These release-or-dismiss orders represent the minimum required response that the government must take if it violates a defendant’s right to remain released. Release-or-dismiss orders are legal and appropriate, for reasons expounded on below.

### C. *Two Options for the Government*

In the face of a BRA violation, release-or-dismiss orders are not only required, they are also particularly palatable due to their minimal intrusion on government choices. Release-or-dismiss orders do not usurp the powers of the Executive; rather, they allow the Executive to choose between the two options available to it under law: release the defendant or drop the charges. These orders exhibit judicial deference to the Executive Branch on a key question of policy: which matters more, prosecution or deportation?

This question is hotly contested—even within the Executive Branch. DOJ and DHS regularly come into conflict when each races towards its respective goal of obtaining a guilty plea and effectuating a deportation. Several courts have described this as a “turf battle” between DOJ and DHS and have declined to pick sides, stating: “It is not appropriate for an Article III judge to resolve Executive Branch turf battles.”<sup>50</sup> In issuing release-or-dismiss orders, courts prudently stay off the battlefield.

### D. *Courts’ Inherent Power to Order Relief*

Courts’ authority to issue release-or-dismiss orders comes from their “inherent power” to take a “reasonable response to the problems and needs confronting the court’s fair administration of justice.”<sup>51</sup> The orders

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49. See note 5, *supra*. But see *United States v. Betancourt Valenzuela*, No. CR-15-1875-TUC-RCC (BGM), 2015 WL 9312476, at \*1 (D. Ariz. Dec. 23, 2015) (denying defendant’s motion to dismiss but recommending that ICE release the defendant).

50. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1180 (quoting *Barrera-Omana*, 638 F. Supp. 2d at 1112).

51. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016); see also *United States v. Hasting*, 461 U.S. 499, 505 (1983) (“Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct . . .” (citations omitted)); *Trujillo-Alvarez*, 900 F. Supp. 2d at 1180 (“A district court has inherent supervisory powers over its processes and those who appear before

are not “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.”<sup>52</sup> Courts that identify a violation of a statute such as the BRA are compelled to respond with an intent to at least *stop* the violation. Release-or-dismiss orders do no more than identify the government’s two options for stopping the BRA violation.

It also lies within courts’ inherent power to apply an enforcement mechanism to its release-or-dismiss orders, namely, that the court will dismiss the criminal cases if the government does not comply.<sup>53</sup> Inherent power must also allow courts to put some teeth behind their orders. Further, the Federal Rules of Criminal Procedure allow dismissal by courts in certain circumstances, including delay of trial.<sup>54</sup> The government’s failure to comply with a release-or-dismiss order would certainly cause delay, warranting *sua sponte* dismissal.

#### E. Prosecution and Deportation Strategies Available Under the BRA

Far from tying the hands of the Executive Branch, the *Trujillo-Alvarez* reasoning gives DOJ and DHS many options of how to proceed. There is much room for play between the BRA and the INA, which *Trujillo-Alvarez* leaves undisturbed. For instance, DOJ can begin criminal prosecution, prove that the defendant is detainable for being a flight risk or safety threat, transfer the defendant to ICE custody within the ten days prescribed by section 3142(d), and then pursue concurrent criminal and removal proceedings.<sup>55</sup> Another option exists if the defendant wins pretrial release under the BRA: DOJ and DHS can still pursue concurrent

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it . . . . These supervisory powers include, but are not limited to, the ability to implement a remedy for a violation of recognized rights. . . . ‘The Constitution empowers this Court to apply the will of Congress upon a criminal defendant on a personal and individualized basis.’” (quoting *Barrera-Omana*, 638 F. Supp. 2d at 1111-12) (citations omitted)); see also *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991) (“A district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. If the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers.” (citations omitted)).

52. *Dietz*, 136 S. Ct. at 1892.

53. See, e.g., *Trujillo-Alvarez*, 900 F. Supp. 2d at 1181 (ordering that if ICE does not release the defendant, “the pending criminal charge will be dismissed with prejudice”).

54. FED. R. CRIM. P. 48(b)(3) (“The court may dismiss an indictment, information or complaint if unnecessary delay occurs in . . . bringing a defendant to trial.”).

55. See 18 U.S.C. § 3142(d) (2018) (seeming to allow concurrent criminal and removal proceedings against detained defendants if the defendants are found detainable under the BRA). However, constitutional concerns may arise. See discussion *infra* Sections IV.B, IV.C.

criminal and removal proceedings *without either agency detaining the defendant*.<sup>56</sup> Or, DOJ can indict a defendant for a crime, dismiss the charges *without prejudice*,<sup>57</sup> and then transfer the defendant to ICE custody for deportation proceedings; this would allow DOJ to immediately bring the same criminal charges against the person if he or she is ever apprehended in the U.S. again.

These and other options are still available even if *Trujillo-Alvarez* is accepted as good law. The Executive Branch retains substantial discretion to exercise its dual authority to prosecute and deport.

The right to remain released is neither radical nor unrealistic; rather, it reflects the plain text of 18 U.S.C. § 3142(d), and it resolves the BRA's conflict with the INA without unduly burdening the government's power to detain, deport, and prosecute. The right to remain released is the law, and it is just.

## II. REBUTTING CONTRARY READINGS

Several courts have disagreed with the *Trujillo-Alvarez* reasoning and offered contrary readings of the BRA.<sup>58</sup> This Part argues that these counterarguments misinterpret the BRA or simply ignore the operative language of section 3142(d), and that judicial decisions endorsing these arguments are incorrect and should be overruled.

### A. "Harmonizing" the BRA and the INA

One leading counterargument to the *Trujillo-Alvarez* reasoning is that the BRA and INA can and must be "harmonized" to allow ICE to detain BRA-released defendants. The Sixth Circuit advanced this position in *United States v. Veloz-Alonso*, relying on a "long-established canon of statutory interpretation" that says courts must regard potentially conflicting statutes as effective, "absent a clearly expressed congressional intent to the contrary."<sup>59</sup> In that case, the district court had ordered ICE to release a defendant who had been granted *presentencing* release under the BRA.<sup>60</sup> The Sixth Circuit reversed, reasoning as follows:

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56. See 18 U.S.C. § 3142(d) (seeming to allow concurrent criminal and removal proceedings outside of detention, requiring the released defendant to appear at proceedings in both criminal and immigration court while maintaining their freedom).

57. See FED. R. CRIM. P. 48(a).

58. See note 20, *supra*.

59. *United States v. Veloz-Alonso*, 910 F.3d 266, 268-69 (6th Cir. 2018) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); see also *United States v. Rincon-Meza*, No. CR19-0062-JCC, 2019 WL 2208734, at \*2 (W.D. Wash. May 22, 2019).

60. *Veloz-Alonso*, 910 F.3d at 267-68.



[C]ourts following the *Trujillo-Alvarez* framework have held that once an alien is submitted for criminal prosecution, the statutory permissions of the BRA supersede the statutory mandates of the INA. We do not agree. A long-established canon of statutory interpretation instructs that when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. . . . [N]othing in the BRA prevents other government agencies or state or local law enforcement from acting pursuant to their lawful duties. . . . Reading the BRA's permissive use of release to supersede the INA's mandatory detention does not follow logically nor would doing so be congruent with our canons of statutory interpretation.<sup>61</sup>

The Sixth Circuit's reasoning (with which the D.C. Circuit has since agreed<sup>62</sup>) is deficient in two important ways, as the following paragraphs describe.

First, the Sixth Circuit completely sidesteps the so-called "operative sentence" of section 3142(d), to which most courts have cited when issuing release-or-dismiss orders.<sup>63</sup> Giving the operative sentence its full weight makes clear that the BRA and INA are not "capable of co-existence" in the manner that the Sixth Circuit wishes them to be.<sup>64</sup> The sentence that the Sixth Circuit chooses to ignore is crucial to understanding the intent behind the BRA—that citizens and noncitizens are to be afforded the same rights and protections under the BRA, with the sole exception that DOJ can transfer detainable noncitizens to DHS within

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61. *Id.* at 268-70 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (internal quotation marks omitted).

62. *United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019); *see also* *United States v. Alzerei*, No. CR 19-10124-DJC, 2019 WL 2642824, at \*3 (D. Mass. June 28, 2019).

63. 18 U.S.C. § 3142(d) (2018) ("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 . . . deportation or exclusion proceedings."); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1139 (N.D. Iowa 2018) (describing this as the "operative sentence" of the BRA).

64. *Veloz-Alonso*, 910 F.3d at 268; *see also* Brief of the National Immigration Project of the National Lawyers Guild as Amicus Curiae in Support of Appellee, *Vasquez-Benitez*, 919 F.3d 546 (Nos. 18-3076, 18-3080), 2018 WL 6840030, at \*9 ("*Veloz-Alonso* permits DHS to detain noncitizen defendants that are not dangerous and do not pose a flight risk in their criminal cases by citing the need to harmonize different acts of Congress. Harmonization is not the proper canon to apply where an Act like the BRA elaborates a carefully drawn statutory scheme intended to apply to all defendants in federal criminal cases.>").

ten days. The Sixth Circuit erred by reading such a crucial sentence out of the statute.

Second, the Sixth Circuit reaches its conclusion in part by invoking the incorrect standard of proof for pretrial detention under the BRA. It erroneously reads the BRA as “impos[ing] a presumption of detention for criminal defendants pending trial . . . that defendants must overcome by a showing of ‘clear and convincing evidence.’”<sup>65</sup> Here, the court mixes up the standard for *pretrial* release with that for *post-trial, presentencing* release. Presentencing release was understandably on the Sixth Circuit’s mind in *Veloze-Alonso*: unlike the defendants in *Trujillo-Alvarez* and other cases, who had been granted pretrial release, Mr. Velloz-Alonso had been granted presentencing release.<sup>66</sup> But the BRA prescribes two distinct standards for these two types of release: before *sentencing*, it is *release* that must be supported by “clear and convincing evidence,”<sup>67</sup> whereas before *trial*, it is *detention* that must be supported by clear and convincing evidence.<sup>68</sup> These two standards are diametrically opposed. And yet the Sixth Circuit, taking aim at the entire *Trujillo-Alvarez* line of cases, conflates these opposite standards, incorrectly stating that the BRA “imposes a presumption of detention for criminal defendants pending trial.”<sup>69</sup> This statement defies not only the statute’s plain text, but also its legislative intent<sup>70</sup> and its interpretation by the Supreme Court.<sup>71</sup> The BRA has long been understood to channel the presumption of innocence, placing a higher burden of detention on those who have not yet been proven guilty. *Veloze-Alonso*’s dangerous misreading of the BRA has already been cited by other federal courts, perverting the BRA’s purpose.<sup>72</sup>

65. *Veloze-Alonso*, 910 F.3d at 269 (citing 18 U.S.C. §§ 3142, 3143).

66. *United States v. Velloz-Alonso*, No. 1:18-CR-464, 2018 WL 4940692, at \*1 (N.D. Ohio Oct. 12, 2018) (“In this case, the Court decides whether to grant Defendant Velloz-Alonso’s request to be released on bond pending sentence, under the Bail Reform Act.”), *rev’d*, 910 F.3d 266 (6th Cir. 2018).

67. 18 U.S.C. § 3143(a) (“[T]he judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released.”).

68. 18 U.S.C. § 3142(f) (“The facts the judicial officer uses to support a finding [in favor of pretrial detention] pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.”).

69. *Veloze-Alonso*, 910 F.3d at 269.

70. *See infra* Part III.

71. *See United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

72. *United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019) (noting that “[*Veloze-Alonso*] reasoned that ‘. . . the BRA’s *permissive use of release* . . .’” (emphasis add-

In light of the Sixth Circuit's choice to ignore the BRA's operative sentence and to conflate its distinct standards, *Veloz-Alonso's* argument for harmonizing the statutes should be met with deep skepticism.

### B. Limiting the BRA to Bail Decisions

Another common counterargument to the *Trujillo-Alvarez* reasoning states that the BRA and its operative sentence should be read more narrowly, as only preventing magistrates from considering deportability when they decide whether to detain or release defendants; this view still fails to give the operative sentence its due weight. This is the counterargument advanced by the Northern District of Iowa in *United States v. Villatoro-Ventura*.<sup>73</sup> That opinion reaches a similar conclusion to *Veloz-Alonso*—that ICE detention of a BRA-released defendant does not violate that defendant's rights under the BRA—but unlike *Veloz-Alonso*, it squarely addresses the operative sentence of section 3142(d) and offers an explanation as to why it does not affect the outcome:

To the extent that § 3142(d) has any relevance to this case, I construe the operative sentence to mean, simply, that in making its decision under the BRA, the court must apply “the other provisions of this section” without considering “other provisions of law governing release pending trial or deportation or exclusion proceedings.” 18 U.S.C. § 3142(d). In other words, whether release is warranted under the BRA, the court cannot take into account the possibility that the defendant will be deported.<sup>74</sup>

Under this interpretation of the BRA, the operative sentence's only function is to require judges and magistrates to make pretrial detention decisions without considering the likelihood that the defendant will be detained and deported if released.<sup>75</sup>

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ed)); *United States v. Alzerei*, No. CR 19-10124-DJC, 2019 WL 2642824, at \*3 (D. Mass. June 28, 2019) (“[ICE's detention] authority is not in conflict with the ‘permissive release that is allowed under the BRA.’” (citing *Veloz-Alonso*, 910 F.3d at 269)).

73. *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118 (N.D. Iowa 2018); see also *United States v. Ailon-Ailon*, 875 F.3d 1334, 1338–39 (10th Cir. 2017) (interpreting section 3142(d)'s “notwithstanding” clause to mean that a district court should not consider the possibility of ICE detention when making a decision of release).

74. *Villatoro-Ventura*, 330 F. Supp. 3d at 1141.

75. While the following paragraphs argue that *Villatoro-Ventura's* reading of the BRA is erroneously narrow, its reading of the BRA nonetheless expresses an accurate and important point of law: that magistrates and judges may not consider a defendant's immigration status or ICE detainer when making an assessment of flight risk. See, e.g., *Trujillo-*

While *Villatoro-Ventura*'s close textual reading of section 3142(d) is more commendable than *Veloz-Alonso*'s sidestepping of it, its interpretation is nonetheless wrong. If ICE were allowed to re-detain BRA-released defendants, then section 3142(d)'s requirement that these defendants be "treated in accordance with the other provisions" of the BRA would be an empty promise. Section 3142(d)'s mandate of equal treatment cannot be read as only applying to the adjudication of the defendant's bail status—it must refer to the defendant's actual enjoyment of bail. But *Villatoro-Ventura*'s did not see it this way; its treatment of section 3142(d) is not so much a reading as it is a neutering.

### C. Conditioning the BRA right on ICE's Motives

A few judges have misinterpreted the *Trujillo-Alvarez* reasoning as applicable only to defendants whose detention by ICE is for the sole purpose of facilitating criminal proceedings—when ICE detention is essentially pretrial detention in disguise.<sup>76</sup> This is a misreading of section 3142(d) that confines the meaning of its operative sentence to a small and obvious idea: that ICE detention cannot serve the purpose of criminal pretrial detention, particularly when detainee has already been ordered released from pretrial detention.<sup>77</sup> This limitation of section 3142(d)'s scope is unsupported by case law. ICE certainly did not detain Enrique Alvarez-Trujillo to ensure his appearance at criminal proceedings; they detained him outside of his prosecuting district and failed to bring him to

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Alvarez, 900 F. Supp. 2d at 1176 ("If the Court accepted the government's argument [that an ICE detainer evinces a flight risk], Congress's carefully crafted detention plan, set forth at 18 U.S.C. § 3142, would simply be overruled by an ICE detainer. . . . The risk of nonappearance must involve an element of the defendant's own volition." (quoting *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009))). This is correct as a matter of law, as discussed in the Introduction, *supra* note 25. But *Villatoro-Ventura* is wrong to limit section 3142(d)'s meaning to this sole principle.

76. See, e.g., Brief for Appellee United States of America, *United States v. Soriano Nunez*, 928 F.3d 240 (3d Cir. 2019) (No. 18-2341), 2019 WL 493924, at \*17 (quoting the district court opinion, which said "this Court cannot conclude that ICE has detained Defendant to secure her appearance for criminal trial as would be required to find a violation of the BRA").

77. Even the judge in *Villatoro-Ventura*, who argued for a narrower reading of the BRA's operative sentence, see Section II.B, *supra*, suggested that ICE detention of BRA-released defendants without intent to deport would violate the BRA: "[R]elief may be warranted in a particular case if it becomes clear that the Executive Branch is using ICE solely to hold a defendant for his or her federal criminal trial after the court has ordered release under the BRA. A policy of simply stashing a defendant in ICE custody, with no effort to proceed under the INA, would raise serious concerns as to the defendant's rights under the BRA." 330 F. Supp. 3d at 1141.

multiple pretrial hearings.<sup>78</sup> Nonetheless, his right to remain released applied.

In cases where ICE has in fact detained someone to facilitate their criminal prosecution, ICE's purpose has been immaterial to the ultimate holding. For instance, in *United States v. Garcia*, the Eastern District of Michigan noted, "Garcia now argues that ICE is not planning to immediately proceed with her removal, but is instead detaining her for the sole purpose of ensuring her appearance in these criminal proceedings, in contravention of the magistrate judge's order of release."<sup>79</sup> But the court makes no further reference to ICE's motives, instead making broad statements as to why ICE detention of BRA-released defendants violates their rights regardless of ICE's motives, and issuing an order to that effect.<sup>80</sup> This line of analysis reflects the fact that the right to remain released does not hinge on ICE's purpose; its protection from ICE detention is absolute.

#### D. The "Flee or Pose a Danger" Language

U.S. Attorneys have at times misinterpreted the reference to defendants who "may flee or pose a danger to any other person or the community" in section 3142(d).<sup>81</sup> Citing this language, the government has claimed that the *Trujillo-Alvarez* reasoning "only applies to defendants who actually present a risk of flight or danger to the community."<sup>82</sup> This is wrong. Section 3142(d) only mentions people who "may flee or pose a danger" to describe the narrow category of defendants who are subject to section 3142(d)'s "temporary detention" provision. The *Trujillo-Alvarez* reasoning does not pertain to temporary detention, but rather to what it means to be "treated in accordance with the other provisions of this section"—namely, that it protects defendants from the provisions of immigration law.<sup>83</sup> Hence, to assert that the *Trujillo-Alvarez* reading is limited

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78. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1172.

79. *United States v. Garcia*, No. 18-cr-20256, 2018 WL 3141950, at \*1 (E.D. Mich. June 27, 2018), *abrogated by* *United States v. Veloz-Alonso*, 910 F.3d 266 (6th Cir. 2018).

80. *Id.* at \*2 ("Because the Government has decided to proceed with Garcia's criminal case, her removal proceedings must take a backseat until the criminal prosecution comes to an end.").

81. *See, e.g., United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019) ("18 U.S.C. § 3142(d) applies only if a 'judicial officer determines that . . . [the defendant] may flee or pose a danger to any other person or the community.'").

82. Brief for Appellee United States of America, *supra* note 77, at \*19. The brief then says: "It would make no sense that, after the court decides to release such a person, ICE could not exercise its statutory authority to detain the alien pending removal, but would retain that authority in less serious cases." *Id.*

83. 18 U.S.C. § 3142(d) (2018).

to defendants who pose a risk of flight or danger is to misread section 3142(d)'s plain text.

E. “Mandatory” Detention Under the INA

After the Supreme Court’s decision in *Nielsen v. Preap*,<sup>84</sup> which widened the scope of “mandatory” detention under 8 U.S.C. § 1226(c), it is possible that prosecutors and judges will cite certain defendants’ “mandatory” detention to obviate their right to remain released;<sup>85</sup> this too would be incorrect. In section 1226(c), the INA dictates that the government “shall take into custody any alien who” is inadmissible or removable on crime or terrorism-related grounds “when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation.”<sup>86</sup> A divided Supreme Court recently affirmed this provision’s constitutionality and wide scope in *Preap*, holding that the “when the alien is released” language does not require “immediacy,” and that even if a person convicted of a 1226(c)-triggering offense was never detained by ICE and continued living in the community, ICE is now *required* to detain them.<sup>87</sup> However, whether detention is mandatory or not is immaterial to the BRA, which must be applied “notwithstanding” immigration provisions like 1226(c)<sup>88</sup> regardless of whether they label themselves “mandatory.”

The same logic would apply if the ICE detention were under the authority of 8 U.S.C. § 1231(a)(1-2), which requires that “when an alien is ordered removed,” the individual be removed “within a period of 90 days,” and that “[d]uring the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall

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84. *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

85. *See, e.g., United States v. Rincon-Meza*, No. CR19-0062-JCC, 2019 WL 2208734, at \*2 (W.D. Wash. May 22, 2019) (citing *Preap* to justify its disagreement with the *Trujillo-Alvarez* reasoning).

86. 8 U.S.C. § 1226(c) (2018) (emphasis added). Note that “[r]oughly 70 percent of immigrants in detention are mandatorily detained.” *Mandatory Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/mandatory-detention>. Note also that the constitutionality of “mandatory” detention under the INA has been called into question. *See, e.g., Rigoberto Ledesma, The Unconstitutional Application of Apprehension and Detention Laws: Section 236(c) of the Immigration and Nationality Act*, 19 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 361 (2017); *see also United States v. Veloz-Alonso*, 910 F.3d 266, 270 (6th Cir. 2018) (“Veloz-Alonso questions whether the detain-and-deport provisions of INA are actually mandatory if ICE may use its discretion to delay deportation and ‘release’ him to the U.S. Attorney’s office for prosecution . . . other district courts have raised similar questions.”).

87. *See Preap*, 139 S. Ct. 954.

88. 18 U.S.C. § 3142(d).

the Attorney General release an alien who has been found inadmissible . . . or deportable.”<sup>89</sup> Again, what the INA says the Attorney General (or, now, the Secretary of Homeland Security) “shall” do is expressly subverted by the BRA, which must be applied “notwithstanding” the provisions of immigration law.

The plain and powerful text of section 3142(d) protects the right to remain released from the counterarguments that have been lodged against it thus far. Where judges have agreed with these counterarguments, they have only done so by erroneously contorting the law.

### III. THE LEGISLATIVE HISTORY

This Part presents the BRA’s legislative history as further evidence that it was intended to grant released defendants a right to remain released, trumping their detainability under the INA. Three aspects of this legislative history underscore the accuracy of this BRA interpretation: lawmakers’ expressions of opposition to class-based distinctions, the BRA’s passage in the context of increased immigrant detention under the INA, and the specific history of section 3142(d).

#### A. *The Equitable Intent Behind the BRA*

The origin and history of the BRA evince an equitable intent behind the law, supporting the interpretation of the BRA as protecting noncitizen defendants from being re-detained solely on the basis of their immigration status. In passing the first version of the Bail Reform Act in 1966, Congress intended to address categorical disparities in the detention of criminal defendants pending trial.<sup>90</sup> With the BRA of 1966, which for the first time would require release based not on payment but on flexible factors like family and community ties,<sup>91</sup> the legislature aimed to ensure a broad right to pretrial release, to be protected in all but the most extreme circumstances. The Senate Report stated:

There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in

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89. 8 U.S.C. § 1231(a)(1)–(2).

90. See Brickenstein, *supra* note 28, Part I.A.1 (“The History and Purpose of the BRA”).

91. Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 (June 22, 1966), available at <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966> (“[T]his legislation, for the first time, requires that the decision to release a man prior to the trial be based on facts—like community and family ties and past record . . .”).

pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses, cannot consult his lawyer in private, and enters the courtroom—not in the company of an attorney—but from a cell block in the company of a marshal. Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.<sup>92</sup>

Evidently, the legislature intended to ensure the benefits of pretrial release to all criminal defendants except those who posed a flight risk; thus, to allow ICE detention of such defendants would be antithetical to freedoms that the BRA of 1966 sought to protect.

President Lyndon Johnson affirmed Congress's equitable intent when signing the BRA into law, stating that it “does not restrict the power of the courts to detain dangerous persons in capital cases or after conviction. What this measure does do is to eliminate needless, arbitrary cruelty.”<sup>93</sup> President Johnson and Congress shared a goal: to fix the inequities in the bail system by requiring individualized, non-categorical detention decisions. If ICE were allowed to detain noncitizens released under the BRA, it would categorically exclude a class of people from pretrial liberty. This is antithetical to the BRA's original, equitable intent.

The amendments included in the Bail Reform Act of 1984, including the addition of section 3142(d), did not change this core intent. The amendments added public safety to the judicial equation of pretrial release,<sup>94</sup> setting standards by which judges could detain potentially unsafe defendants.<sup>95</sup> Nonetheless, the BRA's central principles of favoring release and prohibiting class-based detention remained the same.<sup>96</sup> The BRA's fifty-year-plus history has demonstrated that it was always about more than just ending the unfair system of cash bail; it was about granting defendants a right to their liberty until they had been found guilty of an

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92. S. REP. NO. 89-750, at 7 (1965); *see also* H.R. REP. NO. 89-1541, at 9 (1966).

93. Johnson, *supra* note 91.

94. Brickenstein, *supra* note 28, at 233 (“[A]fter the 1984 amendments it is apparent that the primary purpose of pretrial detention is to prevent dangerous defendants from causing public harm while they await trial.”).

95. *See* S. REP. NO. 98-225, at 6 (1983) (“The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.”).

96. *See* Brickenstein, *supra* note 28, at 234 (“The fundamental tenets of the BRA have remained unchanged for almost 50 years. The aims and preferences expressed in the BRA are in keeping with the most bedrock principle of American criminal justice—that the accused are presumed innocent until proven guilty beyond a reasonable doubt.”).



imprisonable offense.<sup>97</sup> Therefore, where ICE detains defendants who have already been found deserving of release under the BRA, it violates the liberty interests that the BRA was meant to grant.

### B. *The Backdrop of Immigrant Detention*

The historical context of the BRA's passage in 1966 and amendments in 1984—after the INA's passage and contemporaneous with the increased use of immigrant detention—further supports the interpretation of the BRA as superseding the INA's detention authority.

When the BRA was first passed in 1966, lawmakers may have considered the possibility that BRA-released defendants might be at risk of immigration detention. Immigrant detention had declined since the 1954 closure of Ellis Island (the world's first dedicated immigrant detention center),<sup>98</sup> but it still existed.<sup>99</sup> The executive branch continued to defend immigrant detention in the courts, winning approval from the highest court in several cases. A 1953 Supreme Court, case *Shaughnessy v. Mezei*, affirmed the indefinite detention of excludable noncitizens whose countries would not accept them.<sup>100</sup> A 1958 case, *Leng May Ma v. Barber*, acknowledged that “[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States.”<sup>101</sup>

During this era, the executive branch was not timid in leaning on its immigrant detention authority. Detentions spiked during “Operation Wetback,” President Eisenhower’s mass arrest and deportation of more than a million Mexicans and Mexican-Americans in 1954.<sup>102</sup> During this episode, many immigrants were rounded up into what the *Los Angeles*

97. See Johnson, *supra* note 91 (“In the words of the act, ‘A man, regardless of his financial status—shall not needlessly be detained . . . .when detention serves neither the ends of justice nor the public interest.’”).

98. Allyson Hobbs & Ana Raquel Minian, *A Firsthand Look at the Horrors of Immigration Detention*, WASH. POST (June 25, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/a-firsthand-look-at-the-horrors-of-immigration-detention/>; *A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-timeline/>.

99. *A Short History of Immigration Detention*, *supra* note 98.

100. *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

101. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). It also described immigrant detention as “the exception, not the rule . . . generally employed only as to security risks or those likely to abscond.” *Id.* at 190.

102. See, e.g., Erin Blakemore, *The Largest Mass Deportation in American History*, HISTORY (Mar. 23, 2018), <https://www.history.com/news/operation-wetback-eisenhower-1954-deportation>.

*Times* then described as a “Concentration Camp” to await their removal.<sup>103</sup> Upon being returned to Mexico, these deported immigrants were described in news reports as “broken men, with strength spent and exhausted by . . . the degradation of jail and prison cells.”<sup>104</sup> In the shadow of this awful, high-profile episode of immigrant detention, with the potential for further detention of immigrants enshrined in the INA and upheld by the Supreme Court, and perhaps with unfaded memories of Japanese-American internment, Congress passed the Bail Reform Act of 1966. It did not explicitly mention immigrants, but its unwavering protections of individual liberty were most likely meant to preclude a released defendant from being re-detained in a “concentration camp.”<sup>105</sup>

When the BRA was amended in 1984 and the heightened immigrant protections of section 3142(d) were added, a more recent and high-profile trend in immigrant detention may have occupied the minds of lawmakers: the detention of “Marielitos,” the Cuban passengers of the infamous Mariel boatlift.<sup>106</sup> Following their arrival in the United States, “tens of thousands of Mariel migrants were sent to makeshift detention centers on military bases.”<sup>107</sup> Some of these detainees were subject to prolonged, indefinite detention because they were found to have serious criminal records from Cuba and because Cuba refused to take them back.<sup>108</sup> Most detainees were eventually released,<sup>109</sup> but those who were later convicted of crimes in the United States “were immediately returned to INS custody after they served jail or prison sentences” to face indefinite detention.<sup>110</sup> It was in this context that the Bail Reform Act was amended, including the addition of section 3142(d), which granted

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103. *Wetbacks’ Detention Camp Slated*, L.A. TIMES (June 12, 1954), <http://documents.latimes.com/june-12-1954-wetbacks-detention-camp-slated/>.

104. Eyder Peralta, *It Came Up in the Debate: Here Are 3 Things to Know About ‘Operation Wetback,’* NPR (Nov. 11, 2015, 3:54 PM), <https://www.npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback>.

105. *Wetbacks’ Detention Camp Slated*, *supra* note 104.

106. See generally KATE DUPES HAWK, RON VILLELLA & ADOLFO LEYVA DE VARONA, *FLORIDA AND THE MARIEL BOATLIFT OF 1980: THE FIRST TWENTY DAYS* (Kristen Cifers ed., 2014).

107. Alexander Maxwell Stephens, “I Hope They Don’t Come to Plains”: Race and the Detention of Mariel Cubans, 1980-1981 (May 2016) (unpublished M.A. thesis, University of Georgia), [https://getd.libs.uga.edu/pdfs/stephens\\_alexander\\_m\\_201605\\_ma.pdf](https://getd.libs.uga.edu/pdfs/stephens_alexander_m_201605_ma.pdf). Stephens also notes that “Black and mulato Cubans made up a disproportionate number of the people confined to these carceral spaces.” *Id.*

108. *Id.*

109. Miles Corwin, *Cuban ‘Detainees’ from Mariel Boat Lift: 2,500 Prisoners of U.S. Face No Charges*, L.A. TIMES (Aug. 27, 1989, 12:00 AM), [http://articles.latimes.com/1989-08-27/news/mn-1741\\_1\\_federal-prison](http://articles.latimes.com/1989-08-27/news/mn-1741_1_federal-prison).

110. *Id.*

noncitizen defendants a right to remain released pending trial “notwithstanding” the provisions of immigration law.<sup>111</sup> The strong language of section 3142(d) was most likely meant to protect noncitizen defendants from the high-profile risk of immigrant detention. In the years that followed, as courts upheld the constitutionality of immigrant detention—including the indefinite detention of Marielitos after having served their criminal sentences<sup>112</sup>—this protection would prove all the more important.

### C. *The History of Section 3142(d)*

The Bail Reform Act of 1984 was passed by the 98th Congress as Public Law 98-473, a joint resolution on appropriations.<sup>113</sup> The law repealed and replaced the original 1966 Act, adding section 3142(d) among other provisions. While scarce evidence exists of the precise legislative intent behind section 3142(d), a few legislative sources suggest a desire to prevent inequitable treatment of immigrants.

Early drafts of the bill from the House appear to propose a blanket provision for detaining unauthorized immigrants pending trial.<sup>114</sup> The Senate bill, however, did not include such language. The Senate instead opted for a careful delineation of how immigrants would be treated differently under the BRA—including being subject to 10-day temporary detention only if they are considered a flight risk or a danger to the community, and only if they are neither citizens nor permanent resi-

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111. 18 U.S.C. § 3142(d) (2018).

112. See, e.g., Philip Erickson, *The Saga of Indefinitely Detained Mariel Cubans: Garcia Mir v. Meese*, 10 LOYOLA L.A. INT'L & COMP. L.J. 271 (1988); Randy Toledo, *Garcia-Mir v. Meese: Reaffirming the Indefinite Detention of Aliens in the 1980s*, 2 AM. U. J. INT'L L. & POL'Y 653 (1987). The indefinite detention of Marielitos was eventually struck down in *Clark v. Martinez*, 543 U.S. 371 (2005).

113. Bail Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984); see also Margaret S. Gain, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371 (1989) (citing the BRA of 1984 as “Pub. L. No. 98-473”).

114. See H.R. 1098, 98th Cong. (1983); H.R. 5865, 98th Cong. (1984) (both summarized on Congress’s website as “Provid[ing] for the detention of an alien whose presence in the United States is not under color of law”).

dents.<sup>115</sup> It was this language from the Senate bill that made it into the House's joint resolution and became part of the Bail Reform Act.<sup>116</sup>

The pertinent Senate Report makes the equitable intent behind section 3142(d) even more clear.<sup>117</sup> The Senate deemed it in the interest of public safety to give immigration officers the "minimal time necessary" to take custody of a noncitizen criminal defendant, in the words of Senate Report 98-225.<sup>118</sup> This is a clear expression of legislative intent: immigration officials get a short window to take custody of certain immigrants, after which they no longer can as long as the BRA still applies. That report also contains strong reaffirmations of the BRA's general bent towards individual liberty and equitable treatment, which surely carries over to its treatment of immigrants.<sup>119</sup>

The BRA's original intended purpose—to favor pretrial release and resist categorical detention—and its continued reaffirmation of this purpose amidst growing threats to the liberty of noncitizens, strongly support this Article's reading of the BRA. The statute was intended to grant released defendants a right to their release that immigration enforcement could not infringe.

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115. See S. 215, 98th Cong. (1984) (summarized on Congress's website as "Authoriz[ing] a judicial officer to order detention for up to ten days: (1) if a person who is presently on pretrial release for a felony under Federal, State, or local law or on probation or parole or release pending sentencing or appeal for any offense, upon a determination that such person may flee or pose a danger to any person or the community; or (2) if such person is not a U.S. citizen").

116. H.R.J. Res. 648, 98th Cong. (1984) (adopting the same language as S. 215).

117. Scholarly articles discussing the legislative history of the Bail Reform Act most commonly point to Senate Report 98-225. See, e.g., Brickenstein, *supra* note 28; Gain, *supra* note 113; Donald Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WILLIAM MITCHELL L. REV. 929 (1985).

118. S. REP. NO. 98-225, at 17 (1983) ("Subsection (d) permits a judicial officer to detain a defendant for a period of up to ten days if it appears that the person is already in a conditional release status or is not a citizen of the United States or lawfully admitted for permanent residence under the Immigration and Naturalization Act, and the judicial officer further determines that the person may flee or pose a danger to any other person or to the community if released. . . . The ten-day period is intended to give the government time to contact the appropriate court, probation, or parole official, or immigration official and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate.").

119. *Id.* at 8 (recognizing that a pretrial detention statute could be constitutionally defective "if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect").

## IV. THE CONSTITUTION IN ICE DETENTION

This Part looks beyond the Bail Reform Act to the Constitution. It argues that ICE detention of noncitizen criminal defendants on pretrial release violates their constitutional rights. Such detention particularly threatens defendants' rights to counsel, but potentially also to due process, to be free from excessive bail, and to have a government of separated powers.

Unlike the arguments in Parts I through III, which pertain only to federal criminal defendants, the arguments in Part IV pertain to both federal and state criminal defendants.

A. *The Indeterminacy of the Constitutional Law*

At the time of this Article's writing, no court has decided a question like that posed in *Trujillo-Alvarez* on constitutional grounds alone. *Trujillo-Alvarez* and its progeny all reach their results on statutory grounds, discussing constitutional claims only in dicta.<sup>120</sup> The cases disagreeing with *Trujillo-Alvarez* spend most of their text on statutory interpretation, followed by a brief statement on why the constitutional claims fail.

The limited judicial comment on the constitutionality of ICE detaining released defendants makes it difficult to draw a bright line as to what constitutes a constitutional "violation" in this context. But a "violation" need not be proven to invoke the canon of constitutional avoidance and interpret the statute in a way that steers clear of potential unconstitutionality. The Supreme Court recently reaffirmed the applicability of constitutional avoidance to immigration statutes in *Jennings v. Rodriguez*.<sup>121</sup> As such, the constitutional concerns discussed in this Part should persuade a court to err on the side of a defendant's liberty, even if there is no good law regarding what counts as a constitutional "violation."

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120. For example, in *Trujillo-Alvarez*, the fact that ICE detained Enrique out-of-district in Tacoma, WA was not dispositive. After reaching its conclusion on statutory grounds, the court simply observed that the out-of-district detention "jeopardiz[ed]" Enrique's constitutional rights. "[I]t has deprived him and his court-appointed counsel of the ability to meet and work together to prepare for his defense at trial without undue inconvenience or hardship, thereby jeopardizing not only his statutory rights under the BRA, but also his rights under the Fifth, Sixth, and Eighth Amendments and under basic principles of fundamental fairness." 900 F. Supp. 2d 1167, 1180 (D. Or. 2012).

121. *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (reaffirming the applicability of the canon of constitutional avoidance to immigration statutes by citing *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001)); see also Brief of the National Immigration Project of the National Lawyers Guild as Amicus Curiae in Support of Appellee, *supra* note 64 (applying the canon of constitutional avoidance to the question this Article addresses).

B. *The Sixth Amendment Right to Counsel*

ICE detention of BRA-released defendants may deprive those defendants of their right to counsel in their criminal cases, as protected by the Sixth Amendment.<sup>122</sup> Of greatest constitutional concern are ICE's common practices of detaining defendants far away from their prosecuting districts, failing to provide detainees with consistent access to phones or other methods of communication, and transferring detainees between different facilities. These deprivations jeopardize the constitutionality of the criminal proceeding, such that a federal or state court would be justified in issuing a release-or-dismiss order on constitutional grounds alone.

ICE detention centers have long encumbered communications between detainees and their lawyers—but since most ICE detainees are only in immigration proceedings, where there is no constitutional right to counsel, ICE's deprivation of counsel has escaped constitutional scrutiny. But when ICE detains criminal defendants who were ordered released under the BRA and whose criminal proceedings are ongoing, ICE must ensure their full right to counsel as protected by the Sixth Amendment. ICE is quite bad at this.

It is common practice for ICE to detain people in remote, rural areas outside of their districts, sometimes hundreds or thousands of miles away, inhibiting their access to counsel and court proceedings.<sup>123</sup> A 2018 study by the American Immigration Council found that “[a]bout 48 percent, 26 percent, and 22 percent of detainees were confined at least once in a facility that was located more than 60 miles, 90 miles, and 120 miles away, respectively, from the nearest nonprofit immigration attorney who practiced removal defense.”<sup>124</sup> Some experts have described the use of far-away detention centers as a “strategic move” by ICE to restrict access to counsel.<sup>125</sup> Whether by design or not, remote detention centers are very

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122. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

123. EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 2 (2018), [https://americanimmigrationcouncil.org/sites/default/files/research/the\\_landscape\\_of\\_immigration\\_detention\\_in\\_the\\_united\\_states.pdf](https://americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf).

124. *Id.*

125. Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017, 4:00 PM), <https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help> (“‘It’s been a strategic move by ICE to construct detention centers in rural areas,’ said Amy Fischer, policy director for RAICES, a San Antonio-based nonprofit that supports on-site legal aid programs at two Texas facilities for detained families. ‘Even if the money is there, it’s very difficult to set up a pro bono network when you’re geographically three hours away from a big city.’”).

effective at depriving detainees of counsel. Nationwide, only 14 percent of ICE detainees have lawyers; at a 2000-person detention center in the tiny, remote village of Lumpkin, Georgia, that number drops to 6 percent.<sup>126</sup> This difficulty of access affects immigration lawyers as well as criminal defense lawyers, threatening the Sixth Amendment.

In the First Step Act, Congress recently expressed its disfavor with imprisoning federal criminal defendants far from home, placing a 500-mile limit on how far from home someone can be incarcerated.<sup>127</sup> It stands to reason that pretrial detainees should be detained within an even closer radius, as their criminal proceedings are still ongoing.<sup>128</sup>

It is also well-documented that detained immigrants are not granted consistent access to telephones or other means of communication, threatening their right to counsel if they are also in criminal proceedings.<sup>129</sup> Phone calls from inside detention facilities can be expensive, and in some facilities, phone access requires 24 hours of notice and is limited to just

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126. *Id.*

127. First Step Act § 601, 18 U.S.C. § 3621(b) (2018) (stating that the Bureau of Prisons shall, subject to certain conditions, “place the prisoner in a facility as close as practicable to the prisoner’s primary residence, and to the extent practicable, in a facility within 500 driving miles of that residence.”).

128. Brief of the National Immigration Project of the National Lawyers Guild as Amicus Curiae in Support of Appellee, *supra* note 64, at \*15 (“Conditions in DHS custody interfere with a defendant’s ability to communicate with counsel and to prepare a criminal defense. In a federal criminal case, the defendant must stand trial in the same district in which the alleged offense occurred. There is no such requirement for immigration detention, which means that DHS can detain a person admitted to bail far from criminal defense counsel.”); *see also* Bail Memorandum Brief of Appellant, *United States v. Hernandez-Medina*, 644 F. App’x 808 (mem.) (10th Cir. 2018) (No. 16-3026), 2016 WL 695439, at \*15-16 (“Holding Mr. Hernandez-Medina for nearly two months in Arizona deprived him and counsel of the ability to meet and work together to prepare for his defense at trial without undue inconvenience or hardship, thereby jeopardizing not only his statutory rights under the Bail Reform Act but also his rights under the Fifth, Sixth and Eighth Amendments and under basic principles of fundamental fairness.”).

129. Brief of the National Immigration Project of the National Lawyers Guild as Amicus Curiae in Support of Appellee, *supra* note 64, at \*15 (“A 2007 General Accounting Office report found widespread problems with telephone access at DHS detention facilities. . . . On December 14, 2018, detainees in Southern California filed a complaint challenging, among things, a lack of proper telephone access. . . . DHS detained Mr. Vasquez-Benitez at the Farmville Detention Center. At Farmville, detainees similarly lack access to free and confidential phone calls with attorneys. Were DHS permitted to detain Mr. Vasquez-Benitez at Farmville again during the pendency of his criminal case, the long distance and limited access to communication by phone would interfere with his right to counsel. DHS civil detention poses other obstacles to a defendant’s right to communicate with counsel including extremely limited access to the Internet, and mail (such as ‘post-card only’ policies that prohibit detainees from sending or receiving envelopes).”).

15 minutes.<sup>130</sup> This not only makes it more difficult to stay in touch with loved ones, but also with counsel, with witnesses, with friends and family who will testify to good character, and more. Access to the internet is similarly limited. In one facility, ICE detained the wrong person, and the detainee could not even use Google to prove his identity, until his lawyer arrived and used his own smartphone to prove it.<sup>131</sup> ICE detention similarly restricts access to law libraries and interpreters,<sup>132</sup> making effective trial preparation from ICE detention virtually impossible.

These problems are compounded by the fact that immigrants are often shuffled between various detention centers, putting a serious strain on their access to counsel and other resources. According to the American Immigration Council, “[a]bout 60 percent of adults who were detained in fiscal year 2015 experienced at least one interfacility transfer during their detention.”<sup>133</sup> This makes constitutionally adequate access to counsel virtually unattainable.

Even judges who have disagreed with the *Trujillo-Alvarez* reasoning have conceded that ICE detention of BRA-released defendants can lead to conditions that violate their constitutional rights. In *Villatoro-Ventura*, although the judge declined to issue a release-or-dismiss order, he concluded that “if a defendant released under the BRA is taken into ICE custody, transferred to a facility in another part of the country and actually (or practically) deprived of access to his federal criminal defense attorney, due process concerns would naturally arise.”<sup>134</sup> Indeed they would.

These three conditions—detention in remote, rural areas, lack of telecommunications, and frequency of interfacility transfers—could easily deprive a detained immigrant of their Sixth Amendment right to counsel. To avoid a constitutional violation, criminal defendants released pending trial should be shielded from ICE detention until their criminal proceedings come to a close or have their criminal charges dropped if detained by ICE.

### C. *The Fifth and Eighth Amendments Under Salerno*

Another possible constitutional argument can be premised on the following notion: since ICE detention of a bailed-out defendant is technically a form of pretrial detention, the constitutional law governing pre-

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130. Lee, *supra* note 125.

131. *Id.* (“He didn’t have access to do an online search to prove it wasn’t him,” Ahmed said. “All he could say was, ‘It’s not me.’ You can’t just go on Google. You don’t have smartphones. There’s really no access.”).

132. *Id.*

133. Ryo & Peacock, *supra* note 123.

134. *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1142 (N.D. Iowa 2018).



trial detention (as opposed to that governing immigrant detention<sup>135</sup>) should apply. As such, *United States v. Salerno* governs.<sup>136</sup> And under *Salerno*, ICE detention of a defendant on pretrial release clearly violates the Fifth and Eighth Amendments. (Note that this argument may be more persuasive for federal defendants, since *Salerno* explicitly concerns the BRA, but could still be invoked by state defendants.)

Ever since the Supreme Court narrowly upheld the BRA's preventive detention provisions in *United States v. Salerno*, pretrial detention has stood on thin constitutional ice.<sup>137</sup> Writing for the majority, Chief Justice Rehnquist stated:

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing.<sup>138</sup>

Here, Justice Rehnquist makes clear that the constitutionality of pretrial detention hinges on the BRA's narrow tailored provisions and procedural safeguards.

Under *Salerno*, interpreting the BRA as granting broad rights and safeguards is key to its constitutional survival. The BRA passed the Court's muster because, when read in isolation, it appears to prevent the executive branch from detaining any criminal defendant who cannot be shown by "clear and convincing evidence" to pose a flight risk or a dan-

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135. See, e.g., *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Kim*, 538 U.S. 510 (2003).

136. *United States v. Salerno*, 481 U.S. 739, 756 (1987). For more support for this argument, see Brief of the National Immigration Project of the National Lawyers Guild as Amicus Curiae in Support of Appellee, *supra* note 65, at \*13 ("Interpreting section 3142(d) to permit DHS to constructively detain a defendant admitted to bail means that the U.S. is denying liberty before trial to non-dangerous individuals who do not pose a flight risk. Interpreting the BRA to permit DHS to take custody of such individuals would raise a serious concern that the BRA would no longer be narrowly tailored to achieve its public safety goal, which the *Salerno* Court found essential in affirming the BRA's constitutionality.").

137. *Salerno* was decided 6–3, with Justices Marshall, Breyer, and Stevens in dissent. 481 U.S. 739.

138. *Salerno*, 481 U.S. at 755.

ger to the community.<sup>139</sup> Justice Rehnquist cited the BRA's "regulatory" purpose,<sup>140</sup> "narrow" focus,<sup>141</sup> "careful delineation,"<sup>142</sup> and high standard of persuasion<sup>143</sup> to establish that the BRA does not violate Fifth Amendment substantive due process.<sup>144</sup> He cited the BRA's various "procedures" surrounding the detention hearing—including defendants' rights to counsel, to present evidence in their own defense, to have their detainability proven by "clear and convincing evidence," to have a detention decision issued in writing, and to appeal—as proof that the BRA does not violate Fifth Amendment procedural due process.<sup>145</sup> And he cited the "compelling interests" that BRA detention serves as evidence that the BRA does not violate the Eighth Amendment right against excessive bail.<sup>146</sup> *Salerno* made clear that the BRA's strong bent towards individual liberty was essential to its survival.<sup>147</sup>

When ICE detains a BRA-released defendant, the *Salerno* standards should apply. ICE detention of pretrial criminal defendants still counts as pretrial detention at the hands of the executive branch. Thus, its constitutionality should be scrutinized by *Salerno*'s standards, not by the standards of immigrant detention cases that do not involve the BRA. After defendants are released under the BRA (following individualized hearings to prove they are not a flight or safety risk), it defies the BRA's bent towards liberty for the defendants to be re-detained based solely on their immigration status, without any procedural safeguards.<sup>148</sup> It also defies procedural due process and the right against excessive bail for ICE detainees to have to re-argue for their release and pay a minimum \$1,500 money bond or have new conditions attached to their release.<sup>149</sup> This

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139. 18 U.S.C. § 3142(e) (2018).

140. *Salerno*, 481 U.S. at 746.

141. *Id.* at 750.

142. *Id.* at 751.

143. *Id.*

144. *Id.*

145. *Id.* at 751-52.

146. *Id.* at 754-55.

147. *See id.* at 755; *see also* S. REP. NO. 98-225, at 8 (1983) (Congress recognizing that a pretrial detention statute could be constitutionally defective "if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect.").

148. *See Salerno*, 481 U.S. at 750.

149. *See* 8 U.S.C. § 1226(a) (2018). Some scholars have noted that the Supreme Court has never announced a coherent theory of "excessiveness" under the Excessive Bail Clause, and that establishing such a theory may be crucial for getting the judiciary to act on bail reform. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1384 (2014) (arguing that a new framework of excessiveness will need to be articulated in order to secure a right to be GPS-monitored instead of jailed under the Excessive Bail Clause). Note also that some scholars have questioned the con-

may also defy defendants' rights under the principle of *res judicata*, also known as collateral estoppel or issue preclusion.

ICE detention of BRA-released defendants stretches far beyond the constitutional limits that *Salerno* placed on pretrial detention, and as such, it threatens defendants' rights under the Fifth and Eighth Amendments.<sup>150</sup>

#### D. Implications for State-level Defendants

For noncitizen defendants who are charged with state crimes, bailed out of jail, and then detained by ICE, all hope is not lost. The aforementioned constitutional arguments apply to state-level defendants, and state judges can hear such arguments.<sup>151</sup> But beyond these constitutional claims, state-level defendants have very few avenues for challenging ICE's deprivation of their court-ordered liberty.

Note that under the doctrine of *Younger* abstention, these constitutional challenges must be made in state court, not federal court. *Younger* abstention bars federal courts from hearing constitutional claims arising out of state criminal proceedings until those proceedings have ended.<sup>152</sup> This rule is rooted in the 1971 Supreme Court case *Younger v. Harris*, which held that federal courts must generally abstain from enjoining state criminal proceedings, even if someone alleges that the state criminal charges are unconstitutional.<sup>153</sup> In practice, though, *Younger* abstention can help states avoid being held accountable for constitutional violations in the criminal justice system.<sup>154</sup> Thus, if a state-level defendant who had been released on bail but subsequently detained by ICE were to sue in federal court, the court almost certainly would cite *Younger* as a sufficient

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stitutionality of the mandatory minimum \$1,500 bond in immigration court. See Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. REV. 69, 81 (2017).

150. At least one federal court has rejected this argument, on the grounds that the BRA does not preclude the applicability of the INA. See *United States v. Rincon-Meza*, No. CR19-0062-JCC, 2019 WL 2208734, at \*3 (W.D. Wash. May 22, 2019).

151. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) ("Congress did not divest the state courts of their concurrent authority to adjudicate federal claims.").

152. *Younger v. Harris*, 401 U.S. 37, 41 (1971) (invalidating a federal court's injunction of an ongoing state criminal proceeding, and recognizing a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances"); see also 28 U.S.C. § 2283 (2018) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."), quoted in *Younger*, 401 U.S. at 40.

153. *Younger*, 401 U.S. at 41.

154. See generally Fred O. Smith Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).

reason not to respond to the claim. This would be true even if the state court had declined or failed to intervene in the defendant's situation.

As such, federal district courts provide absolutely no recourse to state defendants detained by ICE. The only federal courts these detained defendants can get into are immigration courts, which lack jurisdiction over the constitutional concerns at issue. *Younger* abstention keeps state defendants in state court, even when the subject of a defendant's claim is the *federal* immigration enforcement agency.

#### E. *Effect of a State Bail Statute*

State law can do little to stop ICE from detaining state-level defendants released on bail. Even the most immigrant-friendly state bail statute imaginable would have limited effect.

Imagine a fictional state, a bastion of progressivism with innovative ideas about immigration and criminal justice, just passed a bail reform law that contains the following language:

A criminal defendant released on bail pending adjudication has the right to remain released and pursue life's activities to the fullest extent possible, barring a violation of a condition of bond, proven beyond a reasonable doubt at a bond revocation hearing. For noncitizen criminal defendants, this right to remain released supersedes the provisions of immigration law. Detention by Immigration and Customs Enforcement or another federal immigration agency, for anything other than a newly committed criminal offense after the defendant has been released on bail, is a violation of this defendant's rights under this statute. If the defendant is not released within forty-eight hours of the appropriate agency receiving notice of the violation, then the court of jurisdiction is required to dismiss the defendant's criminal charges without prejudice.

While crafting the law, a majority of state legislators professed a clear intent to craft the statute around equitable bail rights for noncitizens. The Governor restated these intentions at the signing ceremony, as reported by the press. The law is nationally heralded as a next step for "sanctuary" jurisdictions, a strong message from state law enforcement that it will not cooperate with ICE.

But implicit in this statute is a confession of the state's limited power—particularly, that the state cannot control what ICE does. When ICE is acting pursuant to its mandate under federal law but its actions

suddenly come into conflict with a state law, ICE need not be concerned. Federal law remains “the supreme Law of the Land.”<sup>155</sup> If ICE violates a defendant’s rights under this state bail statute, ICE is not obligated to do anything; the responsibility rests with the state to stop the violation of its own bail law. The state cannot force ICE’s hand, so if it cannot persuade ICE to release the defendant, it is left with one choice: dismiss the charges.

Even the most immigrant-friendly state bail statute could not stop ICE detention; it could only control how state judges and prosecutors react. The state entities with the best chance of affecting ICE’s behavior are not its lawmakers, but its voters.

### CONCLUSION

Each new case agreeing with *Trujillo-Alvarez* strengthens noncitizens’ equal rights to bail. But each new case also represents another noncitizen who *was* detained by ICE after being released on bail, someone who took a chance at freedom and then had that freedom snatched away from them. Even if they won back their liberty from a release-or-dismiss order, they were still not treated equally.

This begs the question: has *Trujillo-Alvarez* changed anything? Has it made prosecutors think more critically about when to bring charges against people who are likely to be deported? Has it made immigration officials more patient with the criminal process and with noncitizens’ right to remain released on bail? Has it made our federal government a better steward of its powers to prosecute and deport?

It doesn’t seem so. Zero tolerance has infected the system, the turf war rages on, and more and more courts are willing to contort the law and grant the government nearly unfettered power to detain. Caught in the crossfire are foreign-born fathers and mothers, sons and daughters, hard workers, business owners, taxpayers, churchgoers, students, and dreamers who are thrown in jail cells and accused of crimes, often just because their only path to a future was a trip across the border, which our laws deem a crime. They took that leap of faith once, a shot at a better life. Now detained, they face another leap—a bail hearing—a shot at winning their freedom back. Their citizen cellmates do it—they have hearings, make their cases, and go home to their families. But not the noncitizens, on whom ICE has already set their sights. They only have two options: jail, or jail by another name.

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155. U.S. CONST. art.VI, § 2.