No. 13-1324

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE MILLAN-VASQUEZ,
Defendant-Appellant.

INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA
HONORABLE DONALD E. O'BRIEN, U.S. DISTRICT COURT JUDGE

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF IOWA IN SUPPORT OF APPELLANT

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INTRODUCTION

This case raises a serious and recurring issue in federal criminal cases: whether a district court should categorically deny bail under the Bail Reform Act of 1984, 18 U.S.C. § 3142, where a defendant is subject to an immigration "detainer" and has previously been ordered removed by an immigration judge. In the proceedings below, the district judge upheld the magistrate judge's order denying bail to Defendant Jose Millan-Vasquez based on the presence of a detainer issued by U.S. Immigration and Customs Enforcement (ICE) and a previous order of deportation. *See United States v. Millan-Vasquez*, No. 5:12-cf-04102-DEO (D. Iowa Jan. 31, 2013) [hereinafter "Slip Op."].

This conclusion was legally erroneous and raises serious implications for noncitizen defendants in the federal criminal system because it could be read more broadly to impose two categorical rules contravening the requirement that bail determinations be based on individualized consideration of flight risk and danger to the community. First, although the district court found that Defendant lacked significant ties to the community, weighing in favor of a finding of flight risk, *see* Slip Op. at 4 n.1, 6, the court's analysis, if upheld, would categorically mandate the detention of a defendant subject to a detainer and with a prior removal order, even where the court also finds that he poses no flight risk or danger and meets all the requirements for release under the Bail Reform Act. *See, e.g., United States v.*

Castro-Inzunza, No. 12-30205, 2012 WL 6622075 , at *1 (9th Cir. July 23, 2012) (reversing order denying bail in such circumstances). Second, the magistrate judge appeared to hold as a matter of law that a defendant may be deemed a flight risk based on circumstances beyond his control, such as the possibility that the federal government might elect to remove him from the United States rather than delay his removal in order to complete the criminal prosecution. *See United States v. Millan-Vasquez*, No. 5:12-cr-04111 (DEO), at *7 (D. Iowa Dec. 19, 2012). Either holding would contravene the basic principle of the Bail Reform Act: that custody determinations should be made based on the individual circumstances of each case.

Amici curiae urge the Court to reverse the decision of the district court and remand for a new detention hearing. As set forth below, the district judge's decision is inconsistent with the plain language of 18 U.S.C. § 3142(d), which requires that a noncitizen defendant be treated like any other defendant for bail purposes unless the government elects to forgo his criminal prosecution in favor of immediate removal proceedings. Moreover, the possibility that a defendant will be rendered unavailable by a third party such as ICE is not a factor a district court may appropriately consider in determining whether the defendant himself poses a risk of nonappearance—especially when that risk is entirely within the government's control. Yet even assuming that a defendant's unavailability based on government actions could be considered under the Bail Reform Act, the district

court erred in finding that the detainer and prior order of removal requires a defendant's detention. As demonstrated by extensive case law and the record evidence in this case, the federal government has full control over a criminal defendant subject to ICE detention and removal, and thus can delay his physical expulsion from the United States and make him available for court appearances until his criminal proceedings are resolved.[1] And not every defendant who has previously been ordered removed will, in fact, be removed from the United States. In short, the existence of an ICE detainer and previous removal order should not result in categorical ineligibility for bail under 18 U.S.C. § 3142.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of approximately 500,000 members dedicated to enforcing fundamental constitutional and legal rights. The Immigrants' Rights Project of the ACLU engages in litigation, advocacy, and public education to protect the constitutional and civil rights of immigrants, including issues relating to the intersection of criminal and immigration law. In particular, the Immigrants' Rights Project serves as a resource for the criminal defense bar and law enforcement

[1] Indeed, the government itself acknowledges that it has means at its disposal to ensure Defendant's appearance for trial should he be released from the custody of the U.S. Marshals. *See* Gov't Statement of the Case at 17-18, *United States v. Millan-Vasquez*, No. 13-1324 (8th Cir. March 14, 2013) (indicating that U.S. Attorney's Office will seek a writ of *habeas corpus ad prosequendum* if Defendant is released); *see also*, Point I.C, *infra*.

agencies on issues relating to detainers issued by ICE against persons in criminal pretrial custody or serving criminal sentences.

The American Civil Liberties Union Foundation of Iowa (ACLU of Iowa) is the statewide affiliate of the ACLU with approximately 2,300 dues-paying members. The ACLU of Iowa has programmatic interests that track closely with the ACLU Immigrants' Rights Project, and has worked to support immigration rights groups and advocacy in Iowa with financing, projects, litigation, and public advocacy.

ARGUMENT

I. UNDER THE FEDERAL BAIL STATUTE, THE EXISTENCE OF AN ICE DETAINER AND PRIOR REMOVAL ORDER DOES NOT BAR A DEFENDANT'S RELEASE ON BAIL.

A. A Noncitizen Defendant Must Be Treated like Any Other Defendant for Bail Purposes Unless the Government Elects to Forgo His Criminal Prosecution in Favor of Removal Proceedings.

The district judge below relied primarily on the presence of an ICE detainer and prior removal order to conclude that no condition or combination of conditions would reasonably ensure the appearance of the defendant. *See* Slip Op. at 5 (noting that "[r]eleasing the Defendant, who is subject to certain deportation [under a prior removal order] would essentially effect a dismissal of this case"). In doing so, the district court failed to recognize that a specific provision of the Bail Reform

Act, 18 U.S.C. § 3142(d), accounts for the recurring circumstance of a federal criminal defendant who is also subject to civil removal proceedings.

In drafting the Bail Reform Act, Congress first set out the general rubric for pretrial detention or release, permitting one of four options: (1) release on personal recognizance or upon execution of an unsecured appearance bond pursuant to § 3142(b); (2) release on one or more conditions specified in § 3142(c) (e.g., maintaining employment, travel restrictions, regular reporting to the pretrial services agency); (3) *temporary detention to permit revocation of conditional release, deportation, or exclusion under § 3142(d)*; or (4) pretrial detention pursuant to § 3142(e). 18 U.S.C. § 3142(a). Thus, with the third option, Congress specifically anticipated a frequent circumstance in criminal cases: a criminal defendant who may be wanted by another law enforcement agency for custody on a different matter.

Section 3142(d) demonstrates that Congress intended for noncitizen defendants like Mr. Millan-Vasquez to be treated like any other defendant for bail purposes unless the government elects to forgo the criminal prosecution in favor of immediate removal proceedings. The statute provides, in relevant part:

> If the judicial officer determines that . . . [the defendant] . . . is not a citizen of the United States or lawfully admitted for permanent residence . . . such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify . . . the appropriate official of the Immigration and

> Naturalization Service. *If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section*, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings . . . .

18 U.S.C. § 3142(d) (emphasis added). Thus, the statute makes only one special provision for noncitizen defendants who are not lawful permanent residents (or defendants subject to custody on a different criminal charge or on a charge of revocation of parole or probation): it permits the prosecution a 10-day window in which to notify the other government agency that might assert custody over the defendant, and gives that agency an opportunity to take custody of the defendant.

In the case of a noncitizen defendant, if ICE elects not to take custody, then the bail statute provides that the defendant's bail application should be adjudicated under the regular provisions of Section 3142. In essence, if ICE declines to take custody, then Section 3142(d) "admoni[shes] . . . courts not to use the immigration status of defendants against them or as the sole basis of a detention determination." *United States v. Todd*, No. 2:08-cr-197 (MHT), 2009 WL 174957, at *2 n.2 (M.D. Ala. Jan. 23, 2009); *cf. United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986) (rejecting government's argument that an outstanding warrant made defendant a flight risk and noting that under Section 3142(d), "outstanding detainers and warrants, absent other evidence, do not require pretrial detention on the [criminal] charges here.").

Congress thus specifically addressed the circumstance of a federal criminal defendant who is subject to a competing request for custody. In such circumstances, Section 3142(d) provides for a sensible mechanism by which the agencies seeking custody shall determine the order in which the defendant should answer to the two charges—that is, whether the federal criminal prosecution should go forward with the other agency to take custody after the criminal case is resolved, or whether the federal prosecutor will relinquish the defendant for the other proceeding. Section 3142(d) clearly provides that if the other agency (whether it be a parole officer, another prosecuting authority, or ICE) does not take custody of the defendant, then the district court shall treat the defendant's bail application like any other, without regard to the existence of the other pending proceeding.

Federal courts have followed the plain language of Section 3142(d) and held that if the government elects to go forward with the criminal prosecution first, then the defendant is eligible for release on bail pursuant to the regular provisions of Section 3142, without regard to the existence of an ICE detainer, prior removal order, immigration detention statutes, or any other factors other than the ordinary statutory considerations of flight risk and danger to the community. For example, in *United States v. Xulam*, 84 F.3d 441 (D.C. Cir. 1996), the D.C. Circuit reversed a district court order that had denied bail to a defendant on the ground that he was

subject to deportation proceedings. The Court of Appeals specifically pointed to Section 3142(d), noting that if immigration authorities decline to take a defendant into custody during the prescribed 10-day period, then the defendant should be subject to the ordinary provisions of the Bail Reform Act. *Id*. at 444. "When the government [does] not move . . . for temporary detention under section 3142(d), it does not seem legitimate for it to now introduce the specter of a possible deportation through the back door as a principal reason for detention." *Id*.

Similarly, in *United States v. Adomako*, 150 F. Supp. 2d 1302 (M.D. Fla. 2001), the district court ordered the defendant's release on a bond with conditions of supervision, but the Department of Justice refused to release him because of an administrative detainer issued by the Immigration and Naturalization Service (INS), the predecessor agency to ICE. *Id*. at 1303. Recognizing the plain language of Section 3142(d), the district court rejected the government's arguments that INS could carry out the deportation of the defendant at any time and that therefore the administrative detention provisions of the Immigration and Nationality Act (INA) should apply to the detention of the defendant in the criminal case. *Id*. at 1304, 1307. *Adomako* correctly concludes that under Section 3142(d), a criminal defendant "is not barred from release because he is a deportable alien." *Id*. at 1307. *See also United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 964 (E.D. Wis. 2008) (rejecting government's argument that potential detention and

deportation provided a basis for pretrial detention and holding that Section 3142(d) requires the court "to treat defendant like any other offender under the Bail Reform Act."); *United States v. Luna-Gurrola*, No. 2:07-1755M, Order Re: Def. Ex Parte Application for Hearing, at *4 (C.D. Cal. Nov. 20, 2007) (holding that Section 3142(d) "directs the court to apply the normal release and detention rules to deportable aliens without regard to the laws governing release in ICE deportation proceedings"); Order Re: Def. Mot. for Release, *United States v. Banuelos*, No. 06-0547M (FMO), at *3 (C.D. Cal. Apr. 12, 2006) (same) (attached in Addendum); *United States v. Montoya-Vasquez*, No. 4:08-CR-3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009) (noting that "the Act simply requires temporary detention and the giving of notice by the court to immigration officials so they can investigate and determine whether they wish to pursue filing a detainer against the alien defendant" (citing Section 3142(d))); *accord United States v. Tapia*, ___ F. Supp. 2d ___, 2013 WL 557278, at *4 (D.S.D. Feb. 12, 2013).

B. Because the Government Is in Full Control of Whether the Defendant Is Removed from the United States, That Factor Is Not Relevant to the Consideration of Flight Risk.

The Bail Reform Act further requires the release of a person facing trial under the least restrictive conditions that will "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c). The Eighth Circuit and other courts of appeals have consistently

interpreted Section 3142(e) to permit pretrial detention when the defendant poses "either danger to the community or risk of flight." *United States v. Sazenski*, 806 F.2d 846, 848 (8th Cir. 1986). *See also United States v. Kisling*, 334 F.3d 734, 735 & n.3 (8th Cir. 2003) (noting different standards for two possible grounds for pretrial detention under Section 3142—risk of harm and flight risk); *United States v. Maull*, 773 F.2d 1479, 1485 (8th Cir. 1985) (en banc) ("When the judge finds that no condition can reasonably prevent defendant's flight, he or she is empowered to detain."); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) ("On a motion for pretrial detention [under the Bail Reform Act], the government bears the burden of showing by a preponderance of the evidence that the defendant poses a *flight risk*" (emphasis added)); *United States v. Aitken*, 898 F.2d 104, 107 (9th Cir. 1990) (same); *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir. 1986) ("the court is obliged to determine . . . *whether the defendant is likely to flee the jurisdiction* if released" (emphasis added)); *United States v. Patriarca*, 948 F.2d 789, 791 (1st Cir. 1991) (a court must inquire whether "the defendant poses a danger to the community and/or a *risk of flight*" (emphasis added)).

While this Court has not squarely addressed the question, numerous district courts in this Circuit have held that a finding of flight risk cannot be based on circumstances outside a defendant's control; rather, flight risk should be based

upon a likelihood that the defendant will fail to appear of her own volition. As noted above, numerous district courts within this Circuit have considered defendants for release on bail under Section 3142 despite an ICE detainer. The courts have reasoned that the likelihood that a defendant will decide to flee—not the likelihood of government action rendering defendant unable to appear—is the relevant inquiry under the Bail Reform Act. *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 857 (N.D. Iowa 2010) (holding that "'failure to appear' as used in the Bail Reform Act is limited to the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions, and will" (quoting *Montoya-Vasquez*, 2009 WL 103596 at *4)); *United States v. Jocol-Alfaro*, 840 F. Supp. 2d 1116, 1118 (N.D. Iowa 2011) (citing *Montoya-Vasquez*); *United States v. Rembao-Renteria*, No. 07mj399 (JNE/AJB), 2007 WL 2908137, at *2 (D. Minn. Oct. 2, 2007) ("The Court does not construe [the Bail Reform Act] to mandate that this Court, in effect, save the government from itself in this way."); *Tapia*, 2013 WL 557278 at *5 ("The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II agencies will not coordinate their respective efforts." (quoting *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111-12 (D. Minn. 2009)); *Barrera-Omana*, 638 F. Supp. 2d at 1111 ("The risk of nonappearance referenced in 18 U.S.C. § 3142 has

to involve an element of volition.").[2] In all of the foregoing district court cases, bail was set based upon findings that the defendants had extensive family ties and other factors indicating that they would appear as directed, notwithstanding the issuance of an ICE detainer.[3]

These district court cases are consistent with this Court's decisions interpreting Section 3142. *See, e.g.*, *Sazenski*, 806 F.2d at 848 (affirming denial of bail based upon false identification documents and access to private planes and helicopters); *Kisling*, 334 F.3d at 735 (affirming denial of bail based upon defendant's lack of employment and assets in community, previous failure to appear, and evasion of service of process); *Maull*, 773 F.2d at 1488 (affirming finding of flight risk based upon length of possible sentence and previous attempt to flee). *Amici* have discovered no case in which this Court considered, in determining the risk of a defendant's nonappearance, anything other than whether the defendant by her own conduct will abscond rather than appear to stand trial.

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[2] *But see United States v. Lucas*, No. 4:08CR3139, 2008 WL 5392121 at *3 (D. Neb. Dec. 19, 2008) (noting in dicta that risk of non-appearance based on possible removal by ICE is "not relevant to the issues of [defendant's] absconding," but that situation "differs markedly from one in which a defendant has already been the subject of a removal order" and denying bail based upon individualized factors going to flight risk including use of fraudulent identities in the past).

[3] That is not to say that a district court could never consider the alienage of a defendant or a defendant's awareness that she may be deported, among many other circumstances, in considering whether there is a risk that defendant will not appear for trial. But those facts are only relevant to the extent that they shed light on the future conduct of defendant, rather than as evidence that the government's actions will remove defendant from the jurisdiction.

Thus, the presence of an ICE detainer and the speculative possibility that a defendant will be removed are particularly inappropriate factors for consideration under the rubric of "nonappearance." Whether the defendant "is in the custody of the Attorney General as he wears his U.S. Marshals Service hat, or as he wears his INS hat," the appearance of defendant at trial in such circumstances is entirely within the government's control. *Adomako*, 150 F. Supp. 2d at 1308; *see also* Point I.C *infra*. Courts have rejected the argument the government makes here: that the "[c]ourt *must* detain [the defendant] or the government will be compelled to deport [him], thereby depriving the government of the opportunity to prosecute [him]." *Rembao-Renteria*, 2007 WL 2908137, at *2 (emphasis in original). The Bail Reform Act does not permit the court to "save the government from itself in this way." *Id.* Instead, the Act requires that the court consider whether defendant is likely to fail to appear as a result of his own volitional act, not whether he may fail to appear as a result of a government decision to make him unavailable for trial.

Here, it is fully within the power of the government to delay Defendant's removal so that he may appear at trial. Mr. Millan-Vasquez himself has no control over these decisions. The district court therefore erred to the extent that it relied on the speculative possibility that Mr. Millan-Vasquez would be held in immigration

detention or deported in determining whether pretrial detention was justified. *See* Slip Op. at 5-6.

C. Even Assuming the Consideration of Flight Risk Includes Defendant's Possible Detention and Removal, the Government Is Fully Capable of Ensuring Defendant's Availability for Criminal Prosecution.

Even assuming a defendant's unavailability based on the government's actions could be considered under the Bail Reform Act, the district court erred in relying upon this factor. As set forth below, any concern that Mr. Millan-Vasquez cannot appear for court in the criminal case because ICE will detain and remove him is unfounded as a matter of fact and law. Indeed—as the government partially acknowledges here—the government has numerous tools at its disposal to ensure that a defendant is not removed prior to the conclusion of his criminal proceedings. *See* Gov't Statement at 17-18 (discussing *habeas corpus ad prosequendum*).

1. The Government May Obtain a Departure Control Order to Delay Removal Until the Conclusion of the Criminal Case.

As a practical matter, the district court frequently will require surrender of the defendant's passport or other travel documents as a condition for pretrial release. 18 U.S.C. § 3142(c)(1)(B)(iv); *cf. Xulam*, 84 F.3d at 443. Without such travel documents, ICE will not be able to carry out the defendant's removal. *See* 8 C.F.R. § 241.4(g)(2) (directing ICE to obtain travel documents in order to effectuate removal).

Moreover, where ICE has issued a removal order for a defendant whom the district court has released under the Bail Reform Act, the United States Attorney's Office may avail itself of a regulatory mechanism—namely, a departure control order—for delaying a defendant's removal. Upon the request of any prosecuting authority—whether federal or state—ICE will delay the removal of a noncitizen who is a defendant in a criminal case. The Department of Homeland Security and the Department of State have promulgated identical regulations enumerating specific categories of noncitizens whose departure is deemed "prejudicial to the interests of the United States." 8 C.F.R. § 215.3; 22 C.F.R. § 46.3. One subsection of those regulations specifically lists certain criminal defendants as among those whose departure would be "prejudicial":

> 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: *Provided*, That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.

8 C.F.R. § 215.3(g) (emphasis in original); *see also* 22 C.F.R. § 46.3(g) (same). An accompanying regulation provides that:

> [an ICE] departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.

8 C.F.R. § 215.2(a); *see also* 22 C.F.R. § 46.2(a) (same). The temporary order becomes final 15 days after service upon the noncitizen, unless he requests an administrative hearing before a special inquiry officer.[4] 8 C.F.R. § 215.2(b); 22 C.F.R. § 46.2(b). Thus, once a prosecutor informs ICE that a noncitizen is a defendant in a criminal case, ICE shall not remove that noncitizen from the United States.

Indeed, numerous federal district courts have released criminal defendants on bail, noting the use of a departure control order to block the removal of the defendant. *See, e.g.*, *United States v. Morales*, No. 11-cr-20132-09-KHV-DJW, 2012 WL 603520, at *2 (D. Kan. Feb. 24, 2012) (rejecting prosecution's argument that defendant posed flight risk because of ICE detainer and noting that 8 C.F.R. § 215.3 prevents departure unless prosecution consents); *United States v. Lozano-Miranda*, No. 09-cr-20005-KHV-DJW-5, 2009 WL 113407, at *3 n.13 (D. Kan. Jan. 15, 2009) (same); *see also United States v. Lopez-Aguilar*, No. CR 93-209, 1996 WL 370160, at *3 (E.D.N.Y. Jun. 28, 1996) *partially vacated on other grounds by United States v. Londono*, 100 F.3d 236 (2d Cir. 1996) (admonishing the prosecutor for failing to make use of a departure control order to prevent the deportation of defendant before sentencing).

[4] As the regulation implicitly recognizes, the Due Process Clause of the U.S. Constitution requires procedural protections for a person subject to a departure-control order.

State courts also have noted the availability of a departure control order in state criminal cases, not only as applied to defendants but even to witnesses. *See, e.g.*, *People v. Jacinto*, 49 Cal. 4th 263, 274 (Cal. 2010) (noting that departure control orders are available to prevent deportation of witness and ensure his appearance at trial); *People v. Roldan*, 205 Cal. App. 4th 969, 983 (Cal. Ct. App. 2012) (noting that "the prosecution could have sought to delay [witness'] deportation under federal regulations, which recognize it is generally in the best interests of the federal government to temporarily delay the departure of an illegal alien who is needed as a witness in a pending criminal case" (citing 8 C.F.R. § 215.3); *People v. Rodriguez*, No. B168304, 2004 WL 2397261, at *9 (Cal. Ct. App. Oct. 26, 2004) (same). It is thus within the power of the U.S. Attorney to ensure that defendant will not be removed prior to the conclusion of his criminal proceedings.

2. Even Without a Departure Control Order, the Government Has Complete Control Over a Defendant's Removal.

Even without a departure control order, the government is entirely capable of deferring a detained defendant's removal until the conclusion of the criminal case. Indeed, in the instant case, when ICE took custody of the defendant in October 2012, ICE could have deported him in the first instance under the prior order of removal. *See* 8 U.S.C. § 1231(a)(5). However, ICE did not do so, but

instead held the defendant so that the United States Attorney's Office could exercise its discretion to prosecute him. *See* Gov't Statement at 5. "By delivering the defendant to the United States Attorney's Office in this case, rather than simply deporting him immediately, ICE yielded to the judgment of the prosecutorial arm of the Executive Branch that the public's interest in criminally prosecuting the defendant was greater than the public's interest in swiftly deporting him." *United States v. Marinez-Patino*, No. 11CR064, 2011 WL 902466, at *7 (N.D. Ill. Mar. 14, 2011). There is no reason ICE could not do so again upon defendant's release pursuant to the Bail Reform Act.

Indeed, ICE generally has broad authority to stay a noncitizen's removal from the United States as "appropriate." 8 C.F.R. § 241.6(a) (agency "may grant a stay of removal or deportation" to noncitizen with final removal order "for such time and under such conditions as . . . deem[ed] appropriate"); *see also Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials," including the discretion over "whether it makes sense to pursue removal at all"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) ("the Executive has discretion to abandon" immigration cases at any stage of the litigation, including "execut[ing] removal orders") (alteration in original); Memorandum from John Morton, Director, Exercising Prosecutorial Discretion

Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, at 3 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (noting agency's discretion to stay removal). Moreover, the regulations specifically contemplate the use of stays to allow noncitizens to testify in pending criminal proceedings. *See* 8 C.F.R. § 241.6(a) (incorporating factor by reference). This policy of facilitating criminal prosecutions with respect to *witnesses* applies *a fortiori* to criminal *defendants*.[5]

Moreover, should the defendant be taken into ICE custody, the government has several means of making the defendant available for court appearances in his criminal case.[6] As demonstrated by this case, when a defendant is in the custody

[5] For this reason, the magistrate judge erred in concluding that 8 U.S.C. § 1231 requires the defendant's removal within 90 days of entry of the removal order. *See Millan-Vasquez*, No. 5:12-cr-04111-DEO, at 8. Although Section 1231(a)(1)(A) instructs that the government "shall remove" the alien during this period, the statutory scheme, implementing regulations, and facts of this case make clear that the provision is not mandatory, but merely "direct[s] the discharge of a specified duty." *See Marinez-Patino*, 2011 WL 902466, at *8 (citing *Bartholomew v. United States*, 740 F.2d 526, 531 (7th Cir. 1984)). As explained *supra*, ICE regulations interpret Section 1231 to authorize ICE to stay a removal order as "appropriate," *see* 8 C.F.R. § 241.6(a), and ICE itself declined effectuate Mr. Millan-Vasquez's removal based on his prior deportation order. Moreover, departure control orders are available to delay the removal of a noncitizen criminal defendant.

[6] Although the Court need not reach the question here, *amici* also maintain that detention of defendant by ICE after his release from pretrial detention would not be permitted under either the Bail Reform Act or the immigration statutes. Under the Bail Reform Act, if the government elects to proceed with criminal prosecution, the district court's release order, rather than any immigration statutes, should

of another agency of the federal government rather than in the hands of a state custodian, informal coordination will suffice. *See supra*; *United States v. Brown*, 169 F.3d 344, 347 n.2 (6th Cir. 1999) (noting that it is unnecessary to file a writ of *habeas corpus ad prosequendum* when a defendant is in federal custody "as a writ is only necessary to secure the attendance of a person who is being held by another jurisdiction"). But, as the government notes, *see* Gov't Statement at 17-18, it is nonetheless within the discretion of the district court to issue a writ of *habeas corpus ad prosequendum* to secure the presence of a defendant held in immigration detention should other means fail. *See* 28 U.S.C. § 2241(c)(5) (a writ of habeas corpus may issue for a prisoner if "[i]t is necessary to bring him into court to testify or for trial").[7] *See also Tapia*, 2013 WL 557278, at *2, 5 (noting that magistrate judge issued writ of *habeas corpus ad prosequendum* to ICE to ensure

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control. *See* 18 U.S.C. § 3142(d). In addition, even if immigration statutes were to apply, ICE's general detention power is limited to maintaining custody for the purpose of effectuating removal. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). In any event, even if detention were permitted, it would not prevent Mr. Millan-Vasquez's appearance in this case.

[7] The habeas statute thus codifies the common law writ of *habeas corpus ad prosequendum*. *See United States v. Mauro*, 436 U.S. 340, 357-58 (1978) (discussing the purpose of the writ of *habeas corpus ad prosequendum* and its codification at 28 U.S.C. § 2241). Writs of *habeas corpus ad prosequendum* are often requested by prosecutors and issued by district courts to ensure that state prisoners are present for federal criminal proceedings. *See, e.g., United States v. Neal*, 564 F.3d 1351, 1353 (8th Cir. 2009) (noting that federal prosecutors obtained custody of defendant from state prosecutors by means of a writ of *habeas corpus ad prosequendum*); *Toledo v. Warden*, No. 08–3671 (NLH), 2009 WL 2182597, at *1 (D.N.J. July 21, 2009) (same).

noncitizen defendant's appearance for criminal proceedings); *Barnes v. Black*, 544 F.3d 807, 809 (7th Cir. 2008) (noting that § 2241(c)(5) can be used to obtain custody "from a state facility as well as a federal one"); *United States v. Stephens*, 315 F. Supp. 1008, 1011 (W.D. Okla. 1970) ("persons already in the custody of the United States. . . . may be transferred from the district of detention to the district of trial by writ of *habeas corpus ad prosequendum*"). The district court and the U.S. Attorney thus clearly have the ability to ensure an immigration detainee's presence at federal criminal proceedings. The possibility of administrative immigration detention is therefore not a basis for pretrial criminal detention under the Bail Reform Act.

II. NEITHER AN ICE DETAINER NOR A PREVIOUS REMOVAL ORDER MEANS AN INDIVIDUAL WILL BE HELD IN IMMIGRATION DETENTION OR REMOVED FROM THE UNITED STATES.

Finally, the government's contention that ICE will certainly detain and remove Defendant from the United States is incorrect as a matter of law.[8] First, the issuance of an ICE detainer in no way requires that a noncitizen be taken into custody. By definition, an immigration detainer merely

> serves to advise another law enforcement agency that [ICE] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request

[8] Although the government characterizes the district court holding as a finding of fact, *see* Gov't Statement at 12, the question of whether removal is certain is a legal issue and therefore subject this Court's de novo review.

> that such agency advise [ICE], prior to release of the alien, in order for [ICE] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

8 C.F.R. § 287.7(a). A detainer is only a notification to another agency of ICE's interest in a particular inmate and a request to hold the inmate for a limited period to permit ICE to arrange custody. It does not guarantee, much less require, that ICE will take a defendant into custody. *See Xulam*, 84 F.3d at 442 n.1 ("The fact that a detainer has been lodged does not mean [the defendant] necessarily will be taken into custody by the INS if released by [the] Court.").

Even when a prior removal order has been reinstated, the defendant will not necessarily be removed from the United States. Although the statute governing reinstatement of prior orders generally bars collateral attacks on the prior removal order and applications for immigration relief, *see* 8 U.S.C. § 1231(a)(5), individuals may raise any number of challenges to the reinstatement order. Noncitizens subject to reinstatement may still seek withholding of removal or relief under the Convention Against Torture. *See* 8 C.F.R. § 241.8(e). Moreover, reinstatement orders are subject to this Court's review. *See Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 843 (8th Cir. 2006) (citing 8 U.S.C. § 1252(a)).

Moreover, in criminal re-entry cases like this one, the defendant may prevail in the criminal matter through a successful collateral attack on the prior removal order—which would also invalidate the prior removal order. *See United States v.*

Mendez-Morales, 384 F.3d 927, 929 (8th Cir. 2004) (holding that, under 18 U.S.C. § 1326(d), the noncitizen may collaterally attack a prior removal order upon showing that "(1) an error in the deportation proceedings rendered the proceedings fundamentally unfair in violation of due process, and (2) the error functionally deprived the alien of the right to judicial review"); *see also United States v. Santos-Vanegas*, 878 F.2d 247, 251 (8th Cir. 1989) (invalidating deportation order where noncitizen was "never apprised . . . of his right to appeal the administrative decision in federal court" in case where immigration judge applied improper legal standard to deny asylum claim); *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987) (invalidating deportation order where immigration judges failed to explain noncitizen's potential eligibility for suspension of deportation and permitted uninformed waiver of right to appeal).

In other cases, defendants may have valid claims to U.S. citizenship, and thus not be properly subject to prosecution or removal. *See, e.g.*, *United States v. Juarez*, 672 F.3d 381, 384 (5th Cir. 2012) (invalidating illegal reentry conviction where defense counsel failed to independently research and investigate derivative citizenship defense); *Perez v. United States*, 502 F. Supp. 2d 301, 302-03 (N.D.N.Y. 2006) (granting habeas relief to defendant who pled guilty to illegal reentry, but later discovered that he had attained derivative citizenship based on his mother's naturalization); *United States v. Ramirez-Garcia*, No. M0-00-CR-138,

2001 WL 561603, at *3-*4 (W.D.Tex. May 22, 2001) (permitting a defendant in illegal reentry case to withdraw guilty plea in order to assert a derivative citizenship challenge).

In sum, the mere issuance of an ICE detainer and existence of a prior order of removal do not necessarily mean that a defendant will be taken into ICE custody or removed from the United States. Given the limited significance of detainers, and the complexity of reinstatement proceedings, a district court is not justified in assuming that a defendant with a detainer and prior removal order who is released on bond will be removed from the United States before trial. Instead, in determining whether a defendant is likely to appear for trial, the court must rely on the usual considerations of flight risk and danger without any presumption that a detainer or previous order of removal will render the defendant unavailable.

CONCLUSION

Amici curiae urge the Court to reverse the decision of the district judge below and remand for a new detention hearing.

Dated: April 1, 2013

Respectfully submitted,

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I, Randall C. Wilson, hereby certify that:

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I hereby certify that I electronically filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on April 1, 2013.

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