

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL LOPEZ DEJESUS,

Petitioner,

v.

DREW BOSTOCK, Seattle Field Office
Director,

BRUCE SCOTT, Warden of Northwest
Immigration Detention Center,

Respondent.

No. CV25-1427-JHC

RESPONSE TO FEDERAL
RESPONDENTS' RETURN
MEMORANDUM

I. INTRODUCTION

Immigration and Customs Enforcement ("ICE") has detained Mr. Lopez for a total of 26 months since first taking him into custody in March 2020. It first detained him in March 2020, then held him without a bond hearing for more than 17 months, before releasing him on an Order of Release on Recognizance ("OREC") in September 2021. For three and one-half years after his release, Mr. Lopez complied fully with the conditions of his release, including checking in regularly and avoiding any problems with law enforcement. Nonetheless, on February 1, 2025, ICE re-detained Mr. Lopez without warning and without establishing that he had become a flight risk or a danger to the community. ICE has continued to detain Mr. Lopez for nine additional months. Mr. Lopez has never had a hearing to determine if he is a flight risk or a risk to the community, and his perfect conduct while on supervision proves that he is neither.

Two different lines of authority demonstrate that Mr. Lopez's continued detention violates due process and that he is entitled to release until such time as ICE holds a hearing and demonstrates by clear and convincing evidence that he is a risk of flight or a risk to the community. One line of authority, grounded in *Martinez v. Clark*, 18-cv-1669, 2019 WL 5968089 (W.D. Wash. May 23, 2019), holds that detention under 8 U.S.C. § 1226(c) can become unreasonable without a custody determination hearing, depending on a number of factors, the most important of which is the length of detention. Those factors weigh heavily in favor of finding that Mr. Lopez's detention is unconstitutional and strongly mitigate in favor of release. The other line of authority, not acknowledged by Respondents, looks to the fact that Mr. Lopez developed a liberty interest in his continued freedom during his years of compliance with supervision. That interest cannot lawfully be taken from him without such a hearing.

II. STATEMENT OF FACTS

A. Mr. Lopez's ongoing immigration proceedings

Mr. Lopez is 37 years old. He was brought to the United States from Mexico in 1991, when he was just three years old. Exh. 1. Mr. Lopez was raised in a close-knit family in Salem, Oregon, where he excelled in school and helped care for his younger siblings, nieces, and nephews. Exh. 2. Today, Mr. Lopez is a father to four U.S.-citizen children, the youngest of whom is 16 and has autism. Exh. 3 ¶ 3.

In 2007 and 2010, while still a teenager, Mr. Lopez was convicted of certain state crimes under the laws of Oregon, the most serious of which were a robbery offense and controlled-substance offenses. Exh. 4, pp. 1, 3. The crime that forms the basis for Mr. Lopez's charge of inadmissibility to the United States is a methamphetamine possession conviction for a crime committed in 2007, for which he was sentenced to 18 months' probation. Two 2010 convictions, one for delivery of methamphetamine and another for possession of methamphetamine, resulted in 34

1 months and 6 months sentences respectively. Mr. Lopez's 2010 robbery conviction
 2 resulted in a sentence of 90 months in custody. He was pardoned for all these offenses
 3 by Oregon's governor in 2020 and 2021, Exh. 4, resulting in the actual expungement of
 4 his criminal records. Exh. 5.¹

5 While in prison, Mr. Lopez turned his life around and obtained an associate's
 6 degree through the University of Oregon's prison education program with a GPA of
 7 3.77. Exh. 7. He completed nearly every educational, employment-related, and skills-
 8 based program that the prison offered, while also mentoring his peers. Exh. 8.

9 ICE took Mr. Lopez into custody immediately after his release by Oregon
 10 authorities on approximately March 28, 2020. Nine months later, on December 30,
 11 2020, the Department of Homeland Security ("DHS") ICE commenced removal
 12 proceedings against Mr. Lopez by filing a Notice to Appear ("NTA") in immigration
 13 court. Exh. 9. The NTA charged Mr. Lopez with removability under 8 U.S.C.
 14 § 1182(a)(6)(A)(i), as an alien noncitizen who was present in the United States without
 15 being admitted or paroled. Exh. 9 at 1. On January 12, 2021, DHS brought an additional
 16 charge of inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II), charging Mr. Lopez as
 17 an alien noncitizen who was convicted of a controlled substance offense. Exh. 10. The
 18 Immigration Court held a series of removal hearings between February 16, 2021, and
 19
 20

21 ¹ Although the pardons focus on the risks of deportation, it is evident that Governor
 22 Brown did not issue pardons indiscriminately, and based her decision to pardon Mr.
 23 Lopez based on the evidence of rehabilitation he provided. Exh. 6. She granted pardons
 24 to only about 7 % of those applying for pardons. Amanda Waldroupe, *"The story of one*
 25 *US governor's historic use of clemency: 'We are a nation of second chances.'"*, The
 26 Guardian, Oct. 17, 22, <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency> [<https://perma.cc/3AW7-L2F6>] (last visited Oct. 25, 2025). By attaching various letters in support of his rehabilitation, Mr. Lopez is not asking the Court to read the entirety of them, but is simply making them available should the Court wish to review any.

1 August 19, 2021. These hearings were presided over by four rotating Immigration
2 Judges (“IJ”).

3 An IJ issued an oral decision denying Mr. Lopez’s application for cancellation of
4 removal for non-lawful permanent residents on August 19, 2021. Mr. Lopez appealed
5 that decision, which effectively stays the finality of the removal order.

6 On September 1, 2021, ICE released Mr. Lopez on an OREC. As part of that
7 arrangement, ICE Enforcement and Removal Operations (“ERO”) required Mr. Lopez
8 to have ongoing in-person check-ins with ICE officers in Eugene, Oregon, an hour’s
9 drive from Salem, which Mr. Lopez dutifully did 27 times before his re-detention in
10 February 2025, fully complying with this requirement. Exh. 11, Exh. 3 ¶ 2. In addition,
11 Mr. Lopez answered each of the phone calls he received from ICE ERO. Exh. 3 ¶ 2.
12 Another condition of his release was to be fitted with an ankle monitor, which Mr.
13 Lopez wore until his re-detention. For three and one-half years—the time between his
14 release and his re-detention—Mr. Lopez resided in Salem, Oregon with his mother and
15 sister. He saw his children on a regular basis, and provided some financial support to
16 them. Exh. 3 ¶ 4. In October 2022, Mr. Lopez began dating his current partner, a United
17 States citizen, with whom he became engaged in 2024. Exh. 3 ¶ 3. He had no contact
18 with law enforcement. Exh 3 ¶ 2.

19 Nevertheless, after the Board of Immigration Appeals denied his appeal on
20 January 30, 2025, ICE quickly re-detained him on February 1, 2025. The White House
21 shared a photo of Mr. Lopez on its official “X” social media feed and labeled him a
22 “drug dealing” criminal, which was repeated in the news media without reference to his
23 pardons. *See* White House “X” post (Feb. 3, 2025),
24 <https://x.com/WhiteHouse/status/1886556373585969399> [[https://perma.cc/AE4N-](https://perma.cc/AE4N-8WAP)
25 [8WAP](https://perma.cc/AE4N-8WAP)] (last visited Oct. 24, 2025).

1 Mr. Lopez filed a Petition for Review (“PFR”) in the Ninth Circuit Court of
2 Appeals on February 5, 2025, arguing that his removal proceedings fell far short of the
3 minimum standards required under the Constitution to satisfy due process, and also
4 arguing that his full and unconditional pardon by the governor of Oregon renders him
5 eligible for cancellation of removal. *Lopez v. Bondi*, No. 25-747, dkt. 1 (Jan. 30, 2025).

6 At the Ninth Circuit, pursuant to his PFR, Mr. Lopez moved for and the court
7 granted a stay of removal on June 16, 2025. *Lopez*, Order, no. 25-747, dkt. 27 (June 17,
8 2025). In deciding whether to stay Mr. Lopez’s removal to Mexico, the court
9 necessarily considered, among three other factors, whether Mr. Lopez had made a
10 showing that he was likely to succeed on the merits of his appeal. *See Nken v. Holder*,
11 556 U.S. 418, 434 (2009). The stay prohibits ICE from removing Mr. Lopez until the
12 Court rules on the PFR. Briefing on the PFR was completed on September 17, 2025,
13 but the court has not yet indicated potential months for oral argument. The Ninth
14 Circuit indicates that oral argument in civil appeals is set approximately four months
15 after completion of briefing, with “most cases” decided between three months and a
16 year. *See Frequently Asked Questions*, U.S. Court of Appeals for the Ninth Circuit,
17 <https://www.ca9.uscourts.gov/general/faq/> [<https://perma.cc/WN86-NKPN>] (last visited
18 October 18, 2025).

19 If Mr. Lopez prevails before the Ninth Circuit Court of Appeals, he will be
20 entitled to a new hearing before the Immigration Court, where he can seek relief from
21 removal. Those new administrative proceedings could go on for months or years until
22 reaching their conclusion.

23 Mr. Lopez filed pro se motions for custody redetermination, also known as bond
24 motions, with the immigration court in January 2021 and April 2025. Each of those
25 times, Mr. Lopez withdrew the request when ICE attorneys alleged that he was subject
26 to mandatory detention without the option for bond under 8 U.S.C. § 12236(c). Exh. 12

B. Conditions of Mr. Lopez's detention

ICE detained Mr. Lopez at the Northwest ICE Processing Center ("NWIPC") from February 1, 2025 until June 8, 2025, when ICE transferred Mr. Lopez to Anchorage Correctional Complex ("ACC") along with 34 other persons in ICE custody. Conditions at the ACC fell short of what is required under the National Detention Standards. At ACC, ICE subjected Mr. Lopez to confinement in a two-person cell along with two other persons. One person was forced to sleep on a mattress on the floor of the cell. With the mattress on the floor, there was no space to walk around in the cell. Mr. Lopez's cell had a toilet that could only be flushed about once every 30 minutes. ICE kept Mr. Lopez, along with other ICE detainees, on a near-total lockdown, allowing him to be released from his cell only a few times a week, and then for only an hour or two. Exh. 3 ¶ 5. *See* Jenna Kunze, "Alaska corrections department head acknowledges 'bumps in the road' with ICE detainees," Anchorage Daily News, June 21, 2025 [<https://perma.cc/2C9D-RU7U>] (reflecting similar allegations from others, including those regarding lockdown, over-bedding, and toilet problems). Some ICE detainees became sick under these conditions, including one ICE detainee who became ill with tuberculosis, to which he and other ICE detainees at ACC were exposed. ACLU Alaska, "ICE detainee held at Anchorage jail in June is hospitalized with tuberculosis," Jul. 9, 2025, <https://www.acluak.org/en/press-releases/ice-detainee-held-anchorage-jail-june-hospitalized-tuberculosis> [<https://perma.cc/5R2E-VYJN>]. ICE transferred Mr. Lopez back to NWIPC on or about June 30, 2025.

At NWIPC, ICE currently detains Mr. Lopez in a 70-person dormitory room and grants him access to the outside only one hour a day. Exh. 3 ¶ 6. Fights break out frequently, perhaps once a week. About two weeks prior to Mr. Lopez's signing his declaration, an inmate was stabbed with a knife. Many of the detainees are gang members who try to create problems for others. Exh. 3 ¶ 7.

1 In addition, there is a problem with the water at NWIPC. The PBNDS requires
 2 that the facility provide “safe, potable water . . . throughout the facility,” but according
 3 to Mr. Lopez the water “comes out all gray and funky” and does not taste right. Exh. 3
 4 ¶ 8. ICE’s Performance Based National Detention Standards (“PBNDS”), first issued in
 5 2011 and revised in 2016, 1.2 Environmental Health and Safety,
 6 <https://www.ice.gov/detention-standards/2011> [<https://perma.cc/YG49-JKKJ>] (last
 7 visited Oct. 25, 2025). Mr. Lopez tries to boil the water in the microwave to try to make
 8 it safer to consume. The only alternative to drinking this water is to purchase water
 9 from the facility, which is expensive.² This problem is one that has been reported over
 10 100 times to Washington’s Department of Public Health. Nina Shapiro, “*Inside WA ICE*
 11 *detention center, where you could be held for days or years*,” Seattle Times, Oct. 12,
 12 2025 [<https://perma.cc/2ECR-WUST>].

13 There are also problems with the food, including not enough to avoid going to
 14 bed hungry and undercooked food, including poultry. Exh. 3 ¶ 9.

15 Mr. Lopez’s mother and the mother of his youngest son, [REDACTED], who has autism
 16 disorder, report that [REDACTED] is suffering as a result of his father’s re-detention. Exh. 3
 17 ¶ 4. Mr. Lopez and his fiancée’s wedding plans were interrupted by ICE’s decision to
 18 re-detain him, and ICE ERO has not granted his permission to wed in detention, exh 4
 19 ¶ 3, despite the standard set by ICE’s PBNDS, which indicates that “[o]rdinarily, a
 20 detainee’s request for permission to marry shall be granted.” ICE Performance Based
 21 National Detention Standards (2011, rev. 2016), 5.3 Marriage Requests,
 22 <https://www.ice.gov/detention-standards/2011> [<https://perma.cc/YG49-JKKJ>] (last
 23 visited Oct. 25, 2025).

24
 25
 26 ² Counsel neglected to add to Mr. Lopez’s declaration support for the prior two sentences, but attests that this is what Mr. Lopez reported.

III. ARGUMENT

A. The *Martinez* test, used to determine when detention under § 1226(c) requires a bond hearing, heavily favors Mr. Lopez and establishes that Mr. Lopez's detention has become excessively prolonged and does not comport with the Due Process Clause.

Respondents contend that Mr. Lopez's lengthy detention is proper because 8 U.S.C. § 1226(c)(1)(B) states that detention is mandatory for, *inter alia*, an alien deportable by reason of having committed a controlled substance offense. *Id.* (referencing § 1227(a)(2)(B)). Dkt. 8 at 4-5. But they acknowledge cases applying the so-called *Martinez* test (*Martinez v. Clark*, 18-cv-1669, 2019 WL 5968089 (W.D. Wash. May 23, 2019), *report and recommendation adopted by* 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019) (requiring a bond hearing for detainee held under § 1226(c)). Dkt. 8 at 6 ff. Respondents effectively concede that the Due Process Clause trumps the mandatory language of § 1226(c), and that some as-applied challenges to detention under that statute warrant relief in the form of a hearing. Dkt. 8 at 7.³ In fact, “the vast majority of . . . district courts [have] conclude[d] that unreasonably prolonged detention under § 1226(c) without a bond hearing violates due process.” *Martinez*, 2019 WL 5968089 at *7.

To determine whether detention had become unreasonable, *Martinez* looked to:

(1) the total length of detention to date; (2) the likely duration of future detention; (3) whether the detention will exceed the time petitioner spent

³ Respondents do provide a token citation to a concurring opinion, but no further suggestion that *Martinez* is not good law. Dkt. 8 at 7. The Supreme Court upheld § 1226(c) against a facial challenge, *Demore v. Kim*, 538 U.S. 510, 530 (2003), but it has explicitly left open the availability of “as-applied challenges—that is, constitutional challenges to applications of the statute[.]” *Nielsen v. Preap*, 586 U.S. 392, 396, 420 (2019); *see also Perera v. Jennings*, 598 F. Supp. 3d 736, 744 (N.D. Cal. 2022) (“But just because § 1226(c) does not grant the Attorney General statutory authority to release individuals detained under on his own accord does not mean that the Court does not have the power to grant petitions for habeas corpus raising as-applied constitutional challenges to that detention without a bond hearing.”).

in prison for the crime that made him removable; (4) the nature of the crimes the petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal.

Id. at *9.⁴

Mr. Lopez will address those factors in turn; taken together, they weigh decisively in his favor, with all but one (was the government dilatory?) favoring Mr. Lopez.

1. The significant length of detention favors Mr. Lopez.

Length of detention is “the most important factor” of the *Martinez* test. *Martinez*, 2019 WL 5968089, at *9. That is because, in upholding § 1226(c) against a facial challenge, the Supreme Court stressed that “the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.” *Demore*, 538 U.S. at 530. In fact, “[r]eferences to the brevity of mandatory detention under § 1226(c) run throughout *Demore*.” *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008), *abrogated on other grounds as stated in Avilez v. Garland*, 69 F.4th 525, 535 (9th Cir. 2023). As stated in *Martinez*, “[t]he longer detention continues beyond the ‘brief’ period authorized in *Demore*, the harder it is to justify.” 2019 WL 5968089, at *9.

⁴ In at least two § 1226(c) cases in the Ninth Circuit, courts have found detention unconstitutional absent a bond hearing, based on the length of detention, without looking to the other factors analyzed in *Martinez* (and also without having the “liberty based on release” component of the cases discussed in Part III.B). *See Romero Romero v. Wolf*, No. 20-CV-08031-TSH, 2021 WL 254435, at *5 (N.D. Cal. Jan. 26, 2021) (detention of about 13 months absent a bond hearing, was “not compatible with due process”); *Doe v. Garland*, No. 3:22-CV-03759-JD, 2023 WL 1934509, at *1 (N.D. Cal. Jan. 10, 2023), *rev’d and remanded on other grounds* (incorrect district and incorrect respondent), 109 F.4th 1188 (9th Cir. 2024) (detention for 18 months required bond hearing).

1 But despite the factor's importance, Respondents err immediately in discussing
 2 this factor by looking only to Mr. Lopez's most recent period of detention in ICE
 3 custody (over eight months when Respondents filed their response, approximately nine
 4 months by the time this matter is heard), rather than aggregating the total length of his
 5 immigration detention, which is already approximately 26 months. Dkt. 8 at 7.
 6 Respondents' position is belied by the words of *Martinez* itself: "the *total* length of
 7 detention to date[.]" 2019 WL 5968089, at *9. It is also untenable: If a court is looking
 8 at how great a deprivation of liberty a detainee has experienced, that deprivation should
 9 be assessed by the total amount of time a person has been detained, irrespective of
 10 whether the detention has been broken into two segments. The deprivation of liberty is
 11 equal or greater in the case of an individual who is freed for a period of time before
 12 their liberty is again abrogated. Respondents' approach of disaggregating the various
 13 periods of detention is also contrary to the approach taken by courts in this district. *See*,
 14 *e.g.*, *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash.
 15 Aug. 21, 2025) (aggregating original and current periods of incarceration); *Tang v.*
 16 *Bondi*, No. 2:25-CV-01473-RAJ-TLF, 2025 WL 2637750, at *4 (W.D. Wash. Sept. 11,
 17 2025) (same). Outside of this district, too, "[c]ourts . . . broadly agree" that
 18 Respondents' approach to counting the length of the noncitizen's detention is not
 19 correct. *See Diaz-Ortega v. Lund*, 2019 WL 6003485, at *7 n.6 (W.D. La. Oct. 15,
 20 2019), *report and recommendation adopted*, 2019 WL 6037220 (W.D. La. Nov. 13,
 21 2019); *see also Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1876907, at *6 (N.D.
 22 Cal. Apr. 19, 2018) (collecting cases).⁵

23 _____
 24 ⁵ These cases arise in the context of claims under *Zadvydas v. Davis*, 533 U.S. 678
 25 (2001), that the presumptively reasonable six-month period—for detaining an
 26 individual to determine if there was a country he could be removed to—had been
 exceeded. But there is no reason why the period of detention should be analyzed any
 different in the *Zadvydas* context than when determining if a § 1226(c) detention has
 become unconstitutionally long.

Here, Mr. Lopez’s detention has already lasted five times the longest period mentioned in *Demore*. It is more than twice the period found unreasonable in *Martinez* (less than 13 months). *Id.* Numerous other courts have found a bond hearing is required with periods of detention far shorter than Mr. Lopez’s. *See, e.g., Liban M.J. v. Sec’y of Dep’t of Homeland Sec.*, 367 F. Supp. 3d 959, 964 (D. Minn. 2019) (about 12 months; “Other courts have required bond hearings for detentions of similar and much shorter lengths”). Courts in this district have found this factor weighed in petitioners’ favor and granted hearings for periods of detention far shorter than Mr. Lopez’s, including 11 months, 14 months, 12 months, over 14 months, over 15 months, and nearly 13 months.⁶ This factor weighs quite heavily in Mr. Lopez’s favor.

2. The duration of removal proceedings favors Mr. Lopez.

The second *Martinez* factor is “the anticipated duration of all removal proceedings including administrative and judicial appeals.” *Id.* This factor should really only be relevant when the length of detention to date has been short, to determine if it is likely to become lengthy. In any event, briefing in Mr. Lopez’s Ninth Circuit PFR was completed September 17, 2025, but there has been no indication from the court of if, or

⁶ *See* (respectively) *Ashemuke v. ICE Field Off. Dir.*, No. C23-1592-RSL-MLP, 2024 WL 1683797, at *4 (W.D. Wash. Feb. 29, 2024), *report and recommendation adopted*, No. C23-1592-RSL, 2024 WL 1676681 (W.D. Wash. Apr. 18, 2024); *Anyanwu v. United States Immigr. & Customs Enf’t Field Off. Dir.*, No. 2:24-CV-00964-LK-GJL, 2024 WL 4627343, at *1 (W.D. Wash. Sept. 17, 2024), *report and recommendation adopted sub nom. Anyanwu v. ICE Field Off. Dir.*, No. C24-0964 TSZ, 2024 WL 4626381 (W.D. Wash. Oct. 30, 2024); *Pasillas v. ICE Field Off. Dir.*, No. C21-681-RAJ-MLP, 2021 WL 8084206, at *5 (W.D. Wash. Oct. 18, 2021), *report and recommendation adopted*, No. C21-681-RAJ-MLP, 2022 WL 1127715 (W.D. Wash. Apr. 15, 2022); *Juarez v. Wolf*, No. C20-1660-RJB-MLP, 2021 WL 2323436, at *5 (W.D. Wash. May 5, 2021), *report and recommendation adopted*, No. 20-1660 RJB - MLP, 2021 WL 2322823 (W.D. Wash. June 7, 2021); *Odimara v. Bostock*, No. 2:24-CV-01412-MJP-TLF, 2025 WL 1490395, at *5 (W.D. Wash. Mar. 27, 2025), *report and recommendation adopted*, No. C24-1412 MJP, 2025 WL 1489705 (W.D. Wash. May 23, 2025); *Martinez*, 2019 WL 5968089, at *9.

when, oral argument may be set for. The Ninth Circuit indicates that oral argument in civil appeals is set approximately four months after completion of briefing, with “most cases” decided between three months and a year. *See Frequently Asked Questions*, U.S. Court of Appeals for the Ninth Circuit, <https://www.ca9.uscourts.gov/general/faq/> [<https://perma.cc/WN86-NKPN>] (last visited October 18, 2025). If the Ninth Circuit agrees with Mr. Lopez’s challenge to the Board of Immigration Appeals (“BIA”) decision, there would be many more months or years of proceedings to follow. Since the total period of detention will exceed 26 months by a great amount, almost certainly by at least another half-year and most likely significantly longer, this second *Martinez* factor greatly favors Mr. Lopez.

3. The criminal sentence for the crime that made the noncitizen removable and the nature of the offenses favor Mr. Lopez.

The third and fourth *Martinez* factors are “the length of detention compared to petitioner’s criminal sentence [for the crime that rendered the noncitizen deportable] and the nature of his crimes.” 2019 WL 5968089, at *9. These factors are relevant because they may indicate whether it would “be futile to grant [a detainee] a bond hearing[.]” *Id.*; *see also Cabral v. Decker*, 331 F. Supp. 3d 255, 262 (S.D.N.Y. 2018) (cited by *Martinez*, 2019 WL 5968089, at *9 as support for this factor) (looking to these factors as they reflect whether “it is clear that the defendant is a danger to the community or a risk of flight so that a bond hearing would be futile”).

Mr. Lopez’s pardoned convictions were serious, without question, and his length of incarceration, both in total, and for the controlled substance convictions that give rise to ICE’s charge of deportability against him, was significant. But nothing about those factors suggest that a bond hearing would be “futile.” He was a teenager when he was charged with these crimes, and he has taken every possible step to turn his life around, including getting an associate’s degree through the University of Oregon’s prison

1 education program, completing every relevant educational, employment-related, and
2 skills-based program the prison offered, and mentoring his peers. His case for
3 rehabilitation was compelling enough to earn him a full and unconditional pardon by
4 Oregon's governor.

5 The fact that ICE released Mr. Lopez on an OREC in September 2021, combined
6 with his behavior during the three and one-half years of release until ICE re-detained
7 him in February 2025, show that, despite his past (and now pardoned) offenses, it
8 hardly looks "futile" to require a hearing on the issue of dangerousness to his
9 community or flight risk. Especially given the clear and convincing burden on the
10 government at such a hearing (*see* Part III.A.5, *infra*), it seems highly likely that Mr.
11 Lopez would be returned to the form of release ICE previously granted him if this Court
12 finds that he is owed a hearing. For these reasons, these factors weigh in favor of Mr.
13 Lopez.

14 **4. Conditions at the detention facility favor Mr. Lopez.**

15 The fifth *Martinez* factor is the conditions at the detention facility. "The more
16 that the conditions under which the [noncitizen] is being held resemble penal
17 confinement, the stronger his argument that he is entitled to a bond hearing." 2019 WL
18 5968089, at *9 (quoting *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 860 (D. Minn.
19 2019)). That is because the very justification for the reduced rights of detainees to avoid
20 detention is that detention is "nonpunitive in purpose and effect." *Zadvydas*, 533 U.S. at
21 690.

22 At ACC, Mr. Lopez endured a month under conditions that did not just
23 "resemble" penal confinement but were far worse than most penal confinement,
24 because he was on virtually 24-7 lockdown, with occasional and only brief exceptions,
25 was exposed to tuberculosis, and was confined to a small and over-crowded cell with an
26 only-occasionally-flushing toilet.

1 While ICE has removed Mr. Lopez from ACC, the conditions at NWIPC are no
 2 better than those at many penal institutions. Indeed, courts in this district have routinely
 3 found that the conditions at NWIPC weigh in favor of the petitioner under the *Martinez*
 4 test's fifth factor. Those conditions and that reasoning have not changed: Mr. Lopez's
 5 current dormitory housing resembles that of many lower-security prisons and jails, and
 6 the restrictions on his movement are worse than at such facilities. And in that
 7 dormitory, he risks violence at the hands of other people detained there, as fights and
 8 harassment are not uncommon occurrences. Meanwhile, he is offered water that has
 9 been the subject of over 100 complaints to the state Department of Health, with no
 10 viable alternative, and insufficient and dangerously undercooked food.

11 Conditions at NWIPC "are similar to those in many prisons and jails." *Katlong v.*
 12 *Barr*, No. C20-0846-RSL-MAT, 2020 WL 7048530, at *4 (W.D. Wash. Oct. 30, 2020),
 13 *report and recommendation adopted*, No. C20-0846-RSL-MAT, 2020 WL 7043580
 14 (W.D. Wash. Dec. 1, 2020). Conclusions such as *Katlong's* are not based on detainees'
 15 comments alone – "a copy of the NWIPC Detainee Handbook, . . . reinforces
 16 [petitioner's] allegations that restrictions placed on his movements and conduct at
 17 NWIPC are similar to those restrictions imposed in penal institutions." *Anyanwu v.*
 18 *United States Immigr. & Customs Enf't Field Off. Dir.*, No. 2:24-CV-00964-LK-GJL,
 19 2024 WL 4627343, at *6 (W.D. Wash. Sept. 17, 2024), *report and recommendation*
 20 *adopted sub nom. Anyanwu v. ICE Field Off. Dir.*, No. C24-0964 TSZ, 2024 WL
 21 4626381 (W.D. Wash. Oct. 30, 2024). *See also Odimara v. Bostock*, No. 2:24-CV-
 22 01412-MJP-TLF, 2025 WL 1490395, at *8 (W.D. Wash. Mar. 27, 2025), *report and*
 23 *recommendation adopted*, No. C24-1412 MJP, 2025 WL 1489705 (W.D. Wash. May
 24 23, 2025) (reviewing findings of *Katlong*, *supra*, and of *Ashemuke*, *infra*, and other
 25 evidence regarding NWIPC and finding factor five weighs in petitioner's favor); *Sarr v.*
 26 *Scott*, 765 F. Supp. 3d 1091, 1104 (W.D. Wash. 2025) (reviewing findings of *Katlong*

1 and other evidence regarding NWIPC and finding factor five weighs in petitioner's
 2 favor); *Ashemuke v. ICE Field Off. Dir.*, No. C23-1592-RSL, 2024 WL 1676681, at *1
 3 (W.D. Wash. Apr. 18, 2024) (finding, without elaboration, that conditions of
 4 confinement at NWIPC weighed in favor of petitioner under the *Martinez* test); *Diaz*
 5 *Reyes v. Wolf*, No. C20-0377-JLR-MAT, 2020 WL 6820903, at *7 (W.D. Wash. Aug.
 6 7, 2020), *report and recommendation adopted as modified*, No. C20-0377JLR, 2020
 7 WL 6820822 (W.D. Wash. Nov. 20, 2020) (concluding that conditions at NWIPC are
 8 "similar to those in many prisons and jails.") (cleaned up).

9 This factor, too, favors Mr. Lopez.

10 **5. The lack of dilatory delays caused by the parties favor each**
 11 **party.**

12 The sixth and seventh *Martinez* factors are "the nature and extent of any delays
 13 in the removal proceedings caused by petitioner and the government, respectively."
 14 2019 WL 5968089, at *10. The former "factor only weighs against a petitioner when he
 15 "has 'substantially prolonged his stay by abusing the processes provided'" but not when
 16 he "simply made use of the statutorily permitted appeals process." *Odinara v. Bostock*,
 17 No. 2:24-CV-01412-MJP-TLF, 2025 WL 1490395, at *8 (W.D. Wash. Mar. 27, 2025),
 18 *report and recommendation adopted*, No. C24-1412 MJP, 2025 WL 1489705 (W.D.
 19 Wash. May 23, 2025) (quoting *Hechavarria v. Sessions*, 891 F.3d 49, 56 n.6 (2d Cir.
 20 2018)).

21 Respondents provide no support for their claim that the sixth factor favors them.
 22 (dkt. 8 at 9.) Mr. Lopez agrees that there have been no dilatory actions by Respondents,
 23 but similarly, there have been no dilatory actions on Mr. Lopez's part. Mr. Lopez and
 24 the government both requested and received streamlined extensions to brief Mr.
 25 Lopez's complex stay of removal and PFR. Neither the government's nor Mr. Lopez's
 26 actions can be considered dilatory. Likewise, there is nothing in the record to indicate

1 Mr. Lopez delayed his proceedings before the Immigration Court or before the BIA in a
2 dilatory fashion. Factor six favors Mr. Lopez and factor seven Respondent.

3 The final factor is the likelihood that the removal proceedings will result in a
4 final order of removal:

5 Where a noncitizen has not asserted any grounds for relief from removal,
6 presumably the noncitizen will be removed from the United States, and
7 continued detention will at least marginally serve the purpose of
8 detention, namely assuring the noncitizen is removed as ordered. But
9 where a noncitizen has asserted a good faith challenge to removal, the
10 categorical nature of the detention will become increasingly unreasonable.

11 2019 WL 5968089, at *10 (cleaned up).

12 Mr. Lopez has asserted good faith grounds for relief from removal. He is
13 statutorily eligible for cancellation of removal for non-lawful permanent residents.
14 Respondents have not contended that Mr. Lopez has no good faith challenge to
15 removal; they have only stated that, with the IJ and BIA having ruled against him, his
16 “only route to relief from removal is now with the Ninth Circuit.” Dkt. 8 at 9. This
17 factor weighs in favor of Mr. Lopez.

18 Furthermore, as the passage quoted from *Martinez* shows, this factor is relevant
19 only to assuring the noncitizen is removed as ordered. ICE cannot lawfully remove Mr.
20 Lopez during the pendency of his PFR because of the stay of removal issued by the
21 Ninth Circuit. If this Court orders ICE to release Mr. Lopez, or if Mr. Lopez is released
22 because the government cannot show he is a risk to his community or a flight risk, and
23 either Mr. Lopez does not prevail on his PFR, or the IJ once again orders his removal,
24 ICE could re-detain Mr. Lopez for the purpose of removing him to Mexico. There is
25 nothing in the record to support the proposition that Mr. Lopez would fail in complying
26 with any requirements imposed by ICE over his release. In the interim, Mr. Lopez’s
conditions of release could include the same conditions as before, including an ankle

1 monitor, providing further assurance (beyond his past total compliance) that he would
2 be available to be removed.

3 In short, the “most important” *Martinez* factor heavily favors Mr. Lopez. All of
4 the others do as well, except the factor looking at potential government dilatory
5 conduct. Applying *Martinez*, along with the decisions cited at p. 9 n.4, *supra*, that look
6 only to the length of detention, this Court should conclude that Mr. Lopez’s detention
7 has become unconstitutional, absent a hearing establishing either dangerousness or
8 flight risk.

9 **6. The appropriate remedy, other than immediate release, is a**
10 **hearing at which the government has the burden of producing**
11 **clear and convincing evidence.**

12 Respondents contend that, if a remedy is granted, it should be a hearing with the
13 burden on the petitioner, not the government. Dkt. 8 at 10. They cite to *Demore*, 538
14 U.S. at 522, 531, but do not indicate how those portions of *Demore* support
15 Respondents’ position and, in fact, they do not. Nor does *Zadvydas*, which Respondents
16 also cite. *Zadvydas* is inapposite, because it deals with the particularities of bond
17 hearings arising out of cases in which the person seeking release is held when their
18 orders of removal are final, but there is no substantial likelihood of removal in the
19 reasonably foreseeable future. *See* 533 U.S. at 701. In fact, under *Zadvydas*, when the
20 period of detention has become too long, they must be released on appropriate
21 conditions regardless of their history and without a specific hearing regarding risk. *See*,
22 *e.g.*, *Nguyen* 2025 WL 2419288, at *28 (W.D. Wash. And while *Zadvydas* puts the
23 *initial* burden on a petitioner to show that there is “good reason to believe that there is
24 no significant likelihood of removal in the reasonably foreseeable future,” that’s not the
25 end. *Id.* After that, the burden shifts to the government to “respond with evidence
26 sufficient to rebut that showing.” *Id.* Even if that approach were applied here, Mr.

1 Lopez's three and a half-years of history on release provide "good reason to believe" he
2 is not a flight risk, so the burden would ultimately fall to the government anyway.

3 Respondents' reliance on *Rodriguez v. Garland*, 53 F.4th 1189, 1211 (9th Cir.
4 2022), is likewise misplaced. In that case, "the Ninth Circuit declined to extend the
5 procedural requirements [that the government bear the burden of proof at any ordered
6 bond hearing by clear and convincing evidence] to individuals detained under § 1226(a)
7 seeking a second bond hearing, a distinct detention statute not at issue [in § 1226(c)
8 detentions], finding 'existing agency procedures' provided them sufficient protection."
9 *Odimara*, 2025 WL 1490395, at *10 (quoting *Rodriguez Diaz*, 53 F.4th 1189). As
10 *Odimara* explained, "unlike § 1226(c), under § 1226(a) and its implementing
11 regulations, petitioner received an individualized bond hearing shortly after the start of
12 his detention and had a continuing right to request release on the basis of changed
13 circumstances." *Id.* (cleaned up). "[I]t was only in the context of these procedural
14 protections already afforded to the noncitizens detained under Section 1226(a) that
15 *Rodriguez Diaz* concluded noncitizen detainees had no constitutional right to additional
16 bond hearings based solely on the passage of time." *Id.* (cleaned up).

17 Contrary to Respondents' position, "[m]any district courts in this Circuit
18 continue to impose the clear and convincing evidentiary standard on the government
19 once they have ordered a bond hearing, relying on *Singh v. Holder*, 638 F.3d 1196 (9th
20 Cir. 2011). See *Odimara*, 2025 WL 1490395, at *10 (citing cases). The Supreme Court
21 reversed *Singh* and other Circuits' decisions that interpreted § 1226(c) to contain an
22 implicit *statutory* requirement that ICE provide detained people with bond hearings
23 every six months. *Jennings v. Rodriguez*, 583 U.S. 281 (2018). The Court held that the
24 canon of constitutional avoidance could not stretch to read that requirement into the
25 statute, but left open the possibility of constitutional challenges. *Id.* at 312. Because
26 "*Singh*'s holding regarding the burden of proof was based on *constitutional* due process

principles, rather than any interpretation of the statute”(which was what *Jennings* involved), its holding respecting the burden of proof at a constitutionally mandated bond hearing remains intact post *Jennings*. *Odimara*, 2025 WL 1490395, at *10 (quoting *Jimenez v. Current or Acting Field Off. Dir., San Francisco Field Off., United States Immigr. & Customs Enf’t*, No. 23-CV-03566, 2024 WL 714659, at *9 (N.D. Cal. Feb. 21, 2024), *appeal docketed sub nom. Martinez Jimenez v. United States Immigration and Customs Enforcement, et al.*, No. 24-2491 (9th Cir. Apr. 19, 2024)).

The Ninth Circuit, too, has continued to apply the *Singh* standard in cases related to prolonged detention. *See Martinez v. Clark*, 124 F.4th 775, 785-86 (9th Cir. 2024) (finding the BIA applied the correct legal standard in requiring the government to prove by clear and convincing evidence that a noncitizen detained under § 1226(c) was a danger to the community). *See also Anyanwu*, 2024 WL 4627343, at *8 (“the [Ninth] Circuit Court [of Appeals] has signaled that the clear and convincing evidence standard remains good law for immigration detainees subject to prolonged detention.”)

In fact, Respondents’ position is contrary to “an overwhelming majority of courts that have held that the government must justify the continued confinement of a non-citizen detainee under § 1226(c) by clear and convincing evidence that the non-citizen is a flight risk or a danger to the community.” *Sanchez-Rivera v. Matuszewski*, No. 22-CV-1357-MMA (JLB), 2023 WL 139801, at *7 n.9 (S.D. Cal. Jan. 9, 2023) (citing cases and distinguishing *Rodriguez Diaz*). In this district alone, numerous cases have held that when a petitioner is detained under § 1226(c), the government bears the burden by clear and convincing evidence at the court-ordered bond hearing. *See, e.g., Calderon*, 2025 WL 879718, at *3; *Martinez v. Jaddou*, No. 2:24-CV-1960-TSZ-BAT, 2025 WL 1870828, at *4 (W.D. Wash. June 5, 2025), *report and recommendation adopted as modified sub nom. Martinez v. Alfonso-Royals*, No. C24-1960 TSZ, 2025 WL 1866085 (W.D. Wash. July 7, 2025); *Odimara*, 2025 WL 1490395, at *11; *Sarr*,

765 F. Supp. 3d at 1109; *Ashemuke*, 2024 WL 1676681, at *1 (*see also* 2024 WL 1683797, at *2 (W.D. Wash. Feb. 29, 2024) (report and recommendation confirming case involved § 1226(c) detention)); *Anyanwu*, 2024 WL 4626381, at *1 (*see also* 2024 WL 4627343, at *2 (W.D. Wash. Sept. 17, 2024) (report and recommendation confirming case involved § 1226(c) detention)); *Pasillas v. ICE Field Off. Dir.*, No. C21-681-RAJ-MLP, 2022 WL 1127715, at *1 (W.D. Wash. Apr. 15, 2022) (*see also* 2021 WL 8084206, at *1 (W.D. Wash. Oct. 18, 2021) (report and recommendation confirming case involved § 1226(c) detention)); *Juarez v. Wolf*, No. 20-1660 RJB - MLP, 2021 WL 2322823, at *1 (W.D. Wash. June 7, 2021); and *Martinez*, 2019 WL 5968089, at *11.⁷

Other district courts in the Circuit have held the same, also in cases involving § 1226(c) detention). *See, e.g., Jimenez*, 2024 WL 714659, at *9 n.9 (N.D. Cal. Feb. 21, 2024); *Pham*, 717 F. Supp. 3d at 887; *Singh v. Garland*, No. 1:23-CV-01043-EPG-HC, 2023 WL 5836048, at *11 (E.D. Cal. Sept. 8, 2023) (citing *Sanchez-Rivera*'s "overwhelming majority" language); *Durand v. Allen*, No. 3:23-cv-00279, 2024 WL 711607, at *7 (S.D. Cal. Feb. 21, 2024), *Salesh P. v. Kaiser*, No. 22-cv-01785, 2022 WL 17082375 (N.D. Cal. Nov. 17, 2022).

Many of these decisions post-date *Rodriguez Diaz* and specifically reject Respondents' argument here that *Rodriguez Diaz* applies to bond hearings ordered for someone detained under § 1226(c). *See Calderon v. Bostock*, No. 2:24-CV-01619-MJP-GJL, 2025 WL 1047578, at *8 (W.D. Wash. Jan. 17, 2025) (the report and recommendation adopted in part, rejected in part by *Calderon*, 2025 WL 879718, at *3); *Sarr*, 765 F. Supp. 3d 1091, 1109; *Odimara*, 2025 WL 1489705, at *10; *Anyanwu*,

⁷ In *Ashemuke* and *Anyanwu*, the court did not explicitly refer to the "clear and convincing" standard but indirectly did so through reference to the conditions for a bond hearing set forth in *Singh*, which include placing the burden on the government by clear and convincing evidence.

2024 WL 4627343, at *7–8; *Pham*, 717 F. Supp. 3d at 887; *Singh*, 2023 WL 5836048, at *10; *Sanchez-Rivera*, 2023 WL 139801, at *7 n.9; and *Durand*, 2024 WL 711607, at *7. And indeed, the *Rodriguez-Diaz* court itself specifically declined to opine on whether *Singh* remains good law in § 1226(c) cases. *Rodriguez-Diaz*, 53 F.4th at 1202 & n.4.

In sum, this Court should join the “overwhelming majority” of courts and require that, if it orders a bond hearing rather than simply releasing Mr. Lopez, the government must prove by clear and convincing evidence that Mr. Lopez is a flight risk or a risk to the danger of the community.

7. The Court should order immediate release, but if not, it should include certain specifics in its order regarding any hearing.

Mr. Lopez recognizes that the courts applying *Martinez* have generally ordered that the respondents release the petitioner unless a bond hearing within some specified short period has found that petitioner poses a risk of flight or to the community. But since a finding in Mr. Lopez’s favor will entail a finding that his detention has already become unconstitutional, the proper remedy is his release, with an order that he not be re-detained without a prior hearing establishing risk. That is what the Court should order here.

If the Court rejects that position, then it should order release absent a prompt hearing. While some courts have allowed up to 14 days, other courts in § 1226(c) cases have ordered much shorter periods in which there can be detention without a hearing. *See, e.g., Perera*, 598 F. Supp. 3d at 748 (seven days); *Pham*, 717 F. Supp. 3d 888 (five days). Mr. Lopez suggests the Court use five days, in light of the lengthy detention he has already endured.

Because an order for a bond hearing would be based on the constitutional due process requirement that overrides § 1226(c)’s mandatory detention provision, the

1 Court should specify that that provision may not serve, in whole or in part, as a basis for
2 any finding of risk.

3 By releasing Mr. Lopez, ICE at least implicitly made a finding that he was not a
4 risk. Therefore, the order should require that any finding of risk be based on changed
5 circumstances not existing at the time of his previous release. *See Duong v. Kaiser*, No.
6 25-CV-07598-JST, 2025 WL 2689266, at *10 (N.D. Cal. Sept. 19, 2025) (in § 1226(c)
7 case, where there had been a release, requiring that any re-detention first required a
8 hearing “whether a material change of circumstances justifies his re-detention”). The
9 requirement for showing changed circumstances has been applied repeatedly outside
10 the more common non-§ 1226(c) context. *See, e.g., Barrenechea v. Albarran*, No. 25-
11 CV-07883-VC, 2025 WL 2717279, at *1 (N.D. Cal. Sept. 22, 2025) (where individual
12 was released by ICE and then re-detained, “due process requires a showing of a change
13 in those circumstances before a noncitizen can be re-detained”).

14 **B. The heightened liberty interest presented by Mr. Lopez’s 2021**
15 **release and subsequent re-detention requires that he be released and**
16 **not re-detained absent a hearing to determine whether he is a flight**
risk or a danger to the community.

17 As demonstrated above, the *Martinez* test shows that the detention of Mr. Lopez
18 is unconstitutional. But if this Court should find otherwise, other authority establishes
19 that Mr. Lopez’s re-detention after a period of release gives rise to a constitutional
20 violation, thus requiring a hearing to determine flight risk and risk to the community. In
21 addition, because this other authority should lead to a more favorable order, this Court
22 needs to consider this argument regardless of its finding under *Martinez*.

23 **1. Mr. Lopez has a liberty interest in his freedom and is entitled**
24 **to due process before that liberty is denied.**

25 Various courts in this Circuit have held that noncitizens detained pursuant to
26 § 1226(c) “who lived for many years as productive members of the community before
being detained possessed a protected liberty interest.” *Carballo v. Andrews*, No. 1:25-

1 CV-00978-KES-EPG (HC), 2025 WL 2381464, *6 (E.D. Cal. Aug. 15, 2025); *see also*,
2 *e.g.*, *Perera*, 598 F. Supp. 3d at 744 (N.D. Cal. 2022); *Pham v. Becerra*, 717 F. Supp.
3 3d 877, 886 (N.D. Cal. 2024). The length of a person’s detention is not the only feature
4 that can make detention unconstitutional.

5 As to § 1226(c) in particular, several courts have concluded that “[t]here is also a
6 meaningful distinction between a challenge to an initial period of detention, at issue in
7 *Demore*, and a challenge to *re-detention*,” whether such re-detention follows a period of
8 freedom between criminal custody and ICE custody, or between release from
9 immigration custody and a return to it. *Carballo*, 2025 WL 2381464, at *4; *accord*,
10 *Guillermo M.R. v. Kaiser*, No. 25-cv-05436-RFL, 2025 WL 1810076, at *1 (N.D. Cal.
11 June 30, 2025) (“[T]he liberty interests of [an individual] who is re-arrested differ from
12 the liberty interests of a [detained person].”). *Carballo* explained, “[i]n the former
13 situation, where ICE detains an individual upon their release from a correctional
14 facility, without any substantial intervening period of release, that individual has no
15 opportunity “to form the [] enduring attachments of normal life.” 2025 WL 2381464, at
16 *4 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

17 In contrast, a person who has been at liberty between such periods of custody
18 both develops their liberty interest and demonstrates their ability to live safely in the
19 community and to comply with whatever processes and restrictions the government
20 imposes. *Accord*, *Perera*, 598 F. Supp. 3d at 744 (“Perera’s reliance on his freedom
21 [between release from criminal incarceration and ICE detention] is compelling and goes
22 far beyond that present in a typical detention situation under § 1226(c).”); *Pham*, 717 F.
23 Supp. 3d at 886 (petitioner’s “liberty interest is heightened by his exemplary conduct
24 during the period between his release from custody and ICE detention”). Scores of
25 cases outside the context of § 1226(c) have found that when ICE releases a person,
26

1 there must be a hearing prior to any re-detention. *See, e.g., E.A. T.-B. v. Wamsley*, No.
 2 C25-1192-KKE, 2025 WL 2402130, at *5 (W.D. Wash. Aug. 19, 2025).

3 Mr. Lopez's case is directly analogous to two cases in which the courts granted
 4 as-applied challenges in the § 1226(c) re-detention context. Like Mr. Lopez, the
 5 petitioners in *Perera* and in *Pham* never had a bond hearing before an immigration
 6 judge or district court; nevertheless, their time at liberty in the community between their
 7 criminal incarceration and ICE detention gave rise to a protected liberty interest and to
 8 evidence that § 1226(c)'s rationale did not apply to them. Mr. Lopez's period of liberty
 9 began with a discretionary release request granted by ICE, presumably because the
 10 agency concluded—correctly—that Mr. Lopez would present no danger to the
 11 community and would comply with their conditions. *See Barrenechea*, 2025 WL
 12 2717279, at *1 (“ICE's release of Barrenechea on his own recognizance in 2020 can
 13 only be understood as reflecting a determination that he did not pose a flight risk or
 14 danger to the community”). And his release's its duration and success square it with the
 15 facts in *Perera* and *Pham*.⁸ It was shorter than those periods (less than six years in
 16 *Perera*, 598 F.Supp.3d 739; eight years in *Pham*, 717 F.Supp.3d at 880), but involved
 17 many of the same factors in terms of developing “enduring attachments of normal life,”
 18 2025 WL 2381464, at *4, along with demonstration of rehabilitation.

19 **2. Mr. Lopez is owed additional due process, including release or,**
 20 **in the alternative, a bond hearing with the burden on the**
 21 **government.**

22 Courts examining as-applied challenges based on the petitioner's liberty interest
 23 arising from release prior to a re-detention have applied the factors set forth in *Mathews*
 24 *v. Wamsley v. Eldridge*, 424 U.S. 319, 335 (1976). *Carballo*, 2025 WL 2381474, at *7-

25 ⁸ *Carballo* is distinguishable in that there the initial release was a court-ordered
 26 determination of no risk, pursuant to a class action lawsuit. 2025 WL 2381464, at *2
 (E.D. Cal. Aug. 15, 2025). But the court's finding of a greater liberty interest was based
 on primarily on Carballo's time on release, not how that release occurred.

1 8. That test requires this Court to weigh the Petitioner’s interest in a hearing; the risk of
 2 an erroneous deprivation of that interest; and Respondents’ interest in being allowed to
 3 proceed without a hearing. *Mathews*, 424 U.S. at 335.

4 Examining the petitioners’ private interests, *Perera*, *Pham*, and *Carballo* all
 5 found it to be substantial, especially in the context of the more robust liberty interest
 6 those periods of freedom give rise to. For example, in *Carballo*, the court found that the
 7 petitioner had a “substantial private interest in remaining free from detention,” given
 8 that he “had been out of custody for five years before being re-detained, and during that
 9 time, he lived successfully in his community, become engaged to his U.S. citizen
 10 fiancée, helped manage her chronic health issues, developed a relationship with her
 11 adult children, and helped support his family.” 2025 WL 2381464, at *7. Mr. Lopez’s
 12 case presents nearly identical considerations—three and a half years successfully living
 13 in his community, an engagement to a U.S. citizen fiancée, developing a relationship
 14 with his own children, some of them still minors, and assisting the youngest with a
 15 “chronic health issue[.]” *Id.* Thus, the first factor weighs heavily in Mr. Lopez’s favor.

16 As to the second factor, the risk of an erroneous deprivation of liberty, that risk
 17 is high where “[the petitioner] has not received [and will not receive] any bond or
 18 custody redetermination hearing.” *Id.* (quoting *A.E. v. Andrews*, No. 1:25-cv-00107-
 19 KES-SKO, 2025 WL 1424382, at *5 (E.D. Cal. May 16, 2025)) (alterations in
 20 *Carballo*). Noting that civil immigration detention is “nonpunitive in purpose and
 21 effect” (quoting *Zadvydas*, 533 U.S. at 690), the court *Carballo* court noted that such
 22 detention was only “justified when a noncitizen presents a risk of flight or danger to the
 23 community.” *Id.*

24 But where, as here, a petitioner has spent years living successfully in the
 25 community prior to his re-detention, “the probable value of additional procedural
 26 safeguards, i.e., a bond hearing, is high.” *Id.* See also *Pham*, 717 F.Supp.3d at 886

1 (“The risk of erroneous deprivation is significant” where Pham had lived in the
 2 community for years living pro-socially); *Perera*, 598 F. Supp. 3d at 745 (risk of
 3 erroneous deprivation is “significant” given “Perera’s clean record and success in the
 4 multi-year interim period”). In addition to Mr. Lopez’s three and a half years of
 5 demonstrated compliance and positive impact on the community, Mr. Lopez is in the
 6 unusual position of having been granted a full and unconditional pardon for his
 7 convictions. His exceptional rehabilitation and his extensive ties to the community
 8 make the erroneous deprivation of his liberty absent a hearing quite likely. Thus, this
 9 factor also weighs in Mr. Lopez’s favor.

10 As to the third and final *Mathews* factor, “the government’s interest in detaining
 11 petitioner without a hearing is low.” *Carballo*, 2025 WL 2381464, at *8 (cleaned up).
 12 “In immigration court, custody hearings are routine and impose a minimal cost.” *Id.* See
 13 also *Perera v. Jennings*, No. 21-CV-04136-BLF, 2021 WL 2400981, at *5 (N.D. Cal.
 14 June 11, 2021) (granting TRO, prior to final judgment in *Perera*, *supra*; “the interest at
 15 stake is not whether the government may detain Perera, but whether they may do so
 16 without providing him an individualized bond hearing”). Because the burden on
 17 Respondents is minor and routine, this factor also weighs in favor of providing Mr.
 18 Lopez with additional due process protections.

19 As the courts did in *Carballo*, *Perera*, and *Pham*, this Court should find that the
 20 *Mathews* factors weigh in Mr. Lopez’s favor.

21 **3. The appropriate remedy for Mr. Lopez’s unconstitutional**
 22 **arrest is his immediate release, with Respondents barred from**
 23 **re-detaining him absent a hearing that determines he is a flight**
 24 **risk or risk to the community.**

25 The cases applying *Martinez* have ordered a bond hearing rather than immediate
 26 release. That may be the appropriate remedy under *Martinez*, where the detention is

1 initially lawful but becomes a violation of due process as the time of detention grows
2 longer. *But see* Mr. Lopez's contrary position at p. 21, *supra*.

3 However, the situation is different from some like him who had a distinct liberty
4 interest, based on his release. In that situation, it was unconstitutional to arrest him
5 without a prior hearing. Numerous courts have found, outside the context of § 1226(c),
6 that where an individual has developed a liberty interest through release by ICE, "due
7 process requires that Petitioner receive a hearing before an immigration judge *before* he
8 can be re-detained." *E.A. T.-B.*, 2025 WL 2402130, at *5) (emphasis added) (granting
9 petition and ordering that petitioner be released immediately and not re-detained until
10 an immigration court hearing is held with adequately notice). *See also, e.g., Ledesma*
11 *Gonzalez v. Bostock*, No. 2:25-CV-01404-JNW-GJL, 2025 WL 2841574, at *9 (W.D.
12 Wash. Oct. 7, 2025) (same).

13 The appropriate remedy is therefore to undo the consequences of that illegality
14 and release Mr. Lopez forthwith. Of course, if the government provides a pre-
15 deprivation hearing, and establish flight risk or dangerousness by clear and convincing,
16 then he may be re-detained.

17 **IV. CONCLUSION**

18 This Court should grant the petition. It should order Mr. Lopez released
19 immediately, either because that is the proper remedy based on a finding that the length
20 of his detention has become unconstitutionally prolonged or because his arrest after his
21 release was unlawful absent a pre-deprivation hearing. The Court should further order
22 that he may not be retained absent such a pre-deprivation hearing.

23 Alternatively, the Court should order Mr. Lopez released unless Respondents
24 provide him with a bond hearing within a short period. As previously discussed, five
25 days is an appropriate period.

1 Under either alternative, the Court should specify that at any hearing, the
2 government bears the burden by clear and convincing evidence that he is either a flight
3 risk or a risk to the community, with the mandatory provision of § 1226(c) being
4 disregarded in the IJ's determination and the decision based solely on changed
5 circumstances subsequent to his prior release.

6 DATED this 27th day of October, 2025.

7 Respectfully submitted,

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