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8
9 UNITED STATES DISTRICT COURT
10 FOR THE WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE
12

13 Javier Martinez,
14 Petitioner

15 vs.

16 Bruce Scott, et al.,
17 Respondents

W.D. Wash. No. 25-1538-TSZ-GJL

PETITIONER'S REPLY TO
GOVERNMENT'S OPPOSITION TO
MOTION FOR TRO

18 Petitioner, Javier Martinez, hereby submits the following reply to the Government's
19 Opposition to Motion for Temporary Restraining Order.

20 **I. Request for Prompt Hearing under 28 U.S.C. §2243**

21 Mr. Martinez has requested this Court to schedule a prompt hearing and "summarily hear
22 and determine the facts, and dispose of the matter as law and justice require," as authorized
under 28 U.S.C. §2243. Dkt. No. 2, pp. 7-10. The Government does not respond to this request,
but objects solely to the alternative request for a temporary restraining order. Because the

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1 Government has not stated any objection, and under the unique circumstances of this case, Mr.
2 Martinez submits that a prompt hearing under §2243 should be scheduled. If this Court
3 schedules such a hearing and resolves Mr. Martinez' claims, a temporary restraining order would
4 not be necessary.

5 II. Request for Temporary Restraining Order

6 The Government has not shown that Mr. Martinez does not meet the requirements
7 necessary for a temporary restraining order.

8 A. Likelihood of Success on the Merits

9 The Government asserts that it complied with this Court's order because a bond hearing
10 was held at which the Immigration Judge (IJ) stated that the Government has the burden of
11 proving that Mr. Martinez is a flight risk or a danger to the community by clear and convincing
12 evidence, and then concluded that Mr. Martinez is a danger to the community and a flight risk.
13 Dkt No. 8, p. 10. However, simply announcing the correct legal standard is not sufficient. *See*,
14 *e.g. Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229-230 (2020) (rejecting an interpretation of
15 statute that would "effectively foreclose judicial review of the Board's determinations so long as
16 it announced the correct legal standard"); *Natural Res. Def. Council, Inc. v. Pritzker*, 828 F.3d
17 1125, 1135 (9th Cir. 2016) ("An agency acts contrary to the law when it gives mere lip service or
18 verbal commendation of a standard but then fails to abide the standard in its reasoning and
19 decision."); *Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011) ("[W]here there is any
20 indication that the BIA did not consider all of the evidence before it, a catchall phrase does not

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1 suffice, and the decision cannot stand. Such indications include misstating the record and failing
2 to mention highly probative or potentially dispositive evidence.”); *De La Cruz Sales v. Johnson*,
3 2017 U.S. Dist. LEXIS 215855, at *16-17 (N.D. Cal. 2017) (although the IJ stated the clear and
4 convincing evidence standard correctly, the “brief and conclusory treatment of the evidence”
5 showed that the IJ “[did] not actually, or correctly, apply the clear and convincing standard”).

6 What is significant is what the government does not argue. The Government has offered
7 no argument that there is in fact clear and convincing evidence that Mr. Martinez is currently a
8 danger to the community or a flight risk. In other words, the Government has offered no
9 argument that the continued detention of Mr. Martinez does not violate due process. That means
10 that this is not a “doubtful” case. Dkt. 8, p. 7, citing “*Marlyn Nutraceuticals, Inc. v. Mucos*
11 *Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). Instead, “the law and facts clearly
12 favor [Mr. Martinez’s] position,” making a mandatory injunction appropriate. *Garcia v. Google,*
13 *Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

14 The Government does not dispute any of the following evidence in the record:

15 (1) The only evidence of danger to the community is the record of conviction from 2013.
16 See Dkt 2-2, Exhibit A, pp. 1-65.

17 (2) Mr. Martinez is genuinely rehabilitated. He takes his responsibility seriously,
18 respects authority, and makes efforts to mentor and guide others at the detention center
19 who may be less mature or centered. He is sincerely committed to helping others avoid
20 the mistakes he made. See, e.g., Letter of Support from Liz Strongman, Exhibit B, p. 14.

21 (3) In 2013, this Court determined that Mr. Martinez was not a danger to the community
22 or a flight risk, released him on personal recognizance pending the outcome of the

1 criminal proceedings, and Mr. Martinez complied perfectly with all release requirements.
2 Dkt 2-2, pp. 115-118.

3 (4) For more than 12 years, Mr. Martinez's conduct has been exemplary. There is no
4 evidence whatsoever since 2013 to suggest that Mr. Martinez is a danger to the
5 community or a flight risk. *See* Dkt 2-2.

6 (5) The IJ refused to allow witnesses to testify, was rude and sarcastic in his questioning
7 of Ms. Lindley, and took on the role of a prosecuting attorney. Dkt. 2-2, Exhibits E-H,
8 pp. 109-114.

9 (6) The IJ did not offer any explanation for his conclusion that Mr. Martinez is currently
10 a danger to the community or a flight risk. Dkt. 2-2, Exhibit C, pp. 102-103.

11 This Court required that the Government establish by clear and convincing evidence that Mr.
12 Martinez is currently a danger to the community or a flight risk. The Government has failed to
13 do so. In its Opposition Brief, the Government has not identified any such evidence, and has not
14 even made an argument that Mr. Martinez is a danger to the community or a flight risk. In sum,
15 based on the evidence in the record and on the Government's Opposition Brief, this case is not
16 doubtful; the law and the facts clearly favor Mr. Martinez's claim that his continued detention
17 violates due process.

18 1. The Government has Failed to Prove Danger to the Community or Flight Risk.

19 The Government argues that it has complied with this Court's Order. It briefly describes
20 the bond hearing, Dkt. No. 10, p. 12, and then asserts that Mr. Martinez's claims are not
21 "colorable." *Id.* Significantly, however, the Government does not challenge any of the facts
22 claimed by Mr. Martinez: the IJ was hostile, took on the role of a prosecuting attorney, refused to
allow Mr. Martinez's witnesses to testify, and failed to consider the recency of Mr. Martinez's

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1 criminal record; the only possible evidence of current dangerousness is the conviction from
2 2013; for more than 12 years Mr. Martinez has had exemplary conduct – during the past 12 years
3 there is not a scintilla of evidence suggesting that he is a danger to the community; the only
4 possible evidence of current flight risk is that the IJ ordered removal on November 15, 2024 and
5 the case is pending at the Board of Immigration Appeals.

6 Nor does the Government dispute the case law showing that the evidence provided by the
7 Department of Homeland Security is insufficient to establish danger to the community or flight
8 risk. *See, e.g., Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) (“the recency and severity
9 of the offenses must be considered”) (emphasis added); *Perez v. Wolf*, 445 F. Supp. 3d 275, 287
10 (N.D. Cal. 2020) (“when the offense occurred, and what the immigrant has done since the
11 offense are ... factors the IJ must consider”) (emphasis added); *Calderon-Rodriguez v. Wilcox*,
12 374 F. Supp. 3d 1024, 1036 (W.D. Wash. 2019) (ICE erred as a matter of law by failing to
13 consider petitioner’s danger and flight risk on a current basis; evidence of “serious” DUI
14 convictions not sufficient to meet the government’s burden of proof because the convictions
15 occurred seven years prior and Petitioner was sober since); *Singh*, 638 F.3d at 1205 (although a
16 final order of removal an order “is a relevant factor in the calculus, it alone does not constitute
17 clear and convincing evidence that [the petitioner] presented a flight risk justifying denial of
18 bond”) (emphasis added). In other words, the Government offers no credible argument that Mr.
19 Martinez is not likely to succeed on the merits of his claims.

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1 2. Mr. Martinez should not be required to appeal to the BIA.

2 With respect to exhaustion of administrative remedies, the relevant binding precedents
 3 are *Puga v. Chertoff*, 488 F.3d 812 (9th Cir. 2007), *Leonardo v. Crawford*, 646 F.3d 1157 (9th
 4 Cir. 2011), and *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017). All of these cases
 5 recognize that in a habeas case, exhaustion of administrative remedies is a prudential
 6 requirement, not an absolute requirement. According to *Puga*, “[c]ourts may [but need not]
 7 require prudential exhaustion” if the following factors weigh in favor of exhaustion: “(1) agency
 8 expertise makes agency consideration necessary to generate a proper record and reach a proper
 9 decision; (2) relaxation of the requirement would encourage the deliberate bypass of the
 10 administrative scheme; and (3) administrative review is likely to allow the agency to correct its
 11 own mistakes and to preclude the need for judicial review.” *Puga*, 488 F.3d at 815 (emphasis
 12 added). *See also Leonardo*, 646 F.3d at 1160 (a court should “ordinarily” require exhaustion,
 13 “unless exhaustion is excused”); *Hernandez*, 872 F.3d at 988 (“even if the three *Puga* factors
 14 weigh in favor of prudential exhaustion, a court may waive the prudential exhaustion
 15 requirement”).¹ Thus, nothing in the Government’s brief establishes that exhaustion is required.

16 Here, the three *Puga* factors do not counsel in favor of requiring exhaustion. First, the
 17 issue in this case is a constitutional one – whether the continued detention of Mr. Martinez
 18 violates due process. The record has been generated – DHS has provided the evidence it has to

19 ¹ *See also Singh*, 638 F.3d at 1203 n.3 (“On habeas review under § 2241, exhaustion is a
 20 prudential rather than jurisdictional requirement.”).

1 support its claim that Mr. Martinez is a danger to the community or a flight risk. An appeal to
2 the Board of Immigration Appeals will do nothing further to “generate a proper record.” Thus,
3 the question before the court is a legal question: whether the evidence submitted at the bond
4 hearing constitutes clear and convincing evidence that Mr. Martinez is a danger to the
5 community or a flight risk. *See Martinez v. Clark*, 124 F.4th 775, 779 (9th Cir. 2024) (“the
6 determination whether an alien is ‘dangerous’ for immigration-detention purposes is a mixed
7 question of law and fact and is reviewable as a ‘question of law,’ citing *Wilkinson v. Garland*,
8 601 U.S. 209 (2024)); *Hernandez v. Sessions*, 872 F.3d at 989 (“an administrative appellate
9 record is not necessary to resolve the purely legal questions presented”). Moreover, although the
10 BIA has authority to grant release on bond, it is the federal court that has the ultimate authority
11 and expertise necessary to resolve the constitutional issue. *See, e.g., United States v. Motamedi*,
12 767 F.2d 1403, 1405 (9th Cir. 1985) (the court must provide a “careful review” and an
13 “independent examination” of the reasons given for detention orders in order to protect the
14 detainee’s constitutional rights). Thus, the first *Puga* factor does not support a requirement of
15 exhaustion in this case.

16 Second, waiving the exhaustion requirement would not “encourage the deliberate bypass
17 of the administrative scheme.” In the first place, with respect to Mr. Martinez, there is no
18 “administrative scheme” requiring exhaustion. In the ordinary case, where a bond hearing is
19 held under 8 U.S.C. §1226(a), the administrative scheme contemplates an appeal to the BIA. *See*
20 8 C.F.R. §1003.1(b)(7). But the bond hearing for Mr. Martinez was not held under §1226(a); the

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1 bond hearing was not held under any statute or regulation, or any administrative scheme.
2 Instead, this Court determined that an individualized bond hearing is required as a matter of
3 constitutional due process, as one way to remedy potential unconstitutional detention. There is
4 nothing in this judicially created remedy that requires an appeal to the BIA. As the Ninth Circuit
5 stated in *Hernandez*:

6 [T]he prudential exhaustion requirement will not encourage the deliberate bypass of the
7 administrative scheme in future cases, because, once the questions presented here are
8 decided, they should cease to arise. ... Any risk of deliberate bypass of administrative
procedures is further reduced by the fact that district courts will only have jurisdiction in
the “rare case[s]” where future plaintiffs allege a colorable constitutional or legal
challenge to the government’s procedures.

9 872 F.3d at 989 (cleaned up). Under these circumstances, the second *Puga* factor does not
10 indicate that Mr. Martinez should be required to appeal to the BIA.

11 As to the third *Puga* factor, where the court has mandated a bond hearing because
12 detention is or may be unconstitutional, requiring an appeal to the BIA is a matter of
13 convenience for the court; because of the possibility that the Board may grant release, further
14 judicial proceedings may be unnecessary. But this is not an “ordinary” case in which Mr.
15 Martinez should have to sit in detention for an additional six months to a year waiting for the
16 BIA’s decision. Mr. Martinez has already been in immigration detention for over seven years –
17 far longer than the ordinary case. DHS has not provided any evidence that Mr. Martinez is
18 currently a danger to the community or a flight risk. In its opposition brief the Government does
19 not even make an argument that Mr. Martinez is currently a danger to the community or a flight

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1 risk. There is overwhelming and uncontroverted evidence that Mr. Martinez is not a danger to
 2 the community or a flight risk – i.e. overwhelming evidence that the continued detention of Mr.
 3 Martinez violates due process. Thus, on balance, *Puga* does not support a requirement of
 4 exhaustion in this case.

5 However, even if the three *Puga* factors weigh in favor of prudential exhaustion, a court
 6 may nonetheless waive the exhaustion requirement if “administrative remedies are inadequate or
 7 not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury
 8 will result, or the administrative proceedings would be void.” *Hernandez*, 872 F.3d at 988,
 9 citing *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004). *See also Aden v. Nielsen*, 2019
 10 U.S. Dist. LEXIS 194142 *5, 2019 WL 5802013 (W.D. Wash. 11/7/2019) (noting that
 11 exhaustion may be waived if one of the *Laing* factors is satisfied). If this court decides that the
 12 *Puga* factors weigh in favor of prudential exhaustion, the exhaustion requirement should
 13 nonetheless be waived because, in this case, the administrative remedies are inadequate and not
 14 efficacious, and because irreparable injury will result.

15 In *Aden*, the Court required the petitioner to exhaust administrative remedies by filing an
 16 appeal to the BIA. However, *Aden* is distinguishable. In *Aden*, the court found that “the present
 17 posture of his case is a common one.” 2019 U.S. Dist. LEXIS 194142, at *7. The petitioner did
 18 not argue that the administrative remedies were inadequate or inefficacious. *Id.* at *8. Here, in
 19 contrast, the evidence in the record establishes that the continued detention of Mr. Martinez is
 20 unconstitutional. Every day that Mr. Martinez continues to be held in detention constitutes a

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1 continuing constitutional violation. Requiring Mr. Martinez to appeal to the Board of
 2 Immigration Appeals and wait six months to a year for a decision – even if the Board ultimately
 3 grants release on bond – is not adequate or effective in remedying the constitutional violation.
 4 That is so especially in light of the fact that habeas is supposed to be a “swift and imperative
 5 remedy in all cases of illegal restraint.” *Hoeun Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir.
 6 2000).

7 In *Aden*, the court agreed that constitutionally defective detention constitutes an
 8 irreparable injury. 2019 U.S. Dist. LEXIS 194142 *8, citing *Elrod v. Burns*, 427 U.S. 347, 373
 9 (1976).² But the court held that the petitioner had not demonstrated that continued detention
 10 would violate his constitutional rights. *Id.* Here, in contrast, that has been demonstrated. As
 11 noted above, at the bond hearing on August 4, the Government submitted no evidence
 12 establishing that Mr. Martinez is currently a danger to the community or a flight risk. And in its
 13 Opposition Brief, the Government has not made any argument that Mr. Martinez is in fact

15
 16 ² In *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976), the Supreme Court held: “The loss of First
 17 Amendment freedoms, for even minimal periods of time, unquestionably constitutes
 18 irreparable injury.” Preliminary injunctive relief was appropriate because the plaintiffs
 19 “sufficiently demonstrated a probability of success on the merits.” This case does not involve
 20 First Amendment freedoms, but what is at stake – freedom from incarceration – is just as
 21 important. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from
 22 imprisonment -- from government custody, detention, or other forms of physical restraint -- lies
 at the heart of the liberty that [the Due Process] Clause protects.”). And Mr. Martinez has
 “sufficiently demonstrated” that the law and facts clearly favor his position.

1 currently a danger to the community or a flight risk. These circumstances are different from the
2 circumstances in *Aden*.

3 3. Mr. Martinez Is Entitled to Immediate Release.

4 The Government recognizes that a noncitizen is entitled to release if he can show that his
5 detention is indefinite as described in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and argues that
6 Mr. Martinez is not entitled to immediate release because his detention, although prolonged, is
7 not indefinite. But the Government cites no authority – and there is none – for its suggestion that
8 a noncitizen is entitled to release only if detention is indefinite. In fact, the case law is that
9 immigration detention violates due process if there is no clear and convincing evidence of danger
10 to the community or flight risk, and that can be the case even if detention is not indefinite. *See*,
11 *e.g.*, *Singh*, 638 F.3d at 1203 (“Given the substantial liberty interest at stake — Singh, for
12 example, has been detained for nearly four years — we hold that the government must prove by
13 clear and convincing evidence that an alien is a flight risk or a danger to the community to justify
14 denial of bond.”). Thus, many cases have granted immediate release even though detention was
15 not indefinite. *See, e.g.*, *Harman Singh v. Andrews*, 2025 U.S. Dist. LEXIS 132500, 2025 WL
16 1918679 (E.D. Cal. 2025) (immediate release pending the conclusion of expedited removal
17 proceedings); *Gunaydin v. Trump*, 2025 U.S. Dist. LEXIS 99237, *27, 2025 WL 1459154 (D.
18 Minn. 2025) (immediate release rather than requiring petitioner to wait for a decision from the
19 Board of Immigration Appeals); *Ramos v. Sessions*, 293 F. Supp. 3d 1021 (N.D. Cal. 2018)
(ordering immediate release while removal proceedings were pending against petitioner);

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1 *Judulang v. Chertoff*, 562 F. Supp. 2d 1119, 1127 (S.D. Cal. 2008) (ordering immediate release
 2 pending review of removal order by Ninth Circuit); *Leslie v. Holder*, 865 F.Supp.2d 627 (E.D.
 3 Pa. 2012) (ordering release of detainee while removal proceedings pending before immigration
 4 judge); *Madrane v. Hogan*, 520 F. Supp. 2d 654 (M.D. Pa. 2007) (ordering the petitioner's
 5 immediate release from custody while removal proceedings pending at BIA). The Government
 6 has offered no reason why Mr. Martinez should not be released immediately when there is no
 7 clear and convincing evidence that he is a danger to the community or a flight risk.

8 **B. Irreparable Injury**

9 In this case, the law and the facts clearly favor Mr. Martinez' claim that his continued
 10 detention is unconstitutional. The Government does not dispute the "well established"
 11 proposition that "the deprivation of constitutional rights unquestionably constitutes irreparable
 12 injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). *See also Hernandez v.*
 13 *Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (recognizing that "irreparable harms [are] imposed
 14 on anyone subject to immigration detention," including "the economic burdens imposed on
 15 detainees and their families as a result of detention, and the collateral harms to children of
 16 detainees whose parents are detained"). *Cf. Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) ("The
 17 loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
 18 irreparable injury.") There can be no doubt that in this case, Mr. Martinez faces irreparable
 19 injury if a temporary restraining order is not issued.

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C. Balance of Equities and the Public Interest

The Government argues that the public interest in enforcing immigration laws is significant. Dkt. No. 8, p. 12. But there is also a significant public interest in preventing the violation of a party's constitutional rights. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020). Under the circumstances of this case, the balance of equities and the public interest favor granting a temporary restraining order.

CONCLUSION

For the foregoing reasons, Mr. Martinez requests that this Court schedule a prompt hearing pursuant to 28 U.S.C. §2243, at which he will have an opportunity to establish that his continued detention violates the constitution. Alternatively, Mr. Martinez requests this Court to issue a temporary restraining order allowing him to remain free from detention while these habeas proceedings remain pending. As occurred when Mr. Martinez was released in 2013 pending the criminal case, there is no doubt that Mr. Martinez will comply with all release requirements imposed.

Dated this 18th day of August, 2025.

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I certify that this brief contains 3506 words,
in compliance with the Local Civil Rules.

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