No. _____

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In the Supreme Court of the United States

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JAVIER MARTINEZ,
Petitioner,

v.

LOWELL CLARK, Warden, Northwest Detention Center;
NATHALIE ASHER, Field Office Director, U.S. Immigration and Customs Enforcement;
ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security;
MERRICK B. GARLAND, U.S. Attorney General,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Supreme Court Rule 13.5, petitioner Javier Martinez respectfully requests a 30-day extension of time, until September 27, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Ninth Circuit initially issued its opinion in this case on June 15, 2022. A petition for rehearing en banc was denied on May 30, 2023. The opinion of the court is reported at 36 F.4th 1219 and a copy is attached as Exhibit A. The decision denying en banc reconsideration is reported at 68 F.4th 1198 and a copy is attached as Exhibit B. This Court's jurisdiction would be invoked under 28 U.S.C. §1254.

Absent an extension, a petition for a writ of certiorari would be due August 28, 2023. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

1. The Ninth Circuit concluded - over the dissent of eleven judges who disagreed with the decision not to reconsider the decision en banc - that the jurisdictional limitation in 8 U.S.C. §1226(e), which applies to "the Attorney General's discretionary judgment regarding the application of this section," *id.*, precludes review of a determination by the Board of Immigration Appeals that a noncitizen poses a danger to the community because the dangerousness determination is a "'fact-intensive' inquiry" that is "subjective" with no "clear, uniform standard." *Martinez v. Clark*, 36 F.4th 1219, 1229 (9th Cir. 2022), Exhibit A, p. 16. This case involves important questions concerning a district court's jurisdiction to review its own habeas orders and the concerning a court's jurisdiction to review mixed questions of law and fact in the immigration context.

2. In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), this Court held that 8 U.S.C. §1226(c) mandates detention of noncitizens "until the end of [removal] proceedings" no matter how long such proceedings take, but left open the question of whether the Due Process Clause may require a bond hearing for a detainee held in mandatory detention for a prolonged period of time. In habeas proceedings in this case, the district court determined that the Petitioner, Mr. Martinez has been held in mandatory detention for a prolonged period of time and that his continued detention violates Due Process unless the government proves by clear and convincing evidence that he is a danger to the community. The immigration judge found, and the Board of Immigration Appeals affirmed, a finding of dangerousness based on Mr. Martinez' prior criminal record. Mr. Martinez challenges the dangerousness finding.

3. In *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020), this Court held that mixed questions of law and fact are reviewable as questions of law. In this case, there are no undisputed facts; the mixed question is whether those undisputed facts establish "danger to the

community." The Ninth Circuit held that the determination of "danger to the community" is not reviewable because dangerousness is a "fact-intensive' inquiry" that is "subjective" with no "clear, uniform standard," and therefore it is a completely discretionary determination. 36 F.4th at 1229, Exhibit A, pp. 16-17.

4. The Ninth Circuit's characterization of the dangerousness finding as "subjective" and "discretionary" conflicts with longstanding precedents from the criminal bail context holding that dangerousness determinations are mixed questions of law and fact subject to independent review, and also conflicts with the Supreme Court's decisions in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020), and *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967–68 (2018), decisions holding that mixed questions of law and fact are reviewable as questions of law. There are many questions involving the application of law to fact that are fact-intensive, require balancing multiple facts or considerations, and for which there is no "clear, uniform standard." *See, e.g.*, *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (mixed question whether petitioner exercised "due diligence," a standard that is often fact-intensive and an equitable decision); *Ornelas v. United States*, 517 U. S. 690, 697 (1996) (mixed question regarding application of "reasonable suspicion" and "probable cause" for purposes of the Fourth Amendment); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (mixed question regarding whether a confession is "voluntary" for purposes of due process). As Judge Berzon stated in the decision dissenting from the denial of en banc review:

> The bottom line is that multi-factor standards that require weighing competing interests are commonly understood to constitute legal standards, not to constitute subjective, purely discretionary, unreviewable decisionmaking.

68 F.4th at 1203, Exhibit B, p. 17.

5. The mixed question presented here implicates this Court's pending decision in *Wilkinson v. Garland*, No. 22-666. That case will address the question whether an agency determination that a given set of established facts does not rise to the statutory standard of 'exception and extremely unusual hardship' is a mixed question of law and fact reviewable as a question of law. Petition for Writ of Certiorari at i, *Wilkinson v. Garland*, No. 20-666 (S. Ct. Jan. 17, 2023). Like *Wilkinson*, this case concerns whether review of agency proceedings applying established facts to a legal standard is a question of law that a court may review as a question of law.

6. Moreover, independently of whether mixed questions of law and fact are reviewable as questions of law, 8 U.S.C. §1226(e) is not even applicable in this case. In this case, the district court ordered that, because Mr. Martinez has been held in mandatory detention for a prolonged period of time, Due Process requires the government to prove by clear and convincing evidence that he is a danger to the community. *See Martinez v. Clark*, 2019 U.S. Dist. LEXIS 196836, *4 (W.D. Wash. 2019). The relevant provision in the statute, 8 U.S.C. §1226(c), precludes Mr. Martinez from having a bond hearing under §1226. *Jennings v. Rodriguez*, 138 S. Ct. at 846. Thus, the bond decision made by the IJ and the Board could not have involved the "application of [§1226]" to Mr. Martinez or been made "under" §1226. Instead, the bond decision was made pursuant to the District Court's conclusion that a bond hearing was required by Due Process. Thus, §1226(e) is not even applicable in this case.

7. Petitioner respectfully requests a thirty-day extension of time to file his petition for a writ of certiorari from the Ninth Circuit's decision, so that the petition for certiorari would be due to be filed by September 27, 2023. Undersigned counsel is representing Mr. Martinez on a pro bono basis. Petitioner expects to receive assistance in this matter from other immigrant

rights organizations, including Northwest Immigrant Rights Project. Because of a heavy case load at Northwest Immigrant Rights Project, and the paternity leave of one of their attorneys, Northwest Immigrant Rights Project is not able to provide assistance until after September 2, 2023. Thus, an extension of time is requested in order to adequately and effectively prepare the petition for certiorari.

8. The government will not suffer any prejudice from the requested extension.

Wherefore, Petitioner Javier Martinez respectfully requests that the Court extend the time to file a petition for a writ of certiorari to September 27, 2023.

August 15, 2023

Respectfully submitted

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