

DETAINED

Magistrate Judge Brian A. Tsuchida

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DESMARK NDIFET AWA,

Petitioner,

v.

MARKWAYNE MULLIN,¹ *et al.*;

Respondents.

CASE NO.: 2:26-cv-00922-BAT

**PETITIONER'S REPLY TO FEDERAL
RESPONDENTS' RETURN
MEMORANDUM**

Noted for Consideration:
April 7, 2026

I. Petitioner's detention is not mandatory.

Federal Respondents first argue that Petitioner is mandatorily detained under 8 U.S.C. § 1225(b)(2). Dkt. 5, at 4-5. When Respondents chose to release Petitioner from custody on an Order of Release on Recognizance (OREC), it did so under the authority of 8 U.S.C. § 1226, as explicitly indicated in the OREC. Dkt. 7-4, at 1. By placing Petitioner on an OREC under § 1226,

¹ Federal Respondents substituted Department of Homeland Security Secretary Markwayne Mullin for Kristi Noem under Fed. R. Civ. P. 25(d). Dkt. 5, at 1 n.1.

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1 Respondents acknowledged that they were no longer subjecting Petitioner to detention under §
2 1225. Further, Respondents' argument that Petitioner is an "applicant for admission" and subject
3 to mandatory detention has repeatedly been rejected by this Court, and this Court has declined to
4 follow the split decision in *Buenrostro*. See e.g., *Gill v. Noem*, No. 2:26-cv-00473-GJL, 2026 U.S.
5 Dist. LEXIS 50359, *5, n. 3 (W.D. Wash. March 11, 2026). Therefore, Petitioner is not
6 mandatorily detained, and this argument does not justify his current detention.

7
8 **II. Due process requires Petitioner's immediate release.**

9 Respondents acknowledge that Petitioner was released from detention on an OREC after
10 his first apprehension by the Department of Homeland Security (DHS) on July 10, 2023. Dkt. 5
11 at 2. Respondents admit that that "courts have found that due process requires pre-detention
12 hearings prior to re-detention of an alien" but argue that "due process did not require a pre-
13 detention hearing here" because Petitioner is subject to mandatory detention. Dkt. 5, at 7. First,
14 Petitioner is not subject to mandatory detention, as discussed above. Second, Respondents'
15 argument that this Court has erroneously conflated 8 C.F.R. § 1236.1(c)(9) and 8 C.F.R. §
16 1236.1(c)(8) also fails because Respondents' argument does not consider "the supremacy of the
17 United States Constitution and the executive branch's duty to comply with the Due Process Clause
18 of the Fifth Amendment." *G.S. v. Hermosillo*, C25-2704-TSZ, 2026 U.S. DIST. LEXIS 12874,
19 at *5 n.2 (W.D. Wash. Jan. 22, 2026).

20 Respondents must still comply with constitutional requirements of due process when
21 seeking to re-detain a noncitizen previously released. See *Ramirez Tesara v. Wamsley*, 800 F.

Supp. 3d 1130, 1137 (W.D. Wash. 2025) (“[T]he fact that the Government may believe it has a valid reason to detain Petitioner does not eliminate its obligation to effectuate the detention in a manner that comports with due process.”). This Court has recognized that the three-part *Mathews* test applies when analyzing whether an individual’s re-detention comported with due process. *See id.* at 1135. Under that test, court must consider three factors:

First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The *Mathews* test clearly demonstrates that Petitioner’s due process rights were violated. Accordingly, Petitioner addresses each factor below.

A. Petitioner’s private interest is weighty.

Petitioner gained a liberty interest in his continued freedom when he was last released from Immigration and Customs Enforcement (ICE) custody on his OREC. He has an exceptionally strong interest in freedom from physical confinement and in a hearing prior to any revocation of his liberty. His “interest in not being detained is ‘the most elemental of liberty interests[.]’” *E.A. T.-B. v. Wamsley*, 795 F. Supp. 3d 1316, 1321 (W.D. Wash. 2025) (alteration in original) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)). “Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas*

1 v. *Davis*, 533 U.S. 678, 690 (2001). The Ninth Circuit has held that “[i]n the context of
2 immigration detention, it is well-settled that ‘due process’ requires adequate procedural
3 protections to ensure that the government’s asserted justification for physical confinement
4 outweighs the individual’s constitutionally protected interest in avoiding physical restraint.”
5 *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Singh v. Holder*, 638 F.3d
6 1196, 1203 (9th Cir. 2011)).

7 A noncitizen released from custody has a protected liberty interest in remaining out of
8 custody. See *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019) (“Just as people on
9 preparole, parole, and probation status have a liberty interest, so too does [a noncitizen released
10 from immigration detention] have a liberty interest in remaining out of custody on bond.”).
11 Petitioner then timely filed an application for relief and is pursuing that relief through the
12 Immigration Court and the Board of Immigration Appeals. Despite having a pending application
13 for removal, Respondents re-detained him without due process on December 9, 2025, at a check-
14 in. For over two years, Petitioner’s liberty interest grew. “His release thus allowed him to gain[]
15 a foothold in the United States and develop ties in this country, thereby strengthening his
16 constitutional right to due process. In revoking Petitioner’s release, the Government has
17 undeniably inflicted a grievous loss of Petitioner’s liberty, thereby depriving him of a core private
18 interest protected by the Due Process Clause.” *Velazquez v. Wamsley*, No. 2:25-cv-02641-JHC,
19 2026 WL 84223, at *4 (W.D. Wash. Jan. 12, 2026) (internal quotations and citations omitted).

20 Therefore, Petitioner’s interest in his liberty is constitutionally protected and the first
21 *Mathews* factor weighs in his favor.

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B. The risk of erroneous deprivation is high.

Even when “the Government may believe it has a valid reason to detain Petitioner[s],” that belief “does not eliminate its obligation to effectuate the detention in a manner that comports with due process.” *E.A. T.-B.*, 795 F. Supp. 3d at 1322.

Petitioner’s re-detention must still “bear[] [a] reasonable relation” to a valid government purpose: here, preventing flight or protecting the community against dangerous individuals. *Zadvydas*, 533 U.S. at 690 (second alteration in the original) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *see also, e.g., Hernandez*, 872 F.3d at 990 (“The government has legitimate interests in protecting the public and in ensuring that noncitizens in removal proceedings appear for hearings, but any detention incidental to removal must bear a reasonable relation to its purpose.” (citation modified)). Only a hearing before a neutral and detached decisionmaker—where ICE must prove that re-detention is justified because Petitioner poses a flight risk or danger—can ensure that this “reasonable relation” to a valid government purpose exists.

Respondents argue that Petitioner’s re-detention was justified because he failed to comply with his OREC by being charged with a DUI and he was given notice of the revocation of his OREC. Dkt. 5, at 8. But they do not explain why a pending charge, where no final decision has been reached, is sufficient to constitute a violation of “any local, State, or Federal laws and ordinances.” *Id.*; *see also Jatinder Singh v. Noem*, No. 2:26-cv-00079-DGE, 2026 U.S. Dist. LEXIS 21296, at *11 (W.D. Wash. Feb. 2, 2026).

1 Respondent's further allege that a "custody redetermination was conducted on
2 [Petitioner], and it was determined that [Petitioner] is believed to be a threat to public safety, due
3 to his criminal history." Dkt. 5, at 6; Dkt. 7-1, at 2. However, this redetermination was not
4 conducted before a neutral and detached decisionmaker—this redetermination took place at
5 Petitioner's ICE check-in at an ICE office in Portland. *See* Dkt. 7-1, at 2. The Supreme Court has
6 repeatedly explained that an individual is not afforded due process where it is simply the
7 "government enforcement agent" who makes the decision about the propriety of detention.
8 *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971). That process—which is exactly what
9 occurred here—is a far cry from the hearing before a neutral decisionmaker that due process
10 requires. *See, e.g., Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) ("Whatever else
11 neutrality and detachment might entail, it is clear that they require severance and disengagement
12 from activities of law enforcement.").

13 Only a hearing before a neutral and detached decisionmaker can ensure re-detention is
14 effectuated in a manner that does not run afoul of due process. *See Pinchi v. Noem*, 792 F. Supp.
15 3d 1025, 1035 (N.D. Cal. 2025) (declaring, in the case of a detained noncitizen who was
16 redetained without pre-deprivation hearing, that "there is a significant risk that even the two-day
17 curtailment of liberty that [she] already suffered upon her re-detention by ICE was not justified
18 by any valid interest" and concluding that "[p]roviding her with the procedural safeguard of a
19 pre-detention hearing will have significant value in helping ensure that any future detention has
20 a lawful basis"). Therefore, this factor also weighs in favor of Petitioner.

C. The government has failed to show a countervailing interest against providing Petitioner a pre-deprivation hearing.

“In immigration court, custody hearings are routine and impose a minimal’ cost.” *See Doe v. Becerra*, No. 2:25-cv-00647-DJC-DMC, 2025 WL 691664, at *2 (E.D. Cal. Mar. 3, 2025). Other courts have found that “the Government’s interest in re-detaining non-citizens previously released without a hearing is low: although it would have required the expenditure of finite resources (money and time)” to provide a pre-deprivation hearing, “those costs are far outweighed by the risk of erroneous deprivation of the liberty interest at issue.” *E.A. T.-B.*, 795 F. Supp. 3d at 1324; *see also Gonzalez v. Bostock*, 2:25-cv-01404-JNW-GJL, 2025 WL 2841574, at *8 (W.D. Wash. Oct. 7, 2025) (concluding government interest to be low even assuming “requiring predetention process would present some administrative burden”).

Finally, “[s]ociety’s interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.” *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). This factor also weighs strongly in favor of Petitioner.

In sum, each *Mathews* factor favors Petitioner and demonstrates that his procedural due process rights were violated when ICE re-detained him.

III. Conclusion

The Court should therefore grant Petitioner's habeas petition ordering his immediate release, and further order that Respondents not re-detain him without providing an individualized

1 hearing before a neutral decision maker. He should be released under the conditions that were
2 previously imposed.

3 Dated this 7th day of April 2026,
4

5 /s/ Hilary Smith

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12 *I certify that this memorandum contains 1,692 words, in compliance with the Local Civil*
13 *Rules.*
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