**UNITED STATES DISTRICT COURT**

**FOR THE [DISTRICT]**

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| [Name][Name],Petitioner,v.[Warden of detention facility]; [ICE District Director]; John F. Kelly, in his capacity as Secretary of Homeland Security; Jefferson Beauregard Sessions III in his capacity as Attorney General of the United States,Respondents. | ))))))))))) | Case No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_**ORAL ARGUMENT REQUESTED** |

**MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, petitioner moves this Court for a Preliminary Injunction enjoining respondents from depriving petitioner of liberty without due process of law, in violation of the Fifth Amendment of the United States Constitution, through its indefinite detention of petitioner for a prolonged period without justification before a neutral judicial officer.

 In support of this motion, petitioner relies upon the attached memorandum of law. A proposed Order is attached.

 Respectfully submitted,

**UNITED STATES DISTRICT COURT**

**FOR THE [DISTRICT]**

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| [client] [client],Petitioner,v.[Warden of detention facility]; [ICE District Director]; John F. Kelly, in his capacity as Secretary of Homeland Security; Jefferson Beauregard Sessions III in his capacity as Attorney General of the United States, Respondents. | ))))))))))) | Case No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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# **INTRODUCTION**

This action challenges the government’s authority to detain an individual for a prolonged period of time without a bond hearing under 8 U.S.C. § 1225(b). The government has granted petitioner the opportunity to present a claim for immigration status in removal proceedings before the Executive Office for Immigration Review. Yet during those proceedings, the government has detained petitioner for nearly [time] months, without a bond hearing and without any end to that detention in the reasonably foreseeable future.

 Petitioner’s ongoing, prolonged detention without a bond hearing requires immediate relief. Petitioner suffers irreparable harm by being detained for a prolonged period without a bond hearing, due both to the deprivation of liberty without due process and the physical and mental harm the petitioner currently suffers while detained. Petitioner therefore brings this motion for a preliminary injunction preventing further detention without a bond hearing.

**STATEMENT OF FACTS[[1]](#footnote-2)**

[Facts detailing personal characteristics, basis and supporting facts for immigration status claim (asylum, LPR cancellation, etc.), details of arrest and detention, including location and any adverse physical or mental aspects of detention]

# **ARGUMENT**

 Petitioner is entitled to a preliminary injunction preventing continued prolonged detention without a bond hearing. If petitioner’s motion is not granted, she is certain to suffer irreparable harm both to her constitutional rights and to her physical and mental health. She is also substantially likely to succeed on the merits of her claim: that the government may not detain persons for a prolonged period without a bond hearing. Further, no public interest is served by the government’s indefinite, mandatory detention of [an asylum seeker suffering from psychological trauma stemming from persecution/a long-term lawful permanent resident with substantial ties to her community in the United States.] This Court should therefore grant petitioner’s motion by enjoining the government from further detaining her without a bond hearing.

# **Legal standard for a Preliminary Injunction**

A district court should enter a preliminary injunction when a movant shows “(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.” Grizzle v. Kemp, 634 F.3d 1314, 1320 (11th Cir. 2011). “Furthermore, where injunctive relief is sought from irreparable injury arising in the context of state civil proceedings, ‘the relief sought [is] of course the kind that raises no special problem—an injunction against allegedly unconstitutional state action . . . that is not part of a criminal prosecution.’” Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983) (citing Younger v. Harris*,* 401 U.S. 37, 47 n.4 (1971)).

# **Petitioner is entitled to a Preliminary Injunction ordering a bond hearing.**

## **Petitioner will suffer irreparable harm if her motion is not granted.**

“An injury is irreparable ‘if it cannot be undone through monetary remedies.’” Scott v. Roberts, 612 F.3d 1279, 1295 (11th Cir. 2010) (citing Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir.1987)). “Even when a later money judgment might undo an alleged injury, the alleged injury is irreparable if damages would be difficult or impossible to calculate.” Id. (internal quotations and citation omitted). Petitioner’s prolonged detention without a bond hearing inflicts irreparable injury to her constitutional right to due process when faced with a deprivation of liberty, causing her physical and emotional harms that cannot be undone through monetary remedies.

The Eleventh Circuit presumes irreparable injury where violation of a constitutional right causes intangible (ie. noneconomic) injury. See Scott v. Roberts, 612 F.3d 1279, 1295; Siegel v. LePore, 234 F.3d 1163, 1177–78 (11th Cir. 2000) (irreparable injury presumed from violation of a constitutional right to privacy or speech); see also Am. Civil Liberties Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015) (“[I]rreparable harm is presumed where there is an alleged deprivation of constitutional rights.”). Following that guidance, Eleventh Circuit courts “have held that the very violation of certain fundamental constitutional rights can satisfy the irreparable harm requirement in obtaining preliminary injunctive relief . . . .” Cunningham v. Adams, 808 F.2d 815, 822. See, e.g., Roundtree v. U.S. Dep’t of Hous. & Urban Dev., 2009 WL 7414663, at \*7 (M.D. Fla. Aug. 28, 2009) (“Plaintiffs will then face eviction (or, at least, the legal prospect of it), and the loss of a constitutionally protected right. This is clearly an irreparable harm.”); State of Alabama v. U.S.E.P.A.,1988 WL 156726, at \*4 (M.D. Ala. Oct. 21, 1988) (state action would deprive plaintiffs of “their constitutional rights of due process of law under the Fifth Amendment to the United States Constitution. Based upon such a deprivation, the Plaintiffs are threatened with irreparable harm for which there is no remedy but for the action of this Court.”).

Even where injury is not presumed, evidence of nonmonetary harms caused by constitutional violations may also establish irreparable injury. Cf. Ne. Florida Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1285 (11th Cir. 1990) (no finding of irreparable injury where “no witnesses or other evidence was submitted on the issue”). Physical and mental harms that would befall a plaintiff in the absence of preliminary relief may rise to the level of irreparable injury. See Ingraham v. Wright, 430 U.S. 651, 695–96, 97 S. Ct. 1401, 1425, 51 L. Ed. 2d 711 (1977) (“The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding.”) (White, J. dissenting); Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (plaintiff “raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments”); Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994) (preliminary injunction granted where plaintiffs threatened with harm to their “sense of emotional and psychological well-being”).

Petitioner contends that DHS is depriving her of liberty without due process of law by failing to provide her with meaningful individualized review of her ongoing detention and by failing to justify her prolonged detention in a bond hearing. She is therefore entitled to a presumption of irreparable injury due to the ongoing violation of her constitutional right to due process when faced with a deprivation of liberty.

Even absent that presumption, Ms. Tesfaslassie’s ongoing, unconstitutional detention inflicts irreparable harm to her physical and mental health. [Facts concerning physical/emotional harm endured in detention setting. Should be supported by declaration.]

 The violations of petitioner’s constitutional rights and the physical and mental effects of her indefinite detention each serve as an independent basis to conclude that petitioner will suffer irreparable harm in the absence of preliminary injunctive relief.

## **Petitioner is substantially likely to prevail on the merits of her claim that she is entitled to a bond hearing because her mandatory detention is prolonged.**

The government contends that 8 U.S.C. § 1225(b) gives it authority to indefinitely detain petitionerwithout a bond hearing as an “arriving alien.” It has already lost this argument, several times over. When mandatory detention becomes prolonged, the Fifth Amendment’s Due Process Clause demands that the government conduct a bond hearing at which it bears the burden of persuasion. See, e.g., Rodriguez v. Robbins, 715 F.3d 1127, 1139-1144 (9th Cir. 2013); Rodriguez v. Robbins, 804 F.3d 1060, 1081-1084 (9th Cir. 2015), cert. granted sub nom. Jennings v. Rodriguez, No. 15-1204, 2016 WL 1182403 (U.S. June 20, 2016); Marquez Diaz v. Moore, 16-cv-23684-UU (S.D. Fla. March 6, 2017) (adopting report and recommendation of Mag. Otazo-Reyes); Ahad v. Lowe, 2017 WL 66829 (M.D. Pa. Jan. 6, 2017); Ricketts v. Simonse, 2016 WL 7335675 (S.D.N.Y. Dec. 16, 2016); Gregorio-Chacon v. Lynch, 2016 WL 6208264 (D.N.J. Oct. 24, 2016); Damus v. Tsoukaris, 2016 WL 4203816 (D.N.J. Aug. 8, 2016); Saleem v. Shanahan, 2016 WL 4435246 (S.D.N.Y. Aug. 22, 2016); Arias v. Aviles, 2016 WL 3906738 (S.D.N.Y. July 14, 2016); Maldonado v. Macias, 150 F.Supp.3d 788 (W.D. Tex. 2015); Bautista v. Sabol, 862 F. Supp. 2d 375, 377 (M.D. Pa. 2012) (all construing § 1225(b) to contain a reasonable time limit to mandatory detention).

 At a minimum, petitionerwill be detained without a bond hearing until her next immigration court hearing on [**date]**, or for [**time elapsed since detained]**. Because petitioner’sunderlying claim for immigration status is unlikely to be resolved at a single hearing, her mandatory detention is likely to stretch indefinitely beyond that date.

“A statute permitting indefinite detention of an alien would raise a serious constitutional problem” under the Fifth Amendment’s Due Process Clause. Zadvydas v. Davis, 533 U.S. 678, 690 (2001). For this reason, every higher court to consider the various mandatory immigration detention statutes has held that they must be read to require a bond hearing when detention becomes foreseeably prolonged—even when the statute applies to inadmissible noncitizens. See id. (limiting mandatory detention of admitted noncitizens with a final order of removal under 8 U.S.C. § 1231(a)(6) to a six months); Clark v. Martinez, 543 U.S. 371 (2005) (holding that Zadvydas applies to inadmissible noncitizens); Demore v. Kim, 538 U.S. 510, 518 (2003) (identifying mandatory detention under 8 U.S.C. § 1226(c) as a “brief period,” lasting “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”); Sopo v. U.S. Attorney Gen., 825 F.3d 1199, 1223 (11th Cir. 2016) (Pryor, J., concurring in part and dissenting in part) (“[O]nce the duration of an alien’s detention is determined to be unreasonable, the government must provide an opportunity for the alien to obtain release on bond . . . .”). The result is the same for indefinite detention under § 1225(b). In the absence of a bond hearing, prolonged detention under § 1225(b) is unconstitutional.

Yet even if this Court declines to reach the constitutional question, under the statutory construction doctrine of constitutional avoidance, it should interpret § 1225(b) to afford petitioner a bond hearing. Supreme Court rulings explain why. First, noncitizens detained as arriving aliens under § 1225(b), including returning Lawful Permanent Residents (“LPRs”), are entitled to due process. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly” and holding that Plasencia “could invoke the Due Process Clause on returning to this country”); Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) (in the case of a returning LPR, holding that “[f]rom a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien”).

Second, because the government detains constitutionally privileged LPRs under § 1225(b), the statute must be construed to avoid concerns with infringement of their constitutional rights to due process. See Rodriguez v. Robbins, 715 F.3d 1127, 1139-1144 (9th Cir. 2013); Gutierrez Arias v. Aviles, No. 15-CV-9249 (RA), (S.D.N.Y. July 14, 2016) (both holding that § 1225(b) detainees must be given a bond hearing within six months of their detention). Further, “where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance.” Rodriguez, 715 F.3d at 1141 (citing Clark v. Martinez, 543 U.S. at 380)). “Thus, the dispositive question is not whether the government’s reading of § 1225(b) is permissible in some (or even most) cases, but rather whether there is any single application of the statute that calls for a limiting construction.” Id.

In Martinez, the Court analyzed § 1231(a)(6), a statute it had previously read as a matter of constitutional avoidance to limit mandatory detention of admitted noncitizens with a final order of removal to a reasonable period of six months. Zadvydas v. Davis, 533 U.S. 678. The government argued that the same limit did not apply to inadmissible noncitizens because they were not entitled to the same constitutional protections. Martinez, 543 U.S. at 380. But the statute’s text did not distinguish between previously admitted and inadmissible citizens. Id. at 377. Therefore, every noncitizen subject to the statute was entitled to the same reading limiting mandatory detention. “The lowest common denominator, as it were, must govern.” Id. at 380.

The text of § 1225(b) does not distinguish between LPRs and other noncitizens and the government’s reading of it would abrogate an LPR’s constitutional rights. Such a reading “would raise a serious constitutional problem,” Zadvydas, 533 U.S. at 690, by denying LPRs in prolonged mandatory detention the right to a bond hearing. Therefore, as a matter of both constitutional avoidance and a plain reading of the statute’s text, § 1225(b) must be read to require a bond hearing for all detainees, including non LPRs, when detention becomes foreseeably prolonged. Rodriguez v. Robbins, 715 F.3d 1127, 1142-43.

Finally, the government erroneously interprets § 1225(b) to require mandatory detention pending removal proceedings. A correct interpretation of the statute instead limits mandatory detention to the period between initial arrest of an arriving noncitizen and the moment she is referred to longer term removal proceedings before an immigration judge. Such a reading is supported by the text, purpose, and overall construction of the statute, the doctrine of constitutional avoidance, and the government’s own practice of limiting mandatory detention of other recently arrived noncitizens to the period before removal proceedings commence. See Petition, Third Claim for Relief. Petitioner’s current detention therefore falls under 8 U.S.C. § 1226(a), entitling her to an immediate bond hearing before an immigration judge upon request.

Petitioner’s claim that prolonged detention under § 1225(b) requires a bond hearing has already been accepted by the only Court of Appeals to hear it, a sister court in this district, and several district courts throughout the nation. In contrast, no court has held that the government may indefinitely detain noncitizens as arriving aliens. Petitioner is therefore substantially likely to prevail on the merits of her habeas claim.

## **The balance of equities and public interest weigh in petitioner’s** **favor.**

Petitioner’s prolonged, mandatory detention has already brought severe consequences to her physical and psychological health. It has [aggravated acute trauma caused by her persecution in her home country/caused severe psychological trauma by inflicting prolonged, indefinite separation from her family and community.] And it violates the Constitution’s mandate that the government provide due process of law when depriving persons of liberty. Moreover, petitioner asks only that the government justify her incarceration by showing that she is a flight risk or danger to the community. The government would not be prejudiced by such a requirement, as it has had nearly **[time in detention]** months to observe her and assemble any evidence it would need to make such a showing.

No public interest is served by the government’s bondless detention of this traumatized individual. The government has never contended that petitioner personally requires detention as a threat to the community or flight risk. Instead, it relies only on a generic statutory presumption of bondless detention that the Supreme Court has limited to a “brief” period. Demore v. Kim, 538 U.S. 510, 518. This Court should therefore find that the balance of equities and public interest weigh in favor of granting petitioner’s motion.

# **CONCLUSION**

 For the foregoing reasons, petitioner is entitled to a preliminary injunction releasing her from unconstitutional detention or preventing her continued detention without a bond hearing.

**UNITED STATES DISTRICT COURT**

**FOR THE [District]**

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| [client] [client],Petitioner,v.[Warden of facility]; [ICE District Director]; John F. Kelly, in his capacity as Secretary of Homeland Security; Jefferson Beauregard Sessions III in his capacity as Attorney General of the United States,Respondents.= | )))))))))) | Case No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

 **[PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION**

This matter having come before the Court on Petitioner’s Motion for a Preliminary Injunction [Dkt. #\_\_\_], and this Court having reviewed the pleadings and heard arguments from counsel, the Court hereby GRANTS petitioner’s Motion for a Preliminary Injunction.

Petitioner has satisfied the requirements for preliminary injunctive relief. In particular, Petitioner has demonstrated that she is substantially likely to succeed in proving that prolonged detention without a bond hearing under 8 U.S.C. § 1225(b) is unconstitutional. Petitioner has also demonstrated that, without relief, she would suffer irreparable harm to her constitutional rights and physical and psychological health.

Accordingly, Respondents are ordered to immediately release petitioner from detention, or, in the alternative, provide petitioner a bond hearing before an Immigration Judge where the Department of Homeland Security bears the burden of establishing the necessity of petitioner’s continued detention and considers alternatives to detention that could mitigate flight risk.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_\_\_\_, 201\_\_.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Hon. \_\_\_\_\_\_\_\_\_\_\_\_\_, U.S.D.J.

1. Unless otherwise noted, all facts are taken from Mr. YYY’s Petition for Habeas Corpus, attached as Ex. A. [↑](#footnote-ref-2)