**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. \_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, petitioner XXX YYY moves this Court for a Preliminary Injunction enjoining respondents from violating her Fifth Amendment right to due process by detaining her indefinitely without justifying her ongoing detention before a neutral judicial officer.

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

Respectfully submitted,

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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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. \_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**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 Temporary Restraining Order and Preliminary Injunction**

## **The general standard for a preliminary injunction**

A district court should enter a preliminary injunction when a plaintiff shows that he “is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 825 (2d Cir. 2015) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). “[O]r he may show irreparable harm and either a likelihood of success on the merits or ‘sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.’” Id. (citing Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 215 (2d Cir.2012). “The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical.” Andino v. Fischer, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008).

## **The “substantial likelihood” standard does not apply here.**

In two circumstances, “[t]he moving party must make a ‘clear’ or ‘substantial’ showing of a likelihood of success”: where “(1) the injunction sought . . . is properly characterized as a ‘mandatory’ rather than ‘prohibitory’ injunction; or (2) the injunction sought will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.” Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996). “The ‘clear’ or ‘substantial’ showing requirement—the variation in language does not reflect a variation in meaning—thus alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success.” Tom Doherty Associates, Inc. v. Saban Entm’t, Inc., 60 F.3d 27, 34 (2d Cir. 1995).

“The typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits. A mandatory injunction, in contrast, is said to alter the status quo by commanding some positive act.” Id. (internal citation omitted). “An injunction that prevents a defendant from continuing to interfere with a plaintiff’s rights, while altering the status quo (by commanding a cessation of the interference), is nonetheless a prohibitory injunction.” New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 472 (S.D.N.Y. 2006).

Neither exception to the general preliminary injunction standard applies here. First, petitioner seeks an injunction that prohibits the government from depriving her of liberty without due process by holding her in prolonged mandatory detention without a bond hearing. Second, even if petitioner’s motion is granted and a neutral judicial officer determines that she should be released from detention, the government could later redetain petitioner should it prevail at trial of her habeas petition. Thus, any preliminary relief granted by this Court could be later undone.

Accordingly, this Court should not apply the heightened standard for a preliminary injunction. As explained below, however, under any of the standards, petitioner is entitled to the preliminary relief requested.

# **Petitioner is entitled to a Preliminary Injunction granting her release from prolonged detention or ordering a bond hearing.**

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

“To establish irreparable harm, the movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.” Wright v. New York State Dep’t of Corr. & Cmty. Supervision, 568 F. App’x 53 (2d Cir. 2014) (citing Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir.1995)). Petitioner’s continued prolonged detention without a bond hearing will cause two types of very serious, irreparable harms: the first to her constitutional right to due process and the second to her physical and mental health.

“[I]Irreparable harm is presumed where there is an alleged deprivation of constitutional rights.” Am. Civil Liberties Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015) (citing Statharos v. New York City Taxi & Limousine Comm’n, 198 F.3d 317, 322 (2d Cir.1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”). 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. This allegation alone entitles petitioner to a presumption of irreparable harm.

Even absent that presumption, petitioner’s continued detention absent a bond hearing will cause irreparable harm to his physical and mental health. In Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996), the Second Circuit affirmed a district court’s finding that an inmate’s conditions of confinement subjected him to irreparable harm in the form of “headaches, hair loss, rashes, and an inability to walk without difficulty.” The fact that the plaintiff had “suffered physical effects of his confinement . . . serve[s] as an independent basis for the district court’s conclusion that the plaintiff would suffer irreparable harm in the absence of preliminary injunctive relief.” Id. Later cases reaffirm that “claims of emotional and physical harm may in some circumstances justify preliminary injunctive relief . . . .” Moore v. Consol. Edison Co. of New York, 409 F.3d 506, 511 (2d Cir. 2005) (citing Shapiro, 51 F.3d at 332-333 (upholding finding of irreparable harm based on “physical and emotional harm” that included the “risk of injury, infection, and humiliation”).

[Facts concerning physical/emotional harm endured in detention setting. Should be supported by declaration.]

As with the plaintiff in Jolly v. Coughlin, 76 F.3d 468, 482, the alleged violations of petitioner’s constitutional rights and the physical and mental effects of her confinement “each serve as an independent basis for the . . . conclusion that [petitioner] would suffer irreparable harm in the absence of preliminary injunctive relief.”

## **Petitioner is substantially likely to prevail on the merits of her habeas petition.**

### **Petitioner is substantially likely to prevail on 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); 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, several sister courts in this district, and 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)