UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

L[redacted] N[redacted]	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
ORLANDO PEREZ, Warden, Laredo Detention Center;	§	
ROBERT CERNA, Assistant Field Office Director, San Antonio Field Office, U.S. Immigration and Customs Enforcement;	§	**CIVIL ACTION NO.**
DANIEL BIBLE, Field Office Director, San Antonio Field Office, U.S. Immigration and Customs Enforcement;	§	
RONALD VITIELLO, Acting Director; U.S. Immigration and Customs Enforcement;	§	
KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security;	§	
MATT WHITAKER, Acting U.S. Attorney General; in their official capacities,	§	
	§	
Respondents.	§	

PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner I[redacted] N[redacted] —a [redacted]-year-old [redacted] woman who has been in immigration detention for almost nine months without ever receiving an individualized custody determination before an Immigration Judge —hereby seeks a writ of habeas corpus ordering her immediate release from the Laredo Detention Center while she pursues her application for asylum before the Board of Immigration Appeals. Petitioner's civil immigration detention, in the absence

of an individualized determination of flight risk or danger, is substantially unjustified and has become unduly prolonged, in violation of the Due Process Clause.

Petitioner lawfully applied for asylum at a border port of entry, after enduring past persecution including the assassination of her father, mother, and brother, the disappearance of her sister, multiple attempts on her life, and torture, and inability to secure help from the [redacted] government. After she was detained, a U.S. asylum officer interviewed Ms. N[redacted], determined that she had a credible fear of persecution, and referred her to the Immigration Court for removal proceedings to apply for asylum. She lost her case before an Immigration Judge on legal grounds, and she is appealing to the Board of Immigration Appeals.

Meanwhile, the government has continued to detain Ms. N[redacted] without legitimate basis or adequate procedures. Ms. N[redacted] does not pose a flight risk and is not a danger to the community. She has no criminal record, and the government has no questions regarding her identity, having stipulated to her identity at her asylum hearing. She has provided all necessary information on a sponsor willing to support her, namely an Austin based non-profit shelter housing asylum-seekers. Moreover, medical records and psychological evaluations show that her continued detention has exacerbated her mental health conditions. Because her continued detention is not based on any legitimate justification, the Court should grant this petition.

JURISDICTION AND VENUE

1. This court has jurisdiction over this habeas petition pursuant to 28 U.S.C. § 2241 (habeas corpus statute), 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. § 1331 (federal questions), 28 U.S.C. § 1361 (Mandamus Act), and U.S. Const., Art. I., § 9, Cl. 2 (Suspension Clause). *See INS v. St. Cyr*, 533 U.S. 289 (2001).

2. District courts have jurisdiction to hear habeas petitions by non-citizens who challenge the lawfulness of their detention under federal law, pursuant to 28 U.S.C. § 2241. *Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

3. Congress has preserved judicial review of challenges to immigration detention. *See Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (holding that 8 U.S.C. §§ 1226(e), 1252(b)(9) do not bar review of challenges to prolonged immigration detention); *id.* at 876 (Breyer, J., dissenting) ("8 U.S.C. § 1252(b)(9), . . . by its terms applies only with respect to review of an order of removal") (internal quotation marks and brackets omitted).

4. Section 1252(f)(1) of the Immigration and Nationality Act does not repeal this Court's authority to grant the relief Petitioner seeks because, *inter alia*, Petitioner is in removal proceedings. *See* 8 U.S.C. § 1252(f)(1) (exempting from limits on review claims by "an individual alien against whom proceedings . . . have been initiated"); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (Section 1252(f) "does not extend to individual cases"). If § 1252(f)(1) did bar the relief Petitioner seeks, it would violate the Suspension Clause. Even if otherwise applicable, § 1252(f)(1) does not bar declaratory relief.

5. This court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2241, 2243, 1651, 2201–2202 (Declaratory Judgment Act); and 5 U.S.C. § 702.

6. Venue is proper in the Southern District of Texas pursuant to 28 U.S.C. § 2241(d), because Petitioner is detained at the Laredo Detention Center in Laredo, Texas. The detention center falls within this District.

PARTIES

7. Petitioner L[redacted]N[redacted] is a[redacted]-year-old woman from [redacted]. In 1998, a powerful criminal organization with government allies assassinated her father, who was

a police commissioner, in retaliation for his acts reporting an illegal arms sale, which implicated the organization and government officials. The same criminal organization killed her mother and brother, and later disappeared her sister. It also threatened Ms. N[redacted] [redacted] life multiple times, shooting bullets into her house, holding her at gunpoint, burning her home to the ground, and leaving notes threatening to kill her. Ms. N[redacted] sought safety from this criminal organization, which allies with government officials, by seeking shelter with a group of nuns. However, when the nuns caused her serious physical injury, she fled from [redacted] in September 2017. She entered the United States in March 2018 and passed her Credible Fear Interview (CFI), a threshold screening for asylum seekers. She applied for asylum and was denied. The Immigration Judge's decision is currently awaiting review at the Board of Immigration Appeals (BIA).

8. Respondent Orlando Perez is the Warden of the Laredo Detention Center (aka Laredo Processing Center) in Laredo, Texas. Mr. Castro is an employee of CoreCivic, a corporation that operates the Laredo Detention Center. As facility warden, he is the immediate physical custodian of Plaintiff. He is sued in his official capacity.

9. Respondent Robert Cerna is an Assistant Field Office Director for the San Antonio office of Immigration and Customs Enforcement (ICE), a part of the Department of Homeland Security. As the ICE official in charge of the Laredo Detention Center, he has custody over Plaintiff and is authorized to release her. He is sued in his official capacity.

10. Respondent Daniel Bible is the Field Office Director for the San Antonio ICE office. As such, he oversees all ICE Enforcement and Removal Operations functions and detainees in the San Antonio area of responsibility for ICE, including detainees in the Laredo Detention Center. He has legal custody over Plaintiff and is authorized to release her. He is sued in his official capacity.

11. Respondent Ronald D. Vitiello is the Acting Director of ICE. As such, he oversees all ICE components, including Enforcement and Removal Operations, which is responsible for the apprehension, detention, and removal of non-citizens, and the management and oversight of immigration detention, including at the Laredo Detention Center. He has legal custody over Petitioner and is authorized to release her. He is sued in his official capacity.

12. Respondent Kirstjen M. Nielsen is the Secretary of the Department of Homeland Security (DHS). Under the Homeland Security Act of 2002 (Pub. L. 107-296), DHS assumed all of the functions of the former Immigration and Naturalization Service. Section 441 of the Homeland Security Act created ICE as a component agency of DHS and authorized ICE to enforce the immigration laws. Secretary Nielsen is responsible for the administration of the immigration laws pursuant to 8 U.S.C §1103, is a legal custodian of Petitioner and is empowered to release her. She is sued in her official capacity.

13. Respondent Matt Whitaker is the Acting Attorney General of the United States. The Acting Attorney General has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103 and oversees the Executive Office for Immigration Review (EOIR) and, in turn, the BIA and Immigration Courts. The San Antonio Immigration Court and BIA are responsible for the adjudication of Petitioner's asylum application and the management of removal proceedings against Petitioner, which form the purported basis for Petitioner's detention. The Acting Attorney General and the Immigration Courts conduct custody redetermination hearings for some individuals in removal proceedings and may order release. The Acting Attorney General is sued in his official capacity.

EXHAUSTION OF REMEDIES

14. There is no statutory obligation for Petitioner to exhaust her administrative remedies prior to filing this habeas petition, since she is not requesting review of a final order of removal. *Cf.* 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies prior to challenging removal order in circuit court).

15. Petitioner is unable to obtain an individualized custody review hearing before an Immigration Judge to determine her eligibility for release on recognizance or bond. Respondents take the position that arriving aliens such as Ms. N[redacted] are ineligible for custody review proceedings before an Immigration Judge. *See* 8 C.F.R. 1003.19(h); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

16. Ms. N[redacted]'s efforts to obtain an individualized *agency* determination of her custody have been futile. ICE has the authority under 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5, and 235.3 to release, or "parole," an arriving alien such as Petitioner from detention if she can show that she is not a flight risk or a danger to the community. *See also*, ICE Directive Memorandum 11002.1, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, Dec. 8, 2009. Ms. Nambisse da Silva has filed two requests with ICE for parole or for redetermination of a parole decision through counsel, one of which was denied without reason or explanation, and one of which remains unanswered.

17. On April 27, 2018, ICE informed Ms. N[redacted] that it would review her case for parole. On May 4, 2018, ICE issued a letter denying her parole, stating that she had not establishing her identity and had not established that she was not a flight risk. The denial letter did not allege that she posed any danger.

18. In late June 2018, Petitioner obtained a letter from [redacted], an [redacted] migrant shelter that agreed to provide housing, case management, transportation, and other services to Ms. N[redacted] if she was released from detention. She submitted that to ICE in support of her request for parole to show that she had a stable place to live if released and was not a flight risk.

19. In late July and early August 2018, attorneys with American Gateways, an [redacted] based non-profit immigration legal services provider assisting pro se asylum-seekers, inquired with ICE via email on Ms. N[redacted]'s behalf regarding reconsideration of the parole decision. American Gateways attorneys noted that ICE already had Ms. N[redacted]'s birth certificate, which established her identity, and that she could not apply for an [redacted] passport because she was applying for asylum. Nevertheless, ICE declined to reconsider parole.

20. On or about August 29, 2018, Petitioner obtained counsel for her asylum case. On or about September 17, 2018, Petitioner's counsel submitted a renewed parole request to ICE. Counsel submitted additional evidence relating to identity and flight risk, including: (a) a copy of Ms. N[redacted]'s [redacted] identity card; (b) an updated letter from [redacted] agreeing to provide Petitioner with housing, case management, transportation, and other services upon release; (c) a letter from psychologist Dr. Alissa Sherry, Ph.D. discussing Ms. N[redacted]'s mental decline while in detention; and (d) medical records from T. Don Hutto Residential Center documenting her physical and mental ailments. ICE denied this second parole request in a letter dated October 4, 2018, without providing any reasons or explanation.

21. At Ms. N[redacted]'s asylum hearing on October 2, 2018, ICE, through counsel, stipulated to her identity. In late October 2018, Petitioner's counsel emailed with ICE

officials to inquire about parole. ICE officials informed them on October 30 that because the Immigration Judge had denied her asylum claim, even though she would not be released on parole.

22. On December 14, 2018, Petitioner's counsel submitted a third request to ICE seeking Petitioner's release on parole. Counsel submitted additional evidence relating to Ms. N[redacted]'s mental health status and needs, including an updated assessment by licensed psychologist Dr. Alissa Sherry and ICE medical records dated November 15, 2018 indicating a diagnosis of Major depressive disorder. ICE has not yet responded to this request.

FACTS AND PROCEDURAL HISTORY

Persecution and Entry into the United States

23. Ms. N[redacted] is a[redacted]-year-old woman from [redacted]. Her father was a high-ranking police commissioner who reported an illegal arms sale that directly implicated the government. Because he spoke out against this corruption, the criminal organization he reported, which allies with government officials, targeted him. In 1998, the criminal organization assassinated him along with Petitioner's mother and brother. Before they killed him, they cut out his tongue to threaten others against speaking out.

24. At the time, Petitioner and her sister were living and studying in [redacted] in order to stay out of danger. For the next nineteen years, Petitioner lived between [redacted], and [redacted]. In 1999, her sister returned to [redacted], and she was disappeared. Despite multiple police reports, Petitioner has never learned of her sister's whereabouts.

25. The criminal organization who murdered and disappeared Petitioner's family continues to pursue Ms. N[redacted]. In 2008, unknown persons shot bullets into the walls of her house in [redacted]. In 2016, while she was living in [redacted], men from the criminal organization held her at gunpoint and threatened her, and she narrowly escaped. In September

2017, while she was living in [redacted], unknown individuals burned down her home and left her a threatening note.

26. After her house burned, Ms. N[redacted] fled and sought shelter from a group of nuns. The nuns, however, physically assaulted and injured her by burning her with a metal fork on her thighs. They did this because she was unmarried but not abstinent. Petitioner fled again, and she journeyed for several months to the United States to seek asylum.

27. The [redacted] government, in particular the police, did not offer Ms. N[redacted] any protection despite her repeated reports of attacks she suffered.

28. Ms. N[redacted] continues to fear that criminal organization with the backing of certain government agents will find and kill her, if she were to live anywhere in [redacted].

Immigration Court Proceedings

29. Ms. N[redacted] came to the United States at the Laredo, Texas port of entry on March 21, 2018. At the port of entry, she sought admission to the U.S. and stated her intent to apply for asylum. That same day, immigration officials placed Petitioner in custody.

30. Immigration officials sent Ms. N[redacted] to detention at the Laredo Detention Center in Laredo, Texas, for a few days, after which they transferred her to the T. Don Hutto Residential Center in Taylor, Texas, where she was held for approximately eight months. On November 15, 2018, immigration officials transferred Petitioner back to the Laredo Detention Center, where she remains today.

31. On April 9, 2018, a DHS Asylum Officer conducted a telephonic CFI with Ms. N[redacted]. The officer found that she had established a credible fear of persecution based on the events that had transpired in [redacted], and he referred her to Immigration Court for removal proceedings so that she could apply for asylum.

32. DHS did not serve Petitioner with the positive CFI result and the Notice to Appear, the charging document for removal proceedings, until April 27, 2018 – two weeks after the Asylum Office made its determination.

33. DHS did not file the Notice to Appear with the Immigration Court until May 22, 2018. Since the filing of the Notice to Appear commences removal proceedings, the delay in filing resulted in a month of additional detention for Petitioner.

34. Ms. N[redacted] appeared *pro se* before the Immigration Judge between the beginning of court proceedings in May 2018 and August 2018. In that time, she had five court appearances, all by video teleconference (VTC). At her first hearing on May 29, 2018, via VTC, the Immigration Judge read Ms. N[redacted] her rights in immigration proceedings, confirmed she received her Notice to Appear, and asked if she wanted time to find an attorney, which she did. The hearing was adjourned and reset for June 19, 2018.

35. On June 19, 2018, with Ms. N[redacted] still unable to find counsel, the Immigration Judge sustained Ms. N[redacted]'s charge of removal, designated [redacted] as the country of removal, confirmed she wished to apply for asylum, provided her the asylum application, and set the next hearing for July 3, 2018.

36. On July 3, 2018, the Immigration Judge quickly adjourned the hearing and reset for July 13, 2018, due to audio connection issues and the court's inability to secure a competent [redacted] interpreter.

37. At the July 13 hearing, Ms. N[redacted] submitted her asylum application to the court. She was still appearing *pro se* via video conference, but told the judge that an attorney from American Gateways, a non-profit immigration legal services provider, had helped her complete her application. The Immigration Judge set the hearing date for her case for July 24, 2018

and told Petitioner to confirm the contents of her application with the attorney who had assisted her.

38. At the July 24 hearing, the Immigration Judge accepted Ms. N[redacted]'s completed asylum application, along with two corrections, and informed her that all supporting documentation must be received, with a certified English translation, by September 17, 2018. The Immigration Judge set her final merits hearing for October 2, 2018.

39. On or about August 29, 2018, the University of Texas School of Law Immigration Clinic and its supervising attorney, Elissa Steglich, began to represent Ms. N[redacted] in her removal proceedings. Petitioner's attorneys helped prepare her testimony and additional expert documents to the immigration court.

40. On October 2, 2018, Immigration Judge Thomas Crossan held a final hearing in her asylum case. Ms. N[redacted] represented by counsel, appeared by VTC and testified in support of her application for asylum. In addition, her counsel submitted a declaration from Ms. N[redacted] an assessment by Mental Health Expert Dr. Alissa Sherry, Ph.D., a forensic medical assessment by Dr. Elliot J. Trester, M.D., an affidavit from Country Conditions Expert Dr. Johannes Shubert about [redacted], and various other supporting documents about conditions in Angola.

41. On October 11, 2018, the Immigration Judge denied Ms. N[redacted]'s asylum application in a written decision. He concluded that although Ms. N[redacted] was credible and had been subject to incidents and numerous threats because of her father's political opinions, the harm and threats inflicted on her did not rise to the level of persecution. He further found that her past mistreatment was not an objective basis for fearing future harm. The

immigration judge denied her asylum claim as well as her related requests for withholding of removal and protection under the Convention Against Torture, on these bases.

42. Ms. N[redacted] through counsel timely appealed the Immigration Judge's decision to the Board of Immigration Appeals on November 1, 2018. The BIA has yet to issue a scheduling order for the appeal. Moreover, the BIA has no deadline to issue a final decision on the appeal. If she loses before the BIA, Petitioner intends to file a Petition for Review with the Fifth Circuit Court of Appeals, which would likely take another eighteen months to conclude.

43. Ms. N[redacted]'s chances of succeeding on appeal are high. The Immigration Judge found that Petitioner's testimony was credible, and that she had met all the elements for asylum, except for the degree of past suffering or, alternatively, that she did not establish an objective fear of future harm. The Immigration Court erred both in weighing the facts and applying the law. First, in its analysis of these two points, the Court ignored uncontroverted record evidence, including Petitioner's testimony that death threats were coupled with attempts on her life (bullets shot at her house; a gun put to her head; and her home being burned). The Court also ignored the unchallenged conclusion of an [redacted] country conditions expert that Ms. [redacted] is at risk of death if removed to [redacted]

44. Second, the Court failed to apply Fifth Circuit precedent. *See Tamara-Gomez v. Gonzalez*, 447 F.3d 343, 348–49 (5th Cir. 2006) (finding threats coupled with vandalism to be persecution). Instead, the Court relied on a Seventh Circuit Court of Appeals case without precedential effect, incorrectly believing it to be a Fifth Circuit case. *See Hernandez-Baena v. Gonzalez*, 417 F. 3d 720 (7th Cir. 2005) (holding that oral threats, by themselves, could not amount to past persecution).

Prolonged Detention without Basis or Procedural Safeguards

45. Ms. N[redacted] has been in immigration detention since her arrival in the United States, a period of almost nine months. Through her attorneys, she has made two requests for parole, the first of which ICE denied without reason or explanation, and the second of which is pending. Further, DHS has deemed her ineligible for an individualized custody determination before an Immigration Judge. Although she presents no flight risk or danger to the community, DHS continues her prolonged detention without basis and without adequate procedural safeguards.

46. ICE and the Immigration Court take the position that the immigration court lacks jurisdiction to conduct an individualized custody redetermination hearing for Ms. N[redacted] because she is an "arriving alien" under the INA, that is, a non-citizen who sought admission at a border port of entry. *See* 8 C.F.R. § 1003.19(h); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). Therefore, Petitioner has been unable to present her claim for release, based on lack of flight risk or danger, to any Immigration Judge.

1. Ms. N[redacted] s is not a flight risk

47. Ms. N[redacted] is not a flight risk. She has established her identity with documents from [redacted]. Counsel for ICE conceded in Immigration Court that the government has no questions about her identity.

48. Petitioner has a willing and trusted sponsor. [redacted], a transitional housing center for immigrants, has agreed to house Ms. N[redacted], provide educational services, and assistance to access community resources. [redacted], Operations Coordinator at [redacted], would serve as Ms. N[redacted]s case manager and would assist her.

49. Ms. N[redacted] has every intent to appear for future proceedings, including deportation if that is the conclusion in her case. An Immigration Judge has specifically found that

her testimony was both credible and consistent. This is further evidence that her promise to appear in court for future proceedings is credible.

50. Finally, Petitioner has been receiving visits from a University of Texas at Austin professor named Gabriela Polit who intends to support her upon release. There are no adverse facts on the flight risk issue.

2. Ms. N[redacted] does not present a danger to the community.

51. Ms. N[redacted] has no criminal background in her native country or any other country and presents no danger to the community. She had been the victim of persecution from a criminal organization that killed and disappeared her family members. She came to the United States seeking refuge. Further, she has had no major disciplinary problems while in immigration detention.

3. Humanitarian Reasons for Release

52. Ms. N[redacted] presents humanitarian reasons for release, including her deteriorating mental health condition.

53. As noted in her detention center medical records, Ms. N[redacted] has visited the medical clinic at the detention center numerous times over the last eight months. Clinicians at the Hutto Detention Center have diagnosed her with Major Depressive Disorder and prescribed her medications for treatment.

54. Petitioner has experienced numerous symptoms relating to depression and anxiety. She has struggled to sleep at night while in detention. Medical records show that Petitioner has repeatedly reported symptoms of difficulty sleeping, anxiety, and problems with appetite, concentration and focus.

55. Petitioner has also experienced medical problems while in detention. She recently contracted a painful Urinary Tract Infection that she believes she received from used underwear provided by the Laredo detention center. In addition, she has not menstruated since May, likely due to stress and anxiety.

56. On November 15, 2018, ICE transferred Petitioner to the Laredo Detention Center. She subsequently reported being unable to access a mental health clinician at the Laredo facility.

57. On September 12, 2018, Dr. Alissa Sherry, Ph.D., an independent licensed psychologist, examined Ms. N[redacted] in person after reviewing her medical records. In a subsequent report, Dr. Sherry concluded that Petitioner met the criteria for Post-Traumatic Stress Disorder (PTSD) stemming from her past experiences. Dr. Sherry described numerous current symptoms, including depression, low energy, desperation, sleep disruption, anxiety and panic, nightmares from which she awakens screaming, forgetfulness, decrease in appetite, and isolation. Dr. Sherry also noted that Ms. N[redacted] is too young for menopause, and her lack of menstruation likely resulted from stress related to her confinement. Dr. Sherry that her confinement exacerbates her trauma, and that Petitioner was experiencing clinically significant distress and impairment.

58. On December 10, 2018, Dr. Sherry re-interviewed Petitioner by telephone, reviewed additional medical records, and wrote another report. She concluded that Ms. N[redacted]'s condition has worsened. Given Petitioner's continuing symptoms of inability to sleep, nightmares and perceived lack of safety, Dr. Sherry concluded that she is at greater risk of psychosis or "emotional breakdown because of her pre-existing hypervigilance related to her PTSD." Dr. Sherry also noted her concern that the Laredo detention center may not have mental health services with appropriate clinical supervision to address her medical needs, given her

diagnosis and symptoms. She concluded that Petitioner's continued detention may undermine her mental health functioning to a serious extent.

LEGAL BACKGROUND

59. Under the Immigration and Nationality Act (INA), a person who applies for asylum in removal proceedings receives a hearing before an immigration judge to adjudicate her asylum claim. 8 USC § 1229a; 8 USC § 1158; 8 CFR § 1208.2.

60. There typically is an interval of several months between the initiation of removal proceedings and a decision on an applicant's asylum claim by an immigration judge. During this time, individuals with pending claims may be detained or released pending a determination as to removal and asylum. 8 U.S.C. § 1226(a). DHS makes an initial custody determination and may release an individual pending resolution of the asylum claim. *Id*; *Matter of X-K-*, 23 I&N 731; 8 CFR § 1236.1(c)(8); INA § 212(d)(5); 8 CFR § 212.5. Individuals who have entered the country before apprehension and placement in removal proceedings are entitled to a hearing before the immigration court to review the DHS custody determination. However, individuals who present themselves at a port of entry to seek asylum, like Ms. N[redacted], are considered "arriving aliens" and have no right under current regulations to seek immigration court review of a DHS custody determination. 8 CFR § 1003.19(h); 8 CFR § 1236.1(c)(11); *Matter of X-K-*, 23 I&N 731. The ultimate resolution of the asylum claim can take more than a year or even several years if it involves an appeal to the BIA, as is the case here.

61. The Due Process Clause of the U.S. Constitution imposes strict limits on immigration detention. This is because "freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), *citing Foucha v. Louisiana*, 504

U.S. 71, 80 (1992); *id.* at 718 (Kennedy J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention"). Civil immigration detention must serve a legitimate, non-punitive purpose, based on the need to hold an individual in custody during immigration proceedings or during deportation in order to prevent flight or danger to the community. *See Demore v. Kim*, 538 U.S. at 527-28 (describing "purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings"); *id.* at 531-32 (Kennedy J., concurring) (discussing flight risk or dangerousness).

62. As set forth above, Ms. N[redacted] does not pose any flight risk or danger. Her identity is not in question, she has no criminal history, and she has a reliable financial sponsor and a fixed address. She has promised to appear for deportation if ordered deported. Therefore, DHS has no legitimate governmental interest based in flight risk or danger to justify her continued detention.

63. As with all civil detention, ordinarily there must be an individualized determination of the need for detention focused on the justifications given (here, flight risk or danger), with independent review. *See United States v. Salerno*, 481 U.S. 739, 751-52 (1987); *Reno v. Flores*, 507 U.S. 292, 309 (1993); *Jackson v. Indiana*, 406 U.S. 715 (1972). Prolonged detention without an individualized determination and review is constitutionally prohibited. *Zadvydas*, 533 U.S at 690. Where detention is prolonged, or lasting over six months, "a special justification" (such as an illness or condition that poses harm to others) must be shown to "outweigh[] the individual's constitutionally protected interest in avoiding physical restraint." *Id.*, quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)) (quotation marks omitted).

64. Ms. N[redacted]'s detention has become prolonged because it has lasted almost nine months. No immigration judge has conducted an independent review of her detention. Neither has DHS shown any special justification for her prolonged detention.

65. Recently, the Supreme Court held that the Ninth Circuit erred by interpreting the immigration statute to require automatic periodic custody hearings before the Immigration Court for individuals who had been held during pending removal proceedings for six months or longer. *Jennings v. Rodriguez*, 138 S.Ct. 830, 2018 WL 1054878 at *10 (Feb. 27, 2018). Because the Ninth Circuit had not decided whether the Constitution itself requires individualized hearings in cases of prolonged detention, the Court remanded for the Ninth Circuit to address the issue. The majority opinion left intact the constitutional standards limiting immigration detention.

66. Unnecessary deprivation of liberty "constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988); *Burdine v. Johnson*, 87 F.SUpp.2d 711, 717 (S.D. Tex. 2000) (habeas petitioner "suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution."). If Ms. N[redacted] is being detained in violation of Due Process, each day of continued detention constitutes irreparable harm.

67. The Due Process Clause does not permit civil detention to be used as a mechanism for retribution or "general deterrence." *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (quoting *Hendricks*, 521 U.S. at 372- 74 (Kennedy, J., concurring)); *see* Bell v. Wolfish, 441 U.S. 520, 539 n.20 ("Retribution and deterrence are not legitimate nonpunitive governmental objectives.") (citation omitted); *Foucha*, 504 U.S. at 82 (holding "ordinary criminal processes," not civil detention, are the proper means for deterrence). Civil detention for the purpose of general deterrence violates due process. *Crane*, 534 U.S. at 412; *Foucha*, 504 U.S. at 80; *Bell*, 441 U.S. at 539 n.20. *See also,* U.N. High Comm'n for Refugees, Detention Guidelines § 4.1-4.2 (2012)

(prohibiting detention of asylum-seekers for purpose of deterrence). To the extent that DHS continues to detain Ms. N[redacted] to generally deter potential migrants from Central America, rather than based on an individualized determination of flight risk or danger, this is unconstitutional.

68. Detention that is prolonged and potentially indefinite can also violate Due Process. *Zadvydas*, 533 U.S at 689 (holding that "indefinite detention" is constitutionally suspect and establishing a presumption for release after six months of post-removal order detention); *Demore v. Kim*, 538 U.S. at 531-33 (2003) (Kennedy, J., concurring) (unreasonably lengthy detention pending adjudication is constitutionally suspect, even where Congress has ordered mandatory detention based on criminal history); *see also Maldonado v. Macias*, 150 F.Supp.3d 788, 805 (W.D. Tex. 2015) (prolonged detention of arriving asylum seekers without review is constitutionally problematic); *Angel v. Duke*, No. 17-cv-03172 (S.D. Tex. Dec. 18, 2017) (due process imposes a reasonableness limitation on detention of arriving asylum seekers). Ms. [redacted]s detention will continue for another year or longer while her BIA appeal proceeds. Because it has no foreseeable end, it is potentially indefinite, in addition to being prolonged, and therefore violates Due Process.

69. In general, the courts have allowed pre-trial immigration detention only for a "reasonable" period of time, without clear justification and review. *See Diop v ICE*, 656 F.3d 221, 232-33 (3rd Cir. 2011) (due process prohibits mandatory detention for an unreasonable period of time); *see also Shokeh v. Thompson*, 369 F.3d 865, (5th Cir.) (noting that the Supreme Court upheld mandatory detention of immigrants previously convicted of certain criminal offences during ongoing removal proceedings because of the very limited time of the detention at issue (*quoting Demore*), *vacated on other grounds*, 375 F.3d 351 (5th Cir. 2004); *Maldonado v. Macias*,

150 F.Supp.3d at 805. Some courts have set six months as a guidepost for considering when detention becomes constitutionally suspect. *See Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (prolonged detention of six months or more raises serious due process concerns in cases of individuals seeking relief from deportation after a prior removal order has been reinstated); *Chavez–Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (finding unreasonable length of detention during removal proceedings unconstitutional and using a six-month marker as the starting point for the reasonableness analysis); *Ahad v. Lowe*, 235 F.Supp.3d 676, 688 (M.D. Penn. 2017) (applying *Chavez-Alvarez*, 783 F.3d 469, to arriving asylum seekers). Having long exceeded six months, Petitioner's detention is suspect and should not continue since she does not pose any flight risk or danger.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Prolonged and Potentially Indefinite Detention Without Justification)

Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution Against all Respondents

70. The foregoing allegations are repeated and re-alleged as though fully set forth herein.

71. The government is violating Plaintiffs' rights because the Constitution does not permit prolonged or indefinite immigration detention without sufficient justification.

72. The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits prolonged pre-removal detention of an immigrant unless it is based on a sufficiently legitimate government interest, namely flight risk or danger, or special justifications. *Zadvydas*, 533 U.S. at 689; *Demore*, 538 U.S. at 531-33 (Kennedy, J., concurring).

73. The Due Process Clause prohibits civil immigration detention that deprives an individual of liberty for lengthy or prolonged periods, generally periods longer than six months, in

the absence of an individualized determination that a substantial flight risk or danger exists. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015); *Sopo v. U.S. Atty General*, 825 F.3d 1199, 1214 (11th Cir. 2016); *Maldonado v. Macias*, 150 F.Supp.3d 788, 805 (W.D. Tex. 2015); *Angel v. Duke*, No. 17-cv-03172 (S.D. Tex. Dec. 18, 2017).

74. The government has subjected Ms. N[redacted] to prolonged and potentially indefinite detention. She has been detained for eight months. Her case is currently awaiting decision at the Board of Immigration Appeals, which could take months.

75. DHS does not have any legitimate reason for her detention, since evidence she presented shows that she does not pose any flight risk or danger to the community. In addition, Ms. N[redacted] has not received any individualized review of her detention by the Immigration Court, or any neutral arbiter, of DHS's decision to hold her in detention throughout her proceedings. This violates the Due Process Clause.

76. Because Petitioner's detention is not based on flight risk or danger, and lacks justification, it has become unconstitutionally punitive. *See Demore*, 538 U.S. at 513; *Crane*, 534 U.S. at 412; *Foucha*, 504 U.S. at 80; *Bell*, 441 U.S. at 539 n.20. Detention has exacerbated Petitioner's trauma and medical and mental health conditions. Ms. N[redacted] is a trauma survivor who has suffered persecution from a criminal organization supported by government agents who killed and disappeared her entire nuclear family, which forced her to flee[redacted] for safety. Petitioner suffers from a range of harmful mental and physical conditions, including Post-Traumatic Stress Disorder, depression, low energy, desperation, sleep disruption, anxiety and panic, nightmares, forgetfulness, decrease in appetite, and isolation, which have worsened during detention.

77. Respondents' actions and omissions have violated the Due Process Clause and subjected Petitioner to physical and emotional harm that is continuing. Release is warranted.

SECOND CLAIM FOR RELIEF

((Prolonged and Potentially Indefinite Detention Without Procedural Safeguards)

Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution

Against all Respondents

78. The foregoing allegations are repeated and re-alleged as though fully set forth herein.

79. Civil detainees are entitled to an evidentiary review hearing, with procedural protections, in front of a neutral arbiter, to ensure that a detention decision comports with the strict constitutional standards limiting deprivations of liberty in the absence of a criminal conviction. *See U.S. v. Salerno*, 481 U.S. 739, 751-52 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (overturning a civil commitment order where an individual was not "entitled to an adversary hearing" at which the State would bear the burden of proving dangerousness); *Vitek v. Jones*, 445 U.S. 480, 494–96 (1980) (holding that prisoner facing involuntary transfer to a mental hospital was entitled to notice and an adversarial hearing before an independent decision maker). Independent review is constitutionally required especially when detention is prolonged. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring); *see also Maldonado v. Macias*, 150 F. Supp. 3d at 799-800 (holding that all aliens "are entitled to some constitutional protections").

80. Ms. N[redacted]s detention has gone un-reviewed by a neutral arbiter since she was detained almost nine months ago. DHS has denied her requests for parole without any explanation, and no immigration court has determined whether she poses a flight risk and danger. Respondents take the position that she is not entitled to custody review by an immigration judge. Petitioner is entitled to independent review of the basis for her prolonged and potentially indefinite

detention. Since she poses no flight risk or danger, such review will help determine whether DHS has any justification for her continued detention.

81. Respondents' actions and omissions have violated the Due Process Clause and subjected Petitioner to physical and emotional harm that is continuing. Release is warranted.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court:

1. Assume jurisdiction over this matter;

2. Issue an order directing Respondents to show cause why the writ should not be granted on an expedited basis, by ordering the Respondents to file an answer within twenty days, ordering Petitioner to file a reply within seven days thereafter, and setting a hearing shortly thereafter;

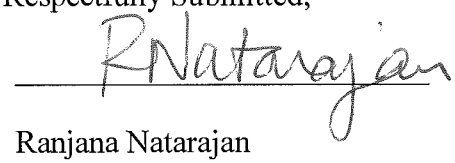
3. Issue a Writ of Habeas Corpus ordering Respondents to release Petitioner immediately on her own recognizance, under parole, or reasonable conditions of supervision;

4. Grant reasonable attorneys' fees, costs, and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

5. Grant such further relief as the Court deems just and proper.

December 19, 2018

Respectfully Submitted,



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VERIFICATION OF COUNSEL

I, Ranjana Natarajan, hereby certify that I am familiar with the case of L[redacted]N[redacted] and that the facts as stated above are true and correct to the best of my knowledge and belief.

RNatarajan

RANJANA NATARAJAN