

return, pursuant to 28 U.S.C. § 2243, and grant him a Writ of Habeas Corpus, ordering Respondents to release him or provide him with an individualized bond hearing before an Immigration Judge.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. §

9. Respondent Jonathan Horton is the Sheriff of Etowah County. His office controls the Etowah County Jail where Mr. Duran Ortega is currently detained under the authority of ICE

19. Mr. Duran Ortega

Mr. Duran Ortega's Pending Immigration Appeal.

26. On April 9, 2018, having secured *pro bono* legal representation, Mr. Duran Ortega filed a motion to reopen his case in

statutorily-mandated notice of the date and time of the immigration hearing at which he was ordered removed *in absentia*. See Ex. 1 at 2-6.

30. Mr. Duran Ortega filed his opening brief in support of his petition for review on January 7, 2019. The government sought and obtained two extensions to file its response brief, totaling 28 days. Then—apparently in lieu of filing any response brief—the government moved on February 20 to remand Mr. Duran Ortega’s case to the BIA to re-examine his asylum claims in light of Eleventh Circuit precedent. Ex. 2. Mr. Duran Ortega opposed the remand, partly on the grounds that it would unduly prolong resolution of his case.

31. On March 26, 2019, the Eleventh Circuit remanded Mr. Duran Ortega’s case in full to the BIA for reconsideration of all claims raised in his petition for review over which the BIA has jurisdiction, including his asylum claims. See Ex. 3. The Eleventh Circuit’s order incorporated the government’s motion, in which the government pledged that Mr. Duran Ortega’s removal will be stayed

during the course of briefing, argument, and eventual court decision. If the Eleventh Circuit does not dis

would be premature. *See Ortega v. U.S. Dep't of Homeland Sec.*, No. 1:18-CV-00508, 2018 WL 4222822, at *4 (W.D. La. July 6, 2018), *report and recommendation adopted*, No. 1:18-CV-00508, 2018 WL 4211864 (W.D. La. Sept. 4, 2018). The District Judge further recognized that “Duran Ortega is not asking for release pending removal pursuant to [*Zadvydas*].” *Ortega*, 2018 WL 4211864, at *2.

38. As his detention became increasingly prolonged, Mr. Duran Ortega made two requests to ICE that the agency exercise its prosecutorial discretion to release him from detention: once in July 2018 and again in December 2018. In making these requests, Mr. Duran Ortega expressed his willingness to abide by the terms of an ICE order of supervision (including regular check-ins with ICE agents), and to wear an ankle monitor that would track and restrict his movements. Mr. Duran Ortega submitted letters from numerous Memphis community members, including a U.S. Congressman, in support of his requests. ICE summarily denied both of these requests.

39. On or around January 4, 2019, Mr. Duran Ortega filed a motion for custody redetermination and bond with the Immigration Court at LaSalle ICE Processing Center, where he was then detained.

Mr. Duran Ortega appealed the denial of bond to the BIA and has since filed a brief in support of his appeal. That appeal remains pending.

41. Mr. Duran Ortega

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. §1231(a)(1)(B). The removal period may be extended beyond 90 days if the individual “fails or refuses to make timely application in good faith for travel or other documents necessary to [his] departure or conspires or acts to prevent [his] removal.” *Id.* § 1231(a)(1)(C). After the initial removal period, detention under Section 1231 is no longer mandatory. The government “may” detain beyond the removal period certain “[i]nadmissible or criminal aliens” or individuals determined “to be a risk to the community or unlikely to comply with the order of removal.” *Id.* §1231(a)(6).

B. Mr. Duran Ortega, Whose Removal Is Stayed Pending the BIA’s Review on Remand from the Eleventh Circuit, Is Detained Pursuant to 8 U.S.C. § 1226, not 8 U.S.C. § 1231.

47. Mr. Duran Ortega sought judicial review of his removal order in the Eleventh Circuit, which stayed his removal and then remanded his claims to the BIA in an order incorporating the remand terms sought by the government. Ex. 3 (“[T]his matter is REMANDED to the BIA for further proceedings as outlined in Respondent’s motion”). These terms included a stay of Mr. Duran Ortega’s removal during the pendency of remand proceedings. *See* Ex. 2 at 2 (“Respondent agrees that Mr. Duran Ortega’s removal will be stayed pending the Board’s disposition of this case on remand.”).

48. Because Mr. Duran Ortega’s removal continues to be judicially stayed, his removal period has not yet begun under section 1231. According to the plain language of that section, when an individual has been granted a stay of removal pending judicial review of his removal order, the removal period has not yet begun, 8 U.S.C. §1231(a)(1)(B) (“The removal period begins on the latest of the following: . . . (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.”), and

thus his detention is not yet governed by that statute. It is axiomatic that when a statute is unambiguous, the courts are bound to faithfully apply its plain language. *See Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015) (“As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.”) (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). Section 1231 unambiguously states that individuals like Mr. Duran Ortega, who have been granted a stay of removal while seeking review of a removal order, have not yet entered the removal period and thus are not subject to the detention rules of that section. Section 1226, which applies to detention that precedes the removal period, applies instead.

49. Multiple circuit courts have agreed with this reading of the statutory scheme. *See Leslie v. Att’y Gen.*, 678 F.3d 265, 270 (3d Cir. 2012), *abrogated in part* 781 F.3d 1008 (10th Cir. 2015).

Accordingly, his removal period has not yet begun and his detention is governed by Section 1226.

C. Mr. Duran Ortega is Entitled to Immediate Release or a Bond Hearing Under Section 1226(a)

51. Mr. Duran Ortega, who has never been convicted of a crime other than misdemeanor traffic violations, is not and has never been subject to mandatory detention under Section 1226(c). Thus his detention is governed by the “default” discretionary

individuals are entitled. *Id.* at 691.

53. As a matter of law, the government cannot meet its burden to show that Mr. Duran Ortega is either a flight risk or danger to the community, particularly when there exist numerous less restrictive means of ensuring Mr. Duran Ortega's attendance at immigration proceedings, such as a reasonable money bond, supervised release with regular reporting requirements, or electronic ankle monitoring. *See Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) (ICE's alternatives to detention program—the Intensive Supervision Appearance Program—has resulted in appearance rates close to 100 percent). “Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, of good reputation or bad. The ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial.” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (detention of an indigent person for inability to post money bail is impermissible if the individual's appearance “could reasonably be assured by one of the alternate forms of release”).

54. In the alternative to immediate release, Mr. Duran Ortega is clearly entitled to an immediate individualized hearing before an Immigration Judge to determine whether he may be released on bond or conditional parole. *See* 8 C.F.R. §§ 1236.1, 1003.19.

II. In the Alternative, Mr. Duran Ortega is Entitled to Immediate Release or a Bond Hearing Under Section 1231(a)(6)

55. Even if the Court determines that Mr. Duran Ortega's detention is governed by Section 1231, he is entitled to immediate release or, alternatively, an individualized bond hearing to assess the necessity and legality of his continued detention, at which the government bears the burden of proving that he is a flight risk or a danger to the community.

56. The only subsection of Section 1231 that could conceivably govern Mr. Duran

ensuring the individual's prompt removal. *See id.* at 699-701. To state a claim under *Zadvydas* in the Eleventh Circuit, an individual detained under Section 1231(a)(6) must show “post-removal order detention in excess of six months” and “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.” *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (citing *Zadvydas* 533 U.S. at 701).

59. Mr. Duran Ortega satisfies the first prong of *Zadvydas* because, as of April 5, he will have been detained for a year based on an administratively final order of removal. He also satisfies the second prong, because there is good reason to believe that there is no significant likelihood of his removal in the reasonably foreseeable future. Mr. Duran Ortega's appeal is currently pending before the BIA, where he is represented by experienced pro bono counsel on substantial challenges to his removal—challenges on which he is likely to succeed, as Judge Martin noted in her concurrence to the panel's unanimous order granting him a stay of removal. *See Ex. 1* at 2-6; *see also Nken*, 556 U.S. at 434 (likelihood of succe(likepan

what counts as the “reasonably foreseeable future” conversely would have to shrink.”)

60. Mr. Duran Ortega has not engaged in any conduct that would extend or suspend the removal period. His decision to avail himself in good faith of legally available avenues of relief by seeking judicial review of his removal order and a stay from the court of appeals—which the government has agreed shall extend to his remanded BIA proceedings, *see* Ex. 2—does not constitute acting or conspiring to prevent his removal. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018) (“We are not saying that aliens should be punished for pursuing avenues of relief and appeals ‘[A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him.’”) (quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003); *accord Leslie*, 678 F.3d at 271; *Prieto-Romero*, 534 F.3d at 1060-61.⁷

61. As detailed above in Section I.C *supra*, Mr. Duran Ortega’s community ties, strong claims for immigration relief, and lack of criminal history establish that the government cannot meet its burden to justify his prolonged civil detention by showing flight risk or

⁷ In its defense, the government may rely on footnote dicta in *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam), which suggested that the petitioner in that case “interrupted” the run/TT4 1 0 0.24 7se .

dangerousness to the community. Thus, Mr. Duran Ortega is entitled to immediate release under *Zadvydas*. In the alternative, he must be provided with an individualized hearing to determine whether the government can meet its burden in light of Section 1231's purpose.

III. Mr. Duran Ortega's Prolonged Detention Without a Bond Hearing Violates Due Process.

62. Even if this Court determines that Mr. Duran Ortega is not entitled to a bond hearing under Sections 1226 or 1231, his continued detention without a bond hearing under either section violates due process. "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*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). In

1225(b) to require an individualized bond hearing for all noncitizens detained for over six months. 138 S. Ct. at 836. The Supreme Court remanded to the Ninth Circuit to address in the first instance whether prolonged detention without a bond hearing pending removal proceedings violates due process *Id.* at 851.

65. Although *Jennings* abrogated the statutory holdings of the First, Second, Third,

determination as to his risk of flight and dangerousness” may be warranted “if the continued detention became unreasonable or unjustified”)

his detention, the likelihood that his detention will continue for many more months or even years, and his confinement in a county jail plagued by systemic civil rights concerns and infamously poor conditions⁸—render his detention unreasonable.

68. In addition to an individualized hearing before a neutral decision-maker, due process requires the government to

bond hearing runs afoul of both substantive and procedural due process.

CLAIMS FOR RELIEF

COUNT ONE

VIOLATION OF IMMIGRATION AND NATIONALITY ACT – 8 U.S.C. § 1226

70. Mr. Duran Ortega re-alleges and incorporates paragraphs 1 to 69 above.

71. Because Mr. Duran Ortega is seeking judicial review of his removal order at the BIA on remand by the Eleventh Circuit, and because his removal has been stayed pending the disposition of remand, his detention is governed by the pre-removal period detention statute, 8 U.S.C. § 1226.

72. Mr. Duran Ortega has not committed any offense that would trigger mandatory detention under Section 1226(c). Thus, his detention is governed by the default, discretionary pre-removal period detention provision, Section 1226(a).

73. Noncitizens detained under Section 1226(a) are immediately entitled to seek individualized review by an Immigration Judge of the government's decision to detain them pending removal proceedings. *See* 8 C.F.R. § 1236.1(d).

74. The circumstances of Mr. Duran Ortega's case overwhelmingly establish that he is neither dangerous nor a flight risk.

75. By continuing to detain Mr. Duran Ortega without a bond hearing for nearly a year, Respondents are violating his rights under 8 U.S.C. § 1226.

76. Mr. Duran Ortega is entitled to immediate release, or an immediate hearing before an Immigration Judge to determine his eligibility for release on bond or parole.

COUNT TWO

(ALLEGED IN THE ALTERNATIVE TO COUNT ONE)

VIOLATION OF IMMIGRATION AND NATIONALITY ACT – 8 U.S.C. § 1231(a)(6)

77. Mr. Duran Ortega re-alleges and incorporates paragraphs 1 to 69 above.

78. Even if Mr. Duran Ortega's detention were governed by 8 U.S.C. § 1231(a), he is subject to the discretionary, post-removal period detention provision Section 1231(a)(6) because he has been detained far beyond the mandatory 90-day removal period.

79. Section 1231(a)(6) and its implementing regulations 8 C.F.R. § 241.4 and § 241.5 authorize release, subject to an order of supervision, following the 90-day removal period.

80. In *Zadvydas*, the Supreme Court ruled that when detention under that provision exceeds six months, it is no longer presumptively reasonable, and the government must release the individual unless it can show that his removal is significantly likely in the reasonably foreseeable future. *Id.* at 701.

81. Mr. Duran Ortega has been detained without a bond hearing for over eleven months based on an administratively final removal order.

82. There is no significant likelihood that the government will remove Mr. Duran Ortega in the reasonably foreseeable future, and there is ample reason to believe it won't be able to do so. The Eleventh Circuit stayed Mr. Duran Ortega's removal in recognition that he raised likely meritorious claims for relief. Mr. Duran Ortega's case will likely remain pending on remand to the BIA for many more months, during which time his removal will continue to be stayed, and he may ultimately be granted relief. Even if he is not granted relief, he will likely litigate a second petition for review, which would further extend the length of his immigration proceedings and the uncertainty of his removal.

83. Mr. Duran Ortega's deep and extensive community ties in the Memphis area and his lack of criminal history demonstrate that he does not present a danger or a flight risk.

84. Thus, Mr. Duran Ortega is entitled to immediate release from detention or,

alternatively, a prompt individualized hearing to assess the legality and necessity of his continued detention.

COUNT THREE
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO
THE U.S. CONSTITUTION

85. Mr. Duran Ortega re-alleges and incorporates paragraphs 1 to 69 above.

86. The Due Process Clause of the Fifth Amendment forbids the government from depriving any person of liberty without due process of law. U.S. Const. amend. V.

87. Civil immigration detention violates due process if it is not reasonably related to its purpose. *See Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *Demore*, 538 U.S. at 513. As categorical detention becomes increasingly prolonged, a “sufficiently strong special justification” is required to outweigh the significant deprivation of liberty. *Zadvydas*, 533 U.S. at 690-91.

88. Prolonged civil detention also violates due process unless it is accompanied by

appearance during removal proceedings or preventing danger to the community.

90. Nor has Mr. Duran Ortega

- g. Declare that Mr. Duran Ortega's detention without a bond hearing violates the Due Process Clause of the Fifth Amendment;
- h. Award reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412; and
- i. Grant