UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MANUEL DURAN ORTEGA,

Petitioner,

v.

JONATHAN HORTON, in his official capacity as Sheriff of Etowah County, KEITH PEEK, in his official capacity as Chief Deputy of Detention in Etowah County, GEORGE LUND III, in his official capacity as acting Director of the Immigration and Customs Enforcement New Orleans Field Office, RONALD D. VITIELLO, in his official capacity as acting Director of U.S. Immigration and Customs Enforcement, KIRSTJEN NIELSEN, in her official capacity as Secretary of the U.S. Department of Homeland Security, and WILLIAM BARR, in his official capacity as U.S. Attorney General,

Respondents.

HEARING REQUESTED

Case No.:

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

INTRODUCTION

1. Petitioner Manuel Duran Ortega ("Mr. Duran Ortega"), a journalist originally from El Salvador, has been imprisoned in U.S. Immigration and Customs Enforcement (ICE) custody since April 5, 2018 without a bond hearing, despite having no criminal history beyond decade-old traffic citations. Mr. Duran Ortega is currently seeking to reopen his 2007 *in absentia*

removal order on the grounds that (1) he is eligible for asylum based on deteriorating conditions for journalists in El Salvador since 2007; (2) he never received notice of the 2007 immigration court hearing at which his removal order was entered; and (3) his First and Fourth Amendment rights were violated when he was unlawfully arrested by local police while reporting on a local news story and then subsequently turned over to immigration authorities.

2. In recognition of Mr. Duran Ortega's substantial claims for relief from his 2007 removal order, the U.S. Court of Appeals for the Eleventh Circuit stayed his removal pending its resolution of his petition for review in November 2018. *See* Ex. 1 (Stay Order). Then, on March 26, 2019, the Eleventh Circuit granted the government's motion to remand Mr. Duran Ortega's case to the Board of Immigration Appeals (BIA), with specific directions to reexamine the asylum claims in light of Eleventh Circuit precedent. *See* Ex. 2 (Gov't Remand Mot.) and Ex. 3 (Remand Order). Pursuant to the Eleventh Circuit's remand order, which incorporates the government's motion for remand, Mr. Duran Ortega's removal will be stayed as the BIA reexamines his appeal. *See* Ex. 2 and 3.

3. Now that Mr. Duran Ortega's case has returned to the BIA for reconsideration of the merits, the future trajectory of his legal proceedings is lengthy. He faces detention for many more months or even years while he litigates his asylum claims—claims that both the Eleventh Circuit and the government have determined merit closer examination—yet he has never had any meaningful review of the necessity and legality of his continued detention.

4. Mr. Duran Ortega challenges his prolonged detention as a violation of the Immigration and Nationality Act and the Due Process Clause of the U.S. Constitution. He respectfully requests that this Court order Respondents to show cause why the writ should not be granted within **three days** and, if necessary, set a hearing on this Petition within **five days** of the

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. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. §§ 2201-02 (declaratory relief), and art. I sec. 9, cl. 2 of the United States Constitution (Suspension Clause), as Mr. Duran Ortega is presently in custody under or by color of the authority of the United States, and challenges his custody as in violation of the Constitution, laws, or treaties of the United States.

6. The federal district courts have jurisdiction under Section 2241 to hear habeas claims by individuals challenging the lawfulness of their detention by ICE. *See, e.g., Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). The Supreme Court recently upheld the federal courts' jurisdiction to review such claims in *Jennings v. Rodriguez*, __ U.S. __, 138 S. Ct. 830, 839-41 (2018).

7. Venue is proper in the Middle Division of the Northern District of Alabama pursuant to 28 U.S.C. §§ 1391 and 2241(d) because Mr. Duran Ortega is detained at the Etowah County Jail in Gadsden, Alabama.

PARTIES

8. Petitioner Manuel Duran Ortega is currently detained by Respondents in the Etowah County Jail pending resolution of his immigration appeal, which was recently remanded by the Eleventh Circuit to the BIA for further consideration of his substantial claims for relief from a 2007 *in absentia* removal order.

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. As such, has direct control over Mr. Duran Ortega and is his immediate physical custodian. He is sued in his official capacity.

10. Respondent Keith Peek is Chief Deputy of Detention at the Etowah County Sheriff's Office and is the officer in charge of the Etowah County Jail where Mr. Duran Ortega is currently detained under the authority of ICE. He may also be considered to be Mr. Duran Ortega's immediate custodian. He is sued in his official capacity.

11. Respondent George Lund III is the acting Director of ICE's New Orleans Field Office, which has jurisdiction over ICE detention facilities in Alabama, including the Etowah County Jail, and thus is Mr. Duran Ortega's immediate custodian. He is sued in his official capacity.

12. Respondent Ronald D. Vitiello is the acting Director of ICE. He is responsible for the administration of ICE and the implementation and enforcement of the immigration laws, including immigrant detention. As such, Mr. Vitiello is a legal custodian of Mr. Duran Ortega. He is sued in his official capacity.

13. Respondent Kirstjen Nielsen is the Secretary of the Department of Homeland Security (DHS), which is responsible for the administration of ICE, a subunit of DHS, and the implementation and enforcement of the immigration laws. As such, Ms. Nielsen is the ultimate legal custodian of Mr. Duran Ortega. She is sued in her official capacity.

14. Respondent William Barr is the Attorney General of the United States and head of the Department of Justice, which encompasses the BIA and the Immigration Courts. Mr. Barr shares responsibility for implementation and enforcement of the immigration laws with

Respondent Nielsen. Mr. Barr is a legal custodian of Mr. Duran Ortega. He is sued in his official capacity.

FACTS

Mr. Duran Ortega's Immigration and Detention History.

15. Petitioner Manuel Duran Ortega is a forty-three-year-old citizen of El Salvador. He has been detained in ICE custody without a bond hearing for just under one year, since April 5, 2018.

16. Mr. Duran Ortega, who worked as a journalist in El Salvador, entered the United States without inspection in June 2006 after fleeing threats made against him. He was apprehended soon after he entered by Customs and Border Protection (CBP), which released him after serving him with a document titled a "Notice to Appear." The document, however, failed to specify the time and date of his future immigration proceedings at the Atlanta Immigration Court, in violation of the federal statute defining the requirements for such notices.[1]

17. The Atlanta Immigration Court later separately mailed Mr. Duran Ortega a Notice of Hearing, specifying that the first hearing in his case would take place on January 31, 2007. That envelope was returned to the Immigration Court, marked undelivered.

18. At the January 2007 hearing, the Immigration Judge ordered Mr. Duran Ortega removed *in absentia* after he did not appear. The Immigration Court mailed him a copy of his removal order, but this envelope was also returned to the Court as undelivered. At the time of these 2007 immigration proceedings, Mr. Duran Ortega had no legal counsel.

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[1] *See* 8 U.S.C. 1229(a)(1) (defining a "notice to appear"); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-16 (2018) (explaining that section 1229(a)(1)'s definition of "notice to appear" requires the document to specify the time at which the initial immigration hearing will be held).

19. Mr. Duran Ortega relocated to Memphis, Tennessee, without having received notification of either his hearing or his removal order. There, he began working as a journalist and reporter with a local radio station. Mr. Duran Ortega eventually established his own Spanish language media outlet called *Memphis Noticias*.

20. In late 2017 and early 2018, Mr. Duran Ortega published reporting that was critical of or embarrassing to local law enforcement, particularly highlighting their collaboration with ICE. Mr. Duran Ortega's reporting was sufficiently controversial that on at least one occasion in 2017, Memphis police officials asked him to take down some of his reporting.

21. On April 3, 2018, Mr. Duran Ortega was covering a protest held in the midst of Memphis's official commemoration of the 50th anniversary of the assassination of Dr. Martin Luther King, Jr. The protest was held to express community members' opposition to increased collusion between Memphis law enforcement and ICE.

22. Mr. Duran Ortega visibly wore his press credentials and carried his phone on a selfie stick to livestream the event. Despite attempting to comply with police orders to clear the street, he was arrested at the protest on charges of disorderly conduct and obstructing a highway.

23. On April 5, 2018, all charges against Mr. Duran Ortega were dismissed. On that date, Memphis officials transferred Mr. Duran Ortega into ICE custody, where he has remained ever since.

24. Mr. Duran Ortega was detained in immigration detention centers in Louisiana until February 15, 2019, when he was moved to his current site of detention, the Etowah County Jail.

25. Mr. Duran Ortega's only criminal record consists of misdemeanor traffic citations in 2009 and 2010.

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 the Atlanta Immigration Court, arguing that he never received legally-required notice of his 2007 immigration hearing, and that he was eligible to apply for asylum based on materially deteriorated circumstances for journalists in El Salvador since 2007. He also argued that constitutional violations occurring in conjunction with his arrest by immigration authorities weighed in favor of *sua sponte* reopening his case. On April 24, 2018, the Immigration Judge in Atlanta denied the motion.

27. Mr. Duran Ortega timely appealed the denial to the Board of Immigration Appeals (BIA). The BIA stayed Mr. Duran Ortega's removal on May 29, 2018 for the pendency of its review, but ultimately dismissed the appeal on October 19, 2018.

28. On October 29, 2018, Mr. Duran Ortega timely filed a petition for review with the U.S. Court of Appeals for the Eleventh Circuit, along with a motion for a stay of his removal pending appeal.

29. On November 29, 2018, a three-judge panel of the Eleventh Circuit entered a unanimous order staying Mr. Duran Ortega's removal pending resolution of his petition for review. Ex. 1. The panel cited *Nken v. Holder*, 556 U.S. 418 (2009), in which the Supreme Court held that "a strong showing that [the petitioner] is likely to succeed on the merits" is one of the two most critical factors in determining whether to stay a removal order. *Id.* at 434. The Eleventh Circuit panel's order was accompanied by a concurring opinion in which Judge Martin explained that it appeared that Mr. Duran Ortega was likely to succeed on at least two grounds: (1) the BIA had failed to properly consider all the evidence supporting his asylum claims based on materially worsened conditions for journalists in El Salvador; and (2) the fact that he never received

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 pendency of his second round of BIA proceedings. *See* Ex. 2, Ex. 3.

32. Now that Mr. Duran Ortega's case is remanded, there will be additional months of delay while the BIA reconsiders all of his claims for relief from his removal order. And, if the BIA rules in Mr. Duran Ortega's favor on either the asylum or notice issues,[2] his asylum claims would likely be remanded for consideration by the Immigration Judge to hear evidence, find facts, and make determinations relevant to the merits of Mr. Duran Ortega's claims.

33. If the BIA does not rule in Mr. Duran Ortega's favor, Mr. Duran Ortega may petition for review at the Eleventh Circuit, a process likely to consume many additional months

[2] If Mr. Duran Ortega successfully shows that he did not receive statutorily-mandated notice of his hearing, his removal case may be reopened for him to present whatever challenges he has to removal, including but not limited to, asylum claims. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii) (where a non-citizen did not receive notice of his immigration hearings, his *in absentia* removal order may be rescinded).

during the course of briefing, argument, and eventual court decision. If the Eleventh Circuit does not dismiss Mr. Duran Ortega's petition in full, his claims are subject to further remand to the BIA (and then potentially to the Immigration Judge) as necessary to fulfill the circuit court's mandate.

34. Because of the fact-intensive nature of Mr. Duran Ortega's claims for relief from his removal order, his case will likely remain pending for many more months or even years before the Eleventh Circuit or another court reaches a final disposition.

Mr. Duran Ortega's Previous Challenges to His Detention.

35. Despite being detained for a year (as of April 5, 2019), Mr. Duran Ortega has never received a bond hearing or other meaningful review to determine whether his prolonged detention is justified.

36. On April 13, 2018, while he was still detained in Louisiana, Mr. Duran Ortega filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Louisiana. In that petition, he asserted that because his detention was the direct result of a retaliatory and otherwise unlawful arrest by Memphis officials and federal immigration authorities, he was being detained in violation of the First, Fourth, Fifth, and Fourteenth Amendments. The petition sought Mr. Duran Ortega's release based on the illegality of his arrest, but did not contend the length of his (then-eight-day-long) detention violated due process, nor did it assert that Mr. Duran Ortega was entitled to a bond hearing.

37. On September 4, 2018, the Western District of Louisiana Court dismissed Mr. Duran Ortega's habeas petition. The Magistrate Judge report and recommendation adopted by the District Court explicitly noted that Mr. Duran Ortega had been detained less than six months and any challenge to his detention as prolonged under *Zadvydas v. Davis*, 533 U.S. 678 (2001)

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. The motion was supported by extensive evidence regarding Mr. Duran Ortega's deep contributions and ties to the Memphis community, his lack of dangerousness, and his low risk of flight. Supporting exhibits included over 25 letters of support, including one by a U.S. Congressman. *See generally* Ex. 4 (bond motion).

40. The Immigration Judge determined that he lacked jurisdiction to set a bond. *See* Ex. 5-6 (Immigration Judge Order and Post-Appeal Opinion[3] Denying Bond). On February 15,

[3] Pursuant to Immigration Court practice, the Immigration Judge issued his opinion supporting his order denying bond after Mr. Duran Ortega filed a notice of appeal to the BIA.

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 has never been issued a notice for failure to comply pursuant to 8 C.F.R. § 241.4(g).

42. Mr. Duran Ortega has deep and extensive community ties in the U.S. *See generally* Ex. 4 (bond motion). His fiancée, her father, stepfather, mother, siblings, nieces, and nephews, all live in Memphis, Tennessee. His fiancée has deferred action for childhood arrivals (DACA), giving her permission to remain and work in the United States. Her father is a lawful permanent resident and her stepfather is a U.S. citizen. Mr. Duran Ortega also has a large and supportive community that he has cultivated through a decade of community engagement as a journalist and active humanitarian. He has organized and participated in fundraising drives for local children's hospitals and for relief for victims of Hurricane Harvey. He has a registered business in Memphis, *Memphis Noticias*, and has a large following of Spanish-speaking Memphians. Prior to his arrest and subsequent detention, Mr. Duran Ortega was in discussion to co-teach a class on investigative journalism with a professor at Christian Brothers University in Memphis.

43. If released from detention, he would return to live with his fiancée, along with her father and stepfather in Memphis. He is currently represented in immigration proceedings *pro bono* by the Southern Poverty Law Center, which will work with him to ensure his attendance at immigration proceedings. Latino Memphis, a Memphis nonprofit organization, has also pledged to assist him with ICE check-ins and other logistical support to facilitate his compliance with rules governing his release.

LEGAL FRAMEWORK AND ARGUMENT

I. Mr. Duran Ortega Is Detained Pursuant to the Pre-Removal Period Detention Statute—8 U.S.C. § 1226

A. The Immigration Detention Statutes

44. Two main provisions of the Immigration and Nationality Act (INA) govern the detention of noncitizens pending removal: 8 U.S.C. §§ 1226 and 1231.[4] Section 1226 governs detention of individuals "pending a decision on whether [they are] to be removed from the United States." 8 U.S.C. § 1226(a). Section 1231 governs detention of individuals during and, in some cases, after the "removal period," 8 U.S.C. §1231(a)(1)(A), i.e., while they are awaiting removal after exhausting the available legal avenues to challenge a final removal order.

45. Detention under Section 1226 is generally discretionary. *Jennings*, 138 S.Ct. at 846. An individual detained under subsection (a) of that statute is immediately eligible to request release on bond or conditional parole. *See* 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). Only under special, limited circumstances—not applicable here—does Section 1226 mandate detention. *See* 8 U.S.C. § 1226(c) (the government "shall take into custody any alien" who has committed certain criminal offenses "when the alien is released" from criminal custody).

46. Section 1231 comes into play once an individual has exhausted the legal avenues to challenge his removal order and there is no longer any legal impediment to his removal. That section mandates detention only during the initial 90-day "removal period," 8 U.S.C. §1231(a)(1)(A)—the time window during which the government typically effectuates the individual's removal. The removal period "begins on the latest of the following:

> (i) The date the order of removal becomes administratively final.
>
> (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.

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[4] Separate statutory provisions, which do not apply here, govern the detention of particular categories of noncitizens. *See* 8 U.S.C. §§ 1225(b) (individuals classified as "arriving aliens") and 1226A (suspected terrorists).

> (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 on other grounds by Jennings*, 138 S. Ct. at 847; *Prieto–Romero v. Clark,* 534 F.3d 1053, 1059 (9th Cir. 2008); *Wang v. Ashcroft,* 320 F.3d 130, 147 (2d Cir. 2003); *Bejjani v. INS,* 271 F.3d 670, 689 (6th Cir. 2001) *abrogated on other grounds by Fernandez–Vargas v. Gonzales,* 548 U.S. 30 (2006). As the Third Circuit explained, "insofar as the purpose of §1231 detention is to secure an alien pending the alien's certain removal, §1231 cannot explain nor authorize detention during a stay of removal pending further judicial review." *Leslie*, 678 F.3d at 270. Consequently, because Section 1231 does not govern detention while an individual's removal is stayed pending judicial review, the pre-removal period detention statute, Section 1226, must control. *See Wang*, 320 F.3d at 147.

50. Mr. Duran Ortega sought judicial review of his removal order in the Eleventh Circuit, which ordered remand of his claims to the BIA under the remand terms sought by the government, which included a stay of Mr. Duran Ortega's removal. *See* Ex. 2, Ex. 3.

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 detention provision, Section 1226(a). Under that section, he is immediately eligible for release, given the prolonged nature of his civil detention, his strong ties to the community, and his negligible criminal history. Based on Mr. Duran Ortega's overwhelming positive equities, his extremely low risk of flight, and the already prolonged deprivation of liberty he has already experienced, this Court should order the government to release him under appropriate conditions of supervision. Alternatively, the Court should order the government to provide Mr. Duran Ortega with an immediate bond hearing.

52. Mr. Duran Ortega's deep community ties in the Memphis area—including his extended family network, his fiancée's LPR father and U.S. citizen stepfather, his impassioned community and congressional support, his broad base of community support for his Spanish-language investigative reporting, and his record of business ownership, employment and humanitarian work—his fear of persecution or torture if deported, and his lack of criminal history overwhelmingly show that he is neither a danger nor a flight risk. No "sufficiently strong special justification" exists to justify Mr. Duran Ortega's prolonged detention beyond the six-month limit. *Zadvydas*, 533 U.S. at 690. Mr. Duran Ortega inarguably is not among the "small segment of particularly dangerous individuals" who have committed the "most serious of crimes"; and he has not been afforded the "strict procedural safeguards" to which even those

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

Ortega's detention is Section 1231(a)(6), which permits—but does not require—the government to continue to detain beyond the removal period certain "[i]nadmissible and criminal aliens"[5] and individuals determined to present a danger to the community or a risk of flight. 8 U.S.C. §1231(a)(6). Section 1231(a)(6) provides that such persons "may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."[6] (emphasis added).

57. Assuming *arguendo* that under section 1231(a)(1)(A) Mr. Duran Ortega's removal period commenced upon the 2007 entry of his *in absentia* removal order, considerably more than 90 days have elapsed since that date. *See* 8 C.F.R. §1241.1(e) (*in absentia* removal order becomes administratively final upon entry of order). Multiple courts have held that noncitizens are eligible for release under section 1231(a)(6) following the 90-day removal period. *See Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011); *accord Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018); *see also* 8 C.F.R. §§ 241.4; 241.5(b) (regulations establishing bond eligibility for non-citizens after the conclusion of the removal period).

58. In *Zadvydas*, the Supreme Court recognized that the Fifth Amendment's Due Process Clause imposes limitations on the government's discretionary detention authority under Section 1231(a)(6). 533 U.S. at 689. The Court held that prolonged detention under Section 1231(a)(6) is no longer permissible if it is not reasonably related to the statutory purpose of

[5] Mr. Duran Ortega is not a "criminal alien," but he is "inadmissible" within the meaning of section 1231(a)(6) because he is a non-citizen who "is present in the United States without being admitted or paroled, or who arrive[d] in the United States at any time or place other than as designated by the Attorney General." 8 U.S.C. § 1182 (a)(6)(A)(i).

[6] Paragraph 3 of section 1231(a) provides for supervision without detention, including mandatory check-ins with ICE officers and compliance with restrictions on the noncitizen's conduct and activities. *See* 8 U.S.C. § 1231(a)(3). In his requests for release, Mr. Duran Ortega has stated that he is amenable to such supervision.

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 success on the merits and irreparable harm are the two most critical factors in granting a stay of removal); *Diouf*, 634 F.3d at 1081 ("The entry of the stay signifies that, at the very least, the petitions have presented a serious legal question or have some "probability of success on the merits.") (internal citation omitted). There is good reason to believe that Mr. Duran Ortega will prevail on remand or in a subsequent petition for review, ultimately obtaining relief—a process that will take many more months or even years, especially if a second petition for review is litigated after remand. There is not only good, but *ample*, reason to believe his removal is not significantly likely in the reasonably foreseeable future. And the likelihood of foreseeable removal diminishes each day his already prolonged detention continues during the remand process. *Zadvydas*, 533 U.S. at 701 ("for detention to remain reasonable, as the period of prior post-removal confinement grows,

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 running of the *Zadvydas* six month period (the period after which detention is no longer presumptively valid) when he obtained a stay of removal in the court of appeals. *See id.* at 1052 n.4. In *Akinwale*, the Eleventh Circuit affirmed the dismissal of a habeas petition where the petitioner had only been detained for four months when he filed his habeas petition, and had also failed to show that the government was incapable of executing his removal in the foreseeable future. *Id*. at 1051-52. In contrast, Mr. Duran Ortega has been detained for nearly a year before filing this habeas petition—and did not obtain a stay of removal in the court of appeals until after he had been detained for over six months. *Cf. Adu v. Bickham*, No. 7:18-CV-103-WLS-MSH, 2018 WL 6495068, at *2 (M.D. Ga. Dec. 10, 2018) (distinguishing *Akinwale* where petitioner, whose removal had been stayed a few weeks before he filed his habeas petition, had been detained for years prior to filing his habeas petition). And, as outlined above, Mr. Duran Ortega makes a strong showing that he is unlikely to be removed in the foreseeable future.

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 the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id.*; *Demore*, 538 U.S. at 528. Because Mr. Duran Ortega's ongoing deprivation of liberty is not sufficiently related to either of these purposes, and because he has not been afforded the necessary procedural safeguards, his detention violates due process.

63. Every federal appeals court to consider the issue, including the Eleventh Circuit, has concluded—either as a matter of constitutional avoidance applied to statutory construction or by reaching the due process question—that mandatory detention without a bond hearing pending removal is impermissible once it exceeds a reasonable time limitation. *See Sopo*, 825 F.3d 1199; *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

64. Recently, in *Jennings v. Rodriguez*, the Supreme Court held that the Ninth Circuit erred in applying the canon of constitutional avoidance to interpret 8 U.S.C. §§ 1226(c) and

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, Sixth, and Eleventh Circuits, those courts' reasoning remains persuasive authority with respect to the due process analysis. These courts identified "serious constitutional concerns," *Sopo*, 825 F.3d at 1213, with a reading of the statutory scheme that would permit prolonged detention absent any periodic review by a neutral decision-maker. Post-*Jennings,* courts have held that a statutory detention scheme that does not allow for such review violates due process. *See Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 222 (3d Cir. 2018) (noting that the Third Circuit's earlier constitutional precedent was not abrogated by *Jennings* and reaffirming that "when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary."); *Hamama v. Aducci*, 349 F. Supp. 3d 665, 685 (E.D. Mich. 2018) (prolonged and indefinite detention of a nationwide class of Iraqi nationals including Section 1225, 1226 and 1231 detainees likely violated the detainees' due process rights "[r]egardless of which provision applies").

66. Mr. Duran Ortega's detention without a bond hearing should be presumed unreasonable because it has already exceeded six months. Civil detention for over six months likely violates due process. *See Demore*, 538 U.S. at 529-30 (upholding only "brief" detention under Section 1226(c), which lasts an average of "about five months in the minority of cases in which the alien chooses to appeal"); *Id.* at 532 (Kennedy, J., concurring) ("individualized

determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified"); *Zadvydas*, 533 U.S. at 701 ("Congress previously doubted the constitutionality of detention for more than six months"); *see also McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972) (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment).

67. Even if a bond hearing is not required after six months in every case, due process requires, at a minimum, a bond hearing after detention has become unreasonably prolonged. *See Diop*, 656 F.3d at 234. In determining the reasonableness of immigration detention, courts have looked to whether the noncitizen has raised a "good faith" challenge to removal that is "legitimately raised" and presents "real issues." *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015). Reasonableness is also a "function of the length of the detention," *id*. at 477 (detention is presumptively unreasonable if it lasts six months to a year); *accord Sopo*, 825 F.3d at 1217-18, and the prospect of future detention pending the resolution of challenges to the individual's removal. *Chavez-Alvarez*, 783 F.3d at 477-78 (finding detention unreasonable after ninth months of detention, when parties "could have reasonably predicted that Chavez-Alvarez's appeal would take a substantial amount of time, making his already lengthy detention considerably longer"); *accord Sopo*, 825 F.3d at 1218; *Reid*, 819 F.3d at 500. The "conditions of confinement" also bear on the reasonableness analysis. *Chavez-Alvarez*, 783 F.3d at 478; *accord Sopo*, 825 F.3d at 1218 ("whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention" is factor in reasonableness determination). Accordingly, the particular factors present in Mr. Duran Ortega's case—his bona fide and substantial challenges to his removal pending at the BIA upon remand by the Eleventh Circuit, the government's actions to delay resolution of his claims, the almost year-long length of

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 conditions[8]—render his detention unreasonable.

68. In addition to an individualized hearing before a neutral decision-maker, due process requires the government to provide Mr. Duran Ortega with other procedural safeguards to protect against the erroneous deprivation of liberty. First, the government must bear the burden of proof by clear and convincing evidence to demonstrate that he is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203-05 (9th Cir. 2011); s*ee also United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (upholding pre-trial detention where "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Foucha*, 504 U.S. at 81-83 (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee). Additionally, in order to show that an individual's continued detention is reasonably related to the detention statutes' primary purpose of ensuring appearance during removal proceedings and effectuating her removal, *see Zadvydas*, 533 U.S. at 697, the government must also consider alternatives to detention and an individual's ability to pay bond. *See Hernandez*, 872 F.3d at 990-91; *see also id*. at 991.

69. For these reasons, Mr. Duran Ortega's continued prolonged detention without a

[8] The Etowah County Jail where Mr. Duran Ortega is currently confined has been the subject of repeated complaints, reports, and investigations for corruption and human rights violations, including by DHS itself. *See, e.g*., DHS Office of Civil Rights and Civil Liberties, *Fiscal Year 2015 Report to Congress* at 28-29, 35 (June 2016), https://www.dhs.gov/sites/default/files/publications/crcl-fy-2015-annual-report.pdf (prior investigations and "numerous complaints" DHS continues to receive from Etowah "raise serious civil rights concerns"; recommending that ICE "cease use of the facility" unless it can implement "comprehensive" reforms); Connor Sheets, "Here's how federal inmates made an Alabama sheriff $1.5 million," *AL.com*, Dec. 30, 2018, https://www.al.com/news/2018/12/heres-how-federal-inmates-made-an-alabama-sheriff-15-million.html (Etowah sheriff and county government reportedly misappropriated $3 million in funds paid to them under the ICE contract).

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 the 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 strong procedural protections to guard against the erroneous deprivation of liberty. *Id.* at 690-91; *Foucha*, 504 U.S. at 81-83. To justify Mr. Duran Ortega's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decision-maker, that Mr. Duran Ortega's detention is justified by clear and convincing evidence of flight risk or danger, even after consideration of whether alternatives to detention could sufficiently mitigate that risk, and taking into account his ability to pay bond. *See Salerno*, 481 U.S. at 750, 752; *Singh*, 638 F.3d at 1203; *Hernandez*, 872 F.3d at 990.

89. Mr. Duran Ortega's detention without a bond hearing, which is approaching a year and could last many more months or even years while his substantial challenge to his removal remains pending, is not reasonably related to the statutory purpose of ensuring his

appearance during removal proceedings or preventing danger to the community.

90. Nor has Mr. Duran Ortega been afforded the necessary procedural safeguards to guarantee against the erroneous deprivation of his liberty, especially as his detention grows increasingly prolonged in significant part due the government's own delaying tactics.

91. Under these circumstances, Mr. Duran Ortega's detention violates both substantive and procedural due process.

PRAYER FOR RELIEF

WHEREFORE, Mr. Duran Ortega prays that this Court grant the following relief:

a. Assume jurisdiction over this matter;

b. Order Respondents to show cause why the writ should not be granted within **three days**, and, if necessary, set a hearing on this Petition within **five days** of the return, pursuant to 28 U.S.C. § 2243;

c. Grant a writ of habeas corpus ordering Respondents to immediately release Mr. Duran Ortega from their custody;

d. In the alternative, grant a writ of habeas corpus ordering Mr. Duran Ortega's release within 30 days unless Respondents schedule an individualized hearing before an Immigration Judge on whether Mr. Duran Ortega presents a risk of flight or danger, even after consideration of alternatives to detention and taking into account Mr. Duran Ortega's ability to pay a bond;

e. Enter preliminary and permanent injunctive relief enjoining Respondents from further unlawful detention of Mr. Duran Ortega;

f. Declare that Mr. Duran Ortega's detention without a bond hearing violates the Immigration and Nationality Act;

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 such further relief as this Court deems just and proper.

Dated: April 3, 2019

Respectfully submitted,

/s/ Jessica M. Vosburgh
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