UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

DORIAN ABAD ABROSI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No.: 5:25-cv-13
	)	
WARDEN OF FOLKSTON ICE PROCESSING CENTER, et al.,	)	
	)	
	)	
Respondents.	)	

RESPONSE TO PETITION FOR HABEAS CORPUS AND RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

COME NOW, Respondents, by and through the United States Attorney for the Southern District of Georgia and the undersigned Assistant United States Attorney, and respond to the Petition, Doc. 1, asking that it should be denied or dismissed. Petitioner Dorian Abad-Ambrosi ("Petitioner")[1] filed this habeas corpus petition pursuant to 28 U.S.C. § 2241 to challenge his detention by Immigrations and Customs Enforcement ("ICE"). He claims he has been unlawfully detained in violation of due process.

The Court should deny or dismiss the Petition for several reasons. First, Petitioner is not entitled to a bond hearing because he is detained pursuant to 8 U.S.C. § 1231. Second, he has failed to establish a *Zadvydas* claim. Third, Petitioner's Due Process rights have not been violated. Finally, Respondents have not violated

[1] The spelling of Petitioner's surname displayed on the Petition differs from the spelling displayed on his Ecuadorian passport. *See* Kelley Dec., Attachment A. All of ICE's records use the spelling displayed on Petitioner's passport. Therefore, Respondents' Motion uses that spelling.

the Administrative Procedures Act ("APA") in their detention of Petitioner. Therefore, he is not entitled to habeas corpus relief.

In addition to seeking habeas corpus relief, Petitioner also filed a Motion for Preliminary Injunction. Doc. 2.[2] Because that latter Motion deals heavily with the same merits questions as the Petition, the reasons for dismissal are also largely the same. Therefore, in the interests of judicial economy, Respondents provide this response both to the Petition, Doc. 1, and also to the Motion for Preliminary Injunction, Doc. 2.

BACKGROUND

Petitioner is a native and citizen of Ecuador. Declaration of James Kelley ("Kelley Dec."), ¶ 3. He initially came to the United States in 1995. Doc. 1, ¶ 16; *see also* Kelley Dec., Attachment C. Since coming to the United States, he has been arrested on numerous charges, including a domestic altercation and multiple traffic-related offenses. *Id.* at 7-8. He has four convictions for DUI and has also violated his probation on multiple occasions. *Id.* at 7-8, 18. On June 22, 2017, Petitioner was ordered removed from the United States. *Id.* After exhausting his appeals, Petitioner self-removed to Ecuador on December 5, 2020. Kelley Dec., Attachment H.

On June 2, 2023, Petitioner re-entered the United States illegally, where he was detained. Kelley Dec., ¶ 8; *see also* Kelley Dec. Attachment I. After being asked,

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[2] Although the Motion is styled as a "Motion for Temporary Restraining Order or Preliminary Injunction," *see* Doc. 2, the United States Attorney was served on February 10, 2025, which means the motion should be treated solely as one for preliminary injunction. *See, e.g., Coastal Logistics, Inc. v. Centerpoint Garden City, LLC*, No. 4:12-cv-294, 2013 WL 12140985, at *2 (S.D. Ga. Dec. 3, 2013) (Moore, J.).

he informed Department of Homeland Security ("DHS") officials that he did not fear harm or persecution in Ecuador. Kelley Dec., Attachment H.

On June 3, 2023, DHS notified Petitioner of its intent to reinstate the prior, valid removal order. Kelley Dec., Attachment I. Petitioner entered Immigration and Customs Enforcement ("ICE") custody on June 11, 2023. Kelley Dec., ¶ 4.

On March 1, 2024, an immigration judge ordered Petitioner removed to Ecuador. Kelley Dec., ¶ 11. Petitioner appealed this decision, and the Board of Immigration Appeals ("BIA") remanded it to the immigration court on May 30, 2024. *Id.*

On November 19, 2024, an immigration judge again ordered Petitioner removed to Ecuador but also granted Petitioner's request to withhold removal pursuant to 8 U.S.C. § 1231(b)(3). Kelley Dec., ¶ 12 (citing the Immigration and Nationality Act). DHS appealed that decision on December 18, 2024. Kelley Dec., Attachment N. That appeal remains pending. *Id.*

During Petitioner's detention, ICE has completed custody reviews pursuant to 8 C.F.R. § 241.4. Kelley Dec., ¶ 14. For example, on November 21, 2023, he was personally served with a copy of the results of one such review. Kelley Dec., Attachment O. The result of a more recent custody review was also provided directly to Petitioner's counsel. Doc. 1-4 at 2.

There are currently no impediments to removal to Ecuador for citizens of that country. Exhibit 2, Declaration of Chezdent Thompson ("Thompson Dec."), ¶ 9.

Petitioner also has a valid Ecuadorian passport. *Id.*, ¶ 8. Therefore, Petitioner's removal is significantly likely in the reasonably foreseeable future. *Id.*, ¶ 10.

ARGUMENT

I. The only proper respondent is the Warden at Folkston.

The only proper respondent in a habeas action is the custodian of the petitioner. 28 U.S.C. §§ 2242-2243; *see also Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) ("[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official."); *Grimes v. Geter*, No. 2:20-cv-42, 2020 WL 13917844, at *1 (S.D. Ga. Apr. 24, 2020) (Cheesbro, J.) ("The only proper respondent in a § 2241 case such as this is the inmate's immediate custodian—the warden of the facility where the inmate is confined.").

Petitioner has shown no reason to depart from this standard practice. In addition to naming the Warden of Folkston, who is Petitioner's immediate custodian, *see* Doc. 1, ¶ 11, Petitioner improperly names as respondents Kristen Sullivan, the Acting Field Office Director, Atlanta Field Office, United States Immigration and Customs Enforcement; Kristi Noem, Secretary of the Department of Homeland Security; and Pamela Bondi, Attorney General of the United States. Even if Petitioner has properly served these additional three government officials under Rule 4(i), none is a proper respondent to this Petition because Petitioner is not in their custody. The only proper Respondent is the current warden at Folkston. *See Grimes*, 2020 WL 13917844, at *1.

Therefore, even if this petition survives a Motion to Dismiss, the other respondents should be dismissed.

II. Petitioner is not entitled to a bond hearing.

Petitioner asks for a bond hearing. Doc. 1, ¶ 6. Because he is detained under § 1231(a), however, he is not entitled to a bond hearing. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 526 (2021) ("We conclude that § 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal, meaning those aliens are not entitled to a bond hearing while they pursue withholding of removal."); *see also Shaikh v. Meade*, No. 21-cv-23752, 2022 WL 844420, at *5 (S.D. Fla. Mar. 22, 2022) (calling "unambiguous" *Guzman Chavez*'s "holding that noncitizens detained for removal under § 1231 are not entitled to a bond hearing"). More recently, the Supreme Court has even noted that "there is *no plausible construction* of the text of § 1231(a)(6) that requires the Government to provide bond hearings before immigration judges after six months of detention, with the Government bearing the burden . . . ." *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 381 (2022). Such a decision falls within the government's discretion. *Id.* at 582.

Petitioner cites no controlling precedent to the contrary. Therefore, Petitioner's request for a bond hearing should be denied.

III. Petitioner's *Zadvydas* claim should be denied.

Petitioner argues that his continued detention violates the Supreme Court's opinion in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Doc. 1, ¶ 68. It does not.

Under the Immigration and Nationality Act, "when an alien is ordered

removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). The Attorney General must detain the alien during that period. 8 U.S.C. § 1231(a)(2). When that period expires, the Attorney General may continue to detain an inadmissible alien. 8 U.S.C. § 1231(a)(6). The continued detention under that statute must not be indefinite, however, as federal law authorizes detention only for as long as "reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689, 701 (concerning certain types of removals); *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (extending *Zadvydas* to inadmissible aliens). While the Supreme Court has held that detention of six months is presumptively reasonable, the Supreme Court also made clear that the six-month presumption *does not mean* that every alien not removed in this timeframe must be released after six months. *Zadvydas*, 533 U.S. at 701. To state a *Zadvydas* claim, an alien "not only must show post-removal order detention in excess of six months but also must provide evidence of a 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).

In the context of § 1231, the likelihood-of-removal analysis is not limited to a single country. Instead, numerous options may be available for removal: "a country designated by the alien; the alien's country of citizenship; the alien's previous country of residence; the alien's country of birth; the country from which the alien departed for the United States; and finally, any country willing to accept the alien." *Guzman Chavez*, 594 U.S. at 536 (2021). There is a "distinction between whether an alien is to

be removed and where an alien is to be sent." *Id.* at 538. As the Supreme Court noted, a grant of withholding relief does not mean that the alien will not be removed—it just means that he or she will not b e removed to one specific country. *Id.* at 537; *see also Castaneda v. Perry*, 95 F.4th 750, 758 (4th Cir. 2024) ("[O]ngoing withholding-only proceedings alone are insufficient to demonstrate that removal is no longer reasonably foreseeable.").

Here, Petitioner is correct that he has been detained longer than six months past his removal order. He was ordered removed on June 22, 2017, and he has been detained beginning on June 11, 2023, to the present. Kelley Dec., ¶¶ 4, 6. Therefore, this first showing is met.

But Petitioner fails to show there is no significant likelihood of his removal in the reasonably foreseeable future. His conclusory assertions that his removal is not reasonably foreseeable are without support. *See, e.g.,* Doc. 1, ¶ 69. Generously construed, he argues that ICE's attempts to find another country for removal "are extremely unlikely to succeed." Doc. 1, ¶ 69. H gives no support for this apart from Exhibit 5, but that exhibit is an OIG report about conditions at Folkston. *See* Doc. 1-6. Petitioner appears to be asking this Court to rule his detention is of indefinite duration merely because he has a pending appeal. That is not sufficient—any alien detained under § 1231 and not yet deported would likely qualify.

There can be no reasonable dispute that Petitioner is likely to be removed. The pending BIA appeal of the withholding decision has only two possible outcomes; both result in Petitioner's removal. If Petitioner loses the appeal, the result will be that he

is removed specifically to Ecuador. Such a removal is feasible and possible. Thompson Dec., ¶¶ 9-10. If instead Petitioner prevails on appeal, and the decision of the immigration judge is upheld, the result will not be a cancellation of his removal. The result will be that the government will seek to achieve his removal to some other country. *See Guzman Chavez*, 594 U.S. at 536 ("If an immigration judge grants an application for withholding of removal, he prohibits DHS from removing the alien *to* that particular country, not *from* the United States."). Nothing in the record shows that removal to another country is not possible, and various options exist to identify such a country. *Id.* (outlining other options); *see also Castaneda*, 95 F.4th at 758 (making the same argument and concluding that, as a result, petitioner was not in "removable-but-unremovable limbo"). Thus, Petitioner is not in the removal limbo of the sort discussed in *Zadvydas*.

Petitioner's removal is reasonably foreseeable—indeed, removal will be the ultimate outcome once the BIA makes a decision on the withholding issue. Therefore, Petitioner's *Zadvydas* claim should be denied.

IV. Petitioner's Due Process rights have not been violated.

Petitioner argues that this Court should grant him a bond hearing because his continued detention violates the Due Process clause of the United States Constitution as interpreted by the Eleventh Circuit in *Sopo v. United States Attorney General*, 825 F.3d 1199, 1217 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952, 953 (11th Cir. 2018). Doc. 1, ¶ 50. Petitioner errs in his reliance on *Sopo*, which discussed an entirely

different statute. Yet even if this Court were to consider Petitioner's challenge under the six *Sopo* factors, Petitioner's challenge should still fail.

First, *Sopo* is inapplicable to Petitioner's argument for a bond hearing. The petitioner in *Sopo* was detained pursuant to 8 U.S.C. § 1226(c). *Sopo*, 825 F.3d at 1202. That statute makes detention mandatory for certain alien felons *prior* to their orders of removal; it concerns pre-order detention. *See* 8 U.S.C. 1226(c). Section 1231 applies to the detention of aliens who have *already* been ordered removed; it concerns a post-order detention. *Id.* § 1231(a); *see also Sopo*, 825 F.3d at 1209 (outlining the difference between § 1226 and § 1231). When an alien is detained pursuant to § 1231 because he or she has a final order of removal, the reasoning in *Sopo* does not apply: "*Sopo* only concerns pre-final order of removal detention and is inapplicable to Petitioner's current detention [under § 1231(a)]." *Piton v. Warden, Folkston ICE Processing Ctr.*, No. 7:16-cv-162, 2018 WL 2056575, at *1 (M.D. Ga. Jan. 26, 2018) (discussing habeas petition), *report and recommendation adopted,* No. 7:16-cv-162, 2018 WL 2056563 (M.D. Ga. Feb. 26, 2018). As Petitioner concedes, the Supreme Court has not addressed whether habeas relief is permissible under § 1231(a). *See, e.g.*, Doc. 1, ¶ 46.[3]

[3] Petitioner argues in his brief that "The *Arteaga-Martinez* Court expressly held that 'as-applied constitutional challenges [to § 1231 detention] remain available to address "exceptional" cases.'" Doc. 1, ¶ 53. He then urges this Court to "follow[] the Supreme Court's instructions . . . ." *Id.* In this instance, Petitioner misquotes the Supreme Court's opinion in *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022). In fact, the Supreme Court expressly *declined* to address that petitioner's constitutional claims because the lower courts did not reach those claims. *Id.* at 583 ("We leave them for the lower courts to consider in the first instance."). The full quotation given in Petitioner's brief reads, "The Government also notes that as-applied constitutional challenges remain available to address 'exceptional' cases." *Id.* Therefore, this sentence was certainly not the "express holding" of the Supreme Court's

Here, Petitioner asserts that he is detained pursuant to § 1231(a). Doc. 1, ¶¶ 2, 38. He provides no binding authority to support the application of the *Sopo* analysis to aliens detained under § 1231(a) post-removal order. Petitioner fails to carry his burden of demonstrating that his detention pursuant to § 1231(a) violates Due Process. It is well-settled that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).

Yet even if the Court were to consider Petitioner's situation under the six *Sopo* factors, his Due Process would still fail. Respondents acknowledge that courts have left open the possibility that a detainee may bring an as-applied due-process challenge to mandatory detention under § 1226(c) that, if successful, may entitle a petitioner to a bond hearing before an immigration judge. *See, e.g., Clue v. Greenwalt*, No. 5:21-cv-80, 2022 WL 17490505, at *1 (S.D. Ga. Oct. 24, 2022) (Cheesbro, J.) (citing *Demore*, 538 U.S. at 531-33 (Kennedy, J. concurring)), *report and recommendation adopted*, 2022 WL 17489190 (S.D. Ga. Dec. 7, 2022); *Dorley v. Normand,* No. 5:22-cv-62, 2023 WL 3620760, at *3 (S.D. Ga. April 3, 2023) (Cheesbro, J.), *recommendation adopted*, 2023 WL 3174227 (May 1, 2023).

While Respondents disagree with this line of cases, courts evaluating the adequacy of process in the context of § 1226(c) detention have referred to the Eleventh Circuit's articulation of certain factors in *Sopo*. *See, e.g., Clue*, 2022 WL 17490505, at *4. Although not controlling precedent, the *Sopo* factors were designed to aid "in

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opinion, as Petitioner asserts.

determining whether a particular criminal alien's continued detention, as required by § 1226(c), is necessary to fulfilling Congress's aims of removing criminal aliens while preventing flight and recidivism." *Sopo*, 825 F.3d at 2017; *see, e.g.*, *Dorley*, 2023 WL 3620760, at *3. These six factors, though not exhaustive, are:

> (1) The amount of time the alien has been in detention without a bond hearing; (2) the cause of the protracted removal proceedings (i.e., whether the petitioner or the government has improperly delayed the proceedings); (3) whether it will be possible to remove the alien upon the issuance of a final order of removal; (4) whether the period of civil immigration detention exceeds the time the alien spent in prison for the crime that rendered the alien removable; (5) whether the facility at which the alien is civilly detained is meaningfully different from a penal institution, and (6) the likelihood the removal proceedings will conclude in the near future.

Id. (citing *Sopo*, 825 F.3d at 1217-18). In order to receive relief, the balance—*i.e.*, the majority—must "tip[] in the alien's favor." *Sopo*, 825 F.3d at 1219.

These factors should be applied on a case-by-case basis; there is no bright-line rule based solely on the length of a petitioner's detention. *See, e.g.*, *Lindsay v. Garland*, No. 5:23-cv-74, 2024 WL 2967271, at *5 (S.D. Ga. Apr. 30, 2024) (Cheesbro, J.), *report and recommendation adopted,* No. 5:23-cv-74, 2024 WL 2959309 (S.D. Ga. June 12, 2024); *Dorley,* 2023 WL 3620760, at *3.

Here, even if this Court considers an as-applied challenge using the *Sopo* factors, they weigh in Respondents' favor.

A. Duration of Petitioner's detention

Sopo found that § 1226(c) detention without a bond hearing may be reasonable up to six months but "may often become unreasonable by the one year mark, depending on the facts of the case." *Dorley*, 2023 WL 3620760, at *4 (citing *Sopo*, 825

F.3d at 1218). Here, twenty months have passed since ICE initially took custody of Petitioner. *See* Kelley Dec., ¶ 4.

Therefore, if this Court applies *Sopo* to § 1231(a) detention, this factor weighs in Petitioner's favor.

B. Cause of protracted proceedings

The second *Sopo* factor requires consideration of "whether the government or the criminal alien have failed to participate actively in the removal proceedings or sought continuances and filing extensions that delayed the case's progress." *Sopo*, 825 F.3d at 1218.

Here, neither Petitioner nor the government has sought to delay the removal proceedings. Both parties have filed appeals. *See* Kelley Dec., ¶¶ 6, 11, 12. Petitioner argues that the government is responsible because otherwise removal proceedings would have ended. Doc. 1, ¶ 58. But Petitioner also concedes that "ICE is entitled to appeal," *id.*, and he does not argue that the government's appeals were not made in good faith. Nor do Respondents suggest that Petitioner's appeals were in bad faith.

Therefore, since both parties have exercised their rights to appeal and neither party has improperly delayed Petitioner's removal proceedings, this factor is neutral.

C. Possibility of removal

Regardless of the outcome of his appeal, Petitioner will be removed once it is concluded. Petitioner makes no argument related to the possibility (or feasibility) of his removal to Ecuador. *See* Doc. 1, ¶ 59. Instead, he argues that the immigration judge ruled that his removal should be withheld—the same decision that is currently

on appeal to the BIA. *See id.* But the immigration judge's decision did not discuss possibility of Petitioner's removal; indeed, the decision presumes that removal is possible. *See* Kelley Dec., Attachment M. Further, removals to Ecuador are occurring without impediment. Thompson Dec., ¶¶ 9-10. Petitioner has a valid Ecuadorian passport. *Id.*, ¶ 8. Removal to Ecuador is both possible and feasible, and there is no evidence that removal to other alternative countries would impossible.

Therefore, this factor weighs in Respondents' favor.

D. Period of civil detention vs. criminal detention

The fourth factor concerns "whether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable." *Sopo*, 825 F.3d at 1218. Petitioner argues that "there is no crime that made [Petitioner] removable, nor even a crime that triggered his immigration detention." Doc. 1, ¶ 60. This is inaccurate. The immigration judge who reviewed Petitioner's case in 2017 dwelt on his extensive history of criminal charges and incarceration, including multiple DUIs and violations of probation. Kelley Dec., Attachment C (IJ Decision June 22, 2017) at 7-8. Petitioner was ordered removed because of this "extensive" criminal history. Kelley Dec., ¶¶ 5-6; Kelley Dec., Attachment F (BIA Decision September 10, 2019) ("The respondent has been arrested on multiple occasions and has an extensive criminal record spanning over a decade.") (affirming immigration judge's decision).

At the same time, while Petitioner's criminal history is known, his history of incarceration on these charges is unclear. Some of his charges involved jail only "for

two or three days." Kelley Dec., Attachment C at 7. His longest period of incarceration appears to have been on home confinement, not in a penal institution. *Id.* Whatever the total, Respondents do not dispute that Petitioner's periods of incarceration for the crimes that led to his removal totaled less than 20 months, which is the length of his current detention in immigration detention, *see* Kelley Dec., ¶ 4.

Therefore, this factor weighs in Petitioner's favor.

E. Petitioner's detention facility

Petitioner is detained at the Folkston ICE Processing Center. Kelley Dec., ¶ 4. He claims that his conditions are substantially the same as in a prison for criminal prisoners, and he supports this claim with specific allegations of fact in his Petition. *See generally* Doc. 1-2. When presented with similar allegations, this Court has previously found this *Sopo* factor to weigh in a petitioner's favor. *See Lewis v. Greenwalt*, No. 5:21-cv-45, (S.D. Ga. Feb. 3, 2022) (Doc. 20 at 12); *Clue*, 2022 WL 17490505, at *6.

Therefore, this factor weighs in Petitioner's favor.

F. Likelihood of Petitioner's removal proceedings concluding soon

Petitioner does not even address this final factor. *See* Doc. 1, ¶ 64 (stating there are only five factors and mistakenly representing this Court's prior cases discuss only five factors). This Court has consistently found a *Sopo* analysis to involve six factors. *See, e.g., Dorley*, 2023 WL 3620760, at *4; *Clue*, 2022 WL 17490505, at *4. Since Petitioner fails even to argue that this final factor weighs in his favor, the Court should find that it weighs in favor of Respondents.

In addition, Respondents have presented evidence that there is "a significant likelihood" that Petitioner's removal will occur in the reasonably foreseeable future. Kelley Dec., ¶ 10. Therefore, this factor weighs in favor of Respondents.

When considering the six *Sopo* factors, two weigh in Respondent's favor (the third and sixth), three weigh in Petitioner's favor (the first, fourth, and fifth), and one is neutral (the second). Petitioner thus falls short of establishing that the balance "tips" in his favor. Therefore, his request for a bond hearing should be denied, even under the *Sopo* analysis.

V. Even if this Court ordered Petitioner to receive a bond hearing, he should bear the burden of proof.

Even if this Court were to order a bond hearing pursuant to *Sopo*, Petitioner should bear the burden of proof at that hearing. He cites no authority on which this Court could reach any other conclusion—that is, Petitioner identifies no other courts who have shifted the burden to the government in a bond hearing about the detention of an alien detained pursuant to § 1231(a).

If this Court applies *Sopo* in the new context of § 1231(a) detention, it should continue to follow that case related to bond hearings. In that case, the Eleventh Circuit declined that petitioner's invitation to shift the burden of proof to the government, noting that this "would give criminal aliens a benefit that non-criminal aliens do not have." *Sopo*, 825 F.3d at 1220. Thus, the Court of Appeals concluded that "the criminal alien carries the burden of proof and must show that he is not a flight risk or danger to others." *Id.* This Court has reached the same conclusion—again, in the i. *Aham v. Gartland*, No. 5:19-cv-46, 2020 WL 806929, at *3 n.3 (S.D.

Ga. Jan. 29, 2020) (Cheesbro, J.) ("Even where prolonged detention would warrant an individualized bond hearing, such as in the § 1226(c) context, the burden typically remains with the detainee . . . ")), *report and recommendation adopted*, No. 5:19-cv-46, 2020 WL 821005 (S.D. Ga. Feb. 18, 2020); *Duncan v. Gartland*, No. 5:19-cv-45, 2020 WL 812962, at *3 n.3 (S.D. Ga. Jan. 29, 2020) (Cheesbro, J.) (same), *report and recommendation adopted*, No. 5:19-cv-45, 2020 WL 820288 (S.D. Ga. Feb. 18, 2020).

Even if this Court had not already determined this issue, due process does not require the government to bear the burden of proof in a judicially created bond hearing for a criminal alien detained under § 1231(a). Petitioner cites no cases—not even persuasive authority from other districts—that require this outcome. The Constitution does not require the government to bear the burden of affirmatively proving that an alien is a flight risk or a danger when that alien has already been ordered removed.

Therefore, even if this Court orders a bond hearing for Petitioner, it should not shift the burden of proof to the government.

VI. Petitioner has been afforded custody reviews during his detention.

Petitioner's third claim is that he is entitled to relief under the "Accardi Doctrine." Doc. 1, ¶ 79. This doctrine originates from a habeas corpus petition that reached the Supreme Court, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). According to the Former Fifth Circuit, *Accardi* has stands for the proposition "that an executive officer who by regulation vests his discretionary authority in a subordinate thereby deprives himself of the power to make the decision himself." *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979).

Petitioner argues that ICE is required to conduct custody reviews during his detention. Doc. 1, ¶¶79-80. In fact, he claims that ICE has never conducted these reviews. *Id.*, ¶ 25. But argument is belied by Petitioner's own attachments. *See* Doc. 1-4. For example, on December 30, 2024, Petitioner's counsel made an express request for a custody review, which was then performed. *See id.* at 2.

Nor was this the only custody review Petitioner has received. In September 2023, after Petitioner had been detained for approximately 3 months, ICE conducted a custody review. Kelley Dec., ¶ 14. ICE determined to maintain Petitioner's custody because he was a flight risk. Kelley Dec., Attachment O. Petitioner was personally served with a copy of this notice. *Id.*

Therefore, this argument should be disregarded because ICE has, in fact, conducted custody reviews for Petitioner during his detention.

VII. Petitioner's complaints about the conditions of his confinement are not cognizable in a habeas petition.

A habeas petition allows a prisoner to challenge the legality or duration of his confinement. *Gomez v. United States*, 899 F.2d 1124, 1126-27 (11th Cir. 1990). It does not allow him to challenge anything else: "its sole function is to grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose." *Pierre v. United States*, 525 F.2d 933, 935-36 (5th Cir. 1976). In this circuit, the rule "is that any challenge to the Fact or Duration of a prisoner's confinement is properly treated as a habeas corpus matter, whereas challenges to conditions of confinement may proceed under § 1983 . . . ." *Johnson v. Hardy*, 601 F.2d 172, 174 (5th Cir. 1979). This standard limitation on habeas petitions has been routinely

echoed by this Court. *See, e.g., Hylander v. Warden, FCI Jesup*, No. 2:22-cv-44, 2023 WL 2169920, at *2 (S.D. Ga. Jan. 25, 2023) (Cheesbro, J.) ("He contests the conditions of his confinement, and such claims are not cognizable under § 2241."), *report and recommendation adopted,* No. 2:22-cv-44, 2023 WL 2167402 (S.D. Ga. Feb. 22, 2023); *see also Archilla v. Witte*, No. 4:20-cv-596, 2020 WL 2513648 (N.D. Ala. May 15, 2020) (finding that courts which allow habeas challenges to the conditions of confinement "simply ignore the plain language of the statute and centuries of habeas jurisprudence."). Nor is the Eleventh Circuit in the minority on this issue. *See Wilborn v. Mansukhani*, 795 F. App'x 157, 163 (4th Cir. 2019) ("Seven of the ten circuits that have addressed the issue in a published decision have concluded that claims challenging the conditions of confinement cannot be brought in a habeas petition." (citing cases)).

Here, Petitioner appears to suggest that his current conditions weigh in favor of his release. *See, e.g.*, Doc. 1, ¶¶ 26-27. These allegations are not the proper basis for a stand-alone habeas claim. Therefore, they should be disregarded by the Court in considering his habeas claim.

VIII. Petitioner's Motion for Preliminary Injunction should be denied.

Petitioner has also filed a Motion for Preliminary Injunction. Doc. 2. In the interests of judicial economy, Respondents provide their response in opposition along with the Response to the Petition and ask this Court to deny Petitioner any preliminary relief.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Because it is an extraordinary and drastic remedy, "its grant is the exception rather than the rule." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1284 (11th Cir. 1990) (noting that the chief function of a preliminary injunction is "to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated.").

The moving party bears the burden to establish the need for a preliminary injunction. To grand such "extraordinary relief," the court must find that the movant has established four essential elements: "(1) a likelihood of success on the merits of the overall case; (2) irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would cause the other litigants; and (4) the preliminary injunction would not be averse to the public interest." *Benavides v. Gartland*, No. 5:20-cv-46, 2020 WL 3839938, at *4 (S.D. Ga. July 8, 2020) (Wood, J.). A preliminary injunction should not be granted "unless the movant clearly established the burden of persuasion as to all four elements." *Horton v. City of Augustine, Fla.*, 272 F.3d 1318, 1326 (11th Cir. 2001) (quotation marks omitted). However, "where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020).

When a party seeks to change the status quo through an injunction, the injunction is a mandatory injunction. *See, e.g., Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484, 116 S. Ct. 1251, 1254 (1996) (outlining difference between mandatory and "prohibitory" injunctions). Mandatory injunctions are "particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *see also Fox v. City of W. Palm Beach*, 383 F.2d 189, 194 (5th Cir. 1967) ("There is no question but that mandatory injunctions are to be sparingly issued and upon a strong showing of necessity and upon equitable grounds which are clearly apparent."); *Wachovia Ins. Servs., Inc. v. Paddison*, No. 4:06-cv-83, 2006 WL 8435308, at *2 (S.D. Ga. Apr. 6, 2006) (Edenfield, J.) (noting that mandatory injunctions are subject to heightened scrutiny). Here, this Court should construe Petitioner's Motion as seeking a mandatory injunction, since Petitioner seeks a change in the current status quo of his detention, and it should give therefore that request heightened scrutiny and require him to meet that burden.

A. Petitioner is not likely to succeed on the merits.

As argued above, Petitioner is not likely to succeed on the merits of his habeas corpus petition, which is the only type of claim he has failed. First, he is detained pursuant to § 1231(a), which means he is not entitled to a bond hearing. Second, Petitioner is not likely to succeed on his *Zadvydas* claim because his removal is reasonably foreseeable. Third, *Sopo* does not apply to Petitioner's detention. Fourth, Respondents did not violate the APA, since custody reviews have been provided to

Petitioner. Finally, Petitioner's complaints about the conditions of his confinement are not cognizable under § 2241. Respondents incorporate their above arguments here.

Therefore, because Petitioner is not entitled to any relief, he is not likely to succeed on the merits of his claim. This alone is sufficient to deny his request for preliminary relief. *See Horton*, 272 F.3d at 1326.

B. Petitioner has not shown irreparable injury absent preliminary relief.

Petitioner asserts that he will suffer worsening health if an injunction is not granted. Doc. 2-1 at 8. His claim should be disregarded for several reasons.

First, not all of Petitioner's claims in his Motion for Preliminary Injunction are not supported by his own sworn declaration. For example, the Motion asserts that Petitioner cannot manage his diet "due to the prevalence of processed foods and lack of fruits and vegetables." Doc. 2-1 at 9. But his declaration does not describe the available food; it instead presents a conclusory assertion that it is "not suitable." Doc. 1-2, ¶ 14. The Motion claims that Petitioner's condition is "worsening," Doc. 2-1 at 8, but that allegation is not based on facts in Petitioner's declaration. The Motion asserts that Petitioner is "unable to exercise sufficiently," Doc. 2-1 at 9, but no claims related to exercise are made in the declaration. Finally, the Motion asserts that one of Petitioner's friends "was of a similar age and with similar conditions," *id.* (presumably diabetes or lack of exercise), and suggests this friend died as a result of those conditions. But the cited news release does not disclose a cause of death, and Petitioner's own declaration contains only speculation about why his friend died ("I

think he had a heart attack." Doc. 1-2, ¶ 16.). This sort of unsupported assertion in Petitioner's Motion—particularly those that contain medical assertions without testimony from medical professionals—should be disregarded.

Second, it is not accurate to suggest Petitioner has been without medical care while at Folkston. In fact, his own attachments to his Petition establish that he is receiving regular medical care. *See* Doc. 1-5. He has been provided numerous medications for his medical needs. *Id.* at 3. At Folkston, his vitals have been taken checked—including five checks in January 2025 alone. *Id.* at 5. There is therefore no support for the idea that ICE has not been treating Petitioner.

Finally, Petitioner fails to argue—let alone establish—that the relief he seeks will have an identifiable, imminent effect on his health. In other words, it appears that the medical needs Petitioner identifies will stay with him whether he is released or not. The Motion speculates that Petitioner's health will decline if he remains detained and goes so far to allege (without support) that he may even die. Doc. 2-1 at 8. But the entitlement to preliminary relief must show harm that is "neither remote nor speculative, but actual and imminent." *Pruitt*, 326 F. Supp. 3d at 1366 (quotations omitted).

In short, beyond unsupported conjecture about his future health, Petitioner has failed to establish that he is likely to suffer any specific, identifiable irreparable harm absent immediate release. Therefore, he has failed to establish this element.

C. Petitioner's requested relief is against the public interest.

An analysis of a motion for preliminary injunction ordinarily has four elements. However, "where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020). Therefore, the third and fourth factors—whether the injury outweighs the harm of an injunction, and whether the injunction is averse to public interest—are the same here.

Here, Petitioner's detention pending the appeal of the immigration judge's decision is in the public interest. Petitioner has multiple criminal convictions. Kelley Dec., Attachment B; *see also* Doc. 1, ¶ 18. ICE has also concluded that Petitioner is a flight risk. Kelley Dec., Attachment O. Further, Petitioner's request is for a release without security, *see* Doc.2-1 at 11, n.6, meaning that he is seeking a release without even the protections afforded the public interest at a bond hearing before the immigration judge.

Petitioner is not likely to succeed on the merits, he has failed to establish irreparable harm if he is not granted an injunction, and his release would be against the public interest. Therefore, this Court should deny the Motion for Preliminary Injunction.

CONCLUSION

For the reasons above, this Court should deny or dismiss the Petition and deny the Motion for Preliminary Injunction.

Respectfully submitted, this 24th day of February, 2025,

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