

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

DORIAN ABAD ABROSI,

Petitioner,

v.

WARDEN OF FOLKSTON ICE
PROCESSING CENTER, *et al.*

Respondents.

Case No. 5:25-cv-13

ORAL ARGUMENT REQUESTED

**PETITIONER'S REPLY TO RESPONSE TO HABEAS PETITION AND MOTION FOR
PRELIMINARY INJUNCTION**

The Government's response ignores several of Petitioner's arguments and exhibits, misstates facts, and distorts relevant case law. The Government concedes that Mr. Abad has been detained for an unreasonably prolonged period—20 months—without bond. The Government furthermore admits that it cannot currently remove Mr. Abad to Ecuador because an Immigration Judge (IJ) granted him protection from deportation there, and it entirely fails to address ICE's own data demonstrating that it is unable to remove non-citizens to alternative countries in virtually every case. And the Government does not contest that it failed to conduct at least three custody reviews required under ICE's own regulations and policies.

Based on these concessions alone, Mr. Abad is likely to prevail on all three of his claims for relief under the Due Process Clause, 8 U.S.C. § 1231(a)(6) as construed by *Zadvydas v. Davis*, 533 U.S. 678 (2001), and the Administrative Procedure Act (APA). Moreover, the likelihood he will suffer irreparable harm has increased even further due to his recent, erroneous transfer from Folkston ICE Processing Center ("Folkston") to the Federal Correctional Institute in Atlanta ("FCI

Atlanta”), and then back to Folkston a week later, which returned his diabetes metrics to dangerous levels and indicates that ICE is willing to send him anywhere in the country on a whim.¹ Therefore, this Court should grant the Temporary Restraining Order (TRO) or Preliminary Injunction (PI) and order Mr. Abad’s immediate release under appropriate conditions of supervision.²

Alternatively, this Court can proceed to adjudication of the habeas petition, as the Government has responded to the petition simultaneously with its response to the Motion for TRO or PI. *See* Resp. at 18.³ As a remedy, Mr. Abad seeks immediate release with conditions or, at a minimum, a bond hearing at which the Government bears the burden of proof to justify his continued detention by clear and convincing evidence.

ARGUMENT

A. This Court should order that Mr. Abad receive a bond hearing as a due process remedy to his prolonged detention without bond.

It is well-established in the Eleventh Circuit that prolonged immigration detention without a bond hearing violates the Due Process Clause. *See Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1212 (11th Cir. 2016), *vacated on other grounds*, 890 F.3d 952 (11th Cir. 2018); *Dorley v. Normand*,

¹ Mr. Abad’s assigned ICE officer was either unaware of this transfer or decided not to inform the Court about it. Mr. Abad was transferred to FCI Atlanta on February 18 and did not return until February 25. Ex. 12, Updated Declaration. Yet Officer Kelley’s declaration, signed and dated February 24, says “Petitioner is currently detained by ICE/ERO at Folkston Immigration Processing Center.” Dkt. No. 7-1 at ¶ 4.

² The Government illogically claims that service of the motion on Respondents’ counsel means the motion “should be treated solely as one for preliminary injunction.” Resp. at 2. But, as the case the Government cites makes clear, service of the motion merely “authorize[s] [the court] to issue a preliminary injunction.” *Coastal Logistics, Inc. v. Centerpoint Garden City, LLC*, No. 4:12-cv-294, 2013 WL 12140985, at *2 (S.D. Ga. Dec. 3, 2013). It does not take away the authority to grant a TRO. *See* Fed. R. Civ. P. 65. Indeed, Petitioner’s counsel served Respondents’ counsel because he indicated an AUSA would not be assigned and the Government would not respond to the motion absent service. In any case, granting a TRO or PI provides equivalent relief.

³ The Government asks the Court to “dismiss” the petition, Resp. at 1, 23, but the Government has not filed a Motion to Dismiss. Rather, the Government has filed what should be construed as a “Return” or “Traverse” to the habeas petition. *See* 28 U.S.C. § 2243-2248.

No. 5:22-cv-62, 2023 WL 3620760 (S.D. Ga. Apr. 3, 2023). The Government simplistically responds that Mr. Abad “is not entitled to a bond hearing. . . because he is detained under § 1231(a).” Resp. at 5. But 8 U.S.C. § 1226(c) similarly does not entitle a non-citizen to a bond hearing, yet courts use the *Sopo* factors to determine when due process demands one. The Government resists application of the *Sopo* factors to this case because they are traditionally applied in the context of § 1226(c) detention. But they articulate no logical basis for declining to apply the *Sopo* analysis to Mr. Abad, whose detention without bond during ongoing removal proceedings is functionally identical to that of a non-citizen detained under § 1226(c).

The Government cites a single, inapposite case for the proposition that *Sopo* never applies outside of the context of § 1226(c). See *Piton v. Warden, Folkston ICE Processing Ctr.*, No. 7:16-cv-162, 2018 WL 2056575 (M.D. Ga. Jan. 26, 2018). But that case dealt with a non-citizen with a final removal order who had no further proceedings; he was simply waiting to be removed. *Id.* at *1. The Court accordingly determined that *Zadvydas* was the proper test and denied the petition under that test. *Id.* at *2. Here, Mr. Abad has been in ongoing immigration proceedings for more than 20 months as he seeks protection from deportation. Indeed, he won such protection three months ago, and ICE is appealing the decision. Thus, his case can and should be analyzed under *Sopo*, which looks to relevant factors such as the length of detention, the reason for delay, and the likely outcome and duration of proceedings. See *Sopo*, 825 F.3d at 1218.

Courts in the Second, Third, and Tenth circuits have applied their circuit’s precedent on pre-order detention to cases of prolonged post-order detention under § 1231(a)(6). See, e.g., *Cabrera Galdamez v. Mayorkas*, No. 22-cv-9847, 2023 WL 1777310, at *4, *9 (S.D.N.Y. Feb. 6, 2023) (holding that 16-month detention under § 1231(a)(6) without bond hearing violated due process under *Velasco Lopez* factors); *Michelin v. Oddo*, No. 3:23-cv-22, 2023 WL 5044929, *6-

8 (W.D. Pa. Aug. 8, 2023) (holding that 18-month detention under § 1231(a)(6) without bond violated due process under *German Santos* factors); *Juarez v. Choate*, No. 1:24-cv-419, 2024 WL 1012912, at *6-8 (D. Colo. Mar. 8, 2024) (holding that two-year detention under § 1231(a)(6) without bond violated due process under *Singh* factors). The Government ignores this persuasive case law and provides this Court with no reason to depart from it. Indeed, the Supreme Court asked “lower courts” to consider these exact “as applied constitutional challenges . . . in the first instance.” *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). The aforementioned courts have taken up the Supreme Court’s invitation, and so should this Court.

The *Sopo* factors overwhelmingly favor Mr. Abad. Indeed, the Government concedes that the first factor—the length of detention, the fourth factor—comparison of civil and criminal detention, and the fifth factor—conditions of confinement—all favor Mr. Abad. *See Resp.* at 12-14. This alone is enough to grant relief to Mr. Abad. *See Clue v. Greenwalt*, No. 5:21-cv-80, 2022 WL 17490505, at *4 (S.D. Ga. Oct. 24, 2022) (finding that “[t]hree of these factors weigh in Clue’s favor” and therefore “Clue should have a bond hearing”). Moreover, contrary to the Government’s misleading arguments, the remaining factors also favor Mr. Abad.

The Government argues that the second factor—the reason for delay—is neutral, but it clearly favors Mr. Abad. The Government is uniquely responsible for the last three months of Mr. Abad’s detention because it appealed his grant of protection from November 2024. While ICE’s decision to appeal may not have been made in bad faith, ICE’s continued detention of Mr. Abad pending its appeal is certainly in bad faith. In Mr. Abad’s case, ICE has entirely failed to comply with its own policy requiring the Field Office Director to personally approve the continued detention of any non-citizen granted fear-based protection. *See Dkt. No. 1-8* (three ICE memorandums from 2004 to 2021 establishing and reiterating release policy). Stunningly, the

Government does not even attempt to explain its failure to comply with this policy, which mandates that non-citizens like Mr. Abad be released barring “exceptional circumstances.” Dkt. No. 1-8 at 4.⁴ ICE has not invoked any “exceptional circumstances” here. Indeed, the only purported basis for Mr. Abad’s current detention appears to be ICE’s 2023 determination that he is flight risk, which was made a full year before he was granted protection from deportation that evidently incentivizes him to remain in the United States with his family. Dkt. No. 7-1 at 113.

The Government also argues that the third factor favors Respondents. Resp. at 12. But this factor asks whether ICE will be able to remove the non-citizen to their country of origin in the event of a final removal order. In this case, Mr. Abad already has a removal order to his country of origin—Ecuador—but an IJ blocked his deportation there due to the high risk he would be persecuted on account of his political opinion. Thus, it is not possible for ICE to remove Mr. Abad to Ecuador, and the Government has provided no evidence to suggest it could remove him to alternative countries, as it fails to do in virtually every case. *See* Dkt. No. 1-7; *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2295 (2021) (“Only 1.6% of noncitizens granted withholding-only relief were actually removed to an alternative country”). Therefore, the third factor favors Mr. Abad.

Finally, the Government claims that the sixth factor—the likelihood of removal proceedings concluding in the near future—favors Respondents simply because Petitioner did not make a specific argument on this factor. Resp. at 14. But this factor closely intersects with the others, and it evidently favors Mr. Abad. In the absence of a specific indication that proceedings

⁴ The Government points to a “custody review” Mr. Abad allegedly received in December 2024. Resp. at 17. But this “custody review” consisted of Mr. Abad’s counsel asking an unnamed ICE officer if he would be released and the officer saying no, without reasoning. *See* Dkt. No. 1-4. The Atlanta Field Office Director did not approve Mr. Abad’s detention and ICE did not specify any “exceptional circumstances” justifying his detention. The Government does not claim otherwise.

will soon conclude, this Court has consistently found that the sixth factor favors the non-citizen. *See, e.g., Clue*, 2022 WL 17490505, at *6 (S.D. Ga. Oct. 24, 2022) (“There is no indication Clue’s immigration proceedings or his detention in the ICE Facility will conclude in the near future. This factor weighs in Clue’s favor.”). ICE’s appeal of Mr. Abad’s grant of protection remains pending at the BIA, and the delay there is likely to be longer than ever now that the administration recently fired half of the BIA judges.⁵ Indeed, the Government’s own arguments indicate that Mr. Abad’s detention is likely to continue, because it insists that ICE would keep Mr. Abad detained and pursue his removal to an alternative country, however fruitlessly, even if the BIA dismisses ICE’s appeal. *Resp.* at 8 (“The result will be that the government will seek to achieve his removal to some other country.”). Thus, the sixth factor favors Mr. Abad, and absent this Court’s intervention, Mr. Abad will stay detained for many more months or years despite winning his case.

If this Court determines that Mr. Abad is likely to prevail on his due process claim, it should order his release during the pendency of the habeas petition. *See Lucas v. Hadden*, 790 F.2d 365, 367 (3d Cir. 1986) (finding bail pending resolution of habeas petition appropriate where the “habeas petitioner (1) make[s] out a clear case for habeas relief on the law and facts, or (2) establish[es] that exceptional circumstances exist warranting special treatment, or both.”). Alternatively, it can proceed to full adjudication of the due process claim and order a bond hearing as a habeas remedy.

⁵ Law 360, *Trump Admin to Nearly Halve Immigration Appeals Board* (Feb. 20, 2025) <https://immigrationcourtside.com/wp-content/uploads/2025/02/Trump-Admin-To-Nearly-Halve-Immigration-Appeals-Board-Law360.pdf>.

B. The Government does not dispute that it failed to conduct several required custody reviews and has therefore violated the APA under the *Accardi* doctrine.

The Government dismisses Mr. Abad's *Accardi* claim while simultaneously failing to dispute the factual basis on which that claim rests. It merely claims that "ICE has, in fact, conducted custody reviews for Petitioner during his detention." Resp. at 17. But this meager response misrepresents what Petitioner alleges, which is that ICE has failed to timely and adequately conduct *specific* custody reviews required by ICE's regulations and policies.

First, Petitioner alleged that ICE failed to properly review his custody under 8 C.F.R. § 241.4, which governs periodic custody reviews for non-citizens with final removal orders. Specifically, ICE had a clear regulatory obligation to conduct a post-order custody review at 90 days of detention, again at 180 days of detention, and a third time at 540 days of detention. 8 C.F.R. § 241.4(k)(2)(ii)-(iii). For these custody reviews, non-citizens are entitled to submit evidence in support of release and to be interviewed, at least in advance of the 180-day review. Apparently, ICE did conduct the 90-day review, two months after it was due. Dkt. No. 7-1 at 114 (signed by Deputy Field Office Director on November 21, 2023). But the Government does not even claim that it conducted the 180-day review, which must be performed by ICE Headquarters following a personal interview, nor has ICE conducted the 540-day review.⁶ This is an inexcusable regulatory violation, and the Government does not even attempt to excuse it.

Furthermore, as explained above, the Atlanta Field Office Director has at no point performed a custody review to determine whether Mr. Abad's detention after being granted fear-

⁶ On March 3, 2025, counsel for Petitioner received DHS' response to the FOIA request counsel filed on Mr. Abad's behalf on January 20, 2025. The nearly 2000 pages of documents constitutes Mr. Abad's DHS records, called an "A-file." Nowhere in these 2000 pages are there any custody decisions under 8 C.F.R. § 241.4, besides the 90-day custody decision from November 2023, which the Government provided as an exhibit in this case.

based protection is justified by “exceptional circumstances,” as required by ICE’s long-standing policy. *See* Dkt. No. 1-8 at 4. Again, the Government does not contend otherwise. This is a *per se* *Accardi* violation. *See* Ex. 13, Massenet R&R at 16-17 (finding that Government violated *Accardi* doctrine by failing to review petitioner’s custody under same ICE policy).

ICE’s failure to perform these required custody reviews is prejudicial to Mr. Abad because, if his custody was properly reviewed, it would likely lead to his release or at least provide a rationale for his continued detention. ICE has not articulated a basis for detaining Mr. Abad since it claimed he was a flight risk in November 2023. Dkt. No. 7-1 at 113. As explained above, ICE’s failure to periodically and thoroughly review Mr. Abda’s custody further exacerbates the due process problem raised by his prolonged detention without bond. *No one*, let alone a neutral arbiter, has evaluated whether Mr. Abad poses a danger or flight risk for a year and a half.⁷ Therefore, Mr. Abad asks this Court to at least order a bond hearing at which an IJ can make this evaluation.

C. The Government argues that Mr. Abad’s removal is foreseeable without identifying any concrete path toward removal.

The Government argues that as long as Mr. Abad’s removal is theoretically *possible*, he cannot meet the *Zadvydas* test. *See* Resp. at 7-8. But the Supreme Court rejected this exact argument in *Zadvydas*. 533 U.S. at 702 (“But this standard would seem to require [a non-citizen] seeking release to show the absence of *any* prospect of removal—no matter how unlikely or unforeseeable—which demands more than our reading of the statute can bear.”). Moreover, the Government’s argument is primarily premised on a hypothetical scenario—that the BIA will outright reverse the IJ’s grant of protection and order Mr. Abad removed to Ecuador. Resp. at 7-8

⁷ As explained in footnote 4, the December 2024 “custody review” consists of an unnamed ICE officer saying that Mr. Abad would stay detained because “the case falls within the current priorities set by the Department of Homeland Security.” Dkt. No. 1-4 at 2. This is not a replacement for the specific reviews ICE was obligated to conduct.

(“If Petitioner loses the appeal, the result will be that he is removed specifically to Ecuador.”). This is not only very unlikely, but it impermissibly turns *Zadvydas* into a conditional test. The question is not whether removal *will be* reasonably foreseeable to the extent some hypothetical event occurs, but rather whether removal *is* reasonably foreseeable in the current moment. *See Zadvydas*, 533 U.S. at 702 (analyzing whether removal will occur “in the reasonably foreseeable future”); *Garcia Diaz v. Acuff*, 507 F. Supp. 3d 991, 997 (S.D. Ill. 2020) (“Because Garcia Diaz cannot be removed during the pendency of his withholding case, there is no significant likelihood that he will be removed in the reasonably foreseeable future.”).

The Government also emphasizes the theoretical possibility that Mr. Abad could be removed to an alternative country. But Mr. Abad provided evidence that this has historically occurred in only a tiny fraction of cases, *see* Dkt. No. 1-7; *Garcia Diaz*, 507 F. Supp. 3d at 996-97 (finding non-citizen’s removal not reasonably foreseeable where “the likelihood of his removal to a third country is slim based on the small number of such cases . . .”), which the Government simply ignores. Resp. at 7 (“H[e] gives no support for this . . .”).⁸ The Government has provided no competing evidence to suggest that ICE is able to remove Ecuadorian citizens to alternative countries, nor does it even state to which countries he *might* be deported. *See Zadvydas*, 533 U.S. at 701 (“[O]nce the [non-citizen] provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.”). If the Government can meet this burden simply by

⁸ Petitioner concedes that he mistakenly cited to Ex. 5, Dkt. No. 1-6, instead of Ex. 6, Dkt. No. 1-7 in two places in the petition, but this error should have been apparent to the Government. Moreover, the Government ignores the 1.6% removal rate in FY 2017, noted in *Guzman Chavez* and cited in the petition. 141 S. Ct. at 2295.

speculating that a non-citizen could possibly be removed to any of the nearly 200 countries in the world, this would render the *Zadvydas* test meaningless.

The Government cites *Castaneda v. Perry*, 95 F.4th 750, 758 (4th Cir. 2024) in support of its position, but that out-of-circuit case is evidently distinguishable. The non-citizen in *Castaneda* did not have an active grant of protection from deportation at the time the Fourth Circuit rendered its decision. Thus, the Court concluded that he was relying on “ongoing withholding-only proceedings alone . . . to demonstrate that removal is no longer reasonably foreseeable.” *Id.* at 758. The Government attempts to construe Mr. Abad’s claim as the same, but it is not. Mr. Abad argues that his removal is not reasonably foreseeable because he currently has a grant of protection from removal to Ecuador, and that is the only country to which he could realistically be removed. This *Zadvydas* claim is unique and substantially stronger than one from a non-citizen seeking release “because *he* has a pending appeal,” Resp. at 7 (emphasis added), which this Court would presumably reject.

If this Court finds that Mr. Abad’s removal is not reasonably foreseeable under *Zadvydas*, or that Mr. Abad’s has shown a likelihood of success on this claim sufficient to grant a TRO or PI, it should order Mr. Abad’s immediate release from custody. *See Zadvydas*, 533 U.S. at 699-700 (“[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”). ICE can release him on an Order of Supervision, as it routinely does for non-citizens granted withholding of removal. *See* Dkt. No. 1-11. And Mr. Abad can be released into the custody of his brother-in-law, who is a U.S. citizen with a stable residence and employment. Dkt. No. 1-12.

D. Mr. Abad has demonstrated irreparable harm warranting urgent relief.

As argued above, Mr. Abad has shown a sufficient likelihood of success on any and all of his three claims for relief. He has also demonstrated a sufficient likelihood of irreparable harm

absent relief, and this risk has increased even further due to the Government's recent actions.⁹ Two weeks ago, ICE erroneously transferred Mr. Abad from Folkston to FCI Atlanta. Ex. 12 at ¶ 3. He was shackled the entire journey and then put in a cell alongside people serving federal criminal sentences. *Id.* at ¶ 4. For the week Mr. Abad was at FCI Atlanta, he did not receive many of his required medications and did not see a doctor. *Id.* at ¶ 5. By the time Mr. Abad returned to Folkston, his blood sugar was 341 mg/dl, which is dangerously high and can lead to heart attack or stroke. *Id.* at ¶ 7.¹⁰ This transfer not only poses an imminent risk to his current health but also suggests that he could be arbitrarily transferred again and go through the same ordeal at any point. The Government calls Mr. Abad's claims "unsupported conjecture" while offering no evidence to counter the medical documentation, medical study, and sworn declaration provided by Mr. Abad demonstrating that he is at high risk of serious illness or death in ICE custody. *See* Dkt. No. 1-2; 1-5; 1-9; 1-10.

Meanwhile, the Government ignores the fact that medical harm is not the only irreparable harm Mr. Abad alleges. To the extent that this Court deems insufficient Mr. Abad's risk of serious illness or death, it should also consider the irreparable harm imposed by the ongoing violation of Mr. Abad's constitutional right to liberty. *See Gayle v. Meade*, 614 F. Supp. 3d 1175, 1205 (S.D. Fla. 2020) ("Petitioners establish irreparable harm by alleging a deprivation of constitutional right"); *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007) (finding irreparable harm where plaintiff "would be deprived of fundamental constitutional right to marry"). And if this Court still deems the combination of medical and constitutional harm to be insufficient to grant a

⁹ Due to the transfer and delays at the facility, Mr. Abad has not yet been able to obtain updated medical records from the last month. Counsel is working to obtain them.

¹⁰ WebMD, *Dangers of Uncontrolled Blood Sugar* (June 3, 2024) <https://www.webmd.com/diabetes/uncontrolled-blood-sugar-risks>.

TRO or PI, it can proceed to full adjudication of the habeas petition, for which briefing is now complete.

E. If this Court orders a bond hearing, the Government must bear the burden of proof.

As a remedy to the due process violation posed by Mr. Abad's ongoing detention without bond, the Government must justify his continued detention at the court-ordered bond hearing. The Government falsely claims that "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)." Resp. at 15. In fact, at least three courts have expressly placed the burden of proof on the Government as a remedy to prolonged detention under § 1231(a)(6). *See Juarez*, 2024 WL 1012912, at *8; *Michelin*, 2023 WL 5044929, at *8; *Cabrera Galdamez*, 2023 WL 1777310, at *9. Recognizing that this Court typically declines to dictate the burden of proof at court-ordered bond hearings, Mr. Abad asks that it do so here in accordance with this persuasive caselaw and given the unique circumstances, including the fact that Mr. Abad has already won protection from removal.

CONCLUSION

The Government argues that the *Sopo* analysis cannot be applied to people like Mr. Abad who have a reinstated removal order, but then simultaneously argues that the *Zadvydas* framework cannot be applied to people like Mr. Abad who are in ongoing proceedings seeking relief from removal. The Government cannot have it both ways and it does not have unfettered authority to detain Mr. Abad for as long as it pleases. The Constitution forbids arbitrary civil detention that is not reasonably related to its purpose. To stop the ongoing constitutional violation, Mr. Abad requests that this Court order his immediate release with appropriate conditions, or at least a constitutionally adequate bond hearing.

DATED: March 5, 2025

/s/ Felix A. Montanez

Felix A. Montanez, Esq.
Preferential Option Law Offices, LLC
P.O. Box 60208
Savannah, GA 31420
Tel: (912) 604-5801
Felix.montanez@preferentialoption.com
Local Counsel

Respectfully submitted,

/s/ Ian Austin Rose

Ian Austin Rose, Esq.
Amica Center for Immigrant Rights
1025 Connecticut Ave. NW, Ste. 701
Washington, DC 20036
Tel: (202) 788-2509
Austin.rose@amicacenter.org
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that on this date, I uploaded the foregoing Reply brief to the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

Dated: March 5, 2025

Respectfully submitted,

/s/ Felix Montanez