IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

J.G.,

Petitioner,

v.

WARDEN, IRWIN COUNTY DETENTION CENTER, *et al*.,

Defendant.

Civil Case No.: 7:20-CV-93 (HL)

ORDER

This case is before the Court on the Recommendation of United States Magistrate Judge Stephen Hyles regarding Petitioner Jinxu Gao's habeas application. (Doc. 30). The Magistrate Judge recommends dismissing each of Petitioner's habeas claims. (*Id.*). Petitioner timely objected to the Magistrate Judge's Recommendation. (Doc. 31). On October 29, 2020, this Court held oral argument via Zoom concerning Petitioner's objections. (Docs. 36, 37). The Court examined the record in this case, and with the benefit of oral argument, made a *de novo* review of the Recommendation. The Court concludes that placing the burden of proof on Petitioner at his bond hearing violated the Fifth Amendment's

Due Process Clause.[1] Accordingly, the Court rejects the Recommendation and **GRANTS in part** Petitioner's application for habeas relief.

I. FACTUAL BACKGROUND

Petitioner does not object to the Recommendation's factual findings. The Court adopts the Recommendation's background and will briefly summarize the facts here. Petitioner is a 52-year-old citizen of the People's Republic of China. He was admitted to the United States legally on a valid B-1 visa as a temporary visitor conducting business. His visa expired on October 18, 2014, and he continued to reside in the United States unlawfully. On December 2, 2018, a U.S. Immigration and Customs Enforcement ("ICE") officer took Petitioner into custody following a traffic offense.

Petitioner received a bond hearing before an immigration judge ("IJ") at the Atlanta Immigration Court on January 22, 2019. (Doc. 1-7, p. 2). The IJ denied bond, finding that Petitioner failed to meet his burden to demonstrate that he was not a flight risk. (*Id.* at p. 5). The IJ's decision was based solely on risk of flight; the IJ did not suggest that Petitioner posed a danger to the community. (*Id.*).

During the same time Petitioner sought release on bond, his asylum application was also under review. He filed his application for asylum on January 8, 2019. That application was denied on February 15, 2019, and the IJ ordered

[1] Petitioner raised several other claims in his habeas application. (Doc. 1). Because the Court finds Petitioner was entitled to relief regarding his due process claim, it will not discuss Petitioner's other arguments.

Petitioner to be removed to China. Petitioner appealed the denial of his asylum application to the Board of Immigration Appeals ("BIA"). On August 9, 2019, the BIA affirmed in part and reversed in part the IJ's denial of Petitioner's asylum application. (Doc. 1-3). The BIA remanded the case to the IJ for further proceedings. (*Id.*).

On February 14, 2020, Petitioner filed a motion for a bond redetermination hearing, arguing that the remand from the BIA materially changed his circumstances. An IJ rejected this argument and denied Petitioner's motion for a second bond hearing. (Doc. 1-9).

In accordance with the BIA's decision to remand Petitioner's asylum application, an IJ conducted evidentiary hearings. On April 10, 2020, his asylum application was denied, and an IJ again ordered him to be removed to China. (Doc. 1-4, p. 13). Petitioner appealed this decision to the BIA on May 8, 2020. (Doc. 1-5). His appeal is currently pending. Throughout the immigration proceedings, ICE detained Petitioner at Irwin County Detention Center. Petitioner never received a subsequent bond hearing after his initial request for bond was denied nearly two years ago.

II. DISCUSSION

Petitioner claims he never received a constitutional bond hearing because allocating the burden of proof to noncitizens to demonstrate whether they are a flight risk or danger to the community violates due process. The

Recommendation concluded that the available immigration bond procedures afforded Petitioner a meaningful opportunity to be heard. Petitioner objects to the Recommendation's analysis.

The Due Process clause establishes that "[n]o person shall be . . . deprived of . . . liberty . . . without due process of law." U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). But an individual's "liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). "[A]n individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context." *Id.*

Civil detention during removal proceedings is authorized by federal law and generally permitted under the Constitution. *See Demore v. Kim*, 538 U.S. 510, 523 (2003). Limitations like the Due Process Clause, however, restrict the Government's power to detain noncitizens. *Id.*; *see Frech v. U.S. Att'y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) ("It is well settled that individuals in deportation proceedings are entitled to due process of law under the Fifth Amendment." (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Courts must review immigration procedures and ensure that they comport with the Constitution—notwithstanding the fact that "Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore,* 538 U.S. at 521; *see id.* at 547 n.9

(Souter, J., concurring in part and dissenting in part) ("The statement that . . . 'Congress regularly makes rules that would be unacceptable if applied to citizens' cannot be read to leave limitations on the liberty of aliens unreviewable." (citation omitted)); *see also Zadvydas*, 533 U.S. at 695 ("Congress has 'plenary power' to create immigration law, . . . [b]ut that power is subject to important constitutional limitations."). Petitioner's habeas claim asserts that the Government's immigration bond procedure is unconstitutional. Specifically, he argues that allocating the burden of proof to the noncitizen to determine his release or detention pending removability proceedings violates the Due Process Clause.

A. Immigration Bond Under § 1226(a)

The Government is detaining Petitioner as a non-criminal noncitizen awaiting a final decision as to whether the Government will order him to be removed. The statute authorizing Petitioner's detention is 8 U.S.C. § 1226(a).[2] Under § 1226(a), detention is discretionary; an IJ may release a noncitizen on bond during this period pending resolution of removal proceedings. The IJ may also set conditions of release such as subjecting the noncitizen to electronic monitoring. 8 U.S.C. § 1226(a)(2). Finally, the IJ may choose to detain a noncitizen pending resolution of removal proceedings. 8 U.S.C. § 1226(a)(1).

[2] This section applies equally to noncitizens who have not received an order of removal and noncitizens like Petitioner who are appealing an order of removal to the BIA. *See* 8 C.F.R. § 1241.1 (describing when an order of removal becomes final).

The statute provides no guidance as to how IJs make discretionary bond determinations. Section 1226(a) is silent as to whether the Government or the noncitizen bears the burden of proof. To fill this gap, the BIA adopted 8 C.F.R. § 236.1(c)(8)'s standard for release. *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999). The regulation, promulgated by the Immigration and Naturalization Service ("INS"), allows "[a]ny officer authorized to issue a warrant of arrest" to release the noncitizen provided that he "must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that [he] is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). The noncitizen carries the burden to prove that he is not a flight risk or danger to the community, and the standard of proof is "to the satisfaction of the officer" executing the arrest warrant. *Id.*

The regulation applies only to officials issuing arrest warrants for immigration violations. *Id.*; 8 C.F.R. §§ 236.1(b), 287.5(e)(2). As written, this regulation does not apply to IJs determining release at bond hearings. *See Matter of Adeniji*, 22 I. & N. Dec. at 1112 ("An Immigration Judge is not authorized to issue a warrant of arrest."). Nevertheless, the BIA concluded that 8 C.F.R. § 236.1(c)(8) provided the appropriate standard "for ordinary bond determinations" under 8 U.S.C. § 1226(a). *Matter of Adeniji*, 22 I. & N. Dec. at 1113. Thus, at a § 1226(a) bond hearing, a noncitizen must demonstrate that his release would not pose a danger to the community and that he is likely to appear

"even though [§ 1226(a)] does not explicitly contain such [] requirement[s]." *Matter of Adeniji*, 22 I. & N. Dec. at 1113. The BIA has repeatedly applied this burden of proof in subsequent opinions. *See, e.g.*, *Matter of Fatahi*, 26 I. & N. Dec. 791, 795 n.3 (B.I.A. 2016); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

The statutory background provides context for the issue ultimately before this Court: whether the procedures employed at Petitioner's bond hearing satisfied due process, and what—if any—additional procedural protections are necessary. Neither the Supreme Court nor the Eleventh Circuit have resolved this issue.[3] Other courts around the country that have considered the burden of proof at immigration bond hearings are split. The Third Circuit stated it "perceive[d] no problem" with noncitizens bearing the burden of proof under § 1226(a). *Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 279 (3d Cir. 2018).[4] The Ninth Circuit found that noncitizens detained under § 1226(a)

[3] The Recommendation and the Government both cite to *Sopo v. United States Attorney General*, 825 F.3d 1199 (11th Cir. 2016) for support. The Eleventh Circuit vacated this opinion in 2018; it has no precedential value. *Sopo v. U.S. Att'y Gen.*, 890 F.3d 952, 954 (11th Cir. 2018). Furthermore, it did not resolve the present issue. *Sopo* asked whether due process required IJs to afford bond hearings to criminal noncitizens detained under 8 U.S.C. § 1226(c). 825 F.3d at 1202. The Eleventh Circuit was explicit that there was "no separate constitutional challenge . . . to the bond regulations . . . that apply to non-criminal aliens." *Id.* at 1219 n.10.

[4] For noncitizens detained for an unreasonable time under § 1226(c), however, the Third Circuit has "already held that the Government bears the burden of

are "entitled to release on bond unless the government establishes that he is a flight risk or will be a danger to the community." *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008) (internal quotation marks and citation omitted); *see Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) ("[T]he burden of establishing whether detention is justified falls on the government."). Most recently, the Second Circuit also concluded that placing the burden of proof on the government was proper. *Velasco Lopez v. Decker*, No. 19-2284-cv, 2020 WL 6278204, at *8–*9 (2d Cir. Oct. 27, 2020). This Court joins the Ninth and Second Circuits as well as "the overwhelming majority of district courts" that hold the Government must bear the burden of proof to justify a noncitizen's detention pending removal proceedings. *Hernandez-Lara v. Immigr. & Customs Enf't, Acting Dir.*, No. 19-cv-394-LM, 2019 WL 3340697, at *3 (D.N.H. July 25, 2019); *see, e.g.*, *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632, 646–47 (D. Md. 2020); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018).

B. *Mathews v. Eldridge* Test

The Court applies the *Mathews v. Eldridge* three-factor balancing test to evaluate the immigration bond procedure. 424 U.S. 319, 335 (1976). The three factors are: (1) "the private interest that will be affected by the official action"; (2)

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proof" when a court orders an individualized bond hearing. *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020).

"the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguard would entail." *Id.* Courts balance the private and governmental interests at stake to determine whether the procedures provided comply with the constitutional demands of due process. Ultimately, that balance requires courts to discern "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Id.* at 348; *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("[C]ourts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process . . . .").

1. Private Interest

Petitioner does not object to the Recommendation's finding that the "first factor weighs in Petitioner's favor." Nevertheless, it bears emphasizing: Petitioner's private interest at stake—freedom from physical incarceration—is a fundamental liberty interest. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he most elemental of liberty interests [is] the interest in being free from physical detention . . . ."). The Supreme Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)).

The Government tries to downplay Petitioner's liberty interest. It urges the Court to ignore non-immigration, civil confinement cases, claiming that they are inapplicable in the immigration context. This argument belies the fact that the Supreme Court regularly relies upon civil commitment cases to inform its due process analysis in immigration cases. *See Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80 and *Hendricks*, 521 U.S. at 356); *Demore*, 538 U.S. at 561 (Souter, J., concurring in part and dissenting in part) ("[T]he analytical framework set forth in *Salerno*, *Foucha*, *Hendricks*, *Jackson*, and other physical confinement cases applies . . . ."). Furthermore, the Supreme Court "is clear that commitment for *any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Foucha*, 504 U.S. at 80 (emphasis added) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). Thus, immigration detention is an extraordinary liberty deprivation that must be "carefully limited." *Salerno*, 481 U.S. at 755.

Petitioner has been incarcerated for nearly two years without a criminal conviction or final order of removal lodged against him. Rather, prolonged immigration proceedings have stalled his removal case. Petitioner's appeal of the denial of his asylum application is currently pending at the BIA. At oral argument before this Court, the Government surmised that the BIA likely requires an

additional year to resolve Petitioner's appeal and conclude his removal case.[5] (Doc. 37, pp. 47–48).

Petitioner has already experienced a severe liberty deprivation. Two years of immigration detention imitates the Government's punishment of individuals convicted of serious offenses. *See* 18 U.S.C. § 3156(a)(2) ("'[F]elony' means an offense punishable by a maximum term of imprisonment of more than one year . . . ."); 18 U.S.C. § 924(e)(2)(B) ("'[V]iolent felony' means any crime punishable by imprisonment for a term exceeding one year . . . ."); 18 U.S.C. § 3559(a). Petitioner now faces a third year of incarceration—though the Government has "no . . . punitive interest" in civil confinement, and he "may not be punished." *Foucha*, 504 U.S. at 80. The first *Mathews* factor weighs heavily in Petitioner's favor.

2. Risk of Erroneous Deprivation

Petitioner objects to the Recommendation's finding that the second *Mathews* factor favors the Government. This factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. "[A]t this stage in the *Mathews* calculus, [the Court]

[5] The Court asked the Government to "guess" how much longer Petitioner's removal proceedings would continue. (Doc. 37, pp. 47–48). The Government responded that the proceedings would take a year to complete and added that proceedings could continue for a longer or shorter amount of time, depending on the posture of Petitioner's case following a decision from the BIA. (*Id.*).

consider[s] the interest of the *erroneously* detained individual." *Hamdi*, 542 U.S. at 529.

The risk of an erroneous deprivation under the bond procedure is high. The current scheme places the onus on noncitizens who are incarcerated to gather and present evidence regarding their flight risk or potential danger. Incarceration restricts the noncitizen's ability to communicate with attorneys, family members, or other individuals who may present testimony or have access to the noncitizen's records. Limited resources and investigative tools increase the likelihood that the factual record developed at the bond hearing will be incomplete. An incomplete record creates a considerable risk of error in the IJ's findings and impairs the BIA's ability to correct erroneous deprivations.

The Government is not required to present a shred of evidence, yet it has substantial resources available. Federal law requires the Government to collect and maintain immigration data. *See, e.g.*, 8 U.S.C. §§ 1365a, 1376, 1377, 1377a, 1378, 1378a, 1226(d); *see also* 8 C.F.R. § 103.16(a). Federal law also ensures that ICE, DHS, and the Department of Justice ("DOJ") share information through interagency databases.[6] *See, e.g.*, 8 U.S.C. §§ 1360, 1722. The Government is

[6] DHS maintains several databases that contain immigration records documenting removals, arrests, detentions, naturalization applications, and noncitizen status information. *See Split Rail Fence Co. v. United States*, 852 F.3d 1228, 1241–42 (10th Cir. 2017) (describing various databases that DHS operates).

not limited to federal resources. State and local authorities may cooperate and share their information with federal agencies. 8 U.S.C. §§ 1373, 1357(g).

Not all information available to the Government is publicly accessible, or it would be difficult to obtain promptly. *See, e.g.*, 8 U.S.C. §§ 1722(a)(5)–(6), 1229a(b)(4)(B). As Petitioner argued before this Court, noncitizens seeking immigration records other than their own generally cannot access them without a request under the Freedom of Information Act ("FOIA"). Even when a FOIA request is made, the Government can block disclosure of immigration documents under FOIA's exemptions. 5 U.S.C. § 552(b); *see, e.g.*, *Mezerhane de Schnapp v. U.S. Citizenship & Immigr. Servs.*, 67 F. Supp. 3d 95, 100 (D.D.C. 2014) (withholding immigration data under FOIA's law enforcement exemption).

The Government expends substantial resources tracking noncitizens and collecting their private information. It faces few obstacles in obtaining evidence required to demonstrate whether a noncitizen is a flight risk or danger to the community. Perhaps the Government lacked sufficient information when the ICE officer initially decided to detain Petitioner. But he was incarcerated over a month before he appeared before the IJ for his bond hearing. During that time, the Government had ample opportunity to gather, prepare, and present evidence concerning Petitioner's risk of flight.

The Government argues the current bond procedure is constitutionally sufficient because IJs have broad discretion to consider relevant information

when determining bond, and a noncitizen may seek further agency review at the BIA or a subsequent bond determination hearing. The fact that an IJ can consider any relevant evidence does little to ameliorate the challenges an incarcerated noncitizen faces in gathering and presenting evidence. If the noncitizen carries the burden of proof and is unable to present evidence, then the IJ's broad discretion is meaningless. Additionally, the review procedures do not sufficiently mitigate the risk of an erroneous deprivation because the administrative review process takes several months to conclude. *See Mathews*, 424 U.S. at 341–42 ("[T]he possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests." (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)). Petitioner was taken into ICE custody on December 2, 2018. The IJ denied his bond request on January 22, 2019; he appealed, and the BIA affirmed the IJ's denial of bond on August 7, 2019. This process took just over eight months—during which Petitioner experienced a significant liberty deprivation. Petitioner's experience is not unusual. He presented evidence showing that the BIA appeals process generally takes six months. (Doc. 1-6, p. 2).

The bond redetermination procedure also does not provide a meaningful opportunity to correct an erroneous deprivation. To receive a subsequent bond redetermination hearing, the noncitizen must first demonstrate that his "circumstances have changed materially." 8 C.F.R. § 1003.19(e); 8 C.F.R.

§ 236.1(d)(1). A showing of materially changed circumstances secures only a second bond *hearing*; it does not guarantee the noncitizen's release. The additional hurdle to prove materially changed circumstances makes relief more remote. And of course, not all erroneously deprived noncitizens will have access to this relief. Absent changed circumstances, a noncitizen will never receive a second bond hearing. This outcome befell Petitioner. The IJ concluded that his circumstances had not materially changed, so he never received another bond hearing. (Doc. 1-9, p. 2).

Even if a subsequent bond hearing is granted, an incarcerated noncitizen faces the same problems he encountered at his first bond hearing: lack of resources to prove his case. Appeal to the BIA following denial of bond redetermination potentially entails another six months of incarceration while awaiting the BIA's decision.

The immigration bond procedure and available administrative review do not abate the high risk of erroneous deprivation. Where the risk of erroneous deprivation is high, and the deprivation the individual faces is severe, then modest, additional procedural safeguards carry high value. Shifting the burden of proof underscores the importance of the IJ's decision and can reduce the chances that erroneous detentions will be ordered. *Addington v. Texas*, 441 U.S. 418, 426 (1979). The second *Mathews* factor weighs in Petitioner's favor.

3. Government Interest

The third *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Petitioner objects to the Recommendation's finding that this factor weighs "heavily" in favor of the Government. (Doc. 30, p. 7).

To comply with due process, the Government must point to "a special justification . . . [that] outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356). The Recommendation notes the Government's "interest in efficient administration of the immigration laws at the border." *Landon*, 459 U.S. at 34. While the Government's power over immigration law is probably at its height at the border, those government interests do not justify Petitioner's detention.

Supreme Court due process jurisprudence distinguishes between noncitizens seeking initial entry to the United States at the border and those who entered the country legally. *See Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S.Ct. 1959, 1982–83 (2020) (discussing the "century-old rule regarding the due process rights of an alien seeking initial entry"). "Any analysis

of the constitutional rights of [noncitizens] in the immigration context must begin by taking note of th[is] fundamental distinction . . . .” *Jean v. Nelson*, 727 F.2d 957, 967 (11th Cir. 1984). A noncitizen “seeking initial admission to the United States . . . has no constitutional rights regarding his application, for the power to admit or exclude [noncitizens] is a sovereign prerogative.” *Landon*, 459 U.S. at 32. In contrast, “once [a] [noncitizen] gains admission to our country . . . his constitutional status changes accordingly.” *Id.*; *see Thurasissigiam*, 140 S.Ct. at 1983 (“[A]n alien [detained at the border] has only those rights regarding admission that Congress has provided by statute. . . . [T]he Due Process Clause provides nothing more . . . .).

Petitioner was admitted to the United States legally and overstayed his previously-valid visa. He thus receives procedural protections not afforded to noncitizens seeking initial entry, and the Government’s interest in controlling admission of noncitizens at the border does not justify his detention. *See Zadvydas*, 533 U.S. at 695 (declining “to consider the political branches’ authority to control entry into the United States”).

Nonetheless, the Court recognizes that civil detention pending removal proceedings can serve the legitimate government interest of preventing noncitizens from fleeing the country. *Demore*, 538 U.S. at 528. Detention “prior to or during their removal proceedings . . . increas[es] the chance that, if ordered removed, the [noncitizens] will be successfully removed.” *Id.* On the other hand,

the Government has no interest in detaining a noncitizen who does not pose a flight risk. *See Addington*, 441 U.S. at 426 ("[T]he State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others."). And currently, whether Petitioner's detention is serving the Government's purpose of preventing him from absconding is unclear.[7]

The Government also has a strong interest in avoiding erroneous deprivations of liberty. Incarceration that serves no legitimate purpose wastes taxpayers' money[8] and hinders judicial efficiency.[9] *See Mathews*, 424 U.S. at

[7] *Demore* considered due process rights under 8 U.S.C. § 1226(c), which requires mandatory detention for noncitizens convicted of a crime. 538 U.S. at 527–28. The Supreme Court relied upon "evidence suggesting that permitting discretionary release . . . would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Id.* at 528; *see id.* at 519 ("Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings."). Neither party cites nor suggests at what rates *non-criminal* detainees, such as Petitioner, abscond pending their removal proceedings. *See id*. at 552 (Souter, J., concurring in part and dissenting in part) ("[D]etaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself.").

[8] According to ICE's estimates, immigration detention costs taxpayers approximately $134 per person, per day. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW 14 (2018). To date, Petitioner's incarceration has cost approximately $95,810.

[9] In 2018, the immigration courts received 91,291 bond matters, exceeding the previous year's bond statistics by nearly 13,000 matters. EXEC. OFFICE FOR IMMIGR. REV., DEP'T OF JUST., STATISTICS YEARBOOK 9 (2018). The number of bond matters before immigration courts has increased by over 30,000 since 2014. *Id.* In 2018, the BIA received 3,576 bond appeals. *Id.* at 36.

348 ("[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

Shifting the burden of proof to the Government would serve both the Government's interest in preventing noncitizens from absconding and limiting the resources expended on erroneous deprivations. As discussed above, ICE and DHS document noncitizens' private information and access records maintained by other federal agencies and local law enforcement departments. Funds saved by not housing noncitizens suffering erroneous liberty deprivations would likely outweigh the fiscal burdens of accessing and presenting evidence at a bond hearing. And conserving judicial resources may reduce the six-month delay in BIA decisions. The Government does not argue that the additional administrative burden would interfere with achieving its interests.

Weighing the Government's interests and finding the fiscal and administrative burdens to be minimal, the Court concludes that the third factor is neutral. It favors neither the Government nor Petitioner.

On balance, the Court concludes that Petitioner's incarceration—without the Government showing any evidence to justify it—violated Petitioner's right to due process of law. To address the violation, the Court orders a second bond hearing with the burden of proof placed on the Government. Shifting the burden to the Government is appropriate given the Constitutional interests at stake and the possible injury in the event of an erroneous deprivation. Furthermore, the

Supreme Court's due process principles support such a procedural requirement. *See, e.g.*, *Foucha*, 504 U.S. at 81–82 (concluding that Louisiana's "scheme of confinement" violated due process because "the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous"); *Addington*, 441 U.S. at 427 ("[T]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.").[10]

4. Standard of Proof

Having concluded that the Government must bear the burden of proof, the Court now turns to the appropriate standard of proof. "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Id.* at 423. As discussed above, civil confinement is a significant liberty deprivation. Accordingly, the Supreme Court assigns to the Government the "clear and convincing" standard of proof in civil confinement cases. *Id.* at 432–33; *Foucha*, 504 U.S. at 86. Circuit courts considering the standard of proof in the immigration bond context have also

[10] The Recommendation and the Government both cite to *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) for support. But it has no bearing on Petitioner's claims because the Supreme Court expressly declined to address the constitutional issues that are currently before this Court. *See id.* at 851 ("[T]he Court of Appeals . . . had no occasion to consider respondents' constitutional arguments on their merits. . . . [W]e do not reach those arguments.").

adopted the clear and convincing standard. *See Velasco Lopez*, 2020 WL 6278204, at *9–10 ("[C]lear and convincing standard was appropriate [at subsequent bond hearing]."); *Singh*, 638 F.3d at 1203 ("[T]he government must prove by clear and convincing evidence that an alien is a flight risk . . . to justify denial of bond . . . ."). This Court will do the same.

The clear and convincing standard strikes the appropriate balance between avoiding erroneous deprivations and detaining noncitizens who legitimately pose a flight risk. *See Addington*, 441 U.S. at 431 ("[Clear and convincing standard] strikes a fair balance between the rights of the individual and the legitimate concerns of the state."). In civil confinement cases, "due process places a heightened burden of proof on the State" because "the individual interests at stake are both particularly important and more substantial than mere loss of money." *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quotation marks and citation omitted). Therefore, the preponderance of the evidence standard typically assigned to resolve "monetary dispute[s] between private parties" is inappropriate. *Addington*, 441 U.S. at 423. In criminal cases, "our society imposes almost the entire risk of error upon itself" because the Government asserts its punitive interests. *Id.* at 424. The higher, reasonable doubt standard is also inappropriate for immigration bond procedure.

The Court concludes that an "intermediate standard," requiring clear and convincing evidence "reflects the value society places on [the] individual liberty"

at stake in immigration bond hearings. *Id.* at 424–25; *see also Woodby v. INS*, 385 U.S. 276, 284 (1966) (requiring a showing of "clear, unequivocal, and convincing evidence" before a "deportation order may be entered").

III. CONCLUSION

For the reasons discussed above, the Court rejects the Recommendation. (Doc. 30). Petitioner's application for habeas relief is **GRANTED**, in part. (Doc. 1). The Government is hereby **ORDERED** to take Petitioner before an IJ for an individualized bond hearing no later than November 30, 2020. At that hearing, in accordance with the Fifth Amendment's Due Process Clause, the Government shall bear the burden of demonstrating by clear and convincing evidence that Petitioner is either a danger to the community or a flight risk. If the Government fails to provide Petitioner with such a bond hearing within the 14-day period, the Government is **ORDERED** to release Petitioner immediately. The Government is hereby **ORDERED** to submit a joint status report to the Court on or before December 1, 2020. Petitioner's Motion for Expedited Discovery is **DISMISSED as moot** because the Court did not reach Petitioner's arguments concerning the IJs alleged legal error in ruling on his motion for bond redetermination. (Docs. 21, 21-1).

SO ORDERED, this 16th day of November, 2020.

s/ Hugh Lawson
HUGH LAWSON, SENIOR JUDGE

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