IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JHONATAN HERNANDEZ-PEREZ	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. CIV-25-1081-J
US IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*[1]	)	
	)	
	)	
Respondents.	)	

RESPONDENTS' OBJECTION TO THE REPORT AND RECOMMENDATION

In this immigration habeas case, Petitioner seeks immediate release from custody under the United States Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which held that once removal is no longer reasonably foreseeable, continued detention is no longer authorized by law.[2] On October 28, 2025, the Honorable United States Magistrate Judge Suzanne Mitchell issued a Report and Recommendation regarding Petitioner's Petition for a Writ of Habeas Corpus.[3] Judge Mitchell found that "Petitioner [had] made a prima facie showing there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,"[4] and recommended the Court "conditionally grant habeas corpus relief to Petitioner after a forty-five-day deferral period

[1] Pursuant to the Court's Order dated October 27, 2025, the case caption has changed.

[2] *Zadvydas*, 533 U.S. at 699.

[3] R&R (Doc. 18), *Hernandez-Perez v. U.S. Immigration and Customs Enforcement*, No. 25-1081-J, (W.D. Okla. Oct. 28, 2025) ("R&R").

[4] *Id.* at 10.

so that Respondents can provide the Court with additional information on the removal efforts."[5] The recommendation was further buttressed by a recommendation that an order should be entered enjoining Respondents from transferring Petitioner "until the Court resolves this action"[6]

Respondents respectfully object to the Report and Recommendation ("R&R") as specifically addressed below. Respondents further re-assert, adopt by reference, and do not waive the arguments presented in the Response in Opposition to Petitioner's Petition for Writ of Habeas Corpus for purposes of appellate review.[7]

Argument

I. Should the Court adopt the recommendation to "provide Petitioner a custody review determination," it should allow more than five days to do so.

The R&R recommends that the Court "[o]rder Respondents to provide Petitioner a custody review determination no later than five days after the adoption of this Report and Recommendation."[8] The R&R does not set forth a basis for its determination that five days is a sufficient amount of time to allow for the consideration of relevant information, although it accurately notes that Petitioner's 180-day custody review was completed recently, on October 9, 2025.[9] To start, it is unnecessary for the Court to Order Respondents to make this determination because, as noted in the Deportation Officer's Declaration, the

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[5] *Id.* at 2.

[6] *Id.* at 12.

[7] *See* Resp. in Opp'n to Pet.r's Pet. for Writ of Habeas Corpus ("Resp.") (Doc. 14).

[8] R&R at 10.

[9] *Id.* at 9.

final custody decision is already under review.[10] Should the Court order Respondents to make this determination, however, it should allow sufficient time for the Executive Associate Commissioner to "consider the recommendation and appropriate custody review materials and issue a custody determination."[11] Accordingly, Respondents request that should the Court determine it is appropriate to order such relief, it should allow 45 days within which to do so. Allowing 45 days would correspond to the R&R's recommendation to update the Court with information relevant to efforts to remove the Petitioner, should the Court adopt that recommendation.

II. The recommended injunctive relief—to order that no transfer can be made pending resolution of this matter—is jurisdictionally barred and runs afoul of executive discretion.

Congress has strictly defined district courts' jurisdiction to hear cases falling within the immigration statutory framework. For example, Section § 1252(a)(2)(B)(ii) provides that "[n]o court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is *specified under this subsection* to be in the discretion of the Attorney General or the Secretary of Homeland Security[.]"[12] That is, "§ 1252(a)(2)(B) bars judicial review of certain discretionary decisions of the Attorney General or the Secretary of Homeland Security."[13] And "[t]he phrase 'specified under this subchapter'" has been interpreted to mean

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[10] *See* Resp. at 9 n.42, 12.

[11] 8 C.F.R. § 241.4(i)(6).

[12] 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

[13] *Green v. Napolitano*, 627 F.3d 1341, 1343-44 (10th Cir. 2010).

"subchapter II of Chapter 12, 8 U.S.C. §§ 1151-1378."[14] The only question is thus whether a specific action has been Congressionally-defined as a discretionary *statutory* power, or not.[15]

Section 1231(g)(1) of title 8 is a discretionary statutory power. This section specifically states that "[t]he Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."[16] Cases challenging a petitioner's detention or removal confirm the Secretary possesses authority over the place of detention and is not reviewable.[17]

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[14] *Zafar v. United States Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006)

[15] *See Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011); *see also Zafar v*, 461 F.3d at 1360, *Bakran v. Sec'y United States Dep't of Homeland Sec.*, 894 F.3d 557, 562 (3d Cir. 2018).

[16] 8 U.S.C. § 1231(g)(1). The INA's statutory references to the Attorney General are "a legal artifact," and the term "Attorney General" should be read to mean the "Secretary of Homeland Security." *Awe v. Napolitano*, 494 F. App'x. 860, 862 n. 3 (10th Cir. 2012); *see also United States v. Sandoval*, 390 F.3d 1294, 1296 n. 2 (10th Cir. 2004) (noting that in March 2003 the Immigration and Naturalization Service "ceased to exist" as an agency within the Department of Justice, and that its functions were transferred to DHS)).

[17] *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (holding district court lacked jurisdiction to enjoin attorney general's discretionary transfer of noncitizens in a *Bivens* class action); *see also Sinclair v. Att'y Gen. of United States*, 198 F. App'x 218, 222 (3d Cir. 2006) (reaffirming attorney general's discretion under § 1231(g)(1) to determine place of detention), *Comm. Of Cent. Am. Refugees v. Immigr. & Naturalization Serv.*, 795 F.2d 1434, 1441 (9th Cir. 1986) (confirming that district court could not supervise attorney general's day-to-day discretion over detention placement); *Jane v. Rodriguez*, No. 20-5922, 2020 WL 10140953, at *2 (D.N.J. May 22, 2020) (recognizing DHS' discretion to detain and set detention locations and transfers during COVID-19); *Lway Mu v. Whitaker*, 18-cv-06924, 2019 WL 2373883, at *5 (W.D.N.Y. June 4, 2019) (declining to order DHS to house petitioner in a specific facility, citing § 1231(g)(1)); *Tercero v. Holder*, No. 12-cv-0246, 2012 WL 8667571, at *3 (D.N.M. Oct. 4, 2012) (court lacked jurisdiction under § 1231(g)(1) over attorney general's decision to detain noncitizens in New Mexico pending proceedings in Texas).

Here, the injunctive relief specifies that Petitioner is not to be transferred outside the district "until the Court resolves this action," which "would in effect grant Petitioner's request for a preliminary injunction."[18] But the decision on where to detain noncitizens pending removal is in the sole discretion of the Secretary of Homeland Security. Accordingly, any such order would run afoul of § 1231(g)(1).

Further, the recommended relief runs headlong into Title 8, Section 1252(g) of the United States Code, providing that courts lack jurisdiction to consider "any cause or claim by or on behalf of any alien arising from the decision or action by [DHS] to *commence* proceedings, *adjudicate* cases, or *execute* removal orders against any alien under this chapter." (emphasis added). The Tenth Circuit, in step with the Fifth Circuit, has held that "claims that clearly are included within the definition of 'arising from' . . . are those claims connected directly and immediately with a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.'"[19] And in *Namgyal Tsering v. U.S. Immigration & Customs Enforcement*, the Tenth Circuit declined jurisdiction, finding petitioner's due process claims brought in a habeas proceeding resulted from ICE's removal of him to Nepal in lieu of Tibet related directly and immediately to his removal order.[20] Here, the recommended relief would not only prohibit the Executive's exercise of authority but would prohibit Petitioner's transfer as well. Such

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[18] R&R at 12.

[19] *Namgyal Tsering v. U.S. Immigr. & Customs Enforcement*, 403 F. App'x 339, 343 (10th Cir. 2010) (quoting *Humphries v. Various Fed. USINS Employs.*, 164 F.3d 936, 943 (5th Cir. 1999)).

[20] *Id.*

an order that directly and immediately relates to Petitioner's removal order is thus jurisdictionally barred.

But in a practical sense, the recommendation to enjoin Respondents from transferring the Petitioner in order to "maintain the status quo" does not articulate how it would do so.[21] In other words, the R&R does not state why it is that Respondents could not comply with the other recommendations even should transfer occur. Each recommended directive would be able to be complied with no matter Petitioner's place of confinement.

Without abdicating responsibility to determine the lawfulness of an alien's continued detention, judicial review under *Zadvydas* "must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive" efforts to enforce the INA, "and the Nation's need to 'speak with one voice' in immigration matters."[22] Courts must give executive agencies "decisionmaking leeway in matters that invoke their expertise" and must "recognize Executive Branch primacy in foreign policy matters."[23] And "courts must 'listen with care when the Government's foreign policy judgments, including ... the status of repatriation negotiations, are at issue, and to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.'"[24] This is how

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[21] R&R at 13.

[22] *Zadvydas*, 533 U.S. at 700.

[23] *Id.*

[24] *Nguyen v. Noem*, --- F.Supp.3d ---, 2025 WL 2737803, at *3 (N.D. Tex. Aug. 10, 2025) (quoting *Zadvydas*, 533 U.S. at 700) (alterations by the district court).

Congress has set the statutory framework. The Court should not supplant it.

III. The R&R incorrectly found that Petitioner met his burden of showing that there is no significant likelihood of removal in the reasonably foreseeable future.

As the Supreme Court articulated in *Zadvydas*, "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[25] Critically, "the onus is on the alien to 'provide[] good reason to believe that there is no [such] likelihood' before 'the Government must respond with evidence sufficient to rebut that showing.'"[26]

The Report and Recommendation characterized Respondent's position as to the elapsed time between his detention and his filing as, "any delay is a simple delay."[27] But that was not the Respondents' position. Petitioner pointed to two facts to support a claim that there is no significant likelihood of removal in the reasonably foreseeable future. First, that he was granted a deferral under the Convention Against Torture and thus cannot be removed to his third country.[28] And second, that the 180-day "removal period" had passed and that removal to a third country to-date had been "not possible."[29] In other words, and

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[25] *Id.*

[26] *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004) (citing *Zadvydas*, 533 U.S. at 701); *Diop v. Gonzales*, 2007 WL 2080173, at *1 (W.D. Okla. July 18, 2007); *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001) ("*The burden is upon the alien to show that there is no reasonable likelihood of repatriation.*") (emphasis in original).

[27] R&R at 9.

[28] Mem. of Law in Support of Pet. Of Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 ("Mem. of Law") at 4, ¶ 11 (Doc. 2).

[29] *Id.*

as relevant to the Judge's assertion, Petitioner simply asserted his removal has not happened yet. But the caselaw makes clear that a petitioner must point to *more* than simply saying that it has not happened yet in order to meet his or her burden.[30] Thus, because Petitioner did nothing more than point to simple delay to say that his detention is unlawful, he cannot meet his burden under *Zadvydas*.

Moreover, the R&R did not address the Respondents' example of "more" that was articulated by the Honorable Judge Joe Heaton. In that case, the Court noted that "[a] petitioner must demonstrate the existence of either institutional barriers to repatriation to the country in question or barriers peculiar to the individual in question such that there is no significant likelihood of removal in the reasonably foreseeable future."[31] Petitioner failed to set out anything of that nature. Nor did he proffer that the delay was so "extraordinarily long as to trigger[, for example,] an inference that travel documents will likely never issue at all."[32] Because he has failed to explain institutional or personal barriers to removal, or show an inference that travel documents are likely to never issue, the Petition for a Writ of Habeas Corpus should be denied.

Conclusion

The Court should decline to adopt the Report and Recommendation. Petitioner has failed to make a showing under *Zadvydas* that there is no significant likelihood of removal

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[30] *See* Resp. at 9-10.

[31] *Al-Shewaily v. Mukasey*, No. 07-0946-HE, 2007 WL 4480773, at *5 (W.D. Okla. Dec. 18, 2007) (citing *Khan,* 194 F.Supp.2d at 1136-37).

[32] *Chen v. Banieke*, No. 15-2188 DSD/BRT, 2015 WL 4919889, at *4 (D. Minn. Aug. 11, 2015).

in the reasonably foreseeable future. Further, the Court should decline to adopt the recommendation regarding enjoining Petitioner's transfer, and allow 45 days for Respondents to comply with any directives regarding a custody review determination.

Dated: November 4, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

__X__ I hereby certify that on November 5, 2025, I served the attached document by U.S. Mail on the following, who is not a registered participant of the ECF System:

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