

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

WEI ZHANG,)	
Petitioner,)	
)	
v.)	Case No. CIV-25-1301-PRW
)	
PAMELA BONDI, ET AL.,)	
Respondents.)	

RESPONDENTS’ OBJECTION TO REPORT AND RECOMMENDATION

NOW COME Respondents Attorney General Pamela Bondi, Secretary of Homeland Security Kristi Noem, the United States Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), Acting ICE Director Todd M. Lyons, Acting Executive Associate Director for ICE Enforcement and Removal Operations (ERO) Marcos Charles, and Oklahoma City ICE Field Office Director Mark Siegel (collectively, the “Federal Respondents”), who object to Magistrate Judge Shon T. Erwin’s Report and Recommendation (R&R) [Doc. 16] insofar as it recommends that the Court grant Petitioner Wei Zhang habeas corpus relief and order his immediate release from custody. The Federal Respondents do not object to Magistrate Judge Erwin’s recommendation that the Court should decline to address Petitioner’s other claims, including his claims for injunctive and/or declaratory relief. R&R [Doc. 16] at 13. In support of their objection, the Federal Respondents respectfully submit the following:

Brief in Support of Objection

- I. Petitioner’s *Zadvydas* claim was premature when filed, so the Court should enter an order of dismissal without prejudice to refiling.**

On April 9, 2025, an Immigration Judge (IJ) found Petitioner removable under

Immigration and Nationality Act (INA) § 237(a)(2)(B)(i) and denied his requests for asylum, for withholding of removal, and for cancellation of removal. The IJ granted his request for deferral of removal under the Convention Against Torture (CAT). Response Att. 6 [Doc. 12-6] at 1-2.

Mr. Zhang appealed the order of removal to the Board of Immigration Appeals (BIA). The BIA dismissed his appeal on May 27, 2025. Petition [Doc. 1] at 1, ¶ 2.

When an alien is ordered removed, he is to be removed within a 90-day removal period. 8 U.S.C. § 1231(a)(1)(A). The removal period begins on the latest of the following: (i) the date the order of removal becomes administratively final; (ii) the date of a court's final order if a stay of the removal is ordered; or (iii) the date of release from non-immigration detention or confinement. *Id.*, § 1231(a)(1)(B).

An order of removal “shall become final upon dismissal of an appeal by the Board of Immigration Appeals[.]” 8 C.F.R. § 1241.31. Thus, the removal period in this case began on May 27, 2025, the date the BIA dismissed the appeal of the order of removal. *See* Petition [Doc. 1] at 1, ¶ 2 (“An appeal was filed and dismissed on May 27, 2025.”).

Certain aliens may be detained beyond the 90-day removal period, “namely, inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien ‘who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.’” *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (quoting 8 U.S.C. § 1231(a)(6)). Six months of post-removal-period detention is presumptively reasonable. After this six-month period, if the alien provides

good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must rebut that showing. The six-month presumption does not mean that every alien not removed must be released after six months; rather, “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.” *Id.* at 701.

“[T]he six-month presumptively reasonable period of post-removal detention under *Zadvydas* expired November 27, 2025.” R&R [Doc. 16] at 8. Mr. Zhang filed his § 2241 petition on November 3, 2025, and his habeas corpus claim clearly is premised on *Zadvydas*. See Petition [Doc. 1] at 16-20, ¶¶ 65-67, 69, 87 (citing and discussing *Zadvydas*).

The R&R correctly observes that “Petitioner’s *Zadvydas* claim was not ripe when filed,” but incorrectly recommends that the Court allow the case to proceed. R&R [Doc. 16] at 8, n. 5. “The question of whether a claim is ripe for review bears on a court’s subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution.” *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995). Because it involves a court’s power to hear a case, subject-matter jurisdiction “can never be forfeited or waived.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126-27 (10th Cir. 2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The objection that a federal court lacks subject-matter jurisdiction may be raised at any stage in the litigation, even after entry of judgment, by a party or the court *sua sponte*. *Arbaugh*, 546 U.S. at 506. If at any time a court determines that it lacks subject-matter jurisdiction, “the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

It is well established that a court’s jurisdiction “depends upon the state of things at the time of the action brought.” *Mollan v. Torrance*, 22 U.S. 537, 539 (1824). “Federal jurisdiction is determined based on the facts as they existed at the time the complaint was filed.” *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1223 (10th Cir. 2011) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n. 1 (1957)); see also *C&M Res., LLC v. Extraction Oil & Gas, Inc.*, 159 F.4th 755, 767 (10th Cir. 2025) (same); *Boulter v. Noble Energy Inc.*, No. 23-1118, 2024 WL 1526289, at *4, n. 4 (10th Cir. Apr. 9, 2024) (same).

Boulter in particular stands against the proposition that a claim can become ripe and be allowed to proceed *after* the operative complaint has been filed. In that case, complaints were dismissed without prejudice for lack of subject-matter jurisdiction for failure to exhaust administrative remedies as required by law. 2024 WL 1526289, at *1. While the appeal was pending, the appellants exhausted their administrative remedies, arguably curing their ripeness problem. Unpersuaded, the Tenth Circuit panel observed:

But “[f]ederal jurisdiction is determined based on the facts as they existed at the time the complaint was filed,” *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1223 (10th Cir. 2011), and when the instant complaint was filed, Appellants had not exhausted administrative remedies and accordingly did not plead as much. Appellants’ subsequent exhaustion of administrative remedies may well enable them to file another complaint that adequately alleges the existence of federal subject-matter jurisdiction, but it does not permit them to rewrite the operative complaint on appeal and overcome the application of issue preclusion to dismiss the same Appellants cannot cure the deficiencies in the operative complaint by exhausting administrative remedies *after* filing the operative complaint.

Id. at *4, n. 2 (emphasis in the original).

Since federal courts are courts of limited jurisdiction, there is a presumption against

federal jurisdiction, and the party invoking federal jurisdiction has the duty to establish that it exists. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). Mr. Zhang “believes his removal order became administratively final on April 9, 2025,” Petition [Doc. 1] at 1, ¶ 2,¹ but he is mistaken, and his mistaken belief does not establish jurisdiction. The removal order was administratively final on May 27, 2025, the date the BIA dismissed his appeal. 8 U.S.C. § 1231(a)(1)(A). When he filed suit on November 3, 2025, his habeas corpus claim under *Zadvydas* was not ripe, so the Court lacked jurisdiction.

The R&R cites three cases for the proposition that while Mr. Zhang’s *Zadvydas* claim “was not ripe when filed, it is now ripe.” R&R [Doc. 16] at 8, n. 5. Its reliance on *Momennia v. Bondi*, No. CIV-25-1067-J, 2025 WL 3011896 (W.D. Okla. Oct. 15, 2025), *report and recommendation adopted*, 2025 WL 3006045 (W.D. Okla. Oct. 27, 2025), is misplaced. *See id.* (observing that the claim in *Momennia* “ripened during the pendency of the case”). *Momennia* does not address the ripeness question in either its R&R or the order issued by the Honorable Bernard M. Jones.

Smith v. Barr, 444 F. Supp. 3d 1289 (N.D. Okla. 2020), is distinguishable. The petitioner in *Smith* challenged his detention as unconstitutional not only under *Zadvydas* but also under *Demore v. Kim*, 538 U.S. 510 (2003), and the parties disagreed whether the petitioner’s “pre-final order” detention was constitutional under *Demore*. 444 F. Supp. 3d at 1298. Regarding the *Zadvydas* claim, the Northern District of Oklahoma explained,

¹ *See also* Petition [Doc. 1] at 15, ¶ 62 (“Petitioner’s ‘removal period’ began when his order became administratively final, which *is believed* to have occurred on April 9, 2025, causing it to end 90 days later on July 8, 2025.”) (emphasis added).

“The Court agrees that any potential *Zadvydas* claim petitioner advances in his § 2241 petition was not ripe when he filed the petition and that it would be appropriate to dismiss his unripe *Zadvydas* claim without prejudice to refiling.” *Id.* at 1297.

Smith did not order outright dismissal of the action, explaining first that the petitioner challenged his detention “not only under *Zadvydas* but also under *Demore*.” *Id.* at 1298. Mr. Zhang challenges his “post-final order of removal detention” under *Zadvydas*. Petition [Doc. 1] at 16, ¶ 65. His pleading includes *Demore* only in a string cite to support the basic proposition, “Federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness or constitutionality of their detention.” *Id.* at 5-6, ¶ 23 (citing *Demore* and three other cases in support).

Procedurally, *Smith* is far different. The petitioner in *Smith* filed a motion for stay of removal in the United States Court of Appeals for the Second Circuit, and months later he filed his § 2241 petition in the United States District Court for the Southern District of New York, which (citing the petitioner’s transfer to the Moore Detention Center in Okmulgee) promptly transferred the habeas corpus case to the Eastern District of Oklahoma. The petitioner was transferred to a facility in Tulsa, prompting transfer of the habeas case to the Northern District of Oklahoma. Meanwhile, the Second Circuit granted the petitioner’s motion for stay of removal. 444 F. Supp. 3d at 1292-93.

The presumptively reasonable phase of the post-removal-period detention ended on March 31, 2019, but the detention continued for 130 more days before the Second Circuit granted his motion for stay of removal on August 8, 2019. “*On these facts*, petitioner arguably had a ripe constitutional claim under *Zadvydas* as of April 1, 2019, after he filed

the instant petition but well before briefing was complete.” *Id.* at 1298 (emphasis added).

In *Smith*, the respondents’ focus on the viability of the petitioner’s *Zadvydas* claim “ignore[d] the effect of the Second Circuit’s August 8, 2019 order granting petitioner’s motion for stay of removal.” *Id.* That action shifted the authority for the petitioner’s detention from § 1231(a) back to § 1226(c). “In short, because the Second Circuit granted a stay of removal, neither § 1231(a)(6) nor *Zadvydas* govern[ed]” the petitioner’s challenge to his detention in *Smith*. *Id.* at 1299.

Ultimately, the habeas relief ordered in *Smith* was far more limited than what Magistrate Judge Erwin recommends in this case. The Northern District of Oklahoma found that the petitioner’s detention was authorized by § 1226(c) but ordered an individualized bond hearing. It did not order his immediate release. *Id.* at 1304.

Nor should *Quang Minh Lien v. Sessions*, No. 18-CV-2146-WJM-SKC, 2018 WL 4853339 (D. Colo. Oct. 5, 2018), be read to allow Mr. Zhang’s claim to proceed. At issue was a motion for a preliminary injunction. The court denied the motion, finding that the petitioner did not meet his burden for injunctive relief, and in addition it ordered partial dismissal of the underlying habeas claim for lack of jurisdiction. *Id.* at *1.

Earlier, the court had denied a habeas petition “as unripe because he had not been detained for six months.” *Id.* at *2. In a separate action, the petitioner filed a new habeas petition with requests for a temporary restraining order and a preliminary injunction. The court *sua sponte* dismissed that portion of the habeas petition premised on alleged infirmities in the petitioner’s removal order. Addressing the preliminary injunction, the court addressed only the likelihood-of-success element. The petitioner, who was

represented by counsel, mis-interpreted his burden under *Zadvydas*, failed to show a likelihood of success on the merits, and offered only arguments to challenge the likelihood of his removal. *Id.* at *5. Rather than dismiss the petitioner's *second* action which, like the first, was filed before the expiration of the presumptively reasonable six-month period, the court allowed it to proceed. The alternative would be to dismiss the second petition, "only for Petitioner to re-file and pay another court-filing fee." *Id.* at 4, n. 2.

The court in *Quang Minh Lien* directed the parties to contact a magistrate judge's chambers to set a scheduling conference and for further proceedings as appropriate. *Id.* at *6. The court's docket shows that a scheduling conference was set for October 23, 2018, but a stipulation of dismissal was filed on October 22, 2018.

Magistrate Judge Erwin's R&R does not address this Court's findings and decision in *Al-Shewaily v. Mukasey*, No. CIV-07-0946-HE, 2007 WL 4480773 (W.D. Okla. Dec. 18, 2007). In that § 2241 habeas case brought pursuant to *Zadvydas*, Magistrate Judge Bana Roberts found that the petition was filed prematurely. *Id.* at *3. The petitioner had been in post-removal-order custody for less than the six-month presumptively reasonable period when he filed his petition, prompting Magistrate Judge Roberts to find, "Thus, Petitioner's habeas petition seeking relief under *Zadvydas* is premature and fails to state a *prima facie* claim for habeas relief." *Id.* at *4. The petitioner responded but did not object, so Judge Joe Heaton adopted the R&R and ordered the case dismissed. *Id.* at *1.

The Northern District of Texas similarly has explained, "In order for an alien to establish a *prima facie* claim for habeas relief under the *Zadvydas* rationale, ... he must first establish that he has been in post-removal order custody for more than six months at

the time the habeas petition is filed.” *Saeku v. Johnson*, No. 1:16-CV-155-O, 2017 WL 4075058, at *3 (N.D. Tex. Sept. 14, 2017). In another case, that court found, “Petitioner cannot make the necessary showings to be entitled to relief under *Zadvydas*. First, he cannot show that he was in post-removal custody for six months prior to filing the habeas petition in this case.” *Apau v. Ashcroft*, No. 3:02-CV-2652-D, 2003 WL 21801154, at *2 (N.D. Tex. June 17, 2003).

The Eleventh Circuit Court of Appeals has addressed the ripeness issue, finding, “This six-month period ... must have expired at the time Akinwale’s § 2241 petition was filed in order to state a claim under *Zadvydas*.” *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (*per curiam*). It affirmed the dismissal of the petition without prejudice to the filing of a new § 2241 petition. *Id.*

Ruling on an immigration detainee’s challenge to post-removal-order detention, the Fifth Circuit Court of Appeals in *Chance v. Napolitano*, 453 F. App’x 535, 536 (5th Cir. 2011), explained that the petitioner “had not been in post-removal-order detention longer than the presumptively reasonable six-month period set forth in *Zadvydas*[.] Consequently, the district court did not err in finding that his challenge to his continued post removal detention was premature.”

The Western District of Louisiana recently found that a § 2241 petition alleging that continued detention was unconstitutional under *Zadvydas* was premature. The petition was filed “prior to the expiration of the presumptively reasonable six-month period of post-removal order detention.” *Enwonwu v. Joyce*, No. 6:25-CV-0232, 2025 WL 2112712, at *3 (W.D. La. May 14, 2025).

The Supreme Court in *Zadvydas* found it “practically necessary to recognize some presumptively reasonable period of detention” and set that period at six months. 533 U.S. at 701. *Zadvydas* established a bright-line rule. Letting petitioners bring premature claims in the belief that their claims may ripen while their habeas cases are pending blurs that bright-line rule. Claims that might otherwise be resolved or rendered moot in the immigration system could be brought prematurely to federal court, burdening both the Judiciary that must hear such claims and the Executive Branch when it opposes them.

Mr. Zhang filed suit before his habeas corpus claim was ripe. The three opinions cited in the R&R either do not squarely address the ripeness question or, upon closer reading, *support* the dismissal of Mr. Zhang’s claim without prejudice.² Instead of ordering Mr. Zhang’s immediate release from custody, the Court should enter an order of dismissal without prejudice.

II. *Zadvydas* does not compel Petitioner’s release at this time.

The Supreme Court in *Zadvydas* made clear that its “6-month presumption, of course, does not mean that every alien not removed must be released after six months.” 533 U.S. at 701. To the contrary, an alien may continue to be confined until it is established that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.*

Mr. Zhang has not satisfied his burden. In support of his *Zadvydas* claim, Mr. Zhang

² See *Smith*, 444 F. Supp. 3d at 1297 (“The Court agrees that any potential *Zadvydas* claim petitioner advances in his § 2241 petition was not ripe when he filed the petition and that it would be appropriate to dismiss his unripe *Zadvydas* claim without prejudice to refiling.”); *Quang Minh Lien*, 2018 WL 4853339, at *2 (The court noted the earlier dismissal of the petition in “*Lien v. Sessions*, No. 18-cv-878 (D. Colo. filed Apr. 13, 2018) ... as unripe because he had not been detained for six months.”).

alleges a “total lack of intent” on the part of the Federal Respondents to remove him from the United States. Petition [Doc. 1] at 2, ¶ 4. He alleges “that ICE has not taken so much as a cursory step towards third-country deportation.” *Id.* at 3, ¶ 12. Such allegations simply are not true. DHS has requested and is seeking third-country removals. Response Att. 1 [Doc. 12-1] at 3, ¶¶ 11-12, 16; Response Att. 2 [Doc. 12-2] at 2, ¶¶ 4-5.

In support of his claim, Mr. Zhang alleges, “ICE also lacks any credible or persuasive or probative evidence indicating that Zhang is a flight risk.” Petition [Doc. 1] at 3, ¶ 12. He further alleges, “Zhang is not a flight risk,” and “Zhang is not likely to violate the conditions of release.” *Id.* at 12-13, ¶¶ 45, 51. Those allegations simply are not true.

On September 15, 2025, Mr. Zhang was asked in an interview, “Have you ever failed to appear for any judicial proceedings; failed to appear as directed by a law enforcement entity; or have any history of escapes?” Response Att. 7 [Doc. 12-7] at 3, no. 16. He was represented during that interview. *Id.* at 4.³ He responded to the question in the affirmative: “Yes.” *Id.* at 3.

In support of his claim, Mr. Zhang describes his “marijuana conviction” as “not the type of conviction that indicates he constitutes a current or future threat to his community.” Petition [Doc. 1] at 13, ¶ 54. His description of his drug crime ignores basic truths.

Mr. Zhang minimizes the gravity of his offense and the circumstances surrounding

³ An Oklahoma City attorney who represented Mr. Zhang in his removal proceedings in April 2025 is identified in the Amended Order of the Immigration Judge. Response Att. 6 [Doc. 12-6] at 1. The Federal Respondents cannot discern from Response Att. 7 [Doc. 12-7] whether that Oklahoma City attorney represented Mr. Zhang in the September 15, 2025, interview.

it. He was charged with and convicted of trafficking 110 pounds of marijuana, which was found in 110 vacuum-sealed packages during a traffic stop in Custer County, Oklahoma. Response Att. 3 [Doc. 12-3]. The Federal Respondents respectfully invite the Court's attention to the Affidavit of Probable Cause (Response Att. 3 [Doc. 12-3] at 19-20) for the details of Mr. Zhang's arrest.

In January 2024 he was sentenced to 10-year prison term. He served 10 months. The rest of the term was suspended upon his completion of a drug abuse treatment program in October 2024. He was ordered to pay a \$100,000 fine plus court costs. All but \$2,150 of the monetary penalties were suspended. *Id.* at 1, 5, 9; *see also* Response [Doc. 12] at 8.

Under the circumstances, Mr. Zhang's continued detention is reasonable while ERO and the Department of State work to accomplish a third-country removal. Response Att. 1 [Doc. 12-1] at 3, ¶ 16; Response Att. 2 [Doc. 12-2] at 2, ¶¶ 4-5; *see also* 8 C.F.R. § 241.4(e)(4), (5), and (6) (administrative criteria for release include whether the detainee poses a threat to the community, is or is not likely to violate conditions of release, and whether the detainee poses a significant flight risk if released); *id.*, § 241.4(f)(2) (factors for consideration when determining whether to recommend further detention or release include the detainee's criminal conduct and criminal convictions, including the nature and severity of the crimes, the sentences imposed and the time served, etc.).

If the Court is inclined to afford Mr. Zhang relief, the Federal Respondents respectfully submit that such relief need not go so far as to include an order directing his immediate release from custody. *Zadvydas* does not compel his immediate release, nor do the circumstances of this case.

Prayer for Relief

WHEREFORE, the Federal Respondents respectfully pray for an order or orders of this Honorable Court refusing to adopt the Report and Recommendation [Doc. 16], denying Petitioner's Verified Petition for Writ of Habeas Corpus [Doc. 1], and dismissing the action without prejudice to refiling.

Respectfully submitted this 10th day of December, 2025.

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