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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

O.E.O.,
Petitioner,

v.

Fred Figueroa, et al.,
Respondents.

Case No. CV-25-02283-PHX-DWL (MTM)

Hon. Judge Dominic W. Lanza

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR LIMITED, EXPEDITED DISCOVERY

INTRODUCTION

Respondents' administrative record, sworn statements, and response to O.E.O.'s motion seeking limited, expedited discovery have presented numerous inconsistencies that only further call into question whether Respondents followed their statutory obligations in age re-determining O.E.O. These inconsistencies can only be clarified by granting O.E.O.'s narrowly tailored request for limited written discovery and the deposition of the two agency employees who allegedly age re-determined O.E.O. This Court should grant O.E.O. limited, expedited discovery.

ARGUMENT

I. O.E.O.'s APA and *Accardi* Claims Are Cognizable and ORR Is a Proper Respondent

Respondents argue that (1) O.E.O.'s APA claims are not cognizable in a habeas action, and (2) ORR is an improper Respondent in this action. *See* Dkt. 57, Response in Opposition to Motion for Limited Discovery at 3. But O.E.O. did not exclusively bring a habeas petition before this Court. *See generally* Dkt. 1, Complaint and Petition for Writ of Habeas Corpus. O.E.O.'s complaint clearly brings constitutional, APA, and *Accardi* claims against all Respondents and seeks relief beyond release from detention. *Id.* at ¶¶ 81–109. Those claims are properly raised before the Court in his complaint and there is good cause for limited, expedited discovery to clarify the inconsistencies raised by the agencies' administrative records and Ms. Gast's sworn declaration.

Respondents' attempt to re-litigate whether ORR is a proper respondent in the present action also fails. *See* Dkt. 57, Response at 3–4; *see also* Dkt. 29, Respondents' Response to Motion for Temporary Restraining Order at 9. O.E.O. does not bring habeas claims against ORR. Any claims against ORR are brought under the U.S. Constitution, the APA, and the *Accardi* doctrine and seek declaratory relief that ORR failed to follow its statutory obligations and internal policies and procedures in age re-determining O.E.O., as well as injunctive relief to remedy that error. *See* Dkt. 30, Reply in Support of Petitioner's Motion for a Temporary Restraining Order or Preliminary Injunction at 6; *see*

also R.R. v. Orozco, 2020 WL 3542333 at *8 (finding that restoring unaccompanied child designation also restores other statutory entitlements under the TVPRA, including the ability to seek asylum before U.S. Citizenship and Immigration Services).

Because O.E.O. brings claims against Respondents under the APA, Respondents were under an obligation to produce the administrative record. *See* 5 U.S.C. § 706; *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (a reviewing court limits its review of APA cases to the administrative record). O.E.O.'s challenge to the adequacy of Respondents' records is thus properly governed by the discovery standards applicable to cases that bring APA, *Accardi*, and constitutional claims.[1] As argued in his motion and below, limited extra-record discovery is both appropriate and warranted. *See* Dkt. 49, Mot. for Limited Expedited Discovery at 4–5.

II. Extra-Record Discovery Is Allowed Under the Operative Legal Standard

Respondents suggest this Court should apply the discovery standards under the Federal Rules Governing Section 2254 (the "Habeas Rules") and argue that Petitioner has not complied with Habeas Rule 6(b), which governs discovery in habeas actions. *See* Dkt. 57, Response at 4–5. But O.E.O. is not seeking discovery pursuant to his habeas claims. Instead, he seeks limited discovery based on the additional claims raised in his complaint/petition. *See* Dkt. 1, Complaint/Petition at ¶¶ 81–122.

While there is generally no extra-record discovery in APA actions, courts have allowed for discovery where, as here, the APA claims are brought alongside *Accardi* and constitutional claims. *See e.g.*, *Emami v. Nielsen*, No. 3:18-cv-01587-JD, at *3 (N.D. Cal. Sept. 12, 2019) (discovery beyond the administrative record is warranted where APA claims are brought alongside *Accardi* and constitutional claims, especially when those claims go to procedural fairness); *see also Grill v. Quinn*, No. CIV S–10–0757 GEB GGH PS, 2012 WL 174873, at *2, 5 (E.D. Cal. Jan. 20, 2012) (courts are entitled to

[1] APA actions are exempted from initial discovery disclosure and discovery conference requirements. *See* Fed. R. Civ. P. 26(a)(1)(B)(i), (f)(1).

look beyond the administrative record when constitutional challenges are brought alongside APA claims). Even if O.E.O.'s claims were limited only to the APA (they are not), O.E.O. has established that extra-record discovery is warranted because (1) it is unclear whether Respondents have "considered all relevant factors and ha[ve] explained [their] decision," (2) it is unclear if Respondents "relied on documents not in the record," and (3) O.E.O. has "made a showing of agency bad faith." *See Lands Council*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)) (internal quotations omitted); *see also* Dkt. 49, Motion at 6–9. Discovery is also warranted under O.E.O.'s Fourth Claim for relief, which alleges a failure to act. *See Ctr for Biological Diversity v. U.S. Dep't of Hous. and Urban Dev.*, 2007 WL 9723130 at *1 (D. Ariz. 2007) (finding extra-record discovery is warranted in failure-to-act APA claims). As argued in Petitioner's motion, extra-record discovery is appropriate here. Dkt. 49, Motion at 5–9.

III. Limited, Expedited Discovery Is Warranted In This Case

In his motion, O.E.O. argues that there exist factual inconsistencies that fall into three categories: (1) the Tazkira; (2) corroborating evidence from O.E.O.'s family members; and (3) ICE's lack of contemporaneous age determinations. *See* Dkt. 49, Motion at 2. Respondents do not refute any of O.E.O.'s arguments as to the inconsistencies in the record. In fact, O.E.O.'s arguments either go un-responded to or, if mentioned at all, are downplayed as immaterial. Respondents' response has only further called into question the sufficiency of ORR's and ICE's age determinations, raising new inconsistencies within the record. To be sure, as the record stands now, O.E.O. prevails on his claims that ORR and ICE have acted arbitrarily and capriciously in violation of the APA, the TVPRA, and the Constitution. *See* Dkt. 2, TRO at 23–26. But because O.E.O.'s APA claims question whether the agencies acted arbitrarily and capriciously when they deviated from their own regulations and failed to consider certain evidence, he simply asks for limited discovery so that this Court can evaluate upon what grounds the agency acted. *See New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 660 (S.D.N.Y.

2019) ("[J]udicial review of agency action requires that the grounds upon which the . . . agency acted be clearly disclosed.").

A. Respondents Are Silent About Their Most Egregious Failures

It is notable that Respondents have no answer to two of their most egregious errors: (1) ICE's administrative record contains documents dated beyond the certification of the administrative record and the date of the agency's decision, and (2) ORR either relied on the incorrect version of O.E.O.'s Tazkira or made a misrepresentation to the Court in its sworn declaration. Each error is taken in turn.

ICE: Respondents claim that ICE "did make a pre-suit decision regarding" O.E.O.'s minority. Dkt. 57, Response at 6. But the only purported age-determination they cite to in their Response is dated August 7, 2025, which is two days after the administrative record was certified on August 5, 2025. *See* AR-0001, 0135; *see also* Dkt. 57, Response at 6. ICE has no response to this egregious error raised in O.E.O.'s motion. *See generally* Dkt. 57, Response. The Court should not rely on a document dated outside the certification of the administrative record. This error alone warrants the granting of O.E.O.'s limited discovery request for two reasons. First, it proves that the administrative record was compiled in a self-serving manner by agencies who flouted their own rules and regulations and thereby misclassified an unaccompanied child as an adult. *Emami v. Nielsen*, No. 3:18-cv-01587-JD, at *3 (N.D. Cal. Sept. 12, 2019). Second, it borders on "a showing of agency bad faith." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Each reason is enough for this Court to grant discovery beyond the administrative record.

ORR: As to ORR, Ms. Gast declared she sent two translated versions of O.E.O.'s Tazkira to the AAU, not the original version. *See* Dkt. 49, Motion at 2–3, 6–7. However, the record evidence shows that those translated versions were not in ORR's possession on March 21, 2025, the date on which she declared she sent the Tazkiras to the AAU. *See* Dkt. 43-1, Gast Decl. at ¶ 12, Ex. C; *see also* Dkt. 45-2, S.O. Decl. at ¶ 15, Tab 5, 6 (showing O.E.O.'s brother sent the two translated declarations to ORR in May 2025);

ORR-AR-0458 (confirming Dari-translated Tazkira was sent to ORR in May 2025). Respondents again have no response to this serious inconsistency in the record. Admission of extra-record evidence is thus necessary to determine which version of the Tazkira the AAU examined and thus whether Ms. Gast's age re-determination relied upon the proper evidence. *Lands Council v. Powell*, 395 F.3d at 1030.

B. Respondents' Arguments Have Only Further Confused the Record

Respondents argue that discovery is not warranted because the agencies' administrative records are complete. *See* Dkt. 57, Response at 6–8. But Respondents miss the point of O.E.O.'s motion. Whether or not the administrative records are complete as they exist now, there are material factual inconsistencies that need clarification. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014) ("Reviewing courts may admit evidence under th[e first] exception only to help the court understand whether the agency complied with the APA's requirement that the agency's decision be neither arbitrary nor capricious."). Respondents' arguments collapse because they minimize the agencies' failures as "immaterial," they raise additional inconsistencies in their evidence, and they are explicitly contradicted by the record evidence before this Court. Respondents' arguments only further justify granting O.E.O.'s motion for the reasons below.

ICE: Respondents make two main arguments in response to O.E.O.'s challenges to the adequacy of ICE's administrative record: (1) Officer Hoffman is not the officer who made the relevant age determination; and (2) DHS made "a pre-suit decision regarding Petitioner's age" and the fact that the decision was formalized after "this litigation was initiated is immaterial." Dkt. 57, Response at 6. Both arguments fail for similar reasons.

In APA challenges, "judicial review normally is limited to the administrative record in existence *at the time of the agency's decision.*" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (emphasis added). O.E.O. was taken into ICE custody on May 22, 2025. Dkt. 1, Complaint/Petition at ¶ 46. Between May 22, 2025, and June 4, 2025, ICE was alerted to O.E.O.'s minority multiple times. *See* Dkt.

45-3, Fox Supp. Decl. at ¶ 6–8. The TVPRA explicitly requires that ICE, having been alerted to O.E.O.'s minority, do three things: (1) ICE was required to screen O.E.O. "[w]ithin 48 hours of the apprehension"; (2) ICE was required "to notify the Department of Health and Human services within 48 hours upon . . . any claim or suspicion that a[noncitizen] in the custody of such department or agency is under 18 years of age"; and (3) ICE was required "to make a prompt determination of the age of" O.E.O. that took "into account multiple forms of evidence." 8 U.S.C. § 1232 (a)(4), (b)(2), (b)(4).

In other words, the TVPRA contemplates very short timeframes within which the agencies must act when there is any indication that they are holding a minor in their custody. ICE's obligation "to make a prompt determination of age" must be considered in relation to the other time-sensitive provisions of the TVPRA. It cannot be that ICE has some unspecified amount of time to formalize its age determination or to memorialize it in written form. This would defeat the TVPRA's requirement that an unaccompanied child be identified within forty-eight hours of apprehension and then transferred to the custody of ORR within the following seventy-two hours. *See* 8 U.S.C. § 1232(b)(2), (b)(3). ICE was required to conduct an age determination and formalize its decision "promptly" after being notified of O.E.O.'s minority. 8 U.S.C. § 1232(b)(4). Under its own policies and procedures, ICE was required to document that decision, including "the information referenced, data systems used, individuals or agencies consulted, statements, and conclusions," in a memorandum, an I-213, or a Form G-166C. ERO Juvenile Coordinator Handbook §3.1.2, available at https://www.ice.gov/doclib/foia/policy/handbooikFOJC_Nov2021.pdf (last visited Oct. 8, 2025) (hereinafter "ERO Juvenile Coordinator Handbook"). The only evidence before this Court that falls within the "prompt" timeline under which ICE should have conducted its age determination shows that, first, Officer Hoffman explicitly refused to do so on June 3, 2025, and a subsequent email from Officer Hoffman dated June, 5, 2025, stating ICE had determined O.E.O. is an adult, without providing any reasoning for

that determination. *See* Dkt. 11, Fox Decl. at ¶ 26–28. Officer Hoffman is thus the only DHS employee who allegedly made a timely age determination and therefore the relevant officer to be deposed about that determination.[2]

Respondents also double down on the age determination memorandum written by Officer Ciliberti, dated August 7, 2025, as the relevant agency action. Respondents argue that the fact that it took ICE over two months to "formalize" its age determination is "immaterial," and that there is no specific "date by which the memorandum must be prepared." Dkt. 57, Response at 6. But again, it cannot be that ICE has an unlimited amount of time to "formalize" its decision. Nor would that align with the spirit of the TVPRA, which, at minimum, requires a "prompt determination of" O.E.O.'s age. 8 U.S.C. § 1232 (a)(4), (b)(2), (b)(4). Read together with the other provisions of the TVPRA, it would be inconsistent to find that ICE has more than a few days to "formalize" its decision. So even if the post-certification August 7, 2025 memorandum were to be included as part of the administrative record, it still is insufficient. So, too, is any other document in the administrative record claiming to be an "age determination" because all are dated well beyond the period within which the TVPRA contemplates is appropriate.[3] *Compare* ICE-AR-0051 (Form G-155C dated July 14, 2025), and 0135 (memorandum dated August 7, 2025) with Dkt. 57, Response at 6 (claiming "DHS did make a pre-suit decision regarding Petitioner's age," but providing no citation to any record evidence of a pre-suit age determination). Courts have declined to consider documents prepared by the agency after the timeframe of the relevant agency action. *Ctr.*

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[2] If Respondents are suggesting that it is instead Officer Ciliberti who is the DHS employee that made the relevant age determination for ICE, Dkt. 57, Response at 6, Plaintiff O.E.O. is willing to take Officer Ciliberti's deposition as well.

[3] ICE's administrative record includes two alleged age redeterminations: (1) Form G-155C prepared by Officer Hoffman and dated July 14, 2025; and (2) Officer Ciliberti's memorandum dated August 7, 2025. ICE-AR-0051, 0135. Even if those documents were prepared within a reasonable time after ICE took custody of O.E.O., neither of those deficient documents are sufficient because they do not document the evidence relied upon to make their determinations. *See* ERO Juvenile Coordinator Handbook §3.1.2.

for Biological Diversity v. Wolf, 447 F. Supp. 3d 965, 976 (D. Ariz. 2020). This Court should thus reject ICE's August 7, 2025 memo as a post hoc rationale for its improper age determination and grant O.E.O.'s request for limited written discovery and the deposition of Officer Hoffman. *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019) ("[A] court cannot sustain agency action founded on a pretextual…justification that conceals the true 'basis' for the decision.").

ORR: The Respondents make three unconvincing arguments for why ORR's administrative record is sufficient and limited discovery should not be granted. First, Respondents argue that the Court cannot inquire into the evaluation of the Tazkira because the State Department is not a party to this action. *See* Dkt. 57, Response at 7. But O.E.O. is not seeking discovery from the State Department. *See* Dkt. 49, Motion at 9. O.E.O.'s motion explicitly asks for the following discovery:

- "*ORR's evaluation of O.E.O.'s Tazkiras*, family declarations, and national IDs, including *correspondence between ORR and the AAU* concerning the documents evaluated." *Id.* (emphasis added)
- A deposition of Lucibel Gast. *Id.*

The evidence requested is aimed at determining which versions of O.E.O.'s Tazkiras were sent to the AAU. *Id.* at 2–3, 9. This is information properly requested from ORR, a Respondent in this case, and Ms. Gast, also a Respondent, who declared she emailed the AAU the Tazkiras for evaluation. Dkt. 43-1, Gast Decl. at ¶ 12. Respondents relied on the AAU's evaluation of O.E.O.'s Tazkiras. Understanding whether they relied on the evaluation of the original Tazkira or an evaluation of translated versions is material to this case. This Court should thus grant O.E.O.'s narrowly tailored request for production and interrogatories as to ORR's evaluation of O.E.O.'s Tazkiras, and a deposition of Ms. Gast. *See* Dkt. 49, Motion at 9.

Second, Respondents double down on its inconsistent statement that ORR did not receive O.E.O.'s family members' statements until after the May 21, 2025 memo, and

now argues that the sisters' National IDs were not provided to Ms. Gast by Erik Ortiz Cruz (Mr. Ortiz Cruz), O.E.O.'s case manager at Crittendon Shelter. *See* Dkt. 57, Response at 7. Rather than take responsibility for their failure to consider "the totality of the evidence" before it, Respondents shift the blame to Mr. Ortiz Cruz, claiming he did not provide the documents to Ms. Gast.[4] Dkt. 57, Response at 7. This too is clearly refuted by the agency's own evidence. *See* ORR-AR-3159, 3162 (email exchanges including Ms. Gast and Mr. Ortiz Cruz with attachments of evidence from O.E.O.'s family). In an email dated May 8, 2025, ORRLanguageServices@acf.hhs.gov emailed Mr. Ortiz Cruz and copied Ms. Gast with various attachments, including an attachment titled "Family_Written_Statements.pdf," showing that Ms. Gast had in her possession the family declarations prior to her May 21, 2025 age redetermination. *See* ORR-AR-3159. Further, Respondents cite email threads dated May 13, 2025, to support its argument that Mr. Ortiz Cruz did not timely send Ms. Gast all the documents from O.E.O.'s family members. *See* Dkt. 57, Response at 7 (citing ORR-AR-3180, 82, 83). Again, this evidence only shows that Ms. Gast clearly had knowledge of and access to the additional evidence before her decision on May 21. The ORR Policy Guidance is clear: Ms. Gast was under an obligation to consider "the totality of the . . . evidence" including sworn affidavits from relatives and government issued documents. ORR Policy Guidance §

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[4] Mr. Ortiz Cruz was requesting documents from O.E.O.'s family on behalf of Ms. Gast. If, as Respondents claim, it is true that Mr. Ortiz Cruz did not provide all relevant documents to Ms. Gast, O.E.O. should not be prejudiced by Mr. Ortiz Cruz's failure. And if Ms. Gast did not have all the relevant documents, that's all the more reason ORR's May 21 memo must be rescinded. Further, Respondents' allegation that key evidence held by Mr. Ortiz Cruz did not make it into the administrative record is clear evidence rebutting the presumption of completeness of the record. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (finding that documents submitted to the agency, whether referenced or not in its decision, should have been included in the administrative record and can be considered by the court to determine whether the agency's actions were arbitrary and capricious or unsupported by substantial evidence). At minimum, the still open question of whether this evidence was before Ms. Gast and therefore should be part of the administrative record further supports Petitioner's motion for limited, expedited discovery.

1.6.2, Determining the Age of an Individual without Lawful Immigration Status, available at https://acf.gov/orr/policy- guidance/unaccompanied-children-program-policy-guide-section-1#1.6 (last visited Oct. 8, 2025) (hereinafter "ORR Policy Guidance"). She failed to do so.

As to his sister's national ID, Respondents acknowledge that Ms. Fox emailed Ms. Gast on May 8, 2025, with O.E.O.'s sister's national ID. Dkt. 57, Response at 7 (citing to ORR-AR-3152, an email exchange from Ms. Fox to Ms. Gast with O.E.O.'s sister's ID attached). Yet they dismiss the evidence, stating "it is unclear what impact it would have on Ms. Gast's age determination." *See* Dkt. 57, Response at 8. But the impact the evidence would have had is crystal clear—O.E.O. could not possibly be born on March 21, 2003, because his older sister, B.O. was born on March 18, 2003. B.O.'s National ID establishes that O.E.O. could not possibly be an adult and requires a finding that the ORR's age determination was arbitrary and capricious. *See Motor Vehicle Mfrs/ Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding agency action is arbitrary and capricious when its explanation for its decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Regardless, a deposition of Ms. Gast is warranted to clarify the inconsistencies between her sworn declaration and the evidence in the administrative record.

Third, Respondents cite to a letter from O.E.O.'s mother corroborating that his real date of birth is October 24, 2009, and that his family had to adjust O.E.O.'s Tazkira to obtain his national ID and passport with an age of majority. *See* Dkt. 57, Response at 7; *see also* ORR-AR-4178. It is unclear why Respondents chose to highlight this piece of evidence corroborating O.E.O.'s arguments, but it is worth noting that Ms. Gast did not list this letter in either of her memos and there is no Tazkira with the March 21, 2003 date of birth in the administrative record. *See generally* ORR-AR; see also Dkt. 10, Ex. A, B (Ms. Gast's May 1, and May 21 age determination memos). This argument only further

brings into question what evidence Ms. Gast relied on in making her age redetermination and thus her deposition is necessary.

Fourth, and finally, Respondents point the Court to a dentist's letter that "estimated [O.E.O.'s] age at 20-21 with 95% certainty." Dkt. 57, Response at 7. Ms. Gast did not mention that dentist's letter in her May 21 Memo. *See* Dkt. 10, Ex. B, May 21 Memo. If Ms. Gast relied on that memo to age redetermine O.E.O., she should have stated so in her memo, as is required by ORR policy. ORR Policy Guidance § 1.6.2 ("The FFS compiles all pertinent information (e.g., . . . the information referenced, the individuals or agencies consulted, statements and conclusions) and documents it in a memorandum."). Again, a deposition of Ms. Gast would clarify whether and how she relied on this dental exam in addition to the other dental exam she references in her May 21 Memo. [5]

CONCLUSION

For the foregoing reasons, O.E.O. respectfully requests that this Court grant Petitioner's Motion for Limited, Expedited Discovery.

Respectfully submitted on October 08, 2025,

/s/ *Carson Adrianna Scott*
Carson Adrianna Scott
Pro Bono Attorney for Petitioner

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[5] The fact that two separate dentists employing the Demirjian method came to very different conclusions proves O.E.O.'s argument that use of a dental exam to estimate a minor's age is incredibly unreliable. *See* Dkt. 2, TRO at 5 (explaining the documented unreliability and inaccuracy of the Demirjian method). This new dental exam is even more deficient than the one referenced in Ms. Gast's May 21 Memo. ORR policy requires that dental examinations consider the child's ethnic and genetic background. *See* ORR Policy Guidance, § 1.6.2; *see also RR v. Orozco*, 2020 WL 3542333 at *9 (D.N.M. June 30, 2020) (finding petitioner was likely to succeed on his claim that ICE violated 8 U.S.C. § 1232(b)(4) when it relied on a medical exam that did not specify whether the petitioner's ethnic and genetic background was considered). This exam makes no comparison at all to any ethnic or genetic group. The discrepancies between the two dental examination results are debatable and thus should have been resolved in favor of O.E.O's minority. *See* ORR Policy Guidance, § 1.6.2.