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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Portland Division

B-P-, an adult

Petitioner,

v.

JULIO HERNANDEZ, Seattle Field Office Director, Immigration and Customs Enforcement and Removal Operations ("ICE/ERO"); TODD LYONS, Acting Director of Immigration Customs Enforcement ("ICE"); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MARKWAYNE MULLIN, Secretary of the Department of Homeland Security ("DHS"); U.S. DEPARTMENT OF HOMELAND SECURITY; and PAMELA BONDI, Attorney General of the United States,

Respondents.

Case No.: 3:26-cv-00450-AN

Agency No. A XXX-XXX-801

PETITIONER'S REPLY ISO MOTION FOR LEAVE FOR EXPEDITED LIMITED DISCOVERY

Petitioner B-P- seeks limited and modestly expedited discovery in order to protect his liberty from unlawful executive detention—detention that would have happened absent this very litigation. Respondents oppose discovery of "one issue: an alleged policy of Respondents to illegally detain Laotian nationals." ECF 25 at 5. They oppose discovery under the Federal Rules (but do not oppose statutory discovery) because, they assert, the Court lacks jurisdiction and Petitioner has failed to make a showing that such a policy exists or that the discovery would aide in the development of his legal claims. ECF 25 at 6.

Their opposition is without merit. The Court should grant Petitioner's motion in full.

I. Respondents have waived opposition to statutory discovery.

The Court can grant the motion under 28 U.S.C. § 2246. By statute, "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. When an affidavit is admitted, "any party shall have the right to propound written interrogatories to the affiants[.]" *Id.* The plain text of the statute provides for a right to Petitioner to propound interrogatories on the Deportation Officer and, because facts are in dispute, 28 U.S.C. § 2243, the deposition should be authorized in the Court's discretion. Respondents have not argued any opposition to statutory discovery and therefore have waived it. ECF 25 (making no argument against statutory discovery). "It is clear that the government, like a defendant, may waive an argument by not properly presenting it." *United States v. Hoffman*, No. 2:12-cr-00309-JAM, 2015 WL 5604419, at *2, *citing United States v. Gourley*, No. CR-06-6011-RHW, 2006 WL 2585027, at *4 (E.D. Wash. Sept. 7, 2006) *aff'd*, 267 F.App'x 656 (9th Cir. 2008). The Court has the discretion to consider these arguments waived, especially where the waiving party is the federal government and not a pro se litigant. *See United States v. Smith*, 506 F. App'x 600, 602 n.3 (9th Cir. 2013). Because Respondents had ample opportunity to raise arguments in opposition to

Petitioner's statutory discovery request, but did not do so, the Court should deem those arguments waived and grant the request for statutory discovery. *Accord* LR 26-5(a) ("Failure to object to a discovery request within the time permitted by the Federal Rules of Civil Procedure . . . constitutes a waiver of any objection.").

II. Respondents' jurisdictional opposition to discovery is meritless.

The Court should grant the motion under the Federal Rules because "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (cleaned up). Petitioner's request for discovery directly implicates the Court's jurisdiction because the Respondent's *entire* jurisdictional theory (that, in their view, there is no jurisdiction) rests wholly on uncorroborated, hearsay facts asserted by their declarant who does not present the best evidence available to prove those facts. ECF 17 at 2-3; *id.* at 7 ("Petitioner has…a significant likelihood of obtaining a travel document from the government of Laos."). Accordingly, Respondents' contrary assertion is wrong.

Petitioner has demonstrated good cause for limited discovery—depositions, interrogatories, and production requests—because a "more satisfactory showing of facts" by the Respondents is required given the poor quality of the sole evidence submitted in this case by them to assert the lack of jurisdiction. To support the legal arguments in their return, Respondents provide the court a declaration from a Deportation Officer. ECF 18. Their declarant asserts that Laos is issuing travel documents, that a travel document has generally been applied for, and that removal is therefore factually foreseeable. ECF 18 at ¶¶ 8-10. Indeed, the Respondents' entire theory of their case rests on the veracity and accuracy of their declarant in stating these facts. *Id.* Their 8 U.S.C. § 1252(g) jurisdictional argument relies *entirely* on their declarant's hearsay

assertion of facts and policy. ECF 17 at 7. Their mootness and ripeness arguments rest entirely on their declarant's factually unexplained ability to bind the agency. ECF 17 at 12; ECF 18 at ¶¶ 11-14.[1] But what facts? The facts asserted as to reasonable foreseeability are hearsay or violate the best evidence rule. ECF 22 at 9-10. These so-called facts by their declarant underpin Respondents' 1252(g) jurisdictional argument. ECF 17 at 7-8. But if Respondents "are going to rely on [ ] particular document[s] to demonstrate the Court's lack of jurisdiction, [the documents] will need to be produced." *E.D.Q.C. v Warden, Stewart Detention Center*, 789 F. Supp. 3d 1234, 1246 (M.D. Ga. 2025) (allowing limited discovery in immigration habeas challenge to ascertain jurisdiction).

The reasonable foreseeability of removal is a question of fact. *See Xi v. INS*, 298 F.3d 832, 840 (9th Cir. 2002) (characterizing the question of whether petitioner's removal to China was reasonably foreseeable as a "factual question"); *Diouf v. Mukasey*, 542 F.3d 1222, 1233 (9th Cir. 2008) (looking to the specific evidence in the petitioner's case to determine the foreseeability of his removal); *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) (describing a fact-intensive inquiry into foreseeability). Where "as here, the jurisdictional facts are contested or more facts are needed[,]" discovery is proper. *Laub*, 342 F.3d at 1093. The limited discovery Petitioner seeks goes to the heart of the case and Respondent's jurisdictional argument. The Petitioner has demonstrated the facial deficiencies of Respondents' declaration under the Federal Rules of Evidence; and almost equally important, has put forth good-faith arguments explaining why the bald assertions of these critical facts by Respondent must be tested like any other litigant's factual assertions. ECF 22 at 20-21 (arguing that there is no reason to credit the Deportation Officer's statements without additional proceedings and the opportunity for the taking of the declarant's deposition.) Under the

[1] In the context of OSUP revocation (as is the case here), it is the government's burden to demonstrate reasonable foreseeability. 8 C.F.R. § 241.13(i)(2); *Nguyen v. Hyde*, 788 F. Supp. 3d 144, 150 n.2 (D. Mass. 2025).

good cause standard, this showing is sufficient because "if the facts are fully developed, [the Petitioner may] be able to demonstrate that he is entitled to relief." *Smith v. Mahoney*, 611 F.3d 978, 996–97 (9th Cir. 2010) (cleaned up).

The cases Respondents rely are unhelpful to their argument in opposing discovery. Respondents cite *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022), *Saelee v. Hernandez*, No. 2:26-cv-00735-TL, 2026 WL 1045223 (W.D. Wa. Apr. 17, 2026), and *O.S.S. v Hernandez*, No. 3:26-CV-00796-IM (D. Or. Apr. 27, 2026) for the proposition that 8 U.S.C. § 1252(g) precludes the Court from enjoining detention in anticipation of removal. ECF 25 at 3. This is a repeat of their argument in their return. *Cf.* ECF 17 at 3-6. But that is a bootstrap argument. It presumes that the unlawful detention that is the subject of this litigation is to effectuate a reasonably foreseeable removal. Yet, that premise is disputed by the Petitioner; and the fact that the premise is disputed is precisely why he seeks discovery. ECF 22 at 14-20; ECF 21 at 4.

Respondents' reliance on *Rich v. Calderon*, 187 F.3d 1064 (9th Cir 1999) is also misplaced. Respondents rely on *Rich* to characterize the limited discovery sought here as a "fishing expedition." ECF 25 at 4. But *Rich* has no meaningful applicability to this case because it involves a habeas petition challenging a state court criminal judgment, not an unlawful claim of executive immigration detention. *Rich*, 187 F.3d at 1067. To the extent it has any relevance, it actually undermines the Respondents' position. Indeed, the *Rich* petitioner was not denied discovery. *Id.* A Magistrate Judge provided him with a specific process to identify the claims for which discovery was needed, including five months to investigate and a full day of argument, but he did not take advantage of this opportunity. *Id.* Respondents' reliance on *Rich* is unpersuasive in the context of this case.

III. Conclusion

For the reasons set forth above, Petitioner respectfully requests that the Court order Respondents to provide the discovery requested.

Respectfully submitted on June 18, 2026.

s/ *Jordan Cunnings*
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