UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

M.S., A MINOR, AND CLEANTE STENOR, AS NEXT FRIEND, Petitioners,	:	No. 3:25-cv-02170(VDO)
v.	:	
ANGIE SALAZAR, ACTING DIRECTOR OF THE OFFICE OF REFUGEE RESETTLEMENT, ET AL., Respondents.	:	January 16, 2026

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR EXPEDITED DISCOVERY (ECF NO. 33)

Respondents, Angie Salazar in her official capacity as Acting Director of the Office of Refugee Resettlement, Alex J. Adams in his official capacity as Assistant Secretary, Administration for Children and Families, and Robert F. Kennedy, Jr., in his official capacity as Secretary of Health and Human Services, ("Respondents") submit this memorandum of law in opposition to Petitioners' Motion for Expedited Discovery (ECF No. 33) ("Discovery Motion").

I. PRELIMINARY STATEMENT

Petitioners in this case challenge the Department of Health and Human Services Office of Refugee Resettlement's ("ORR" or the "Agency") decision to deny Ms. Stenor's sponsorship application for M.S. Despite the varied claims Petitioners present in the Verified Petition For Writ of Habeas Corpus And Complaint For Injunctive And Declaratory Relief (ECF No. 1)[1]

---

[1] The Petition seeks relief "pursuant to 28 U.S.C. § 2241 and the Administrative Procedure Act, 5 U.S.C. § 701, et seq." The Petition itself contains eight numbered "claims for relief":

1. "Habeas Corpus" (*see* ECF No. 1, p. 22)
2. "Violation Of Fifth Amendment Right To Substantive Due Process" (*see id.*, p. 23)
3. "Violation Of Fifth Amendment Right To Procedural Due Process" (*see id.*, pp. 23-24)
4. "Violation Of The *Flores* Settlement Agreement" (*see id.*, pp. 24-25)
5. "Violation Of Section 235 Of The Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232" (*see id.*, p. 25)
6. "Violation Of The Administrative Procedures Act" (*see id.*, pp. 25-26)
7. "Violation Of The *Accardi* Doctrine" (*see id.*, pp. 24-25)
8. "Release Pending Adjudication" (*see id.*, pp. 27-28)

("Petition") and Motion for Preliminary Injunction/Temporary Restraining Order (ECF No. 18) ("PI/TRO Motion"), at bottom, the instant civil action seeks Article III judicial review of a final agency decision. Such claims are governed by the Administrative Procedures Act, 5 U.S.C. §§ 555, 701 *et seq.* ("APA"), which limits judicial review in this case to the certified administrative record ("CAR" or "record"). Petitioners are not entitled to discovery under Rule 6, Rule 26, or any exception to the "record rule" and presumption against discovery in APA cases. Petitioners' Discovery Motion is premature and without merit, and it should be denied.

II. RELEVANT BACKGROUND

A. Governing Statutory & Regulatory Framework

The statutory and regulatory framework governing the federal care and custody of Unaccompanied Alien Children ("UAC"), as well as their release and sponsorship, reflects congressional intent for ORR to "mak[e] placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status" that ensure UAC "are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity." 6 U.S.C. §§ 279(b)(1)(C), (b)(2)(A)(ii). This framework balances the mandate that ORR protect UAC from harm with the requirement that ORR "promptly" place UAC "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

1. Homeland Security Act of 2002 ("HSA")

In 2002, Congress enacted the Homeland Security Act ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified in relevant part at 6 U.S.C. § 279), abolishing the Immigration and Naturalization Service ("INS") and transferring responsibility for the care and placement of UAC from INS to ORR. *See* 6 U.S.C. §§ 279(a), (b)(1)(A), (g)(2).

The HSA defines an UAC as "a child who —

(A) has no lawful immigration status in the United States;
(B) has not attained 18 years of age; and
(C) with respect to whom —
(i) there is no parent or legal guardian in the United States; or
(ii) no parent or legal guardian in the United States is available to provide care and physical custody."[2]

6 U.S.C. § 279(g)(2). The HSA assigns ORR broad authority over the care and custody of UAC while they are in federal custody due to their immigration status, including coordinating their care and placement, ensuring their best interests in custodial decisions and that they are protected from smugglers, traffickers, and others who might seek to victimize and exploit UAC. 6 U.S.C. §§ 279(b)(1)(A), (b)(2)(A)(ii). These responsibilities are carried out through cooperative agreements and contracts with care providers under ORR policies and oversight. *See* 6 U.S.C. §§ 279(b)(1); 31 U.S.C. § 6305.

There is no dispute in this case that M.S. is an UAC.

2. The Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA")

Congress enacted the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") to strengthen protections for UAC and support their safe repatriation or appropriate placement. The statute, consistent with the HSA, makes the Secretary of HHS responsible for the care and custody of UAC. 8 U.S.C. § 1232(b)(1). The TVPRA prohibits HHS from releasing a child to a proposed custodian unless HHS first "makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being," which "shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would

[2] This determination is made at the time of border apprehension and does not change if a sponsor is later identified. *See generally* 8 U.S.C. § 1232(b)(3); UAC Policy Guide § 1.1.

indicate a potential risk to the child." 8 U.S.C. § 1232(c)(3)(A). It also requires the HHS Secretary to make a determination that a sponsor "is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). The TVPRA requires ORR to prioritize the safety and well-being of UAC while in its care and upon release. Under its regulations, ORR assesses all potential sponsors (even when the potential sponsor is a child's parent or legal guardian) before making any release determination, including a review of the potential sponsor's strengths, resources, risk factors, and relationship to the UAC. *See, e.g.*, 45 C.F.R. §§ 410.1201(a); 1202(b) and (c).

The TVPRA does not create an independent cause of action against the Federal Government that is separate from the APA.[3] *See, e.g.*, *Lucas R. v. Azar*, No. CV 18-5741-DMG (PLAX), 2018 WL 7200716, at *7 n.12 (C.D. Cal. Dec. 27, 2018).

3. The Foundational Rule (2024)

In April 2024, ORR promulgated the Unaccompanied Children Program Foundational Rule ("Foundational Rule"), codified at 45 C.F.R. Part 410, to establish comprehensive regulations governing its UAC program. The Foundational Rule also implements provisions of the *Flores* Settlement Agreement[4] ("FSA") relevant to ORR's care and custody of UAC and conditionally

[3] The TVPRA does not provide a standalone cause of action because it does not contain an express waiver of the government's sovereign immunity and the government has not otherwise consented to suit under that statute. *See* 8 U.S.C. § 1232; *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"). *See also Cooke v. United States*, 918 F.3d 77, 81 (2d Cir. 2019) ("[t]he United States, as sovereign, is immune from suit unless it waives immunity and consents to be sued."); *Stein v. United States Dep't of Educ.*, 450 F. Supp. 3d 273, 275-76 (E.D.N.Y. 2020) ("It is axiomatic 'that federal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress.'. . . [F]ederal courts lack subject matter jurisdiction over suits brought against the United States unless there exists a specific, express waiver of the government's sovereign immunity.") (quoting *Durant, Nichols Houston, Hodgson & Cortese-Costa P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009)).

[4] *See Reno v. Flores*, 507 U.S. 292, 294-95 (1993). At the heart of the *Flores* litigation was the practices of the legacy INS regarding unaccompanied minors in the INS's Western Region who were subject to removal and who were eligible for discretionary release from detention, but who could not be released because there was no immediately available custodian to whom the INS could release them. *See Reno v. Flores*, 507 U.S. 292, 294-95 (1993). The Government could not "simply send them off into the night on bond or recognizance," but instead needed to "assure

and partially terminated the FSA as to ORR in June, 2024. Effective July 1, 2024, the Foundational Rule formalized previously informal procedures, including those related to ORR's release policies and practices.

The Foundational Rule provides that ORR identifies a standard program placement, unless one of the exceptions in 45 C.F.R. § 410.1104 applies, for the UAC upon notification from any federal department or agency that a child in its custody is an UAC and therefore must be transferred to ORR custody. 45 C.F.R. § 410.1101(b). ORR works with the referring federal government department or agency to accept transfer of custody of the UAC, consistent with the statutory requirements at 8 U.S.C. § 1232(b)(3) and 45 C.F.R. § 410.1101(c). ORR places each UAC in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs. 45 C.F.R. § 410.1103(a). ORR may place a child in a shelter facility, foster home or group home (which may be therapeutic), heightened supervision facility or secure facility (including residential treatment centers), or other care facility that can provide for their specific individualized needs, including an out-of-network ("OON") placement (which may be restrictive or non-restrictive). 45 C.F.R. § 410.1102; UACB Policy Guide § 1.2. ORR also considers several factors that are relevant to the UAC's placement, including but not limited to:

itself that someone will care for those minors pending resolution of their deportation proceedings." *Id.* at 295. To address this problem, the INS's Western Regional Office "adopted a policy of limiting the release of detained minors to a parent or lawful guardian, except in unusual and extraordinary cases, when the juvenile could be released to a responsible individual who agree[d] to provide care and be responsible for the welfare and well-being of the child." *Id.* at 295-96 (internal quotation marks omitted). Plaintiffs' lawsuit challenged this policy and sought to compel the release of unaccompanied minors to non-parental guardians or private custodians; their lawsuit was brought on behalf of a certified class of minors "who [had] been, are, [were] denied release from INS custody because a parent or legal guardian failed to personally appear to take custody of them." *Id.* at 296, 302. The FSA, reached by the parties in 1996 to resolve the case, was approved by the court in 1997. However, the FSA has been mostly terminated as to HHS. *See Flores v. Garland*, No. CV 85-4544-DMG(AGRX), 2024 WL 3467715, at *9 (C.D. Cal. June 28, 2024) (conditionally and partially terminating the FSA as to HHS, on the basis of ORR's publication of regulations implementing the FSA). The few remaining paragraphs of the FSA still applying to HHS do not pertain to ORR release processes (e.g., sponsor vetting processes). *See id.* at * 9.

danger to self; danger to the community/others; runaway risk; trafficking in person or other safety concerns; age; and gender. 45 C.F.R. § 410.1103(b).

While the UAC remains in ORR custody, ORR seeks to release the UAC from its custody "[s]ubject to an assessment of sponsor suitability," 45 C.F.R. § 410.1201, which includes "verification of the potential sponsor's identity," 45 C.F.R. § 410.1202(b), "verification of the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child," 45 C.F.R. § 410.1202(c), and "[i]n all cases, ORR shall require background and criminal records checks," "which may include a criminal history check based on fingerprints. *Id.* The Foundational Rule reinforces the congressional intent articulated in the HSA and TVPRA that HHS ensure the protection of UAC from human traffickers and release UAC only to sponsors who are capable of protecting their well-being. 45 C.F.R. § 410.1003.

B. <u>ORR Release Policies & Practices</u>

To carry out its statutory mandate under the HSA and TVPRA, ORR has developed policies and procedures for identifying and conducting suitability assessments of potential sponsors. These procedures are generally set forth in the ORR's publicly available UAC Bureau Policy Guide[5] ("UACB Policy Guide"). A full assessment of a potential sponsor's suitability is necessary because ORR is not a law or immigration enforcement agency and lacks the authority to hold individuals accountable by reassuming care if the sponsor abuses or neglects the UAC after the UAC has been released from ORR custody; once a child is released, ORR has no ability to resume custody. *See* UACB Policy Guide § 2.1. ORR only takes children into its custody upon referral by another federal agency, as described in statute. *Id.* In this regard, ORR is also very different from state child welfare agencies, which typically retain such authority post-placement. *Id.* Accordingly,

[5] *See* ORR Unaccompanied Alien Children Bureau Policy Guide, *available at* https://acf.gov/orr/policy-guidance/unaccompanied-children-bureau-policy-guide. (last visited Jan. 14, 2026).

ORR must front-load child safety considerations in its identity verification and sponsor-vetting policies. *Id.*

In light of ORR's obligation to protect UAC from smugglers, traffickers, and others who may seek to victimize them, "safe and timely release . . . involves several steps, including: the identification of sponsors; sponsor application; interviews; the assessment (evaluation) of sponsor suitability, including verification of the sponsor's identity and relationship to the child (if any), background checks, and in some cases home studies; and post-release planning." UACB Policy Guide § 2.1. ORR (through its care providers) conducts a suitability assessment of the potential sponsor, including a review of the sponsor's strengths, resources, risk factors, and special concerns within the context of each child's needs, strengths, resources, risk factors, and relationship to the sponsor. *Id.* §§ 2.2.2, 2.4.

There are four categories of potential sponsors:

- **Category 1**, consisting of parents or legal guardians;
- **Category 2A**, consisting of siblings, half-siblings, grandparents, immediate relatives (such as aunts, uncles, and cousins) who previously served as a primary caregiver, and other biological relatives and relatives through marriage;
- **Category 2B**, consisting of immediate relatives (including biological relatives and relatives through marriage) who did not previously serve as a primary caregiver; and
- **Category 3**, consisting of other sponsors, such as distant relatives and unrelated adult individuals.

UACB Policy Guide § 2.2.1. Sponsorship assessment requirements, disqualifying factors, notice requirements and appeal rights vary based upon the sponsor's category. *See, e.g., id.* §§ 2.2.4 (documentation requirements), 2.4.2 (home study requirements), 2.5.1 (background check requirements), 2.7 (deadlines for ORR's recommendations and decisions on release), 2.7.4

(differing standards to deny release request), 2.7.7 (differing standards for notice), 2.7.8 (appeal rights).

C. ORR Denial of Ms. Stenor's Application for Sponsorship Of M.S.

In the instant case, Ms. Stenor is a "Category 3" sponsor for M.S. ORR denied Ms. Stenor's application citing D.S.'s (Ms. Stenor's husband) previously having submitted a false birth certificate for M.S., which identified Ms. Stenor as M.S.'s mother. *See* Petition ¶¶ 29-30, 69, 91. As a Category 3 sponsor, this disqualified Ms. Stenor from sponsorship. *See* UACB Policy Guide § 2.7.4 (ORR "*will* deny release to a Category 2 or Category 3 potential sponsor, if . . . . [t]he potential sponsor or a member of the potential sponsor's household . . . knowingly provided false information, committed perjury, or submitted fraudulent documentation during the sponsor assessment process" (emphasis added)).

As a Category 3 sponsor, Ms. Stenor was not entitled to a written decision enumerating ORR's denial of her sponsorship application for M.S.; instead, she was entitled to (and did receive) a telephone call informing her of the decision. *See* UACB Policy Guide § 2.7.7; Petition ¶ 69. There is no right of appeal for a Category 3 sponsor. UACB Policy Guide § 2.7.8.

III. LAW & ARGUMENT

Setting aside the labels chosen by Petitioners, the *substance* of their claims is this: Petitioners seek Article III judicial review of a final agency decision. They ask this Court to set aside ORR's decision to deny Ms. Stenor's sponsorship application, and compel the agency to act by releasing M.S. into Ms. Stenor's custody. Such claims are governed by the APA; 5 U.S.C. § 706; and, indeed, Petitioners bring an APA claim in this case. *See* ECF 1, at pp. 1, 25-26. Under the APA, there is no entitlement to discovery and the scope of judicial review remains limited to the record compiled by the administrative agency. *See* 5 U.S.C. § 706; *Florida Power & Light Co.*

v. Lorion, 470 U.S. 729, 743-44 (1985). Petitioners are not entitled to discovery under Rule 6, Rule 26, or any exception to the "record rule" and presumption against discovery in APA cases. Petitioners' request for discovery predating production of the administrative record is premature and should be denied.

A. Petitioners' Discovery Motion Should Be Denied

1. The APA Governs This Case, Presumptively Limiting Judicial Review to The Certified Administrative Record

Respondents note, first, that this case differs fundamentally different from a standard habeas petition[6] because "juveniles, unlike adults, are always in some form of custody." *Reno v. Flores*, 507, U.S. 292, 302 (1993). Our Supreme Court has held that "where the custody of the parent or legal guardian fails . . . [the] government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so." *Id.*; *see also Schall v. Martin*, 467 U.S. 253, 265 (1984) (a "juvenile's interest in freedom from institutional restraints . . . must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody" because they "are not assumed to have the capacity to take care of themselves"). The TVPRA reinforces and expands upon the Government's responsibility for the care of UAC. Unlike adults in the custody of other agencies, ORR cannot release children in its care on their own recognizance. 6 U.S.C. § 279(b)(2)(B). Instead, the TVPRA requires ORR to make a considered decision about each child's

[6] Even if this were a standard habeas petition, and it is not, discovery would not be permitted except in exceptional circumstances that Petitioners have not established. *See Bracy v. Gramley*, 520 U.S. 899, 904, 908-09 (1997) ("[A] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." In order to show "good cause" to permit discovery, a petitioner must present "'specific allegations'" that give the Court "'reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'" (*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969)); *Ruine v. Walsh*, No. 00 Civ. 3798 (RWS), 2005 WL 1668855, at *6 (S.D.N.Y. July 14, 2025) ("Rule 6 does not license a petitioner to engage in a fishing expedition by seeking documents merely to determine whether the requested items contain any grounds that might support his petition, and not because the documents actually advance his claims of error." (internal quotation marks omitted); *Renis v. Thomas*, No. 02 Civ. 9256 (DAB)(RLE), 2003 WL 22358799, at *2 (S.D.N.Y. Oct. 16, 2003) (a petitioner "bears a heavy burden in establishing a right to discovery." (*citing Bracy*, 520 U.S. at 904)); and discussion below.

placement based upon all the circumstances. In this case, ORR has done exactly that. ORR's custody of M.S. is not unlawful. To the contrary, it is *required* by the law.

Petitioners' constitutional claims are likewise unavailing. In *Reno*, the Supreme Court found that children such as M.S. (for whom the placement sought is with neither a parent nor a close relative) have neither a substantive nor a procedural due process claim regardless of a *Mathews* analysis. *See* 507 U.S. at 303-04, 308 (finding no right to an individualized hearing regarding whether a private placement would be in the child's "best interest," no substantive due process right to release, and that the procedural due process arguments were "just the 'substantive due process' arguments recast in 'procedural due process' terms."). Petitioners ask the Court to extend the nature of constitutional liberty interests in the familial sphere well beyond that which current authority provides. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (biological parent); *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (biological parent); *Lassiter v. Dep't of Soc. Servs. of Durham Cray*, 452 U.S. 18, 27 (1981) (biological parent); *Moore v. E. Cleveland*, 431 U.S. 494 (1977) (grandparent/grandchild); *Smith v. Org of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977) (foster parents/legal guardians); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (aunt and legal custodian); *U.S. v. Loy*, 237 F.3d 251, 269-70 (3d Cir. 2001) (hypothetical biological parent); *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999) (biological parent); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (biological parent); *Benitez v. Miller*, 687 F. Supp. 3d 304, 318-19 (D. Conn. 2023) (biological parent); *J.S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 741 (D. Conn. 2018) (parents who crossed the border together with biological children).

"The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery. . . . To hold otherwise—and allow fresh discovery, submission of new evidence and legal arguments, or *de novo* review—would be to incentivize every unsuccessful party to agency action to allege bad faith, retaliatory animus, and constitutional violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure." *Chiayu Chang v. U.S. Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017) (citations omitted; internal quotation marks omitted). Petitioners are afforded process now via their APA challenge of the Agency's decision.

Regardless of the specific arguments advanced in support of a request for judicial review (including habeas, constitutional, or statutory infirmities[7]), the APA serves as the general basis for an "aggrieved" individual to seek judicial review of a final agency decision or to compel agency action. *See* 5 U.S.C. § 706(2). And the APA presumptively limits judicial review to the administrative record. 5 U.S.C. § 706. "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141 (1973). "When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its own judgment for that of the agency." *Almaklani v. Trump*, 444 F. Supp. 3d 425, 431 (E.D.N.Y. 2020) (citing *Asarco, Inc. v. U.S. Env't Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)). Indeed, courts have repeatedly rejected litigants' attempts to circumvent the APA by presenting independent, standalone causes of action to the effect that a particular agency action (or inaction) violated a particular federal statute or constitutional provision. *See, e.g.*, *Chiayu Chang*, 254 F. Supp. 3d at 162 (denying request for additional discovery beyond the administrative record; noting that adding constitutional claims in an APA case "cannot so transform the case that it ceases to be primarily a

[7] The Petition cites no actionable statutory cause of action beyond the APA. *See* footnote 3.

case involving judicial review of agency action."); *Lucas R.*, 2018 WL 7200716, at *7 n.12) (TVPRA does not create an independent cause of action separate from the APA).

2. Petitioners' Discovery Motion Is Premature

As in any APA matter, the Agency will produce an administrative record. The case can and will be adjudicated on that record. Petitioners' request for discovery predating production of the CAR is premature and should be denied on this basis alone.

If Petitioners believe there is some defect in the record as produced, then *at that time*, they could seek leave from the Court to conduct limited discovery. Petitioners would bear the burden of proving they were entitled to extra-record discovery. As set forth below, they have not.

3. This Case Does Not Present Any Exception To The "Record Rule"

Courts look beyond the record only when a party challenging the agency decision makes a "strong preliminary showing of bad faith or improper behavior on the part of the agency decision makers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Overton Park*, 401 U.S. at 420).

Petitioners' arguments do not satisfy this standard or create any entitlement to discovery. Petitioners cannot demonstrate that the administrative record is incomplete (indeed, the record has yet to be produced), and have proffered no evidence of bad faith or improper move. As to the latter, Petitioners' arguments have conflated two very important distinctions: (1) An unadjudicated application for sponsorship, versus a final decision issued by ORR thereon; and (2) Category 1 sponsorship, versus Category 3 sponsorship.

This is not a case where ORR has maintained custody of a child without issuing a decision on a pending application for sponsorship. ORR issued its final decision denying Ms. Stenor's application to sponsor M.S. months ago. Petitioners are afforded process now via their APA challenge of the Agency's decision. The fact that Petitioners seek release as a remedy does not alter the procedural posture or fact that they appeal from a final agency decision.

Petitioners' claims of "bad faith" and "pretext" rely almost exclusively on comparisons drawn between ORR's adjudication of Ms. Stenor's applications to sponsor N.F.S and D.F.S (her biological daughters with D.S.), wherein Ms. Stenor was deemed a Category 1 sponsor and ORR granted the applications; and ORR's adjudication of Ms. Stenor's application to sponsor M.S., to whom she has no legal or biological relationship and thus was considered a Category 3 sponsor. *See, e.g.*, Petition ¶¶ 72, 85, 87; Discovery Motion pp. 6-7. This argument ignores an essential reality: sponsorship assessment requirements, disqualifying factors, notice requirements, and appeal rights differ significantly for Category 1 and Category 3 sponsors. *See, e.g.*, UACB Policy Guide §§ 2.2.4 (documentation requirements), 2.4.2 (home study requirements), 2.5.1 (background check requirements), 2.7 (deadlines for ORR's recommendations and decisions on release), 2.7.4 (differing standards to deny release request), 2.7.7 (differing standards for notice), 2.7.8 (appeal rights). ORR denied Ms. Stenor's application to sponsor M.S., citing the fact that D.S. (Ms. Stenor's husband and a member of her household) had previously submitted a false birth certificate for M.S., which identified Ms. Stenor as M.S.'s mother. *See* Petition ¶¶ 29-30, 69, 91. As a Category 3 sponsor for M.S., this fraud was disqualifying for Ms. Stenor *See* UACB Policy Guide § 2.7.4 (ORR "*will* deny release to a Category 2 or Category 3 potential sponsor, if . . . . [t]he potential sponsor or a member of the potential sponsor's household . . . knowingly provided false information, committed perjury, or submitted fraudulent documentation during the sponsor assessment process" (emphasis added)). The denial was mandatory, not permissive as it would have been for a Category 1 sponsor. *See id.* As a Category 3 sponsor, M.S. was not entitled to a written decision enumerating ORR's denial of her sponsorship application for M.S. *See* UACB Policy Guide § 2.7.7. Instead, she was entitled to (and did receive) a telephone call informing her of the decision. *See id.*; Petition ¶ 69. There is no agency right of appeal for a Category 3 sponsor. UACB Policy Guide § 2.7.8. Rather, Petitioners are afforded process via their APA challenge to the Agency's decision.

The CAR will contain all of the above information, and more.

Petitioners' speculation about an alleged "Verbal Moratorium" on releases is just that – speculation – and does not equate to a showing of bad faith. Courts have frequently rejected attempts for extra record discovery because there has not been a strong showing. Consider, for example, the following cases:

- *Hadwan v. U.S. Dep't of State*, 340 F. Supp. 3d 351, 357 (S.D.N.Y. 2018): Rejecting discovery and extra record evidence for a variety of reasons and noting that even arbitrary and capricious conduct does not equate to bad faith because "that the ultimate resolution of his case may be in his favor, though the Court has yet to make such a determination, does not mean the Court should order discovery." (Internal citations and quotation marks omitted; alternations omitted).

- *Ali v. Pompeo*, 2018 WL 2058152 at *6: Rejecting discovery and extra record evidence for a variety of reasons and noting: "That an agency relies upon a document a party believes is inauthentic, improper or fraudulently obtained does not demonstrate that the agency has acted in bad faith. It may be that the agency's reliance on an allegedly coerced confession renders its decision arbitrary and capricious or not based on substantial evidence."

- *Nat'l Post Office Collaborate v. Donahoe*, No. 3:13-CV-1406 (JBA), 2014 WL 6686691, at *13 (D. Conn. Nov. 26, 2014): Rejecting request for additional discovery and extra record evidence in APA review of National Environmental Policy Act ("NEPA") decision, despite recognizing that additional discovery is more common in APA-NEPA cases, because agency acted within its discretion.

- *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 547 (S.D.N.Y. 2012): Rejecting discovery and extra record evidence where plaintiff claimed agency discriminated against Iranian individuals without further evidence.

- *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 315 (S.D.N.Y. 2012): Rejecting discovery and extra record evidence because, "[c]losely analyzed, [plaintiff's] arguments as to bad faith consist of merits arguments as to why [the agency], purportedly, misapplied various review criteria, or misinterpreted information in the competing grant applications. However, to establish bad faith requires a strong showing; this showing is not made out by the mere fact that a court may disagree with the agency on the merits or find error, procedural or substantive, by the agency decision-maker."

- *Citizens Against Casino Gambling In Erie Cty. v. Stevens*, 814 F. Supp. 2d 261, 272 (W.D.N.Y. 2011): Rejecting discovery and extra record evidence on alleged conflict of interest because employee was recused and employee's other work on the matter was pre-decisional.

- *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002): Rejecting request for additional discovery and extra record evidence despite fact that some agency officials with under investigation for dealings in other matters and noting that a decision made in a "rushed fashion" may indicate arbitrary or capricious action, but "does not indicate bad faith or misbehavior."

- *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001): Rejecting plaintiff's request for additional discovery and extra record evidence based on lawyer's assertion that several documents that would support plaintiff's position were omitted from the administrative record.

- *Stewart v. Potts*, 126 F. Supp. 2d 428, 435 (S.D. Tex. 2000): Rejecting discovery and extra record evidence when initial agency report contained statement that there would be a significant or substantial impact to the environment and these words were omitted in final report.

- *Earth Protector, Inc. v. Jacobs*, 993 F. Supp. 701, 708 (D. Minn. 1998): Rejecting request for discovery and extra record evidence despite allegation that agency employees indicated that agency was driven by improper motives.

Undersigned counsel could find only two cases that appear to have fulfilled the bad faith exception.[8] As set forth below, neither is analogous to the present case.

The first case hails from the Western District of Wisconsin. In *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276 (W.D. Wis. 1997), the court ordered limited extra-record discovery after finding that sufficient evidence of improper political contacts between tribes opposed to Chippewa Community's application existed with member of Congress, the Secretary of the

[8] There is no "absence of formal administrative findings" in this case. As a Category 3 sponsor, Ms. Stenor was not entitled to a written notification of denial. *See* UACB Policy Guide § 2.7.7. There will necessarily be limited documentation supporting ORR's decision prior to production of the administrative record, but all agency findings are memorialized in the CAR.

Interior, and others, such that undue political pressure may have been involved in denial of their application.

The second case hails from our district: *Schaghticoke Tribal Nation v. Norton*, No. 3:06-CV-00081(PCD), 2006 WL 3231419 (D. Conn. Nov. 3, 2006). In that case, Judge Dorsey ordered the "limited" depositions of former Secretary of the Interior, and Associate Deputy Secretary of the Interior, after petitioners demonstrated that members of Connecticut's congressional delegation met with Secretary of the Department of the Interior, and that the Connecticut Attorney General, Kent town officials, and the Governor all engaged in *ex parte* communications with the Bureau of Indian Affairs ("BIA"), among other agencies, regarding the Tribes' application. *Id.* at *3-6; *see also Schaghticoke Tribal Nation v. Norton*, No. 3:06-CV-00081 (PCD), 2007 WL 867987 (D. Conn. Mar. 19, 2007) (ordering the depositions of three additional government officials, to include the Director of the OFA, the then Deputy Chief of Staff to the Secretary of the Interior, and an attorney in the DOI Solicitor's Office, after it was learned during deposition of the Former Secretary of the Interior that he based his decision on their recommendations).

Both *Sokaogon Chippewa Cmty.* and *Schaghticoke Tribal Nation* represent an unusually detailed and fact specific tailoring to actual political pressure being demonstrated (at least facially) through aggressive FOIA requests on the agencies in question; this stands in stark contrast to the present case. Further, these cases demonstrate the high bar for supporting evidence required to infer that the agency action was not based solely upon the administrative record before it. A court will not "ascribe . . . nefarious motives to agency action as a general matter." *Est. of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008), *as rev.* Jan. 15, 2009. "Government officials are presumed to act in good faith . . . . [Petitioner] must present 'well-nigh irrefragable proof' of bad faith or bias on the part of government officials in order to overcome this presumption." *Schaghticoke*

Tribal Nation, 2006 WL 3231419 at *2 (citing *China Trade Ctr., L.L.C. v. Washington Metro. Area Transit Auth.*, 34 F. Supp. 2d 67, 70-71 (D.D.C. 1999). "Bald assertions of bad faith are insufficient to require agency officials to submit to depositions." *Friends of the Shawangunks, Inc. v. Watt*, 97 F.R.D. 663, 667 (N.D.N.Y. 1983). Assertions of wrongdoing by ORR do not suffice. Petitioners' allegations do not establish bad faith.

Petitioners' demands for discovery are not supported by precedent in this circuit, or elsewhere. The Supreme Court has only addressed the possibility of discovery of colorable constitutional claims in an APA case in *dicta*. *See Webster v. Doe*, 486 U.S. 592 (1988).[9] Beyond the *dicta* in *Webster*, there is scant evidence of courts allowing for broad discovery in APA cases involving constitutional claims. *See Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urb. Dev.*, 59 F. Supp. 2d 310, 327-28 (D.P.R. 1999) (citing *Webster*, holding that the *complete absence* of an administrative record with respect to certain issues warranted discovery as to the constitutional claims). Some courts simply deny discovery based on the constitutional claims. *See, e.g.*, *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191 (D.N.M. 2014) (denying extra-record discovery on a First Amendment claim); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1 (D.R.I. 2004) (affirming a protective order barring additional discovery for constitutional claims because claims were not raised during the

---

[9] In *Webster v. Doe*, 486 U.S. 592 (1988), a former CIA Employee alleged that he was fired by the CIA because of his sexual orientation. The plaintiff challenged his firing under the APA as an arbitrary and capricious agency decision and as a violation of his constitutional rights to due process and equal protection. The Court's holding was twofold: (1) the National Security Act of 1947 ("NSA") commits individual employment decisions to the CIA Director's discretion, thus precluding judicial review of those specific decisions under APA § 701(a), however, (2) the NSA does not preclude judicial review of "colorable constitutional claims arising out of the actions of the Director' in exercising that discretion." Writing for the Court, Chief Justice William Rehnquist addressed the CIA's concerns that "judicial review . . . of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." Chief Justice Rehnquist noted that "district courts have the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."

administrative hearings and, consequently, were deemed to have been waived). Other courts "deny discovery based on a finding that the constitutional claims 'fundamentally overlap' with the APA claims, making additional discovery unnecessary." *Almaklani*, F. Supp. 3d at 433. *See also*, *e.g.*, *Chiayu Chang*, at 162 (finding that the plaintiffs' constitutional claims in that case were "fundamentally similar to their APA claims" and denying their request for additional discovery beyond the administrative record). Adding constitutional claims in an APA case "cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action." *Id.* (citing *Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993)).

In the District of Connecticut and the Second Circuit, there is no evidence of a court allowing broad discovery outside of the administrative record in an APA action alongside constitutional claims. The only instances of the courts allowing for depositions and extra-record discovery are fact specific and based upon demonstrations that the record is incomplete, or that there has been improper political influence exerted on agency decision-makers. As set forth below, none offer analogous circumstances to this case.

There is a single instance of the District Court allowing deposition of Agency officials, upon a "strong preliminary showing of bad faith or improper conduct among agency decision makers": the *Schaghticoke Tribal Nation* decision, discussed above.

There are three instances of the District Court allowing the administrative record to be "supplemented" by permitting limited, extra-record discovery to ensure that the entire record had been captured—and only then under specific circumstances related to the facts of the case.

Courts have allowed the record to be supplemented when there was a certification of class of similarly situated individuals and where the general course of conduct of the agency is in question, not a discrete, singular adjudication of individual claims. In *Manker v. Spencer*, No. 3:18-

CV-00372 (CSH), 2019 WL 5846828 (D. Conn. Nov. 7, 2019), discovery was allowed outside the administrative record in a class action where the plaintiffs were challenging the Naval Discharge Review Board's *general course of conduct* in denying discharge upgrades and the agency sought to limit review to the administrative records of the *two named plaintiffs* (as opposed to providing the records for the entire class). The court stated: "Where a plaintiff challenges an agency's general course of conduct rather than a discrete adjudication, limited discovery . . . may be necessary where the administrative record does not contain evidence of the challenged action." *Id.* at *19.

In *Kennedy v. Speer*, another class action cited, discovery was allowed for the same reasons as in *Manker*, related to the Army's review board under similar circumstances. No. 3:16-CV-02010, slip op. at 2-3 (D. Conn. Sept. 6, 2019). In both *Manker* and *Kennedy*, the District Court required discovery to be conducted under the supervision of a Magistrate Judge.

In *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982), the Second Circuit reversed the district court's order for summary judgement and remanded the case back to the court for further consideration of the APA claim because there were factual issues in dispute over the accuracy of the record. The district court was ordered to permit "appropriate discovery" to explore whether some portions of the full record were not supplied to the court. *Id.* at 654.

In this case, Petitioners seek expansive discovery before the CAR has been returned. There is no basis in law or fact for the Discovery Motion at this juncture. Inasmuch as ORR policy may have changed, agency action is not subject to a heightened or more searching standard of review simply because it represents change in policy. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). ORR must be given the opportunity to respond to Petitioners' charges with citation to the CAR, before this Court can entertain Petitioners' request for discovery. To permit additional discovery, the submission of new evidence and legal arguments, or *de novo* review would incentivize unsuccessful parties to allege bad faith, retaliatory animus, and constitutional violations; the APA's restrictive procedures cannot be cast aside without substantial justification that is not present in this case. *See, e.g.*, *Chiayu Chang*, 254 F. Supp. 3d at 161-62.

For all the foregoing reasons, Respondents respectfully move the Court to deny Petitioners' Discovery Motion and enter a scheduling order for production of the CAR and briefing on the merits.

RESPONDENTS,

By: DAVID X. SULLIVAN
UNITED STATES ATTORNEY

/s/ Jillian Rose Orticelli
Jillian Rose Orticelli (ct28591)
Sarah D'Addabbo Rocco (ct30016
Assistant United States Attorneys
450 Main Street, Rm. 328
Hartford, CT 06103
Tel.: (860) 947-1101
Fax: (860) 760-7979
Email: Jillian.Orticelli@usdoj.gov
Sarah.Rocco@usdoj.gov