THE HONORABLE LAUREN KING

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-LK

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS CLAIMS OF NATURALIZATION CLASS FOR LACK OF SUBJECT MATTER JURISDICTION

NOTE ON MOTION CALENDAR: November 17, 2023

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Defendants advocate for a jurisdictional rule that is breathtaking in scope and contradicts prior holdings by this Court and the courts in this district: That district courts may hear no claims related to the naturalization process under federal-question and Administrative Procedures Act ("APA") jurisdiction. Defendants assert that all naturalization-related challenges must be brought under either 8 U.S.C. §§ 1447(b) or 1421(c). There is no indication in the text or legislative history that Congress intended to channel all naturalization claims through these statutes. Indeed, such a rule would deny any judicial review over a whole host of naturalization-related agency actions, contradicting the recognition by countless courts throughout the country that federal-question and APA jurisdiction governs naturalization claims that fall outside the narrow confines of §§ 1447(b) and 1421(c), as the Naturalization Class's claims do. Any contrary position would give the agency *carte blanche* to adopt and apply unlawful policies and practices without any judicial oversight. Defendants' motion is without merit.

The Naturalization Class alleges that U.S. Citizenship and Immigration Services ("USCIS") violates the Equal Protection and Due Process Clauses of the Constitution, the APA, and the Immigration and Nationality Act ("INA") and its governing regulations by applying a policy known as the Controlled Application Review and Resolution Program ("CARRP") to the processing and adjudication of their naturalization applications. Under CARRP, USCIS profiles class members as "national security concerns" based on national origin, religious activity, and innocuous characteristics and associations—casting unfounded suspicion on class members based on who they are, not because they did anything wrong or are ineligible for the benefit. Once labeled a "concern," USCIS puts their applications in a "vetting" purgatory designed to prohibit officers from approving applicants with unresolved "concerns," irrespective of their eligibility to naturalize. As a result, most applications with unresolved "concerns" sit for years without adjudication. Contrary to USCIS's own regulations and due process, USCIS does not permit applicants any opportunity to know about or respond to the "concern."

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Federal-question jurisdiction is the only forum for these claims. Sections 1447(b) and 1421(c) permit applicants to ask the district court to decide their naturalization cases where the agency has failed to complete adjudication more than 120 days after the naturalization interview (§ 1447(b)) or has denied their application (§ 1421(c)). Neither situation applies to the present case. Most class members have not had an interview, and none have had their applications denied. Neither statute provides review for the claims of class, which seek to enjoin the agency from applying the CARRP policy to the processing and adjudication of their applications, *not* to establish their eligibility for the benefit or to have their applications decided by the Court.

Defendants' superfluous argument that the Naturalization Class claims must be dismissed because they are not ripe under §§ 1447(b) and 1421(c) fails for the same reason. There is no requirement that their claims be brought under either statute. Moreover, their claims are ripe because they are, by definition, currently subject to CARRP, and thus already suffering the very conduct they complain about.

The Court should deny Defendants' motion to dismiss and proceed to adjudication.

II. FACTUAL BACKGROUND

Plaintiffs Wagafe, Abraham, and Manzoor, on behalf of themselves and the certified Naturalization Class, seek to enjoin Defendant U.S. Citizenship and Immigration Services ("USCIS") from applying an agency-created policy, CARRP, to the processing, investigation, and adjudication of their naturalization applications. They allege that CARRP policies, procedures, and practices impose extra-statutory criteria on naturalization applicants by directing agency officers to deny the applications or delay indefinitely the adjudication of eligible applicants. SAC, Dkt. 47 at 44-50. They do not ask the Court to decide their naturalization applications or to review their eligibility. Rather, they ask the Court to enjoin CARRP, order the agency to adjudicate class members' applications based on the statutory criteria, and declare CARRP to violate the Constitution, the INA, and the APA. SAC, Dkt. 47 at 51.

In fact, the Naturalization Class consists of all persons with naturalization applications *pending* before USCIS who are subject to CARRP and that have been pending for more than six

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months. Dkt. 69 at 8. The Naturalization Class does not include individuals whose applications have been adjudicated.

Plaintiffs allege that CARRP policy and procedures result in naturalization applications being subjected to extraordinary delays and unwarranted denials, often because USCIS officers are told they may not grant applicants subjected to CARRP even when the applicants are statutorily eligible. In Plaintiff Wagafe's case, USCIS had deemed his case ready for adjudication a year and a half before this lawsuit was filed, but then USCIS simply sat on his application, taking no action to schedule or conduct a naturalization interview. Plfs' Motion for Summary Judgment, filed as a Highly Sensitive Document on March 25, 2021 (hereinafter "Plfs' MSJ"), at 18. As described in Plaintiffs' motion for summary judgment, discovery in this case revealed Plaintiff Wagafe was not the only one whose naturalization application faced lengthy pre-interview delay. In response to this lawsuit, USCIS conducted a national review of pending CARRP cases and identified 6,000 "adjudication ready" cases that the agency had simply shelved rather than adjudicate. Plfs' MSJ at 16. On average, applications subject *at any point* to CARRP take 2.5 times longer to adjudicate than non-CARRP applications, and the delays are much longer for applications that remain subject to CARRP throughout their processing. *Id*. A class list from March 2021 revealed extraordinary wait times for class members:

Length of time waiting	**More than 20 years**	**More than 15 years**	**More than 10 years**	**More than 5 years**	**More than 3 years**	**More than 2 years**
Number of class members	18	81	162	309	715	1,348

Id. Discovery also revealed extreme disparities in approval rates between applications processed the regular way (i.e., according to statutory criteria) and those processed under CARRP (i.e., according to extra-statutory, unauthorized criteria), displaying CARRP's profound influence over naturalization outcomes.

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	Routine	CARRP			
Category of NS concern	**Not CARRP**	**Non-NS ("resolved" concern)[1]**	**Non-KST[2]**		**KST[3]**
			Not Confirmed	**Confirmed**	
Approval Rate for Adjudicated Cases	92.5%	86%	73%	44%	11%
Denial Rate for Adjudicated Cases	7.5%	14%	27%	56%	89%

Id. at 17.

III. STANDARD OF REVIEW

Under Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. An attack on subject matter jurisdiction may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack asserts that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* A factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* In deciding a Rule 12(b)(1) facial attack motion, a court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the nonmoving party. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Where jurisdiction is intertwined with the merits, a court must assume the truth of the allegations in a complaint "unless controverted by undisputed facts in the record." *Id.*

[1] This category, "non-National Security," as explained in Plaintiffs' motion for summary judgment, refers to those individuals whose cases were at one point processed under CARRP but whose "national security concerns" were deemed "resolved" and thus returned to routine processing. Plfs' MSJ at 8-10, 14-15.

[2] This category refers to "Non-Known or Suspected Terrorists," meaning USCIS has labeled them a possible "national security concern" and adjudicated their applications under CARRP. Plfs' MSJ at 8-10.

[3] This category refers to "Known or Suspected Terrorists," a government moniker for those who have been placed on a terrorist watchlist and are processed under CARRP. Plfs' MSJ at 8-10.

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"Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Gompper v. VISX, Inc.,* 298 F.3d 893, 898 (9th Cir. 2002).

IV. ARGUMENT

A. The INA Does Not Strip the Court of Federal-Question Jurisdiction Over the Claims of the Naturalization Class.

Defendants argue that two provisions of the INA, 8 U.S.C. §§ 1447(b) and 1421(c), create an exclusive review scheme for virtually all "claims relating to naturalization." Defs' Mot. at 3. These provisions, say Defendants, strip district courts of original federal-question jurisdiction over any naturalization-related claim, except for "existential" questions about "an agency's very power to act." *Id.* Defendants advocate for a sweeping rule that is counter holdings by dozens of courts: that litigants with complaints about the naturalization process may only have those complaints heard by a court if they are (1) asking a court to decide their application, and (2) are either post-naturalization interview or have received a final agency decision denying their application, as those are the only circumstances in which a litigant can bring claims under §§ 1447(b) and 1421(c). All other claims, according to Defendants, such as pre-interview delays or challenges to pre-adjudication unlawful policies and practices, are foreclosed. *Id.* Such a sweeping interpretation of §§ 1447(b) and 1421(c) finds no support in the statute or controlling case law. Indeed, it would deny review to a whole range of conduct and complaints for which USCIS could never be held accountable, including the Naturalization Class's challenges to the legality of CARRP.

District courts can "ordinarily" hear challenges to agency action under their general federal-question jurisdiction, which is conferred by 28 U.S.C. § 1331. *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185 (2023). Congress may, however, choose to remove this jurisdiction over some types of claims by channeling them into a special review procedure. *Id.* It normally does so by providing for "review in a court of appeals following the agency's own review process." *Id.* When it is "fairly discernible" that Congress intended to channel certain cases through an exclusive statutory review scheme, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994),

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the scheme "divests district courts of their ordinary jurisdiction *over the covered cases*," *Axon*, 598 U.S. at 185 (emphasis added). To determine whether it is "fairly discernible" that Congress intended to create an exclusive review scheme, courts begin by examining the scheme's "language, structure, and purpose," as well as its "legislative history." *Thunder Basin*, 510 U.S. at 207.

If a court determines the statutory scheme displays the "discernible intent" to limit jurisdiction, courts go on to ask whether the claim is "of the type Congress intended to be reviewed within th[e] statutory structure." *Axon*, 598 U.S. at 186 (internal quotation marks omitted). The Supreme Court has identified "three considerations designed to aid in [this] inquiry, commonly known now as the *Thunder Basin* factors. First, could precluding district court jurisdiction foreclose all meaningful judicial review of the claim? Next, is the claim wholly collateral to the statute's review provisions? And last, is the claim outside the agency's expertise? When the answer to all three questions is yes, we presume that Congress does not intend to limit jurisdiction." *Id.* (cleaned up). Moreover, as the Court in *Axon Enterprise, Inc.* made clear, a court may find that Congress does not intend to limit jurisdiction even "if the factors point in different directions." 598 U.S. at 186. Significantly, a "heightened showing" of clear congressional intent is required when, as here, a statute would deny a judicial forum for constitutional claims. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012). "The ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question." *Axon*, 598 U.S. at 186. Here, the answer is "no."

1. Congress Did Not Intend to Create an Exclusive Review Scheme for All Naturalization Claims.

The language, structure, purpose, and legislative history of §§ 1447(b) and 1421(c) make clear that Congress did not intend for them to establish a statutory review scheme covering all claims relating to naturalization. On the contrary, §§ 1447(b) and 1421(c) define narrow procedural circumstances in which district courts, rather than USCIS, have the power to decide whether an application for naturalization will be granted or denied. *United States v. Hovsepian*, 359 F.3d 1144, 1162 (9th Cir. 2004) (en banc). The provisions plainly do not reach claimants, like

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the members of the Naturalization Class, who are not in the specified procedural circumstances and do not seek the specified types of review. These statutes do not convey any intent to create a comprehensive review scheme for all claims.

Section 1447(b) applies to naturalization applicants who have been interviewed by USCIS, but whose applications are still pending.[4] 8 U.S.C. § 1447(b). If such applicants do not receive a decision from USCIS within 120 days of their interview, the statute provides that they may seek "a hearing on the matter" before the U.S. district court for the district where they live. *Id.* The district court then assumes "exclusive jurisdiction over" the naturalization application, and ultimately may choose either to adjudicate the application itself or remand with instructions to USCIS. *Hovsepian*, 359 F.3d at 1159, 1161.

Section 1421(c) applies to naturalization applicants whose applications have been denied by USCIS and who have already received a subsequent administrative hearing. 8 U.S.C. § 1421(c). Such applicants may seek *de novo* review of their eligibility for naturalization in the U.S. district court for the district where they live. *Id.* On review, the district court gets the "final word" on the applicant's eligibility to naturalize. *Hovsepian*, 359 F.3d at 1162.

Thus, by their plain text, §§ 1447(b) and 1421(c) create a process for judicial review of individual applications for naturalization in certain circumstances—permitting a federal court, rather than USCIS, to determine whether an application will be granted. Neither provision contains language indicating that Congress intended them to govern all other claims relating to naturalization. Nor does the legislative history. On the contrary, one of the sponsors of the legislation containing §§ 1447(b) and 1421(c) explained that the bill simply preserved the judicial review rights afforded applicants under the prior naturalization scheme—it did not expand or contract them. 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison) ("H.R. 1630 does not take away any of the judicial review rights accorded applicants today."); *see also Etape v. Chertoff*, 497 F.3d 379, 386 (4th Cir. 2007) ("Congress recognized the long-standing power the district courts had possessed over naturalization applications and so provided in the new statute

[4] USCIS conducts naturalization interviews at the very end of the naturalization process.

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that district courts retained their power to review an application if an applicant so chose."). Moreover, the sponsor explained the review procedures were intended to give the "applicant, not the government" the power to "decide[] the place and the setting and the timeframe in which the application will be processed." *Id.*; *see also Hovsepian*, 359 F.3d at 1164.

In short, neither the language, the structure, the purpose, nor the legislative history of §§ 1447(b) and 1421(c) evince a "fairly discernible" intent—let alone a clear intent, *Elgin*, 567 U.S. at 9—to displace federal-question jurisdiction over all claims relating to naturalization, including constitutional and statutory claims challenging USCIS policies. *Thunder Basin,* 510 U.S. at 207.

The Supreme Court's analysis of another INA provision in *McNary v. Haitian Refugee Center., Inc.*, 498 U.S. 479, 492 (1991) is instructive. There, the Supreme Court held that the plain language of 8 U.S.C. § 1160(e)(1), which governs judicial review "of *a determination* respecting *an application*" for Special Agricultural Worker (SAW) status, did not strip district courts of federal-question jurisdiction over "general collateral challenges to unconstitutional practices and policies used by the agency in processing [SAW] applications." *Id.* (emphasis in original). The Court explained that "[t]he critical words" of § 1160(e)(1) were "*a determination* respecting *an application*." *Id.* (emphasis in original). These words, said the Court, referred to "a single act": "the denial of an individual application" for SAW status. *Id.* Consequently, they did not encompass "a group of decisions or a practice or procedure employed in making decisions." *Id.* (emphasis in original). "Given Congress' choice of statutory language," wrote the Court, "we conclude that challenges to the procedures used by INS do not fall within the scope of" § 1160(e)(1); rather, §1160(e)(1) "applies only to review of denials of individual SAW applications." *Id.* at 494.

Defendants unsuccessfully attempt to distinguish *McNary* by pointing out that §§ 1447(b) and 1421(c), unlike the provision at issue in *McNary*, permit *de novo* review of an individual's application for naturalization. Defs' Mot. at 14 n.6. This is a red herring. The holding in *McNary* was based on the plain text of § 1160(e)(1). *McNary*, 498 U.S. at 492 (analyzing the "critical words" of § 1160(e)(1) and stating, based on those words, "[w]e therefore agree with the District

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Court's and the Court of Appeals' reading of this language as describing the process of direct review of individual denials of SAW status, rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications"); *see also Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 55–56 (1993) (explaining *McNary*'s holding based on statutory text). There is no indication that the Court's interpretation of the provision's "critical words" would have been different if the INA permitted *de novo* review of denied SAW applications. *See McNary*, 498 U.S. at 494 (expressly rooting its holding in "Congress' choice of statutory language").

Like the provision at issue in *McNary*, §§ 1447(b) and 1421(c) explicitly describe a process for obtaining judicial review of individual applications for naturalization in expressly limited procedural circumstances. *See* 8 U.S.C. § 1447(b) ("If there is *a failure* to make *a determination* under section 1446 of this title before the end of the 120-day period after the date on which *the examination* is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter.") (emphasis added); *id.* § 1421(c) ("A person whose application for naturalization under this subchapter *is denied* . . . may seek review *of such denial* before the United States district court for the district in which such person resides . . . .") (emphasis added). Defendants offer no basis for concluding that Congress intended §§ 1447(b) and 1421(c) to have jurisdictional effects stretching beyond the express limitations in their plain text.

Indeed, if Congress had intended §§ 1447(b) and 1421(c) to have the astounding jurisdictional breadth Defendants claim they do, then Congress would have drafted them with much broader language, as it did other provisions of the INA. *See McNary*, 498 U.S. at 494 (noting that if Congress had wanted § 1160(e)(1) to reach beyond judicial review of individual applications, it could have used broader language, as it had done before); *see also, e.g.*, 8 U.S.C. § 1252(a) (providing exclusive mechanism for judicial review of removal orders); *id.* § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising

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from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.").

The D.C. Circuit's opinion in *Miriyeva v. U.S.C.I.S.*, 9 F.4th 935 (D.C. Cir. 2021) further undermines Defendants' expansive, a-textual interpretation of §§ 1447(b) and 1421(c). In *Miriyeva*, the D.C. Circuit held that a petitioner seeking "to overturn the denial of her naturalization application by challenging an agency policy" could not bring her challenge in the District Court for the District of Columbia; instead, she had to bring her challenge in the district court where she lived, as required by § 1421(c). *Id.* at 942. To support this holding, the D.C. Circuit reasoned that § 1421(c) is part of a statutory scheme intended to "exclusively direct the review process of naturalization application denials," *id.* at 940 (parentheses omitted); consequently, § 1421(c) implicitly prevents district courts from reviewing such denials pursuant to federal-question jurisdiction, *id.* at 945. *Miriyeva* does not hold that §§ 1447(b) and 1421(c) displace federal-question jurisdiction over all claims relating to naturalization; rather, it holds that § 1421(c) displaces federal-question jurisdiction when an individual is challenging their naturalization denial. *Id.* Here, by definition of the class, no class member has been denied.

Indeed, federal courts routinely exercise federal-question jurisdiction over naturalization-related claims that cannot be pursued under §§ 1447(b) or 1421(c). *See, e.g.*, *infra* Section IV.B (citing cases); *Abdulmajid v. Arellano*, No. CV 08-796, 2008 WL 2625860, at *2-3 (C.D. Cal. June 27, 2008) ("Although §§ 1447(b) and 1421(c) provide for district court review of naturalization applications in certain instances, they are not jurisdiction stripping statutes. Nor do we read these statutes as implicitly limiting our jurisdiction to review claims of undue delay."); *Ibrahim v. U.S.C.I.S.*, No. 10-14520, 2011 WL 3426191, at *3 (E.D. Mich. Aug. 5, 2011) ("[T]he specific grant of jurisdiction to differently-situated applicants does not deprive Ibrahim of alternative means of obtaining judicial review."); *Sidhu v. Chertoff*, No. 07-CV-1188, 2008 WL 540685, at *8 (E.D. Cal. Feb. 25, 2008) ("Here, unlike the plaintiff in *Yarovistskiy,* Plaintiff is not asking the court to adjudicate her application. More importantly, while a specific immigration statute does grant review of delays after an interview [1447(b)], no immigration statute provides for review of

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delays prior to the interview. In this court's opinion, *Yarovistskiy,* and related cases, do not adequately explain why the APA would not apply prior to the interview because the specific immigration statutes at issue do not address delays prior to the interview."); *Hanbali v. Chertoff*, CA No. 07CV-60, 2007 WL 2407232, at *3 (W.D. Ky. Aug. 17, 2007) ("There are ample administrative and judicial remedies should [plaintiff's] application be denied. However, there is no alternative remedy for an unreasonable delay. Plaintiff's only means of compelling agency action in the case of an unreasonable delay is through an order of a district court.").

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Congress spoke clearly in §§ 1447(b) and 1421(c). Those provisions create processes for obtaining judicial review of individual naturalization applications in certain procedural scenarios. The statutes display no intent to channel all naturalization-related claims and strip this Court's federal-question jurisdiction over the claims of the Naturalization Class. *Thunder Basin*, 510 U.S. at 207; *see also McNary*, 498 U.S. at 494 ("Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired."); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1055 (9th Cir. 1995) ("When the provision for exclusive review in the courts of appeals is inapplicable, jurisdiction lies in the district court pursuant to the federal question statute, and pursuant to the general grant of power to review matters arising under the immigration laws.") (internal citations omitted).

2. The *Thunder Basin* Factors Demonstrate that Congress Did Not Intend to Strip Federal-Question Jurisdiction Over the Naturalization Class's Claims.

Even if the Court were to conclude that §§ 1447(b) and 1421(c) create a scheme demonstrating a "discernible intent" to limit jurisdiction, the *Thunder Basin* factors make clear that Congress did not intend to channel the claims of the Naturalization Class into the INA's statutory review scheme.

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a. Precluding Federal-Question Jurisdiction Over the Naturalization Class's Claims Would Foreclose All Meaningful Judicial Review.

Congress clearly did not intend to preclude the Naturalization Class's claims because doing so would foreclose all meaningful judicial review. Defendants assert that §§ 1447(b) and 1421(c) afford the Class meaningful judicial review because they provide class members the opportunity for *de novo* review by a court. Defs' Mot. at 11. They fail to explain how a court's *de novo* review of the denial of a naturalization application under § 1421(c), where a court "make[s] its own findings of fact and conclusions of law" about an applicant's eligibility to naturalize, offers a forum for injunctive claims that seek not to establish eligibility to naturalize but rather to stop the agency from applying unlawful criteria and procedures to the processing of applications. Indeed, in an action under § 1421(c), neither the individual nor the court would have any way of knowing how CARRP impacted the outcome in the case because the government never discloses the reasons it subjects an individual to CARRP. *See* Plfs' MSJ at 32. Similarly, § 1447(b) does not provide an alternative mechanism for judicial review, as class members are not asking the court to assume jurisdiction over the adjudication of their individual cases and determine their eligibility to naturalize, but instead seek only to have the court determine whether the agency must refrain from applying CARRP in adjudicating their applications.

Rather than explain how either statute offers a meaningful forum for review, Defendants string cite cases to quote them out-of-context. Defs' Mot. at 11. These cases support the idea that §§ 1421(c) and 1447(b) are adequate remedies for individuals challenging denied naturalization applications or seeking final decisions on their applications but say nothing about whether they would be deemed meaningful remedies when a litigant does not challenge a denied naturalization application or ask the court to assume jurisdiction over the adjudication of their individual case—as here. *See Garcia v. Vilsack*, 563 F.3d 519, 522-523 (D.C. Cir. 2009) (in a case not involving naturalization, court points out in the APA context that the availability of *de novo* review of an agency action is one feature that may make it an adequate remedy); *Miriyeva*, 9 F.4th at 941 (involved a denied naturalization application); *Aparicio v. Blakeway*, 302 F.3d 437, 447 (5th Cir. 2002) (relying on the availability of § 1421(c) to challenge denied applications and distinguishing

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from cases that "could receive no practical judicial review within the scheme"); *De Dandrade v. U.S. Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 184 (S.D.N.Y. 2019) (holding that Plaintiffs, who challenged USCIS practices for considering N-648 medical disability waiver requests, which excuse applicants from the English and civics test portion of the naturalization interview, could challenge these waiver denials in challenging the denials of their naturalization applications under § 1421(c) and thus were required to bring their claims under § 1421(c)); *Boakye v. Hansen*, 554 F. Supp. 2d 784, 787 (S.D. Ohio 2008) (court held a post-interview applicant, whose granted application had been reopened, had to file his claim seeking a decision on his application under § 1447(b)).

Defendants concede that the Naturalization Class cannot bring their claims under either statute now, yet offer no explanation for how class members could do so in the future. Defs' Mot. at 4 n.3, 14-17. Moreover, waiting until their individual cases become "ripe" under either statute would foreclose the very relief they seek: enjoining the agency from applying an unlawful, extra-statutory set of criteria to the processing of their naturalization applications that results in long delays, discriminatory treatment, and due process and regulatory violations, among other harms. It is precisely because thousands of class members are placed in limbo and are stuck waiting years for an interview and a decision, that they are barred from asking a district court to exercise jurisdiction and adjudicate their applications under §§ 1447(b) and 1421(c). If they could eventually get judicial review, it would be too late to prevent the years of delay and unlawful treatment caused by the application of an illegal policy to their case.

Even those class members who could invoke the statutory remedies would not have a forum to challenge the legality of CARRP. Section 1447(b), by its plain terms, is a vehicle only to seek a decision on a naturalization application, not to challenge the legality of agency policy and practices. Section 1421(c) only provides jurisdiction for *de novo* review of an individual applicant's eligibility to naturalize and a determination of their eligibility, not constitutional, statutory, and APA challenges to an agency's policy and procedures and injunctive relief. Moreover, a § 1421(c) litigant would no longer be subject to CARRP because the administrative

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naturalization process would be finished, meaning their claims would be moot and they would no longer have standing for injunctive relief. A court would find USCIS's application of CARRP to the applicant's administrative naturalization decision irrelevant to the court's *de novo* review of statutory eligibility for naturalization because the court does not consider the administrative process that led to the decision, nor does it defer to the agency's findings. *See Hamdi v. U.S.C.I.S.*, No. EDCV 10-894, 2011 WL 13323631, at *5 (C.D. Cal. Sept. 28, 2011) (holding, in a CARRP § 1421(c) case, that discovery was not permitted into the USCIS policies, procedures, and trainings that informed the agency's decision because the agency's actions were irrelevant to the Court's *de novo* determination of the applicant's eligibility to naturalize).

Courts that have precluded district court jurisdiction under *Thunder Basin* have done so only where another forum existed to present the claims at issue, whether in a different district court, as in *Miriyeva*, or in the Court of Appeals, *see Thunder Basin*, 510 U.S. at 215 (holding petitioner's statutory and constitutional claims could be "meaningfully addressed in the Court of Appeals"); *Elgin*, 567 U.S. at 21 ("Within the [statutory] review scheme, the Federal Circuit has the authority to consider and decide petitioners' constitutional claims."). Here, no alternative forum exists in the statutory scheme to make the Naturalization Class's claims. "Congress rarely allows claims about agency action to escape effective judicial review," and it did not do so here. *Axon*, 596 U.S. at 186.

b. The Naturalization Class's Claims Are Wholly Collateral to the Review Provided by §§ 1421(c) and 1447(b) and Outside the Agency's Expertise.

The second and third factors of the *Thunder Basin* test further demonstrate Congress did not intend to foreclose the Naturalization Class's claims. Their claims are "wholly collateral" to the statutory review schemes because they cannot be raised in § 1421(c) or § 1447(b) actions, as described above. "A claim is not wholly collateral to the claims meant to go through the review scheme if that claim is 'at bottom' an attempt to accomplish what's contemplated by the review scheme." *Miriyeva*, 9 F.4th at 941. Here, the Naturalization Class does not seek the court's determination of their naturalization applications. "At bottom" their claims are entirely dissimilar

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from the relief provided through §§ 1421(c) and 1447(b) and circumstances where courts have held claims were not collateral. *See, e.g.*, *Elgin*, 567 U.S. at 22 (holding petitioners' constitutional claims sought to reverse removal of employment decisions, which was "precisely the type of personnel action regularly adjudicated by the [statutory review body] and the Federal Circuit within the [statutory] scheme."); *Heckler v. Ringer*, 466 U.S. 602, 614 (1984) (holding plaintiffs' claims sought to reverse the agency's decision to deny Medicare payment, which was relief available through the statutory scheme); *Miriyeva*, 9 F.4th at 942 (holding Plaintiff sought to overturn the denial of her naturalization application, which was the remedy provided through § 1421(c)).

Indeed, the Naturalization Class's claims are like those in *McNary*, which, as here, challenged "unlawful practices and policies" in processing adjustment of status applications. 498 U.S. at 487, 492. The Court held that the class's claims were collateral to the judicial review of individual determinations provided by the statute, noting that if the individual litigants prevailed on their claims, the result would not be a determination that they were entitled to the immigration benefit. Instead, if they prevailed on their claims that the practices and procedures were unlawful, they would be "entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures." *Id.* at 495. So too here. If the Naturalization Class prevails on their claims, this Court will not determine their eligibility to naturalize, nor prescribe the outcomes of their naturalization applications. Rather, class members would be entitled to have their naturalization applications adjudicated in accordance with the law and without being subject to the CARRP policies and practices the Naturalization Class alleges are unlawful.

Defendants observe that, unlike the claims at issue in *Axon*, the Naturalization Class's claims do not challenge the power of USCIS to adjudicate naturalization applicants. Defs' Mot. at 12-13. This distinction is immaterial. *Axon* did not announce a rule that only challenges to an agency's power can be pursued in district court; rather, it observed that the plaintiffs' claims, which challenged the agency's power to act, were not the sort that could be heard under the statutory review scheme at issue there, and were thus collateral to it. 598 U.S. at 904-05 (the plaintiffs'

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claims "have nothing to do with the enforcement-related matters the Commissions regularly adjudicate."). Here, the same is true. Plaintiffs' claims—that the agency adopted a policy without notice and comment, as required by the APA; that the policy violates due process and agency regulations by failing to notify applicants of the derogatory information used against them; and that the agency adopted and apply extra-statutory criteria that Congress has declined to legislate nearly a dozen times to the adjudication of naturalization applications—are questions "wholly collateral" to §§ 1447(b) and 1421(c), which simply allow for federal courts to assume exclusive jurisdiction in making eligibility determinations.

The third factor, whether the claims are "outside the agency's expertise," simply does not fit the situation presented here. Defendants do not allege that there is any administrative review process through which Plaintiffs' claims can or should be routed for first consideration by USCIS before being presented for judicial review—indeed, there is none.

Thus, the *Thunder Basin* factors further demonstrate Congress did not intend to foreclose Plaintiffs' claims. When USCIS adopts policies and procedures to govern the naturalization process that violate U.S. laws, such violations may be challenged under 28 U.S.C. § 1331.

B. The Naturalization Class's Claims May Proceed Under the APA.

Defendants also contend that this Court has no subject matter jurisdiction over the Naturalization Class's APA claims because the Class has an "adequate remedy" under §§ 1447(b) and 1421(c), even though class members cannot proceed under either provision. Defs' Mot. at 18-20. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). As explained above, neither statute provides a remedy for the Naturalization Class's claims.

Defendants cite not a single case that holds that §§ 1447(b) and 1421(c) are adequate remedies to displace APA jurisdiction where naturalization applicants bring pre-interview and pre-denial challenges to the processing of their applications. Indeed, Defendants' argument has been rejected repeatedly by courts in this district and around the country. When litigants challenge unreasonable *pre-interview* naturalization delays, courts have held that the APA provides

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jurisdiction over those claims. This is true of courts in this district, *see Roshandel v. Chertoff*, No. C07-1739, 2008 WL 1969646, at *5 (W.D. Wash. May 5, 2008); *Rajput v. Mukasey*, No. C07-1029, 2008 WL 2519919, at *2 (W.D. Wash. June 20, 2008) (holding on summary judgment that pre-interview delay in processing naturalization application was unreasonable under APA); *Abdalla v. Mukasey*, No. C07-1767, 2008 WL 3540201, at *1-3 (W.D. Wash. Aug. 11, 2008) (same); *Singh v. Mukasey*, No. C07-1332, 2008 WL 2230772, at *2-4 (W.D. Wash. May 29, 2008) (holding on summary judgment that APA applied to pre-interview naturalization delay, but delay was not yet unreasonable), and it is true of district courts in the Ninth Circuit and around the country, *see, e.g., Kaplan v. Chertoff*, 481 F.Supp.2d 370, 400 (E.D. Pa. 2007) (section 1447(b) is not an adequate remedy for pre-interview naturalization applicants and APA applies); *Sidhu v. Chertoff*, No. 07-CV-1188, 2008 WL 540685, at *8 (E.D. Cal. Feb. 25, 2008) (holding court had jurisdiction to review Plaintiff's claim that her application had not been adjudicated within a reasonable time under 28 U.S.C. § 1331 and the APA) (noting that "[w]ithout APA relief, CIS could withhold a decision indefinitely in contravention of its statutory duty to process [naturalization] applications," *id.* at *6); *Jiang v. Chertoff*, No. C 08-00332, 2008 WL 1899245, at *3 (N.D. Cal. Apr. 28, 2008) ("This Court agrees with plaintiff and the many district courts that have held that, taken together, the APA, and the statutes and regulations governing immigration establish a clear and certain right to have [naturalization] applications adjudicated, and to have them adjudicated within a reasonable time frame.") (listing cases); *Ibrahim*, 2011 WL 3426191, at *3 (rejecting USCIS's claim that § 1447(b) provided the only avenue for judicial review because "the specific grant of jurisdiction to differently-situated [post-interview] applicants does not deprive Ibrahim of alternative means of obtaining judicial review."); *Hanbali*, 2007 WL 2407232, at *3 (holding APA applies because Congress had not provided an adequate remedy in the statute for judicial review of pre-interview delays); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 50 (D.D.C. 2008) (holding court has jurisdiction to address challenge to delayed naturalization application under APA); *Yea Ji Sea v. U.S. Dep't of Homeland Sec.*, No. CV-18-6267, 2018 WL 6177236, at *5 (C.D. Cal. Aug. 15, 2018) (same); *Abdulmajid*, 2008 WL 2625860, at *2 (same); *Wang v.*

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Mukasey, No. C-07-06266, 2008 WL 1767042, at *3 (N.D. Cal. Apr. 16, 2008) (same); *Rustichelli v. Gonzales*, No. SA CV 07-1008, 2008 WL 11338691, at *3-4 (C.D. Cal. Mar. 31, 2008) (same); *Lavoi v. Mukasey*, NO. 08-20701-CIV, 2008 WL 11333337, at *2 (S.D. Fla. June 5, 2008) (same); *Oniwon v. U.S.C.I.S.*, 2020 WL 1940879, at *4 (S.D. Tex. Apr. 6, 2020), *report and recommendation adopted*, 2020 WL 1939686 (S.D. Tex. Apr. 22, 2020) (same). *See also* Dkt. 69 at 17-18 (holding on Defendants' first motion to dismiss that APA conferred jurisdiction considering the lack of a private right of action under the INA).

Defendants cite a handful of out-of-circuit cases they claim demonstrate that § 1447(b) displaces APA jurisdiction, but they fail to mention that these cases only involved *post*-interview litigants who could plainly obtain relief under § 1447(b). Defs' Mot. at 19. As a result, they are not instructive here. *See Tankoano v. U.S.C.I.S.*, CA No. H-22-2757, 2023 WL 417475, at *5 (S.D. Tex. Jan. 25, 2023) (plaintiff pled claim under § 1447(b) presumably because he was post-interview, which court held was sufficient evidence of Plaintiff's recognition that § 1447(b) offered him a remedy); *Ahmed v. Holder*, No. 08CV826, 2009 WL 3228675, at *3-4, 6 (E.D. Mo. Sept. 30, 2009) (dismissing APA claim for class of post-interview naturalization applications because § 1447(b) provided them an adequate remedy); *Antonishin v. Keisler*, 627 F. Supp. 2d 872, 879 (N.D. Ill. 2007) (same); *Alsamir v. U.S.C.I.S.*, CA No. 06-cv-01751, 2007 WL 1430179, at *1-2 (D. Colo. May 14, 2007) (same); *Boakye v. Hansen*, 554 F.Supp.2d 784, 787 (S.D. Ohio 2008) (dismissing general § 1331 jurisdiction because of the existence of the remedy under § 1447(b) in case where applicant was clearly post-interview because he challenged the re-opening of his granted naturalization application). Defendants also cite *Yelin Du v. Gonzales*, No. CV 07-00151, 2008 WL 11336158, at *6 (C.D. Cal. Feb. 19, 2008), which actually holds that § 1447(b) is *not* an adequate remedy for pre-interview naturalization applicants and therefore does not displace APA jurisdiction, noting that a contrary conclusion would "run[] counter to Congress' intent in enacting § 1447" and would allow USCIS to "delay an applicant's examination indefinitely and avoid judicial review." Finally, they claim *Escaler v. U.S.C.I.S.*, 582 F.3d 288, 291 (2d. Cir. 2009) demonstrates that § 1421(c) is also an adequate remedy for the Naturalization

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Class's claims, but *Escaler* also points the opposite direction. In *Escaler*, the court acknowledged that when the litigant filed his complaint, neither §§ 1447(b) or 1421(c) provided judicial review because his naturalization application had been *granted*. His issue was that he had not been sworn in as a U.S. citizen, and therefore mandamus jurisdiction under 28 U.S.C. § 1361 might have offered a remedy, to fill the gap. *Id.* at 293. But the court never had to decide that because during the litigation USCIS reopened his application and denied it, thus requiring the applicant to exhaust his administrative remedies before filing a suit under § 1421(c). *Id.*

Even if it were true that judicial review under § 1447(b) was available to the Naturalization Class, a court in this district has held that class members can pursue relief under both § 1447(b) and the APA in a case like this where § 1447(b) is not a vehicle for systemic challenges to agency policy and practices. In *Roshandel*, 2008 WL 1969646, a class action challenging systemic *post-interview* naturalization delays, the court denied the government's motion to dismiss and held it had jurisdiction under *both* the APA and § 1447(b) because the relief the statutes provided was not duplicative. The court explained that even though the plaintiffs' delay claims might otherwise be reviewed under § 1447(b), "[w]ithout the APA, Plaintiffs cannot obtain a declaration of the unlawfulness of the policy and practice of delaying these naturalization applications." *Id*. at *5. *Cf. Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 35 (D.D.C. 2017) (rejecting Defendants' argument on preliminary injunction that naturalization statute precluded judicial review and holding APA conferred jurisdiction to challenge policies blocking naturalization for military members); *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 264–65 (D.D.C. 2018) (same denying motion to dismiss). *But see Ahmadi v. Chertoff*, No. C 07-03455, 2007 WL 3022573, *7 (N.D. Cal. Oct. 15, 2007) (holding no jurisdiction under APA in putative class action over naturalization delays *post-interview* because plaintiffs had an adequate remedy under § 1447(b)).

C. The INA plainly does not foreclose jurisdiction over the Naturalization Class's APA claims. The Claims of the Naturalization Class are Ripe for Adjudication.

Defendants argue that because there is no federal-question jurisdiction over the Naturalization Class's claims, their claims must be dismissed because they are not ripe under

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§§ 1447(b) and 1421(c). Defs' Mot. at 14-17. As there is clearly federal-question jurisdiction over the Class's claims, this argument fails.

Defendants' argument only underscores that neither §§ 1447(b) nor 1421(c) provide a forum for judicial review or an adequate remedy for Naturalization Class's claims. Indeed, class members may never have ripe claims under §§ 1447(b) and 1421(c) precisely because CARRP prevents their applications from being scheduled for an interview and decided. Prior to filing this lawsuit, USCIS had simply "shelved," without deciding, six thousand CARRP cases that were "adjudication ready," presumably because CARRP dictated the applications not be granted despite their eligibility and USCIS could find no basis to deny. *See supra* Part II; Plfs' MSJ at 5-8, 34. Even after USCIS adjudicated those six thousand cases in response to this lawsuit, *see id.* at 34, by March 2021, there were still 570 class members that had been waiting for adjudication for more than five years, with 18 class members waiting more than 20 years.[5] *Supra* Part II.

To the extent Defendants attempt to argue that the Class's claims are not ripe even if the Court holds there is federal-question jurisdiction, they are mistaken. The doctrine of ripeness has both constitutional and prudential components. *Safer Chems., Healthy Fams. v. U.S.E.P.A.*, 943 F.3d 937, 411–12 (9th Cir. 2019). "[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022). This Court has already held that the members of the Naturalization Class have standing to press their constitutional and statutory claims. Order, Dkt. 69 at 11–14, 17–18. Notably, in rejecting Defendants' initial motion to dismiss for lack of standing, the Court explained that Plaintiffs had satisfied the injury-in-fact requirement of Article III because they alleged that "CARRP . . . suspended [their] applications or will suspend applications of the putative class, and that such suspension was unlawful." *Id.* at 12. Defendants offer no reason to revisit this holding; that is, Defendants do not argue that the members of the Naturalization Class lack standing and

[5] Defendants' claim that 75% of CARRP cases are approved is both unsupported and not true. Defs' Mot. at 15-16. On average, applications still subject to CARRP when they are adjudicated are granted only 42.6% of the time, while routine cases not subjected to CARRP are granted 92.5% of the time. *See supra* Part II.

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could not plausibly do so. *See* Defs' Mot. at 14–15. The claims of the Naturalization Class satisfy the requirements of constitutional ripeness.

"Prudential considerations of ripeness are discretionary." *Bishop Paiute Tribe v. Inyo County.*, 863 F.3d 1144, 1154 (9th Cir. 2017) (citation omitted). In the Ninth Circuit, the prudential ripeness inquiry is "guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (internal quotation marks omitted). A case is fit for judicial decision when it "presents a concrete factual situation" that "demonstrates" how the challenged government action infringes the claimant's rights. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (internal quotation marks omitted). Thus, prudential considerations generally weigh against hearing cases in which the court must "hypothesize about how" a challenged law, regulation, or policy "might be applied" to a plaintiff. *Id.* Such concerns are absent when, as here, the claims in question "arise from" government action "that has already occurred." *Id.* at 838. CARRP, the agency policy at issue, has already been applied to the members of the Naturalization Class; therefore, there is no need for the Court to "hypothesize about" whether or how CARRP will impact the Naturalization Class. *Id.* On the contrary, the factual record of CARRP's application to, and effects on, the members of the Naturalization Class is well-developed.

Because this case is fit for judicial decision, the Court need not reach the second prudential-ripeness factor: "hardship to the parties in delaying review." *Oklevueha*, 676 F.3d at 838. In any event, the "hardship" factor weighs decisively in favor of ripeness. There can be no serious doubt that withholding adjudication of the Naturalization Class's claims will subject the class to serious hardship. Among other things, being placed in CARRP dramatically increases (a) the length of time for which naturalization applications remain pending and (b) the likelihood that a naturalization application will be denied on *any* ground. *See* Pls' MSJ at 17–26. That is, CARRP's concrete, injurious effects are already being felt by the members of the Naturalization Class; they relate to, but are not contingent upon, whether or on what basis any given class member's application is denied.

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Defendants fail to engage with these standards. They assert that the claims of the Naturalization Class are unripe because it is not certain whether, or on what grounds, each member's application for naturalization will be denied. Defs' Mot. at 15. Such purported uncertainties raise no ripeness concerns; that is, they do not require the Court to "hypothesize about" whether CARRP will be applied to the Naturalization Class or how its application will violate the Naturalization Class's rights. *Oklevueha*, 676 F.3d at 838. Unlike the plaintiffs in *CSS*, 509 U.S. 43 (1993), the members of the Naturalization Class have already "taken the affirmative steps" necessary for the agency to subject them to the challenged policy. *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130, 1136-37 (9th Cir. 1999) (summarizing the holding of CSS). And unlike the regulation at issue in *Aparicio v. Blakeway*, 302 F.3d 437, 446 (5th Cir. 2002), there is ample evidence that CARRP imposes injuries concretely felt by members of the Naturalization Class regardless of whether, and on what grounds, their applications are ultimately denied.

The Ninth Circuit's opinion in *Proyecto San Pablo* is instructive. 189 F.3d at 1138. There, Plaintiffs challenged "the procedures by which" the same "legalization program" at issue in *CSS* was "administered." In particular, Plaintiffs brought constitutional and statutory claims based on "their inability to get access to their prior deportation records" while their applications for "legalization" were still pending. *Id.* The Ninth Circuit, applying *CSS*, held that the plaintiffs' claims were "ripe because they attempted to obtain their prior deportation files while their cases were pending," but were unable to do so. *Id.* In other words, the Ninth Circuit held that the plaintiffs could establish ripeness based on pre-denial injuries caused by the agency's challenged procedures—injuries the plaintiffs incurred while their applications were pending. *Id.* This Court should reach the same result.

In sum, "[t]he basic rationale of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Oklevueha*, 676 F.3d at 835 (citation omitted). The claims of the Naturalization Class are far from an "abstract disagreement[]" with CARRP. On the contrary, there is no dispute that USCIS has applied CARRP to the members of the Naturalization Class, and the record is replete with evidence

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that this application of CARRP has injured, and continues to injure, the members of the Naturalization Class in specific, concrete ways. Ripeness requires nothing more.

V. REMAINDER OF THE CASE

Plaintiffs agree with defendants that if the Court were to conclude that it lacks jurisdiction of the Naturalization Class claims, it should continue to stay the balance of the case pending rulings on the cited cases pending at the Ninth Circuit.

VI. CONCLUSION

The Court should deny Defendants' motion to dismiss and proceed with adjudication of the pending motions for summary judgment.

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We certify that this memorandum contains 8,191 words, in compliance with the Local Civil Rules.

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