The Honorable Lauren King

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of himself and other similarly situated,

Plaintiffs,

v.

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

Defendants.

CASE NO. C17-00094-LK

NOTICE OF MOTION AND MOTION TO DISMISS CLAIMS OF NATURALIZATION CLASS AND INDIVIDUAL CLAIMS OF NAMED PLAINTIFFS WAGAFE, JIHAD AND MANZOOR FOR LACK OF SUBJECT MATTER JURISDICTION

(Note on Motion Calendar for: October 20, 2023)

Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and (h)(3) for an order dismissing the claims of the "Extreme Vetting Naturalization Class" and their individually named class representatives (hereafter "the naturalization class") for lack of subject matter jurisdiction.

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This motion is made and based on the pleadings and papers filed herein, and such oral argument as the Court may entertain.[1]

INTRODUCTION

The Immigration and Nationality Act ("INA") establishes a special statutory review scheme for claims concerning naturalization. Because the Court has stayed the adjustment class claims, centering the case on the *Wagafe* naturalization class, the INA naturalization judicial review scheme is now of particular importance.

Following the July 2, 2021 completion of summary judgment briefing in this case, *see* Dkt. # 457, the Supreme Court and D.C. Circuit issued new precedent highlighting the jurisdictional significance of such special statutory review schemes. The Supreme Court reiterated that such statutory schemes may "preclude district courts from exercising jurisdiction over challenges to federal agency action." *Axon Enterprise, Inc. v. Fed. Trade Comm'n,* __ U.S. __, 143 S. Ct. 890, 900 (2023) (hereinafter "*Axon Enterprise*") (citing and discussing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)). And, applying the *Thunder Basin* analysis, the D.C. Circuit held that the special statutory review scheme for naturalization applications foreclosed it from considering, under general federal question jurisdiction, constitutional and APA-based challenges to the propriety of the agency's procedures for adjudicating a naturalization application. *See Miriyeva v. United States Citizenship & Immigr. Servs.*, 9 F.4th 935, 945 (D.C. Cir. 2021).

The special statutory review scheme relevant here was enacted in 1990, when Congress reorganized the naturalization laws and created the application process now administered by United States Citizenship and Immigration Services ("USCIS"). The new judicial review scheme relieved

[1] In the early stages of this litigation, Defendants moved to dismiss Plaintiffs' Second Amended Complaint once before in this lawsuit. *See* Dkt. # 56. However, none of the arguments made in the instant motion were advanced in Defendants' previous motion, and their jurisdictional nature permits them to be raised now. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, (2006) (explaining that objections to the court's subject matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment"); *Reno v. Cath. Soc. Servs.*, 509 U.S. 43, 56 (1993) (referring to ripeness as a "jurisdictional hurdle" and "jurisdictional and justiciability requirements that apply in the absence of a specific congressional directive"), 57 n.18 ("[e]ven when a ripeness question in a particular case is prudential, we may raise it on our own motion"); *see also id.* 67-68 (O'Connor, J., concurring in judgment).

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overburdened federal district courts from the more-involved role they had once performed in naturalizing noncitizens. The new process placed the initial responsibility for adjudicating naturalization applications with the former Immigration and Naturalization Service ("INS"),[2] and adopted two channels for judicial review of claims arising from or relating to that administrative process. First, applicants who have been "examined" (interviewed) by USCIS but whose applications have remained unadjudicated for a period exceeding 120 days from the date of interview may invoke the jurisdiction of a district court under 8 U.S.C. § 1447(b). Such applicants may request that the court either remand the matter to USCIS with "instructions," or determine the eligibility of the applicant for naturalization in a hearing *de novo*. Second, applicants denied by USCIS may invoke the jurisdiction of a district court under 8 U.S.C. § 1421(c) and obtain a *de novo* determination of their eligibility for naturalization. Under both provisions, an action may be initiated by a plaintiff only in the judicial district in which they reside. *See* 8 U.S.C. § 1447(b); 8 U.S.C. § 1421(c).

These provisions are part of a process the INA makes exclusive: "A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed . . . and not otherwise." 8 U.S.C. § 1421(d); *see also INS v. Pangilinan*, 486 U.S. 875, 884 (1988) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress.") (cleaned up). The existence of these special statutory review provisions results in three fundamental jurisdictional defects in the claims of the naturalization class.

First, the sole basis for jurisdiction invoked by Plaintiffs is general federal question jurisdiction under 28 U.S.C. § 1331. However, *Thunder Basin*, and its recent applications in *Axon Enterprise* and *Miriyeva*, make plain that Congress has prescribed an exclusive judicial review process for raising claims relating to naturalization, and so claims that rest upon 28 U.S.C. § 1331 are almost entirely precluded—leaving general federal question jurisdiction intact only for "existential" questions about an agency's very power to act, which Plaintiffs do not raise here. *See*

[2] In 2003, the responsibilities were transferred to USCIS. *See* 6 U.S.C. § 271(b)(2).

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Axon Enterprise, 143 S. Ct. at 904. Because Plaintiffs do not invoke Sections 1447(b) and 1421(c), and because the naturalization class, as certified, cannot invoke these statutes, their claims in this case are barred under *Thunder Basin*.

Second, because the claims of the naturalization class are premature when measured against the INA's special statutory review scheme for naturalization, the class's claims are also unripe—a further jurisdictional flaw in the class's case.

Third, the INA's special statutory review scheme provides adequate remedies for the claims of the naturalization class. They are unable, therefore, to rely on the waiver of sovereign immunity contained in the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, *et seq*., to supply the necessary waiver of sovereign immunity. For this reason as well, their claims are beyond the subject matter jurisdiction of the Court.

STATEMENT OF FACTS

This motion concerns the Court's jurisdiction to hear the claims of class members with naturalization applications pending for more than six months.[3]

In the operative complaint, the naturalization class alleges that CARRP (USCIS' "Controlled Application Resolution and Review Program") is "an agency-wide policy for identifying, processing, and adjudicating immigration applications that raise 'national security concerns.'" Second Amended Complaint ("SAC"), Dkt # 47, ¶ 55. Elaborating, class members allege that "[i]f a USCIS officer determines that an application presents a national security concern, he or she will take the application off a routine adjudication track and—without notifying the applicant—place it on a

[3] The class definition proposed by Plaintiffs, and certified by the Court, does not include adjudicated applicants, who by definition no longer have an application "pending" before USCIS:

> A national class of all persons currently and in the future (1) who have or will have an application for naturalization *pending before USCIS*, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) *that has not been or will not be adjudicated* by USCIS within six months of having been filed.

Dkt. # 69, p. 8, *ll.* 5-8 (emphasis added). Under the class definition, adjudicated individuals are not encompassed by the naturalization class. Thus, persons within the naturalization class cannot invoke this Court's jurisdiction under Section 1421(c) because, by definition, their applications have not been adjudicated and denied. In addition, the class is not defined with reference to whether class members have been examined or interviewed, and thus no basis exists for invoking the Court's jurisdiction under Section 1447(b) on behalf of the class as certified.

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CARRP adjudication track where it is subject to distinct procedures, heightened scrutiny, and, most importantly, extra-statutory criteria that result in lengthy delays and prohibit approvals, except in limited circumstances, regardless of an applicant's statutory eligibility." *Id.* at ¶ 61. They criticize the procedure through which USCIS identifies an applicant as a national security concern for purposes of applying CARRP to vet their applications, and specifically its reliance on the Terrorist Screening Database ("TSDB") for this purpose. *Id.* at ¶¶ 62-75.

The naturalization class next alleges that CARRP is the source of untoward delay in adjudicating immigration benefit applications due to its various stages of processing, *e.g.*, "deconfliction," "internal vetting," "external vetting," whereby USCIS coordinates with external law enforcement and intelligence agencies, as well as internally, to refine its information and confirm the existence of a national security concern in the vetting process. *Id.* at ¶¶ 78-88. They allege that through CARRP, USCIS denies immigration benefits to applicants who "satisf[y] all statutory and regulatory criteria" on "pretextual grounds." *Id.* at ¶¶ 91-97.

Based on these allegations, Plaintiffs advanced several causes of action on behalf of the naturalization class. First, they claim that CARRP violates due process because USCIS does not inform applicants that they are being vetted under CARRP on account of a national security concern, and does not afford them "any process" to assert that such vetting should not occur. *Id.* at ¶¶ 262-263. Plaintiffs also claim that through CARRP, USCIS is applying unlawful criteria to the adjudication of their applications. *Id.* at ¶¶ 273-278; 289-283. Next, Plaintiffs claim that CARRP is "arbitrary and capricious" and therefore being unlawfully applied to vet their applications, causing them injury in the form of unreasonable delays and unwarranted denials of their immigration applications. *Id.* at ¶¶ 279-282. Lastly, they claim that through CARRP, USCIS is unlawfully applying a "substantive rule" to their applications without having formally promulgated the rule under the APA. Plaintiffs do not dispute that USCIS is the agency authorized to vet and adjudicate immigration benefit applications, including those raising potential national security concerns. *See*

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SAC, generally.[4]

The sole basis upon which the Plaintiffs invoke the subject matter jurisdiction of the Court for all of the claims alleged in the SAC is general federal question jurisdiction pursuant to 28 U.S.C. § 1331. Dkt # 47, ¶ 42.[5] While the complaint does not expressly refer to a waiver of sovereign immunity, it does repeatedly refer to the APA, presumably relying on that statute's waiver.

[4] Several claims in the SAC have been overtaken by events. The SAC raises several claims challenging two executive orders that have since been rescinded. Dkt. # 47, ¶¶ 249-253, 254-259, 260-261, 265-266, 267-272. Three of these causes of action are brought on behalf of a putative "Muslim Ban Class" (but not the naturalization class). *Id*. at ¶¶ 249-261. A Muslim Ban Class has never been certified by the Court, however. Dkt. # 69, p. 8 n. 3. But to the extent Plaintiffs would contend they retain the right to revisit those dormant claims, they are discussed in Section IV of this memorandum, in answer to the Court's question about the "remaining claims" in the case.

[5] The complaint also refers to the APA, the mandamus statute, 28 U.S.C. § 1361, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, as "authority." Dkt. # 47, at 6. These statutes generally do not create subject matter jurisdiction. *See, e.g., Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (APA); *San Diego Cnty. Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1022 (9th Cir. 2023) (Declaratory Judgment Act); *Starbuck v. City & Cnty. of San Francisco*, 556 F.2d 450, 459 n.18 (9th Cir. 1977) (28 U.S.C. § 1361/mandamus). Further, as to 28 U.S.C. § 1361, the SAC contains no allegations of a failure by Defendants to carry out any clear, ministerial duty owed to the naturalization class in relation to CARRP that can be enforced through a writ of mandamus. *See Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986).

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ARGUMENT

I. THROUGH THE INA'S SPECIAL STATUTORY REVIEW SCHEME CONGRESS HAS PRECLUDED GENERAL FEDERAL QUESTION JURISDICTION OVER THE CLAIMS OF THE NATURALIZATION CLASS

It is well established that Congress defines, and may withdraw, the lower federal courts' subject matter jurisdiction, *see* U.S. Const., Art. III, § 1; *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004), and equally settled that objections to a court's subject matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp*., 546 U.S. 500, 506 (2006). Because Congress has withdrawn general federal question jurisdiction over the claims asserted by the naturalization class, those claims should be dismissed.

Relying on *Thunder Basin*, the Supreme Court recently explained that while courts may ordinarily hear challenges to agency actions by way of 28 U.S.C. § 1331's grant of federal question jurisdiction, Congress may "substitute . . . an alternative scheme of review." *Axon Enterprise,* 143 S. Ct. at 900. The Court explained that Congress may do so explicitly or "implicitly" by specifying a "different method to resolve claims about agency action." *Id.* Congress did that regarding naturalization, in 1990, when it completely revised the manner in which foreign nationals could become naturalized citizens of the United States. Congress enacted a comprehensive framework of interlocking provisions involving USCIS' administration of the naturalization process, as well as statutory mechanisms for judicial review made available to applicants for naturalization at two stages of the process. *See* Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, §§ 401-408, 104 Stat. 4978, 5038-5047 (1990).

Prior to 1990, only district courts had the authority to make a final naturalization determination, but the system proved unworkable because of the backlog it created on district courts' dockets. *See Etape v. Chertoff*, 497 F.3d 379, 385-86 (4th Cir. 2007). In the 1990 Act, Congress streamlined the process by giving the Attorney General the "sole authority," without permission from a district court, to naturalize persons as United States citizens. 8 U.S.C. § 1421(a); *see also* 8 U.S.C. § 1443(e). The 1990 Act provided for a formal determination to grant or deny the

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application by an employee of the former INS designated to conduct interviews. 8 U.S.C. § 1446(d). Denied applicants could request an additional hearing before an immigration officer. 8 U.S.C. § 1447(a). Approved candidates take a statutorily prescribed oath before USCIS or, in some cases, a U.S. District Court, and are issued a certificate of naturalization. 8 U.S.C. §§ 1421, 1448-1450.

Of particular importance here, the 1990 Act "streamlin[ed] the "naturalization process" while "ensur[ing] that applicants had judicial recourse when [the agency] failed to act [on a naturalization application]" or denied the application. *Etape*, 497 F.3d at 386. First, prior to an adjudication, a naturalization applicant may invoke the jurisdiction of a district court if USCIS fails to determine the applicant's eligibility within 120 days following "examination." 8 U.S.C. § 1447(b); *see also Etape,* 497 F.3d at 385. In such cases, a district court may "either determine the matter or remand the matter, with appropriate instructions, to [USCIS] to determine the matter." 8 U.S.C. § 1447(b). The district court's review is *de novo*. *United States v. Hovsepian*, 359 F.3d 1144, 1163 (9th Cir. 2004) (*en banc*). Second, if the application is denied by the agency, the applicant may seek *de novo* review by a district court of eligibility for naturalization. Such judicial review claims are channeled into the "exclusive statutory scheme established by § 1421(c)." *Miriyeva*, 9 F.4th at 945; *see Hovsepian*, 359 F.3d at 1162-63 (discussing both § 1447(b) and § 1421(c), and recognizing, based on "the statutory text and context," that district courts have "the final word" concerning the processing of naturalization applications in "one of two ways"). This is underscored by Congress's specification that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and *not otherwise*." 8 U.S.C. § 1421(d) (emphasis added); *see also Pangilinan*, 486 U.S. at 884.

In *Thunder Basin*, the Supreme Court set out a two-step framework for determining when a specialized scheme of judicial review for administrative proceedings forecloses general federal question jurisdiction. Courts are first instructed to ask whether such intent is "fairly discernible in the statutory scheme." *Thunder Basin Coal Co*., 510 U.S. at 207. If so, courts must then consider whether the litigant's claims are "of the type Congress intended to be reviewed within [the] statutory structure." *Id*. at 212. A finding that they are forecloses jurisdiction under 28 U.S.C. § 1331.

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See Miriyeva, 9 F.4th at 939. Here, both *Thunder Basin* requirements are met, precluding the Court's subject matter jurisdiction over the claims of the naturalization class alleged in the SAC.

A. *Thunder Basin* step one: Congress intended an exclusive framework

The Supreme Court has explained that congressional intent to preclude jurisdiction may be "fairly discernible" through examination of "the statute's language, structure . . . purpose [and] legislative history." *Elgin v. Dep't of Treasury,* 567 U.S. 1, 9-10 (2012). In that case, the Supreme Court held that the Civil Service Reform Act's (CSRA) "comprehensive system for reviewing personnel action taken against federal employees" provided the exclusive avenue to judicial review for such individuals. *Id.* at 5, 8. "To determine whether it [was] 'fairly discernible' that Congress precluded district court jurisdiction over [CSRA] claims, [the Court] examined the CSRA's text, structure, and purpose." *Id.* at 10. Here, the language, structure, and purpose of the Immigration Act of 1990 reveal in two ways Congress' intention to set forth a comprehensive and exclusive review process.

First, the 1990 Act's "grant of authority is unusual in its scope -- rarely does a district court review an agency decision *de novo* and make its own findings of fact." *Nagahi v. INS*, 219 F.3d 1166, 1169 (10th Cir. 2000). Examining this authority, the Ninth Circuit, sitting *en banc*, held that Sections 1447(b) and 1421(c) give district courts "the last word" with respect to naturalization applications by granting them the authority to conduct their own hearings and determine matters before them *de novo*. *Hovsepian*, 359 F.3d at 1162; *see also Gonzalez v. Napolitano*, 2010 WL 3522789, at *2 (D.N.J. Sept. 2, 2010) (noting that "[*d*]*e novo* review of agency decision-making is rare, if not unique to the naturalization context").

Second, the elaborate and interlocking provisions of the 1990 Act, involving both agency proceedings and federal district court review, reflect a careful and deliberate effort on the part of Congress to address prior difficulties with the naturalization process, such as the backlog referenced in *Etape,* 497 F.3d at 385-86. The Supreme Court has noted that "[g]enerally when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems those procedures are to be exclusive." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*,

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561 U.S. 477, 489 (2010). And the 1990 Act's multiple avenues for district court supervision of the process, beyond the agency's role, underscores an intention to preclude district courts' general federal question jurisdiction.

Accordingly, in the recent *Miriyeva* decision, the D.C. Circuit applied *Thunder Basin*'s analysis when it reviewed the dismissal of a naturalization applicant's district court action challenging the denial of her naturalization application under the APA and the Due Process Clause. The district court determined that because of the INA's special statutory review scheme, there was no subject matter jurisdiction for Miriyeva's federal question-based claims (APA and due process). Rather, the district court concluded that the exclusive jurisdictional basis for Miriyeva's claim was 8 U.S.C. § 1421(c), for which subject matter jurisdiction existed only in her district of residence and not the District of Columbia. *Miriyeva v. U.S. Citizenship & Immigr. Servs.*, 436 F. Supp. 3d 170, 179 (D.D.C. 2019). Affirming, the D.C. Circuit analyzed 8 U.S.C. §§ 1421, 1446 and 1447, and found their "intertwined" nature comparable to the Civil Service Reform Act's "elaborate" statutory scheme found to be exclusive in *Elgin*. *Miriyeva*, 9 F.4th at 939-40. The D.C. Circuit concluded that "[b]oth the text and structure make clear that Congress intended this multistep review scheme to be the only path to judicial review for certain types of claims." *Id.* at 941; *cf. Teng v. Dist. Dir., USCIS*, 820 F.3d 1106, 1109-12 (9th Cir. 2016) (concluding that, under 1990 Act, district courts lack jurisdiction to order USCIS to amend naturalization certificates).

In short, *Thunder Basin*'s first step is satisfied, because it is clearly discernible in the text and structure of the 1990 Act that Congress intended the naturalization provisions to be exclusive of general federal question jurisdiction.

B. *Thunder Basin* step two: The naturalization class claims are "the type" Congress intended to be reviewed within its special framework

Under *Thunder Basin*'s second step, the court must determine whether a plaintiff's "claims are of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin*, 510 U.S. at 212. The Supreme Court instructs, to that end, that three factors be considered: (i) whether a finding that jurisdiction is precluded would "foreclose all meaningful judicial review,"

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(ii) whether the suit is "wholly collateral to a statute's review provisions," and (iii) whether the claims are "outside the agency's expertise." *Thunder Basin*, 510 U.S. at 212-213 (cleaned up); *see also Free Enterprise Fund*, 561 U.S. at 489; *Axon Enterprise*, 143 S. Ct. at 900. These three factors do not "form three distinct inputs into a strict mathematical formula," but rather are "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Jarkesy v. S.E.C.*, 803 F.3d 9, 17 (D.C. Cir. 2015). Although courts have concluded that "the first factor—meaningful judicial review—is the most critical thread in the case law," *Hill v. Sec. & Exch. Comm'n*, 825 F.3d 1236, 1245 (11th Cir. 2016) (internal quotation omitted), in this case all three factors demonstrate that Plaintiffs' claims are of the type Congress intended to be reviewed within the INA's statutory scheme.

1. *The statutory scheme provides meaningful judicial review*

Even though Plaintiffs must seek relief through the exclusive statutory mechanisms established by Congress, Congress has not foreclosed meaningful judicial review of their claims. To the contrary, Sections 1447(b) and 1421(c) provide meaningful judicial review by affording naturalization applicants *de novo* review of their claims in a United States District Court. *See Garcia v. Vilsack*, 563 F.3d 519, 522–23 (D.C. Cir. 2009) (cleaned up) ("[R]elief will be deemed adequate where a statute affords an opportunity for *de novo* district-court review of the agency action."); *Miriyeva*, 9 F.4th at 941 ("Bringing challenges through § 1421(c) does not 'foreclose all meaningful judicial review,' even if it does foreclose the review that Miriyeva wants."); *Aparicio v. Blakeway*, 302 F.3d 437, 447 (5th Cir. 2002) (In enacting 8 U.S.C. § 1421(c), "Congress has . . . afforded the appellants a complete and wholly adequate review . . ."); *De Dandrade v. United States Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 184 (S.D.N.Y. 2019) ("The statutory scheme enacted by Congress under 8 U.S.C. § 1421(c) contains none of the pitfalls that deprive an aggrieved individual of meaningful judicial review.") (cleaned up), *aff'd sub nom. Moya v. United States Dep't of Homeland Sec.*, 975 F.3d 120 (2d Cir. 2020); *Boakye v. Hansen*, 554 F. Supp. 2d 784, 787 (S.D. Ohio 2008) (district court could not exercise general subject matter jurisdiction in accordance with

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§ 1331 because of the "comprehensive system" created by Congress in enacting § 1447(b), including the limitations placed on the grant of subject matter jurisdiction).

In short, the meaningful review factor is clearly established by the INA statutory framework available to class members.

2. *The naturalization class claims are not "wholly collateral"*

Plaintiffs' claims are not collateral to the review scheme that Congress has enacted. Quite the contrary, they directly implicate that scheme. That is evident from the Supreme Court's recent decision in *Axon Enterprise*, where the Court contrasted the "existential" nature of the claims in that case with the "sorts of procedural and evidentiary matters an agency often resolves on its way to a merits decision." *Axon Enterprise*, 143 S. Ct. at 904. As characterized by the Court, the parties' objection was "to the Commissions' power generally, not to anything about how that power was wielded." *Id.* Accordingly, the claims were determined to be wholly collateral to the review scheme in question. *Id.*

Here, the naturalization class claims are not directed to USCIS' *power* to determine their eligibility for naturalization or to vet their applications as part of the process of determining their entitlement to it. Nor could they be, as USCIS is clearly empowered by statute to do so. *See* 8 U.S.C. §§ 1443(a), 1446(a), (b); *Price v. U.S. I.N.S.*, 962 F.2d 836, 840 (9th Cir. 1991) (noting the "broad authority to make inquiries"). Rather, their claims attack *how* USCIS administers the national security vetting of benefit applications. *See,. e.g.,* Dkt. # 47, ¶¶ 262-264 (operative complaint, claiming USCIS failed to provide notice and an opportunity to be heard regarding CARRP classification); ¶¶ 273-278, 289-293 (claiming USCIS applied "non-statutory, substantive adjudicative criteria" to their applications); ¶¶ 279-282 (claiming that USCIS' use of CARRP in the vetting of their applications is "arbitrary and capricious"); ¶¶ 283-288 (claiming that USCIS is proceeding without published regulations). Thus, unlike the plaintiffs in *Axon Enterprises* who were "challenging the Commissions' power to proceed at all, rather than actions taken in the agency proceedings," *id.* at 904, the claims of the naturalization class are aimed squarely at actions taken by

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USCIS in carrying out its congressionally-assigned obligation to vet their applications under the INA.

In sum, the claims of the naturalization class are not "wholly collateral," further supporting the conclusion that they are "of the type" Congress intended to be reviewed within the INA's statutory framework.

3. *Plaintiffs' claims are not outside the agency's expertise*

The third *Thunder Basin* factor also weighs in favor of recognizing the exclusivity of Congress's naturalization framework. This factor asks whether the disputed claims are "outside the agency's area of expertise," *Thunder Basin*, 510 U.S. at 212, and thus potentially more suited to resolution by district courts. In this case, although Congress has preserved an important role for the district courts, it has granted the agency a critical role in reviewing naturalization applications in the first instance. Indeed, Congress overhauled the statute in 1990 precisely to enlarge that agency role – an obvious legislative affirmation of agency expertise. *See Etape*, 497 F.3d at 386 (noting "the importance of [] [US]CIS's expertise in reviewing naturalization applications"); *id.* (highlighting the agency's "investigatory functions [which] take place before or during" the naturalization examination); *id*. (further citing statutory and regulatory requirements for background checks and investigations pertaining to naturalization applicants); *Singh v. Crawford,* 2014 WL 12778556, at *2 (E.D. Cal. Mar. 7, 2014) (and cases cited) ("The executive branch is uniquely well-suited to determine Plaintiff's eligibility for naturalization."); *Maniulit v. Majorkas*, 2012 WL 5471142 (N.D. Cal. 2012) (observing that unlike district courts, "USCIS is charged with deciding naturalization applications frequently and is therefore better equipped to apply immigration laws thoroughly and consistently"). Accordingly, this factor also weighs in favor of finding that the naturalization class claims are "of the type" that Congress envisioned for the special statutory review scheme.

* * *

For the foregoing reasons, therefore, all *Thunder Basin* factors strongly support the conclusion that the special statutory review scheme in the INA provides the exclusive jurisdictional

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basis to review claims of the type brought by the naturalization class. Because Plaintiffs assert jurisdiction over their claims based only on 28 U.S.C. § 1331, the *Thunder Basin* analysis demonstrates that the Court lacks subject matter jurisdiction and the naturalization class claims should be dismissed.[6]

II. THE NATURALIZATION CLASS CLAIMS ARE NOT RIPE, ALSO PRECLUDING THE COURT'S JURISDICTION

Just as Sections 1447(b) and 1421(c) show that there is no general federal question jurisdiction here, they also indicate that the naturalization class claims are, in their current state, unripe—the second and independently dispositive jurisdictional flaw raised here.

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003) (internal marks and citations omitted); *accord Safer Chems., Healthy Families v. U.S. EPA*, 943 F.3d 397, 411 (9th Cir. 2019); *see also Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990).

[6] *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), is not to the contrary. In *McNary*, the Supreme Court held that a statutory provision expressly limiting judicial review for individual determinations of immigrants' amnesty applications under the Special Agricultural Workers (SAW) program did not preclude general federal question jurisdiction over a claim that the INS had engaged in a pattern and practice of procedural due process violations in its administration of the program. *Id*. at 483-484. *McNary*, which preceded the Court's decision in *Thunder Basin,* turned on the specific wording of the statute under review (8 U.S.C. § 1160(e)(1)). *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1036 (9th Cir. 2016). The Supreme Court held that under that particular statute, general federal question jurisdiction was not precluded in part because otherwise the plaintiffs "would not as a practical matter be able to obtain meaningful judicial review of their application denials or their objections to INS procedures." 498 U.S. at 495-97. As the Court explained in *Elgin, "McNary* was addressing a statutory review scheme that provided no opportunity for the plaintiffs to develop a factual record relevant to their constitutional claims before the administrative body and then restricted judicial review to the administrative record created in the first instance." 567 U.S. 1, 21 n.11. As was true of the statutory scheme under review in *Elgin*, judicial review in the context of claims concerning the naturalization process is "not similarly limited." *Id.* District courts have "plenary authority" under 28 U.S.C. §§ 1447(b) and 1421(c). *See Kasica v. U.S. Dep't of Homeland Sec., Citizenship & Immigr. Servs.*, 660 F. Supp. 2d 277, 281 (D. Conn. 2009); *Phong Thi Vu v. Mayorkas*, 2013 WL 2390557, at *6 (S.D. Cal. May 30, 2013). Thus, apart from being based on a different statute, the rationale underpinning the Court's conclusion in *McNary* is entirely absent.

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Here, Plaintiffs' naturalization-related challenges to CARRP fail to meet the justiciability requirement of ripeness because (1) the claims are premised on Plaintiffs' benefit applications remaining undecided by USCIS, (2) there are multiple nontrivial grounds on which the agency may ultimately decide the applications, and (3) thus, the actual basis for any potential denial of class member applications is, given the class definition, necessarily unknown. Indeed, class members' applications may even be granted instead of denied – as they have been for all but one of the named Plaintiffs, and for over 75% of applications adjudicated after referral to CARRP.

In *Reno v. Cath. Soc. Servs.*, 509 U.S. 43, 46-52, 59-60 (1993) ("*CSS*"), where the *CSS* plaintiffs challenged regulations that allegedly interfered with their ability to obtain lawful immigration status, *see id.* at 46-51, the Court found most challenges unripe because the disputed rules "impose[d] no penalties for violating any newly imposed restriction." *Id.* at 58. Rather, the Court explained, "the Act requires each alien desiring the benefit to take further affirmative steps, *and to satisfy criteria beyond those addressed by the disputed regulations*." *Id.* (emphasis added). The possibility that a benefit application *may be denied based on grounds other that those at issue* in the disputed regulations was critical to the Court's ripeness ruling. *See also id.* at 58 n.19, 59 n.20.[7]

Following *CSS*, the Ninth Circuit highlighted the prudential consideration relating to the "fitness" of the issues for judicial review. *See American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057, 1060-62 (9th Cir. 1995); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc). The Court noted that while an actual agency decision on the application is unnecessary if a "firm prediction" can be made that the agency would deny the application based on the challenged provision, *Montana Env't Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190 (9th Cir. 2014), this means that the allegedly anticipated denial is "inevitable" or "nearly certain." *Id.* at 1190-91; *cf. Immigrant Assistance Project v. INS*, 306 F.3d 842, 862 (9th Cir. 2002) (relying in part on pendency of "applications for more than fourteen years" in firmly

[7] The *CSS* Court did find one type of claim to be ripe—those concerning a government action called "front-desking," by which "a class member . . . would have felt the effects of [contested regulations] in a particularly concrete manner, for his application would have been blocked then and there." 509 U.S. at 63; *see also id.* at 66. No such similar dispositive action is alleged here.

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predicting outcome); *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1061 (claims ripe in part because agency had issued notices of intent to deny). Given the overwhelming percentage (more than 75%) of *granted* applications subject to CARRP, no class member can anticipate a naturalization-related denial with any certainty even when applications have been pending for extended periods.

The decision in *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002), well illustrates the ripeness problem here. That case involved a putative class defined in relevant part as "persons who received permanent resident status through the SAW program and who had applied for or would apply for naturalization. *Id.* at 447. At issue was a challenge to "the INS's alleged practice of referring to [confidential information] solely during and for purposes of the naturalization process." *Id.* at 442; *see also id.* at 439. With respect to pending naturalization applications that had been neither granted nor denied, the Court of Appeals ruled that claims regarding these applications were unripe because it could not be known whether they would be "denied for any of the reasons challenged here" or, instead, on one of numerous other potential grounds. *Id.* at 446; *see id.* at 440, 446 n.2 (citing certain other naturalization eligibility criteria). *Aparicio* has particular significance for assessing the fitness for judicial review of the *Wagafe* claims because it notably concerned the validity of an alleged "practice" by the former INS – rather than a regulation – regarding the manner in which it reviewed and adjudicated naturalization applications. *See id.* at 442; *see also Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) ("As a prudential matter we will not consider a claim to be ripe for judicial resolution if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal marks and citations omitted).

Because there are multiple grounds on which the agency might eventually decide any given naturalization class member's application, and no certainty that issues regarding CARRP would

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actually be relevant to the agency's denial of a benefit application until the decision is actually rendered, the naturalization class claims lack ripeness, further precluding jurisdiction here.[8]

[8] Plaintiffs have at times alleged that they are eligible for naturalization. *See, e.g.*, Dkt. # 47, p. 43, *ll.* 24-26; *id.* at p. 47, *ll.* 22-23. However, this representation is *ipse dixit*. The eligibility of any single class member for naturalization is not a provable fact until eligibility has been determined by either USCIS or by a district court exercising its jurisdiction under Section 1447(b) or Section 1421(c). Moreover, the certified naturalization class definition does not include this qualification. *See supra* note 3. Even if it did, however, the Supreme Court in *CSS* did not consider such a device sufficient to overcome the uncertain grounds for eventual agency decisions and the resulting lack of ripeness in that case. *See* 509 U.S. at 47 (class defined as "prima facie eligible for legalization"), 51 (another class defined as "qualify[ing] for legalization"); *see also id.* at 65 n.27 (indicating that class definition meant that class members were "otherwise . . . eligible for legalization"); 79 n.2 (Stevens, J., dissenting) ("the classes certified in both actions were limited to persons otherwise eligible for legalization"). As the Supreme Court stated, notwithstanding the class definitions, it was "important to know whether the [plaintiffs] would be eligible for the [benefits at issue] but for the challenged regulations." *Id.* at 58 n.19.

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III. SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED AS TO THE NATURALIZATION CLASS CLAIMS BECAUSE THE INA PROVIDES AN ADEQUATE REMEDY

Finally, the naturalization class claims are subject to dismissal because Sections 1447(b) and 1421(c) provide adequate alternative statutory remedies, and therefore the APA's waiver of sovereign immunity is not available.

No suit lies against the Government absent a waiver of sovereign immunity. *See Russell v. U.S. Dep't of the Army*, 191 F.3d 1016, 1018 (9th Cir. 1999). Plaintiffs' CARRP claims, including their constitutional claims, depend on the judicial review provisions of the APA to provide the necessary waiver of sovereign immunity.[9] However, where other adequate statutory remedies exist, the APA does not apply. *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.") (emphasis added). Simply put, "federal courts lack jurisdiction over APA challenges whenever Congress has provided another 'adequate remedy.'" *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998); *see also Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (Congress did not intend the general grant of jurisdiction to "duplicate the previously established special statutory procedures relating to specific agencies.").

"The relevant question under the APA . . . is not whether [the alternatives to APA relief] are as effective as an APA lawsuit against the regulating agency, but whether the private suit remedy

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[9] Plaintiffs' claim that CARRP constitutes an "arbitrary and capricious" final agency action clearly rests squarely upon the APA's waiver of sovereign immunity. So too does their claim that CARRP constitutes a "substantive" or "legislative" rule that is invalid because it was not promulgated in accordance with the notice and comment requirements of 5 U.S.C. § 553(b). *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 855 (8th Cir. 2013); *and see Cohen v. United States*, 650 F.3d 717, 731 (D.C. Cir. 2011) (*en banc*). Their mandamus claim, brought under 28 U.S.C. § 1361 on behalf of three of the named Plaintiffs (whose applications have since been adjudicated) and the putative Muslim Ban class, which was never certified, is effectively moot. In any event, the analysis is no different under 28 U.S.C. § 1361 because, as in the case of the APA, the remedy under 28 U.S.C. § 1361 is only available if there is no other adequate remedy. *See Fallini v. Hodel*, 783 F.2d at1343, 1345 (9th Cir. 1986). Their Fifth Amendment equal protection claim is not assertable against the United States directly. *See Phillips v. Mabus*, 894 F. Supp. 2d 71, 80 (D.D.C. 2012); *and see United States v. An Article or Device Consisting Of... Biotone Model 4*** Muscle Stimulator*, 557 F. Supp. 141, 144 (N.D. Ga. 1982) (citing *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) ("[C]laims against the United States based directly on Fifth Amendment violations are barred by sovereign immunity.")). However, such claims would be cognizable under the APA's waiver of sovereign immunity, if it applied (which it does not). *See* 5 U.S.C. § 706(2)(b) (permitting the assertion of constitutional claims). Plaintiffs' prayers for injunctive and declaratory relief are not claims in and of themselves. *See Miriyeva*, 9 F.4th at 945.

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provided by Congress is adequate." *Garcia*, 563 F.3d at 525. To be "adequate," the alternative remedy need not provide relief identical to that under the APA, so long as it offers relief of the "same genre." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't Dep't of Health & Human Servs*., 396 F.3d 1265, 1272 (D.C. Cir. 2005). An alternative remedy will almost always be deemed adequate where it "affords an opportunity for *de novo* district court review" of the agency action. *Id*. at 1270.

When another statute provides an adequate judicial remedy, dismissal of an APA-based claim for lack of subject matter jurisdiction is appropriate. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) (APA review not available where section of the Internal Revenue Code provided the plaintiff with an adequate remedy); *City of Oakland v. Lynch*, 798 F.3d 1159, 1166-67 (9th Cir. 2015) (court lacked jurisdiction over APA claim where forfeiture claim under Controlled Substance Act provided an adequate remedy); *Brem-Air Disposal*, 156 F.3d at 1003-05 (court lacked jurisdiction over APA claim where Resource Conservation and Recovery Act citizen-suit provision constituted an adequate remedy).[10]

Federal courts have found 8 U.S.C. § 1447(b) to be an adequate remedy that precludes APA claims. *See, e.g.*, *Tankoano v. U.S. Citizenship & Immigr. Servs.*, 2023 WL 417475, at *5 (S.D. Tex. Jan. 25, 2023) ("He has an adequate remedy to challenge any alleged delay in the adjudication of his naturalization application [under § 1447(b)], precluding review under the APA."); *Ahmed v. Holder*, 2009 WL 3228675, at *6 (E.D. Mo. Sept. 30, 2009) (same); *Antonishin v. Keisler*, 627 F. Supp. 2d 872, 879 (N.D. Ill. 2007) ("plaintiffs have an adequate remedy under § 1447(b)"); *Alsamir v. U.S. Citizenship & Immigr. Servs.*, 2007 WL 1430179, at *2 (D. Colo. May 14, 2007) (same); *Boakye*, 554 F. Supp. 2d at 787 (S.D. Ohio 2008) (dismissing for failure to invoke jurisdiction under 8 U.S.C. § 1447(b)); *Yelin Du,* 2008 WL 11336158, at *4. Thus, the claims of the naturalization class should

[10] The analysis here – whether Plaintiffs would have an adequate remedy under Sections 1421(c) and 1447(b) – is distinct from the question whether meaningful judicial review is available for purposes of the *Thunder Basin* doctrine, *see supra* Part I.B.1, although the two inquiries share common themes. Nonetheless, it can hardly be doubted that "meaningful judicial review" and an "adequate remedy" are both available to Plaintiffs, as district courts may exercise *de novo* review under the relevant INA provisions.

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be dismissed because 8 U.S.C. § 1447(b) affords them an adequate remedy.[11] This is true even if individuals whose applications have been adjudicated and *denied* were considered members of the naturalization class (which they are not) because 8 U.S.C. § 1421(c) also affords them an adequate remedy. *See, e.g., Escaler v. U.S. Citizenship & Immigr. Servs*., 582 F.3d 288, 291 (2d Cir. 2009) ("Nor have we been informed as to what judicial relief the APA might authorize that adds to the sweeping *de novo* review provided by Section 1421(c).").[12]

IV. IMPACT OF DISMISSAL OF NATURALIZATION CLASS CLAIMS ON REMAINING CLAIMS IN THE CASE

The Court has requested the parties to address the impact of a potential dismissal of the claims of the naturalization class (which as argued in note 12, *supra*, should include dismissal of the individual claims of Named Plaintiffs Wagafe, Jihad, and Manzoor) on the remaining claims in the case. Defendants identify, in response to the Court's inquiry, three categories of claims that would remain: (1) the claims of the certified Adjustment Class; (2) the claims of the putative Muslim Ban class; and (3) the claims asserting illegality of provisions in two now-repealed Executive Orders issued in 2017.

A. Claims of the adjustment class and individual claims of Plaintiffs Mehdi Ostadhassan, Hanin Omar Bengezi.

The claims of the adjustment class are currently stayed, Dkt. # 613, but at any time the stay "may be terminated by the Court upon the request by either Plaintiffs or Defendants." Dkt. # 612 at p. 2. Three appeals are presently pending in the U.S. Court of Appeals for the Ninth Circuit that

[11] A contrary decision was reached by this Court in *Roshandel v. Chertoff*, 2008 WL 1969646 (W.D. Wash. May 5, 2008), which Defendants believe was wrongly decided. In any event, the case is distinguishable because the Federal Bureau of Investigation was a defendant in the action, and 8 U.S.C. § 1447(b) does not provide a remedy for actions against the FBI.

[12] The Court's dismissal of the naturalization class claims under the arguments of this motion should apply equally to the individual claims of Named Plaintiffs Abdiqafar Wagafe, Mushtaq Abed Jihad and Sajeel Manzoor, all of whom allege that their applications for naturalization were unlawfully subjected to CARRP, and who have also requested on an individual basis that they be afforded relief by this Court. Accordingly, Defendants also hereby move to dismiss their claims. Dkt. # 47, ¶¶ 160, 217, 234. Their applications were granted earlier in the course of this litigation and they are now naturalized citizens, however the Court ruled that the mootness of individual claims did not preclude the named plainitffs from serving as adequate representatives of the class. Dkt. # 69 at 13, 29-30. Nevertheless, their individual claims are indistinguishable from the class claims they represent, and any ruling on the latter obviously applies equally to remove jurisdiction over the former.

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involve the question of a district court's subject matter jurisdiction to adjudicate claims of applicants for adjustment of status: *Nakka v. USCIS*, No. 22-35203 (9th Cir. argued and submitted Feb. 7, 2023); *Patel v. Barr*, No. 21-17024 (9th Cir. argued and submitted May 18, 2023); and *Cabello Garcia v. USCIS*, No. 23-35267 (9th Cir. briefing underway).[13] Without intending to waive Defendants' option to, at any time, request the Court to lift the stay, including for the purpose of seeking jurisdictional dismissal of the adjustment class claims, Defendants currently are prepared to await determination on the jurdisdictional question by the Court of Appeals in one or more of these three cases. Defendants propose to evaluate the Court's subject matter jurisdiction over the adjustment class claims in this case in light of the expected Ninth Circuit decisions and then report to the Court the government's plan for moving forward.

B. Claims of the putative Muslim Ban Class

Three of the claims in this action were brought on behalf of a never-certified "Muslim Ban Class" as well as individually-named Plaintiffs. *See* Dkt. # 47, pp. 45-47. These claims allege that certain provisions contained in two 2017 Executive Orders are unlawful. These Executive Orders have long since been rescinded. 86 Fed. Reg. 7005 (Jan. 20, 2021); 82 Fed. Reg. 13,209, 13,218 (Mar. 6, 2017). Moreover, record evidence establishes that they had no effect on CARRP. *See* Dkt. 94-9 at 3-4. Plaintiffs did not ask the Court to certify the putative Muslim Ban Class class following the filing of their SAC in 2017. *See* Dkt. # 69, p. 8, n.3. Nor have they requested that the class be certified in the six years since. *See* Dkt. 148 at 7-8 (the Court's previous observation that, under the local rules, "Plaintiffs did not timely move to certify the Muslim Ban Class."). Consistent with the Government's pending cross-motion for summary judgment, Dkt. # 513, p. 45 (HSD version); Dkt. # 595-2, p. 45 (provisionally redacted public version), Defendants contend that these claims are now moot. Defendants are prepared to brief their mootness if the Court so orders.

[13] *See* 9th Cir. Gen. Order 4.1, providing in part that "[t]he panel with the earliest originally scheduled oral argument in a case has priority over the disposition of a common legal question pending before two or more panels."

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C. Claims asserting illegality in rescinded 2017 Executive Orders

Including the three claims brought on behalf of the putative Muslim Ban Class, there are a total of five claims in the SAC which are based on the alleged illegality of the now-repealed 2017 Executive Orders. Dkt. # 47, Claims 1-3 (pp. 45-47) and 5-6 (pp. 47-48). As noted above, *see supra,* p. 21, *ll.* 20-23, consistent with prior arguments, Defendants contend these claims are now moot. Dkt. # 513, p. 45, n.6 (HSD version); Dkt. # 595-2, p. 45, n.6 (provisionally redacted public version). Defendants are prepared to supplementally brief the mootness of these claims if the Court so orders.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this motion be granted and that the claims of the naturalization class (and the individual claims of Plaintiffs Abdiqafar Wagafe, Mushtaq Abed Jihad, and Sajeel Manzoor) be dismissed for lack of subject matter jurisdiction.

LENGTH CERTIFICATION

I certify that the foregoing contains 7,990 words, in compliance with Local Civil Rule 7(e)(3).

DATED: September 26, 2023

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Respectfully Submitted,

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