UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUNAY MIRIYEVA, *et al.*, *Plaintiffs*, v. U. S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, *Defendants*.	Civil Action No.: 19-3351 (ESH)

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants respectfully request that the Court dismiss Plaintiffs' Complaint. In support of this Motion, Defendants respectfully refer the Court to the accompanying Memorandum of Law.

November 22, 2019

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ Brian J. Field*
BRIAN J. FIELD
D.C. BAR #985577
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 252-2551
E-mail: Brian.Field@usdoj.gov

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[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss, and the entire record herein, it is hereby:

ORDERED that Defendants' Motion is **GRANTED**; and it is

FURTHER ORDERED that Plaintiff's Complaint is **DISMISSED**.

_____ _____

Date United States District Judge

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Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 252-2551
E-mail: Brian.Field@usdoj.gov

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When an individual wishes to challenge a denial of their naturalization application, Congress provided that such challenges must be brought pursuant to 8 U.S.C. § 1421(c) in the United States district court where they reside. And rather than subjecting such challenges to the deferential review provided for under the Administrative Procedure Act ("APA"), Congress provided that such challenges are subject to *de novo* review. As many courts have held, § 1421(c) allows individuals not only to challenge the individual naturalization application denials, but also to mount broader challenges to related agency policy.

None of the Plaintiffs in this case resides in this District. Yet, Plaintiffs filed their complaint in this Court advancing APA and constitutional claims related to the denials of their naturalization applications. As there is another adequate remedy available to Plaintiffs for exactly the relief they seek, this Court lacks jurisdiction over their APA claim. Similarly, Plaintiffs' constitutional claims fail because they must also be brought pursuant to § 1421(c) (and Plaintiffs lack standing to bring such claims). Further, Plaintiffs' attempt to challenge their naturalization application denials fails because three of the four Plaintiffs have not yet exhausted their administrative remedies. Additionally, Plaintiffs' attempt to recast their individualized claims as challenging a "policy" fails because any such claim is barred by the statute of limitations. Finally, Plaintiffs' attempt to rely on the Declaratory Judgment Act fails because it is not an independent source of federal jurisdiction.

Accordingly, for the reasons discussed below, the Court should dismiss this Complaint.

BACKGROUND

Plaintiffs are four individuals who claim that they "should have been sworn in as naturalized United States citizens by now." Compl. ¶ 1 (ECF No. 1). Specifically, Plaintiffs claim that their military service in the United States Army makes them eligible for naturalization under

8 U.S.C. § 1440(a). *See id.* Under that section, certain individuals who have "served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States" during a period in which the Armed Forces of the United States are or were "engaged in military operations involving armed conflict with a hostile foreign force," and who meet certain other requirements, are eligible to naturalize. *Id*. Individuals who were separated from "such service" are also eligible to naturalize under § 1440(a), provided they were "separated under honorable conditions." 8 U.S.C. § 1440(a). As per the Complaint, each Plaintiff was discharged from the Army with an "uncharacterized discharge." Compl. ¶¶ 34, 63, 76, 87. Plaintiffs further allege that U.S. Citizenship and Immigration Services ("USCIS") denied their naturalization applications on the grounds that they failed to establish they "were discharged from the U.S. Armed Forces under honorable conditions." *Id.* ¶ 67. Subsequent to these denials, all four Plaintiffs filed administrative appeals, seeking review of the naturalization application denials. According to the Complaint, all but one appeal remain pending. *See* Compl. ¶¶ 56, 69, 98.

In this action, Plaintiffs challenge these denials, claiming that an "uncharacterized discharge" satisfies the "honorable conditions" requirement in 8 U.S.C. § 1440(a). According to Plaintiffs, USCIS is acting contrary to law and in violation of the Administrative Procedures Act ("APA"), when it concludes otherwise. *See* Compl. ¶¶ 102–30. On this point, Plaintiffs characterize their claim as challenging the "policy" of applying § 1440(a) in this manner. Plaintiffs also claim that the denials violate the Constitution's Naturalization Clause. *See id.* ¶¶ 131–38. Finally, Plaintiffs bring a claim under the Declaratory Judgment Act, challenging the denials and seeking injunctive relief. *See id.* ¶¶ 139–41.

The Court should dismiss this Complaint in its entirety because Plaintiffs' action represents an attempt to circumvent the congressionally designated mechanism for appealing naturalization denials. Indeed, in 8 U.S.C. § 1421(c), Congress provided that challenges to naturalization decisions are subject to *de novo* review and should be brought in "United States district court for the district in which [the] person resides[.]" Plaintiffs reside in California, Kentucky, Missouri, and Texas. Compl. ¶¶ 18–21. None resides in this District. *See id.*

STANDARDS OF REVIEW

"A motion to dismiss under [Federal Rule of Civil Procedure] 12(b)(1) 'presents a threshold challenge to the court's jurisdiction.'" *Abou-Hussein v. Mabus*, 953 F. Supp. 2d 251, 257 (D.D.C. 2013) (Walton, J.) (second alteration in original) (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987)). For such motions, the Court "'assume[s] the truth of all material factual allegations in the complaint'" and also "'construe[s] the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Id.* (alteration in original) (quoting *Am. Nat'l Inc. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011)). However, the plaintiff "'bears the burden of establishing by a preponderance of the evidence that the Court possesses jurisdiction.'" *Id.* (quoting *Hollingsworth v. Duff*, 444 F. Supp. 2d 61, 63 (D.D.C. 2006)). On a Rule 12(b)(1) motion, the plaintiff's "factual allegations … will bear closer scrutiny … than in reviewing a 12(b)(6) motion for failure to state a claim." *Id.* (quotation marks omitted). Additionally, "in determining whether it has jurisdiction, the Court 'may consider materials outside of the pleadings.'" *Id.* (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

Dismissal is appropriate under Rule 12(b)(6) when it is clear that the plaintiff's claims fail as a matter of law from (i) the face of the complaint; (ii) any documents attached to or incorporated

by reference into the complaint; or (iii) matters of which the Court may take judicial notice. *See Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). While the Court accepts the factual allegations in the complaint as true, to the extent that "a written instrument is attached to a complaint and it contradicts the allegations in the complaint, the written instrument controls." *Regan v. Spicer HB, LLC*, 134 F. Supp. 3d 21, 26 (D.D.C. 2015).

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' APA Claim

The APA provides a "limited waiver of sovereign immunity" for certain challenges to final agency action. *Stone v. Dep't of Housing & Urban Dev.*, 859 F. Supp. 2d 59, 63 (D.D.C. 2012). But "[r]eview under the APA is … limited to 'final agency action for which there is *no other adequate remedy in a court*.'" *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) (quoting 5 U.S.C. § 704) (emphasis added). Insofar as Section 1421(c), Title 8 provides for "sweeping *de novo* review," it affords a perfectly adequate remedy for review of denied naturalization applications. Moreover, it is the remedy explicitly prescribed by Congress for review of naturalization decisions. *Escaler v. USCIS*, 582 F.3d 288, 290–91 (2d Cir. 2009). Accordingly, the Court should dismiss Plaintiffs' APA claim for lack of subject matter jurisdiction. *See id*.; *see also Heslop v. Attorney General*, 594 Fed. App'x 580, 584 (11th Cir. 2014) ("Here, the INA gives [plaintiff] an adequate remedy: the ability to seek in federal district court *de novo* review of USCIS's denial of his application for naturalization after he exhausts his administrative remedies."); *Lexxar v. Heathman*, No. 4:11-cv-4168, 2012 WL 4867694, at *11 (S.D. Tex. Oct. 11, 2012) (dismissing Plaintiff's APA claim after finding that it does not apply to the denial of an application for naturalization). As discussed below, Plaintiffs' attempt to characterize their claim as challenging a "policy," rather than individual denials, does not provide this Court with

jurisdiction; multiple courts have rejected identical efforts to circumvent § 1421(c). Rather, § 1421(c) reflects Congress's judgment that such matters be decided in the local district court where the applicant resides, applying *de novo* review. Even when an individual wishes to make broader policy challenges, those should be made through § 1421(c) proceedings. *See, e.g.*, *De Dandrade v. Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 186 (S.D.N.Y. 2019). Thus, the APA is unavailable for such challenges and this Court should dismiss Plaintiffs' APA claim for lack of jurisdiction.

A. Section 1421(c) Precludes APA Review

Relying on the APA, Plaintiffs purport to challenge "a policy that denies naturalization to an applicant who seeks naturalization pursuant to 8 U.S.C. § 1440 but has been purportedly discharged with an 'uncharacterized' discharge." Compl. ¶ 114. In 8 U.S.C. § 1421(c), Congress provided:

> A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.

8 U.S.C. § 1421(c). This statute is the sole means for challenging naturalization denials. *See Huang v. Napolitano*, 721 F. Supp. 2d 46, 51–52 (D.D.C. 2010) (stating that "the plain[ ] reading" of § 1421(c) "*clearly indicates Congress' intent* that the United States district court located in the district in which an applicant resides is appropriately positioned to review the denial of an applicant's naturalization application") (emphasis added); *Hong Yin v. Frazier*, 265 F.R.D. 460, 463 (D. Minn. 2010) (holding that "§ 1421(c) establishes that" the local district court "has exclusive jurisdiction to hear [plaintiff's] claim"); *Gill v. Chertoff*, No. 07-cv-0516, 2007 WL 4190810, at *2 (E.D. Cal. Nov. 26, 2007) (Beck, M.J.) (holding that § 1421(c) provides "the sole

and exclusive procedures for requesting judicial review of final determinations on applications for naturalization").

As the Second Circuit explained, there are just "three avenues of judicial review" for naturalization decisions: (1) an action under 8 U.S.C. §1447(b) where a naturalization application has not been acted upon within 120 days of the naturalization examination; (2) an action under § 1421(c) when an application is denied; or (3) an action seeking mandamus relief for a failure to perform a clear, non-discretionary duty. *Escaler v. USCIS*, 582 F.3d 288, 291 (2d Cir. 2009). Noticeably absent from that list is an APA claim for relief. And for good reason—Congress intended naturalization application decisions to be reviewed only as provided for under § 1421(c). Indeed, Congress expressly set a standard of review for naturalization disputes (*de novo*) different than the APA's deferential review standard. In fact, Congress determined that review of naturalization decisions specifically should be different from the review afforded in other immigration-related contexts. *See Nagahi v. INS*, 219 F.3d 1166, 1169 (10th Cir. 2000) (Section 1421(c)'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"); *Mobin v. Taylor*, 598 F. Supp. 2d 777, 780 (E.D. Va. 2009) (noting that Congress expressly set forth a less deferential standard of review for agency decisions on naturalization applications than it did for review of removal or asylum decisions). The Fifth Circuit has similarly noted the clarity of Congress' intent to limit such claims to § 1421(c) actions:

> We conclude that Congress intended naturalization applicants to be thus restricted, not out of any desire to vex [applicants] but rather to guarantee that the only people who challenged the INS's interpretation of the Act would be those whose applications had been denied and who then worked within the administrative review system before resorting to the federal courts, with such resort being only pursuant to section 1421(c).

Aparicio v. Blakeway, 302 F.3d 437, 446 (5th Cir. 2002).

Finally, Congress's intent for naturalization decision challenges to be made exclusively through § 1421(c), rather than the APA, is made clear by the fact that it elected to create a different venue provision in § 1421(c) than 28 U.S.C. § 1391(e)'s venue provision that would be applicable for an APA claim. *See Hong Yin*, 265 F.R.D. at 463 (holding that "it is abundantly clear that an action brought under § 1421(c) can be brought only in the district where the applicant resides, regardless of what the general federal venue statutes might otherwise provide").

In this action, Plaintiffs seek an order enjoining USCIS from "denying any naturalization application or sustaining or maintaining the denial of any naturalization application, including each Plaintiff's application, on the grounds that a military naturalization applicant cannot meet his/her burden of showing an 'under honorable conditions' discharge with discharge paperwork identifying the discharge as 'uncharacterized.'" Compl. ¶ 146(b). It is undisputed that, if their legal claims have merit, Plaintiffs can obtain precisely this same relief through 8 U.S.C. § 1421(c). After conducting the *de novo* review Congress directed, the district court where the person resides can issue an order approving the naturalization application if the district court determines that the applicant has established that an "uncharacterized discharge" is "honorable" for the purposes of § 1440(a).

To preclude APA review, "the alternative remedy need not provide relief identical to the relief under the APA, so long as it offers relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) (citing *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1272 (D.C. Cir. 2005)). To be sure, the alternative remedy "will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'" *Garcia*, 563 F.3d at 522 (quoting *Bowen v. Mass.*, 487 U.S. 879, 901 (1988)). On this question, the D.C. circuit has explained that "[i]n evaluating the availability and adequacy of alternative remedies …

the court must give the APA 'a hospitable interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *Garcia*, 563 F.3d at 523 (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

Applying this "hospitable interpretation," there is nothing "doubtful" about the relief available under the alternative remedy. Congress' intent is "clear and convincing," *Garcia*, 563 F.3d at 523, that the proper avenue for challenging naturalization denials is § 1421(c). *See Huang*, 721 F. Supp. 2d at 51–52. Additionally, relying on the alternative remedy of § 1421(c) would not "restrict access to judicial review," *Garcia*, 563 F.3d at 523, as Plaintiffs have a ready avenue for judicial review, which offers the same relief sought here.

Plaintiffs will likely argue that this case is different from the run-of-the-mill § 1421(c) case because they are challenging "a policy" rather than individual denials.[1] This is precisely the type of "manufactured venue" that must be guarded against. *Bourdon v. U.S. Dep't of Homeland Security*, 235 F. Supp. 3d 298, 306 (D.D.C. 2017). In fact, the Fifth Circuit has held that such "policy" challenges may not be used to circumvent § 1421(c). Rather, such challenges to USCIS's interpretation of statutes may only be made in a § 1421(c) proceeding. *See Aparicio*, 302 F.3d at 447 ("The appellants have a sufficient review available to them, and therefore they (and the class they purport to represent) can only challenge the INS interpretation of 8 U.S.C. § 1429 and § 1160(b)(6)(A)(i) by waiting for an application to be denied, and then by appealing that denial through the process set forth in section 1421(c)"). Thus, Plaintiffs' attempt to recast their claim as challenging a policy, rather than merely challenging a naturalization application denial, does not change the fact that they should proceed under § 1421(c).

[1] On this, the Complaint is notable for failing to allege a single action relating to "the Policy" that occurred within this District.

In fact, the court in *De Dandrade* rejected this same argument. There, the plaintiffs argued that the individualized review of § 1421(c) did not afford them an opportunity to also challenge systemic patterns of flawed decision-making in processing N-648 waivers. *De Dandrade*, 367 F. Supp. 3d at 183. Rejecting this argument, the court held that under § 1421(c), "[p]laintiffs may challenge" broader policies and practices "on an individual basis and, should the type of adjudication or practices used be held unconstitutional or otherwise unlawful, that conclusion may be cited by other individuals in future naturalization applications." *De Dandrade,* 367 F. Supp. 3d at 186 (rejecting the plaintiffs' argument that *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991), permitted them to pursue policy claims outside of the review provided for under § 1421(c)). Indeed, the *De Dandrade* court held that § 1421(c) lacked any "pitfalls that deprive an aggrieved individual of 'meaningful judicial review.'" *Id.* (quoting *McNary*, 498 U.S. at 496). Rather, as Congress directed *de novo* review under § 1421(c), "[t]he violations plaintiffs allege such as arbitrary decision-making, discrimination …, due process violations, and failure to provide adequate notice of denial … may be remedied in individualized proceedings in the district court [pursuant to § 1421(c)]." *Id.* at 184; *see also Aparicio*, 302 F.3d at 448 ("appellants may not take the *McNary* escape route" for claims challenging a general INS (now USCIS) practice "because section 1421 provides an adequate review for their challenge"). So too here, where Plaintiffs attempt to circumvent § 1421(c) through APA and constitutional claims.

The court in *Azan-Khan v. Barr*, No. 18-cv-1393, 2019 WL 5653653 (D. Conn. Oct. 31, 2019), reached the same conclusion, rejecting the argument that "review under § 1421(c) is not exclusive when there are other viable claims as well." *Id.* *8. Instead, the court held that "[b]ecause Mr. Khan has an alternative adequate remedy under Section 1421(c) for *de novo* review of USCIS's denial of his naturalization application, the more specific statutory grant of judicial

review *makes his [APA] claim inappropriate*." *Id.* (emphasis added). In that case, plaintiff's Declaratory Judgment Act claim met the same fate. *Id.* at *8. Instead, the court held that "[t]o the extent that Mr. Khan seeks declaratory relief consistent with his § 1421(c) claim, the Court will consider that claim for relief when it conducts *de novo* review under § 1421(c)." *Id.*

Plaintiffs attempt to litigate this case improperly under the APA. Multiple courts have analyzed similar issues and found APA jurisdiction to be missing. This Court should do the same.

B. Transfer Decisions Under 28 U.S.C. § 1404(a) are Instructive

Challenges to immigration-related decisions are local disputes and it is clear from the text of § 1421(c) that Congress intended local district courts to review naturalization decisions. The same principles are evident in the application of 28 U.S.C. § 1404(a), where courts in this District routinely conclude that challenges to immigration-related decisions should be transferred to the district court where the decisions were made. And noting that plaintiffs in such cases frequently attempt to characterize their claims as appropriate because they challenge a "policy," courts "carefully … guard[s] against" such attempts to "manufacture venue" in this District. *Bourdon*, 235 F. Supp. 3d at 306.

Indeed, "cases challenging the actions of local USCIS offices are frequently, and appropriately, transferred to the venue encompassing those local offices[.]" *Id*. For instance, when a plaintiff challenged a decision on his adjustment of status application, the case was transferred because "the claim involves identifiable relevant events occurring in the transferee district and virtually none in this district." *Aftab v. Gonzalez*, 597 F. Supp. 2d 76, 80 (D.D.C. 2009); *see also Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16, 19 (D.D.C. 2008) (Huvelle, J.) (transferring case challenging adjustment of status decision because "little, if any, of the activity giving rise to plaintiff's claims has occurred in the District of Columbia nor will it"); *Mohammadi v. Scharfen*,

609 F. Supp. 2d 14, 19 (D.D.C. 2009) (claim related to naturalization was a local controversy for Maryland, where the plaintiff resided); *Ngonga v. Sessions*, 318 F. Supp. 3d 270, 273 (D.D.C. 2018); *Gyau v. Sessions*, No. 18-cv-0407 (RCL), 2018 WL 4964502, at *1 (D.D.C. Oct. 15, 2018); *Abusadeh v. Chertoff*, No. 06-cv-2014 (CKK), 2007 WL 2111036, at *9 (D.D.C. July 23, 2007).

Courts in this District routinely reject attempts to manufacture venue by purporting also to challenge "a policy." In *Bourdon*, a local USCIS office denied the plaintiff's petition to classify his wife as an immediate relative for immigration purposes. *Id.* at 301. USCIS relied on the Adam Walsh Child Protection and Safety Act of 2006 in denying the petition. *See id.* Bourdon challenged the denial of his petition and also brought an APA challenge to USCIS's "substantive rule … requiring U.S. citizens to establish that they pose no risk 'beyond a reasonable doubt.'" Compl. ¶ 66, *Bourdon*, No. 15-cv-2241 (CKK) (Dec. 23, 2015) (*Bourdon* ECF No. 1); *see also Bourdon*, 235 F. Supp. 3d at 306 (noting that plaintiff describes his claims as "entirely focused on national policies"). The *Bourdon* Court found this unavailing, concluding that the case was not appropriately brought in this District because "[a]lthough aspects of this adjudication may have been influenced by these policy memos," they are "insufficient to support venue in this District." *Id.*; *see also id.* at 306 (noting attempts to manufacture venue). Rather, the court noted that it was appropriate to transfer the case to the venue where Bourdon resided. *Id.* at 305.

The same is true of *Aftab*, where the plaintiff had "assert[ed] that adjudication of applications is an issue of national policy and that the federal officials in this forum play an 'active or significant role in the processing of background and security checks on cases such as the Plaintiff's." *Id.* at 81. The court rejected that argument, notwithstanding the plaintiff's claim to have "relie[d] on policy memoranda and reports by the defendants[.]" *Id.*; *see also Gyau*, 2018 WL 4964502, at *2 (noting that in cases brought under the APA, "courts generally focus on where

the decisionmaking process occurred[;]" concluding that the decisionmaking occurred where USCIS interviewed the plaintiff, adjudicated the petition, and denied the appeal).

All of these same factors are at play here and emphasize the reasons Congress intended review of naturalization disputes to be heard where the naturalization applicant resides, which is generally the same district where the decision was made.

C. Plaintiffs Cannot Rely on 28 U.S.C. § 1391(e) Venue

In their Complaint, Plaintiffs rely on the APA and the general venue provision in 28 U.S.C. § 1391(e). *See* Compl. ¶ 17. But as another Court in this District has explained, § 1391(e) venue is improper here. *See Liu v. Lynch*, No. 14-cv-1516 (APM), 2015 WL 9281580 (D.D.C. Dec. 8, 2015). Section 1391(e) applies unless "otherwise provided by law." 28 U.S.C. § 1391(e)(1). Venue for the "claim concerning denial of [plaintiff's] naturalization application, however, is 'otherwise provided by law.'" *Liu*, 2015 WL 9281580, at *2 (citing 8 U.S.C. § 1421(c)). As the *Liu* court explained, "the weight of authority" holds that challenges to naturalization decisions are to be brought "in the district where the applicant resides." *Id.* (citing cases). And thus, § 1391(e) venue is improper for claims challenging naturalization decisions.

* * *

At bottom, Congress made clear that challenges to naturalization decisions are to be brought under § 1421(c). And as several courts have held, this is the mechanism for challenging not only individual naturalization decisions, but also for challenging policies applicable to such determinations. In the presence of an adequate remedy, the APA is unavailable. *Fund for Animals*, 460 F.3d at 18. Accordingly, this Court should dismiss Plaintiffs' APA claim.

II. Plaintiffs' Claims Fail Because They Did Not Exhaust Their Administrative Remedies

Under 8 U.S.C. § 1421(c), an applicant for naturalization may only come to federal court "after a hearing before an immigration officer under section 1447(a) of this Title" (*i.e.*, INA § 336). Yet, Plaintiffs' Complaint confirms that three of the four Plaintiffs have not yet completed this requirement. *See* Compl. ¶¶ 56 (alleging that Ms. Miriyeva's N-336 appeal remains pending); 69 (alleging that Ms. Tum's N-336 appeal remains pending); 98 (alleging that Mr. Kadel's N-336 appeal remains pending). In its implementing regulations, USCIS provides that "[a] USCIS determination denying an application for naturalization … shall not be subject to judicial review until the applicant has exhausted those administrative remedies available to the applicant under section 336 of the Act." 8 C.F.R. § 336.9(d). Thus, Plaintiffs have not only relied on the wrong cause of action in the wrong court; they also filed at the wrong time.

As noted, Plaintiffs concede that three of the Plaintiffs have not completed the administrative appeal process. Defendants anticipate that Plaintiffs will argue exhaustion is not required because "the administrative decision maker cannot change USCIS policy." Compl. ¶ 98. In other words, Plaintiffs are likely to ask the Court to excuse their failure to complete the administrative appeal process for futility. USCIS regulations provide that exhaustion is required. And multiple Circuit courts agree. *See Escaler*, 582 F.3d at 292 (Section 310(c) exhaustion requirement is mandatory); *Karam v. USCIS*, 373 F. App'x 956, 957–58 (11th Cir. 2010) (no futility exception because 310(c) exhaustion requirement is jurisdictional); *but see Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 719 (6th Cir. 2013) (concluding that the exhaustion requirement is non-jurisdictional); *Eche v. Holder*, 694 F.3d 1026, 1028 (9th Cir. 2012) (holding that exhaustion requirement was non-jurisdictional and "exercising our discretion" to decide the

case because of "unusual circumstances"—namely, the plaintiffs were "told repeatedly that they should not pursue an administrative appeal").

In all events, the Court need not answer whether the exhaustion requirement is jurisdictional because the Court should dismiss Plaintiffs' Complaint because § 1421(c) is the proper mechanism for challenging their denials. But even if the Court were to construe this case as one challenging those denials (albeit, in the incorrect venue), it should still require the Plaintiffs to complete the administrative exhaustion process that Congress provided for in § 1421(c). Without awaiting those final determinations, Plaintiffs ask the Court to address their claims in the abstract, alleging what they *believe* will happen in the future.[2]

III. Plaintiffs' Claims Are Barred By The Statute Of Limitations

As discussed earlier, Plaintiffs purport to challenge the USCIS "policy" of denying naturalization applications where the applicant received an "uncharacterized discharge." *See, e.g.*, Compl. ¶ 7. Specifically, Plaintiffs challenge USCIS' determination that an "uncharacterized discharge" does not constitute an "under honorable conditions" discharge for the purposes of 8 U.S.C. § 1440(a). *See id.* To be sure, Plaintiffs may challenge the decisions under 8 U.S.C. § 1421(c). *See supra*, Part I. But any attempt to challenge a "policy" of applying this determination is barred by the statute of limitations.

The statute of limitations for claims against the federal government is set forth in 28 U.S.C. § 2401(a): "every civil action commenced against the United States shall be barred unless the

[2] This procedural posture also raises questions of whether Plaintiffs' claims are ripe for this Court's consideration. "For a claim to be ripe under Article III, the plaintiff must establish constitutional minima akin to that of standing by showing an injury-in-fact; allegations of possible future injury do not satisfy this requirement." *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999). Here, the injury-in-fact will not occur until each Plaintiffs' administrative appeal is denied.

complaint is filed within six years after the right of action first accrues." "[S]ection 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity." *P&V Enters. v. U.S. Army Corps. of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (quotation marks omitted). "[A] party challenging final agency action must commence his suit within six years after the right of action accrues and the 'right of action first accrues on the date of the final agency action.'" *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) (quoting *Harris v. FAA*, 353 F.3d 1006, 1009–10 (D.C. Cir. 2004)); *see also Common Sense Salmon Recover v. Evans*, 329 F. Supp. 2d 96, 100 (D.D.C. 2004) (holding as untimely a challenge to an agency's policy filed eight years after the policy's adoption); *Ctr. for Food Safety v. Burwell*, 126 F. Supp. 3d 114, 125 (D.D.C. 2015) (holding that for a challenge to agency action, the "right of action would have accrued when the Interim Policy became effective" and challenges brought more than six years late are "time-barred").

Since as early as 2008, "USCIS has consistently interpreted the military naturalization statute at 8 U.S.C. § 1440 to mean that the term 'separated under honorable conditions' does not include an uncharacterized discharge." Decl. of C. Young (attached hereto).[3] As the interpretation Plaintiffs challenge has been applied for more than a decade, Plaintiffs' attempt to mount an APA and constitutional challenge to this is time-barred and should be dismissed.[4]

[3] The six-year statute of limitations is a jurisdictional bar to Plaintiffs' Complaint. *See* 28 U.S.C. § 2401(a); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013) ("The court lacks subject matter jurisdiction to hear a claim barred by section 2401(a)"). Accordingly, this Court may consider the Young Declaration and its attachments on this jurisdictional issue. *See Scolaro v. D.C. Bd. of Educations & Ethics*, 104 F. Sup. 2d 18, 22 (D.D.C. 2000).

[4] Of course, this conclusion only underscores the fact that Plaintiffs should be proceeding as required by § 1421(c), rather than trying to manufacture an APA claim in order to remain in this Court.

IV. Plaintiffs' Constitutional Claim Fails

Plaintiffs also contend that Defendants' actions violate the Constitution's "Uniform Rule of Naturalization" clause. *See* Compl. ¶¶ 131–38. This claim fails for the same reason as Plaintiffs' APA claim: A claim challenging a naturalization application decision must be brought pursuant to § 1421(c). As the *Azan-Khan* court explained, there is "no legal basis" for the purported constitutional relief outside of the § 1421(c) proceeding. *Azan-Khan*, 2019 WL 5653653, at *8. Rather, as discussed above, the Plaintiffs' may make their constitutional arguments in a § 1421(c) claim and Courts lack jurisdiction over challenges to naturalization decisions not brought pursuant to § 1421(c). Indeed, the Court should recognize Plaintiffs' purported "Constitutional Claim" for what it is: a challenge to the legal basis on which USCIS denied their applications for naturalization. Were it true that any individual whose naturalization application was denied could simply recast their challenge to that decision as a "Uniform Rule of Naturalization" claim, there would be nothing left of § 1421(c) and its venue provision; individuals with denied applications would be free to file a "Uniform Rule of Naturalization" claim challenging USCIS's decision in the district court of their choosing.

Moreover, this claim fails for Plaintiffs' lack of standing. Article I, Section 8 of the Constitution establishes that "Congress shall have power … To establish a uniform Rule of Naturalization." This Constitutional mandate empowers Congress to define "the processes through which citizenship is acquired or lost," to determine "the criteria by which citizenship is judged," and to fix "the consequences citizenship or noncitizenship entail." *Davis v. Dist. Director, INS*, 481 F. Supp. 1178, 1183–84 n.8 (D.D.C. 1979) (citation omitted). Alexander Hamilton explained that the word "uniform" in the Naturalization Clause confers upon Congress the "exclusive jurisdiction" to regulate within that area, "because if each State had power to prescribe

a distinct rule, there could not be a uniform rule." The Federalist No. 32, at 199 (Hamilton) (Clinton Rossiter ed., 1961).[5]

Because the Naturalization Clause is an affirmative grant of authority to Congress, and does not confer any rights on private individuals, there is no private right of action under it, and therefore, Plaintiffs lack standing to assert such a claim. *See Flores v. City of Baldwin Park*, No. 14-cv-9290, 2015 WL 756877, *3 (C.D. Cal. Feb. 23, 2015); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). The Clause vests in Congress the power to "establish an uniform Rule of Naturalization," a grant that has been "read broadly to mean federal control over the status of aliens, not just criteria for citizenship." *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014). As the Ninth Circuit explained, the uniformity principle of the Naturalization Clause "was a response to the tensions that arose from the intersection of the Articles of Confederation's Comity Clause and the states' divergent naturalization laws, which allowed an alien ineligible for citizenship in one state to move to another state, obtain citizenship, and return to the original state as a citizen" with all appurtenant privileges and immunities. *Id*. at 581; *see also Gibbons v. Ogden*, 22 U.S. 1, 15 (1824) ("The true reason why the power of establishing an uniform rule of naturalization is exclusive, must be, that a person becoming a citizen in one State, would thereby become a citizen

[5] Congress passed the first "uniform Rule of Naturalization" in March 1790. *See* Naturalization Act of 1790, 1 Stat. 103, Mar. 26, 1790. In 1795, Congress claimed exclusive authority over naturalization by establishing new conditions—"and not otherwise"—for aliens "to become a citizen of the United States, or any of them." *See* Naturalization Act of 1795, 1 Stat. 414, Jan. 29, 1795. This claim was confirmed by the Supreme Court in *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817), where Chief Justice Marshall explained that "the power of naturalization is exclusively in congress," notwithstanding any state laws to the contrary. *See also Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers[.]" (internal citation omitted)).

of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the State"). The Constitution's Naturalization Clause concerns the proper allocation of power as between Congress and the States; it is not a rights-giving provision.[6] Therefore, Plaintiffs lack standing to raise a claim under Article I, Section 8, Clause 4 of the Constitution.[7]

Moreover, Plaintiffs' constitutional claims fail to state a claim for relief. Congress has enacted a statutory framework that carefully delineates when and how an alien may naturalize as a member of the military. 8 U.S.C. § 1440(a). Congress has expressly delegated to the Secretary of Homeland Security the broad authority to administer the provisions of the INA with the force of law, and to establish regulations of this purpose. 8 U.S.C. § 1103; *see also U.S. ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). This includes Defendants' determination that the "Uncharacterized (Entry Level Separation)" does not satisfy 8 U.S.C. § 1440(a)'s requirement that the discharge be "under honorable conditions." *See Nio*, 270 F. Supp. 3d at 64 (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)) (noting that agency action is permissible if it represents a "reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts"). Thus, this claim should be dismissed.

V. Plaintiffs' Declaratory Judgment Act Claim Fails

Plaintiffs also purport to bring a separate cause of action under the Declaratory Judgment Act ("DJA"). *See* Compl. ¶¶ 139–41. Of course, the DJA "is not an independent source of federal

[6] Defendants incorporate the arguments in *Kirwa*, distinguishing *Wagafe v. Trump*, No. 17-cv-0094, 2017 WL 2671254 (W.D. Wash. June 21, 2017), as an unreliable non-precedential decision. *See Kirwa*, 1:17-cv-01793, ECF No. 72.

[7] *But see Kirwa v. U.S. Dep't of Defense.*, 285 F. Supp. 3d 257, 273 (D.D.C. 2018); *see also Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19 (D.D.C. 2018); *Wagafe*, 2017 WL 2671254, at *7.

jurisdiction." *C&E Servs., Inc. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (the DJA is "procedural only").[8] Rather, "the availability of declaratory relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). And given that Plaintiffs' other causes of action fail, reliance on the DJA does not save Plaintiffs' Complaint. *See Perrigo R&D Development Co. v. U.S. Food & Drug Admin.*, 290 F. Supp. 3d 51, 64 (D.D.C. 2017) (dismissing DJA claim for "lack of subject matter jurisdiction since Perrigo has failed to state a claim under the APA"). Rather, Plaintiffs' request "for a declaratory judgment" in the absence of a viable cause of action seeks the type of advisory opinions that this Court cannot issue. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("federal courts established pursuant to Article III of the Constitution do not render advisory opinions"). Accordingly, the Court should also dismiss Plaintiffs' DJA claim.

[8] To be sure, the DJA's text "does not indicate that any independent cause of action is required to invoke the DJA." *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 80 (D.D.C. 2008). But cases from across the Circuits confirm that the DJA only "creates a remedy, not a cause of action." *Id.* at 80–81 (citing cases). Thus, "in most cases a plaintiff would *need* to identify a statutory (or a common law) cause of action to proceed in federal court[.]" *Id.* at 81 (recognizing that a plaintiff may seek declaratory relief under the DJA for constitutional claims).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Motion to Dismiss.

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Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ Brian J. Field*
BRIAN J. FIELD
D.C. BAR #985577
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 252-2551
E-mail: Brian.Field@usdoj.gov