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' REPLY IN SUPPORT OF MOTION TO DISMISS

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In this case, four individuals challenge Defendant U.S. Citizenship and Immigration Services' ("USCIS") denial of their naturalization applications. *See* Compl. ¶ 1. Plaintiffs go to great lengths to suggest that they are not challenging the specific denials, but rather the *reasoning* for those denials (what Plaintiffs call a "Policy"). Semantics aside, Plaintiffs are clearly challenging the legal reasoning behind the USCIS denial of their naturalization applications and Congress created a specific review provision for such challenges in 8 U.S.C. § 1421(c). As USCIS discussed in its Motion to Dismiss ("Mot."), the district court where each Plaintiff resides is the appropriate the venue for challenges to USCIS's decisions, as well as broad policy-based challenges (including constitutional challenges). Accordingly, this Court lacks jurisdiction over Plaintiffs' claims, as each challenge should be brought in a § 1421(c) proceeding. Additionally, Plaintiffs' claims fail because three Plaintiffs have not exhausted their administrative remedies and they are barred by the statute of limitations.[1]

ARGUMENT

I. This Court Should Dismiss Plaintiffs' APA Claim

The APA's "limited waiver of sovereign immunity" does not apply where there are "other adequate remed[ies] in a court." *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). One such "adequate remedy" is 8 U.S.C. § 1421(c), where Congress required that challenges to naturalization application decisions be made "before the United States district court for the district in which such person resides[.]" 8 U.S.C. § 1421(c). Congress expressly stated that this review would encompass not only narrow challenges to an application denial, but

[1] In its December 9 Order, the Court directed USCIS to include "an update on the status of each of the named Plaintiffs." Min. Order (Dec. 9, 2019). In response, USCIS respectfully refers the Court to Exhibit A, where it provides status updates for each Plaintiff.

also broader challenges like those contemplated by the APA. *See* 8 U.S.C. § 1421(c) (stating that § 1421(c) challenges are made "in accordance with chapter 7 of title 5 [the APA]").

At this point in the litigation, one fact is clear—every court to address this question has held that § 1421(c) precludes APA review. In their Opposition, Plaintiffs did not identify a single court that has concluded otherwise. *See generally* Pls.' Opp. ("Opp."). This Court should conclude likewise and reject Plaintiffs' forum shopping and efforts to circumvent § 1421(c).[2]

A. Courts universally hold that § 1421(c) precludes APA claims

Multiple courts have considered whether § 1421(c) constitutes an "adequate remedy" for the purposes of the APA. *See* Mot. at 5–10. Each of these courts concluded that § 1421(c) precludes claims under the APA. As another Court in this District concluded, "the plain[ ] reading" of § 1421(c) "clearly indicates Congress' intent that the United States district court located in the district in which an appellant resides is appropriately positioned to review the denial of an applicant's naturalization application." *Huang v. Napolitano*, 721 F. Supp. 2d 46, 51–52 (D.D.C. 2010). In their Opposition, Plaintiffs attempt to avoid the same fate by pointing to inconsequential differences between those cases and this case. But Plaintiffs have failed to provide the Court with any reason not to conclude likewise that § 1421(c) precludes their APA claim.

For instance, the Eleventh Circuit stated that "the APA does not authorize judicial review 'that adds to the sweeping *do novo* review' that § 1421(c) provides." *Heslop v. Attorney Gen.*, 594 Fed. App'x 580, 584 (11th Cir. 2014) (quoting *Escaler v. USCIS*, 582 F.3d 288, 291 n.1 (2d Cir.

[2] With respect to Plaintiffs' forum shopping, the 28 U.S.C. § 1404(a) decisions are instructive. *See* Mot. at 10–12. Courts must "carefully … guard against" attempts to manufacture venue here by recasting the claim as one challenging a "policy." *See Bourdon v. DHS*, 235 F. Supp. 3d 298, 306 (D.D.C. 2017). That is just what Plaintiffs have done, attempting to rely on 28 U.S.C. § 1391(e). But that statute is unavailable. *See* Mot. at 12. Moreover, Plaintiffs' Complaint does not allege a single action relating to "the Policy" that occurred in this District. *See* Mot. at 8 n.1.

2009)). As the *Heslop* district court similarly explained, "Courts have held that because there is an adequate remedy under § 1421(c), an APA claim seeking similar relief must be dismissed."[3] *Heslop v. Holder*, No. 13-cv-0944, 2014 WL 554563, at *4 (M.D. Fla. Feb. 12, 2014). Although *Heslop* dealt with the exact question at hand, Plaintiffs attempt to distinguish it with the passing statement that it is inapplicable because the applicant "raised only claims challenging the denial of an application." Opp. at 11 & n.8. Of course, nothing in *Heslop* suggests that the Eleventh Circuit intended its decision to be so narrow. Rather, the court stated in clear terms that the availability of relief under § 1421(c) precludes a claim under the APA. *See Heslop*, 594 Fed. App'x at 584.

The same is true of *Lezzar v. Heathman*, No. 4:11-cv-4168, 2012 WL 4867696 (S.D. Tex. Oct. 11, 2012), where the court stated that "the APA's adjudication procedures do not apply to 'a matter subject to subsequent trial of the law and facts de novo in a court,' as is the case under § 1421(c), so the APA does not apply to denial of an application for naturalization." *Id.* at *6. The court specifically held that § 1421(c) constitutes an other "adequate remedy in a court." *Id*. On this point, the *Lezzar* court focused on § 1421(c)'s *de novo* review provision, stating that it should be read to preclude APA review. *Id.* As another Court in this District similarly held, it is "particularly true" that there is no APA remedy where "Congress has provided for *de novo* review, 'given the frequent incompatibility between *de novo* review and the APA's deferential standards.'" *Greenpeace v. DHS*, 311 F. Supp. 3d 110, 126 (D.D.C. 2018) (quoting *CREW v. DOJ*, 846 F.3d 1235, 1244–45 (D.C. Cir. 2017)). Here again, Plaintiffs' only response is a passing statement that *Lezzar* should be ignored because the applicant "raised only claims challenging the denial of an application." Opp. at 11 & n.8. Plaintiffs not only fail to support such a narrow reading, they overlook the *Lezzer* plaintiff's argument that the court had jurisdiction because he was "not

[3] As discussed in Part I.B, Plaintiffs seek the relief they could seek in a § 1421(c) proceeding.

challenging USCIS's decision to deny his N-400 or its decision in his N-336 proceedings, but instead attack[ing] [USCIS's] erroneous interpretations and their arbitrary and capricious process in his administrative proceedings." *Id.* at *8. The court rejected this argument, which mirrors Plaintiffs' argument.[4]

In response, Plaintiffs argue unconvincingly that these decisions are irrelevant because, according to Plaintiffs, they did not involve challenges to USCIS "policy." That argument is wrong and illogical. It is wrong because several of the cited cases included "policy" challenges. As just noted, the plaintiff in *Lezzar* brought a policy challenge, which the court rejected. *See Lezzar*, 2012 WL 4867696, at *8. Moreover, in *De Dandrade v. DHS*, 367 F. Supp. 3d 174 (S.D.N.Y. 2019), a group of lawful permanent residents brought APA and constitutional claims challenging USCIS's "process for granting [language and civics] exam waivers[.]" *Id.* at 179. The plaintiffs did not merely challenge how USCIS made waiver determinations for them, they challenged USCIS's entire "process for considering … waiver applications[.]" *Id.* at 186–87. Yet, the court held that such APA and constitutional claims must be made "in individualized proceedings in the district court." *Id.* at 184–85; *see also id.* at 187 (noting that "Congress did not intend APA review to duplicate existing procedures for review of agency action" under § 1421(c)). Plaintiffs only response is that *De Dandrade* is "not analogous" because it "addressed the application of discretion in processing English language waivers[.]" Opp. at 9.[5] Plaintiffs offer no authority suggesting why this distinction matters (because it doesn't). Rather, *De Dandrade*

[4] As USCIS noted, several other courts have also held that § 1421(c) precludes APA claims. *See* Mot. at 5, 9 (quoting *Hong Yin v. Frazier*, 265 F.R.D. 460, 463 (D. Minn. 2010); *Azan-Khan v. Barr*, No. 18-cv-1393, 2019 WL 5653653 (D. Conn. Oct. 31, 2019); *Gill v. Chertoff*, No. 07-cv-0516, 2007 WL 4190810, at *2 (E.D. Cal. Nov. 26, 2007) (Beck, M.J.)).

[5] Plaintiffs also question *De Dandrade* because, originally filed by seven plaintiffs, only two remained. Opp. at 9 n.7. Unsurprisingly, Plaintiffs cite no authority suggesting this is relevant.

considered a broad challenge to a USCIS "practice" and held that § 1421(c) bars such claims. *See De Dandrade*, 367 F. Supp. 3d at 186–87; *see also Aparicio v. Blakeway*, 302 F.3d 437, 441 (5th Cir. 2002) (considering claims by a group of naturalization applicants challenging processes).

Plaintiffs' attempt to distinguish these cases is also illogical. In each case USCIS cited, the plaintiff challenged USCIS's reason for denying a naturalization application. *See, e.g.*, *Heslop*, 594 Fed. App'x at 583–84 (the applicant challenged how USCIS calculates time spent as a lawful permanent resident). Plaintiffs do the same here, challenging the reason for their denials (and presumably the denials of others). If Plaintiffs were correct, a challenge to the "reason" for a decision would be heard under § 1421(c), whereas a challenge to the same reason, if called a "policy," would be heard pursuant to the APA. But every applicant could simply circumvent § 1421(c) by calling the "reason" a "policy" and asking the court to order that the same reason not be applied to anyone else. Such a reading leaves § 1421(c) without a purpose.

At bottom, every court considering this question has held that Plaintiffs' APA claims are precluded by § 1421(c). This Court should conclude likewise and dismiss Plaintiffs' APA claims.

B. Section 1421(c) provides an "other adequate remedy"

Plaintiffs also suggest that § 1421(c) does not constitute an adequate remedy for their claims in the first place. Opp. at 12–15. They are mistaken. In fact, as noted above, many courts have held the exact opposite. *See, e.g.*, *Aparicio*, 302 F.3d at 447 (in § 1421(c), Congress afforded "complete and wholly adequate review" of claims, including challenges to broad processes).

First, Plaintiffs argue that § 1421(c) does not provide an adequate remedy because it "does not provide clear and convincing evidence of an attempt to create a substitute for APA claims." Opp. at 13. Yet, the text of § 1421(c) does just that; it repeatedly demonstrates an intention to preclude separate APA claims. For instance, Congress expressly stated that APA-type arguments

may be brought in a § 1421(c) action. *See* 8 U.S.C. § 1421(c) (stating that § 1421(c) challenges are made "in accordance with chapter 7 of title 5 [the APA]"). Further, Congress provided for *de novo* review, which clearly suggests Congress's intent that § 1421(c) precludes APA review. *See Greenpeace*, 311 F. Supp. 3d at 126. To support their argument, Plaintiffs point to § 1421(c)'s legislative history—legislative history that cuts against their argument. As Plaintiffs note, citizenship is a highly valuable government benefit and "applicants should receive full recourse to the Judiciary when the request for that benefit is denied." Opp. at 13 (quoting H.R. Rep. No. 101-187, at 14 (1989)). Given this sentiment, it is unsurprising that Congress created a unique review provision in § 1421(c), which would afford an applicant *greater* judicial review than would be available under the APA. *See Nagahi v. INS*, 219 F.3d 1166, 1169 (10th Cir. 2000) (noting the "rare" and "unusual[ly]" broad scope of review under § 1421(c)).

Second, Plaintiffs argue that § 1421(c) does not provide an adequate remedy because "a district court reviewing an individual naturalization application will not entertain the type of notice-and-comment and authority challenges raised by the APA claims here." Opp. at 13. This statement is notable for its rank speculation; Plaintiffs do not identify anything other than an irrelevant FOIA holding to support it. In contrast, a court addressing this argument rejected it. *See De Dandrade*, 367 F. Supp. 3d at 186; Mot. at 7, 9.

Third, Plaintiffs argue that "USCIS will not consider [a finding in a § 1421(c)] proceeding as setting aside the entire Policy." Opp. at 14. Plaintiffs rely exclusively on a statement Government counsel made (counsel from another case) during an initial scheduling call. *See id.* at 14 n.12. Of course, such a statement could not bind the agency. In any event, the impact of a decision made in a § 1421(c) proceeding should be addressed in that proceeding (or subsequent proceedings) rather than in the abstract here. *See De Dandrade*, 367 F. Supp. 3d at 186 ("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.").[6]

Finally, Plaintiffs suggest that § 1421(c) does not provide an adequate remedy because "applicants must have their naturalization applications denied and then … engage in the often long and arduous process of exhausting administrative remedies under § 1447(a), all the while being stuck in immigration limbo." Opp. at 15. But Congress required exactly that—an applicant must first exhaust her administrative remedies and then bring any claims (including APA-type challenges) pursuant to § 1421(c). Plaintiffs fail to call this review regime into question. Rather, Plaintiffs rely on *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015), *see* Opp. at 15, misleadingly quoting it to suggest broadly that where "*de novo* review … occurs weeks or months after" an initial denial, *de novo* review "offers no adequate remedy …." *Id.* (second alternation in original). The full quote, however, provides that such *de novo* review "offers no adequate remedy *for the period of unlawful detention* members of the class suffer *before* receiving this review–*the central inquiry at issue in this case*." *R.I.L-R*, 80 F. Supp. 3d at 185 (first and third emphases added). There is no similar claim here; Plaintiffs are not seeking a remedy with respect to an interim status that cannot be remedied after the fact. Rather, Plaintiffs are seeking the ultimate relief—naturalization, which is fully available in a § 1421(c) proceeding.[7]

At bottom, if Plaintiffs were correct, § 1421(c) would be superfluous. The APA already exists to provide judicial review of final agency action, which would include naturalization

[6] Plaintiffs' belated suggestion that they also need to remedy "reputational impacts" is discarded easily as they never pleaded any reputational harm. *See generally* Compl.

[7] Plaintiffs' reliance on *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), is equally misplaced. *See* Opp. at 15. In that case, the Supreme Court addressed a statute (the Clean Water Act) that "ma[de] no reference to standalone jurisdictional determinations[.]" *Hawkes*, 136 S. Ct.at 1816. In contrast, § 1421(c) expressly provides for review.

application denials (after exhaustion). Yet, Congress must have concluded that the naturalization process should be reviewed differently. Concluding otherwise renders Congress's enactment of § 1421(c) superfluous, in violation of the principle of statutory interpretation requiring construction "so that no provision is rendered inoperative or superfluous, void or insignificant." *C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997). This further explains why Congress set forth a less deferential standard in § 1421(c) than under the APA—to ensure that the "applicants [w]ould receive full recourse to the Judiciary when the request for [naturalization] is denied." Opp. at 13. Indeed, the Fifth Circuit reached this exact conclusion in *Aparicio*: "We conclude that Congress intended naturalization applicants to be thus restricted[.]" 302 F.3d at 446.

C. Plaintiffs ask this Court to rely on inapposite cases

Plaintiffs ask this Court to ignore the cases above, which held that § 1421(c) precludes separate APA actions, and follow instead decisions that addressed different questions.

i. *McNary* is inapplicable

Plaintiffs argue that under the Supreme Court's decision in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), they may circumvent § 1421(c) by styling their claim as a "collateral" challenge to a naturalization application decision. *See* Opp. at 5–8. Plaintiffs are mistaken, and they may not take advantage of the "*McNary* escape route." *Aparicio*, 302 F.3d at 448. Once again, Plaintiffs advance an argument that multiple courts have considered and rejected. *See* Mot. at 9 (citing cases). Undeterred, Plaintiffs ask this Court to reach a different conclusion.

"*McNary* involved a provision that barred district-court review of any 'determination respecting an application for adjustment of status' of certain alien farm workers." *DCH Regional Med. Ctr. v. Azar*, 925 F.3d 503, 507 (D.C. Cir. 2019) (quoting *McNary*, 498 U.S. at 486 n.6). "[T]he Supreme Court held this provision did not bar a class action asserting due-process

challenges to the procedures used by the agency to adjudicate individual adjustment decisions." *Id.* The Supreme Court "reasoned that the preclusion provision covered only 'a single act rather than a group of decisions or a practice or procedure employed in making decisions.'" *Id.* (quoting *McNary*, 498 U.S. at 491–92). Further, "the relief sought in *McNary*—greater agency process—would not have had the 'practical effect of also deciding the claims for benefits on the merits." *Id.* at 408 (quoting *Fornaro v. James*, 416 F.3d 63, 68 (D.C. Cir. 2005)). The *McNary* Court was also swayed by the fact that, were the challenge precluded, "meaningful judicial review of the[ ] statutory and constitutional claims would be foreclosed." *McNary*, 498 U.S. at 484.

Plaintiffs argue that the only relevant part of *McNary* in this Circuit is the "distinction between 'collateral and particularized claims.'" *See* Opp. at 5–6 (quoting *Gen. Elec. v. Jackson*, 610 F.3d 110, 126 (D.C. Cir. 2010)). In other words, Plaintiffs believe that a statute prohibiting courts from reviewing denials of individual applications cannot bar "those same courts from considering general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* at 5 (quoting *McNary*, 498 U.S. at 492).

As the D.C. Circuit recently explained, that is not the standard. Rather, where a party's collateral challenge would have the practical effect of also deciding the underlying claims, "*McNary* is inapplicable." *DCH*, 925 F.3d at 507. In *DCH*, the D.C. Circuit considered a Medicare statute that precluded judicial review of the estimates used to make certain payments to hospitals. *Id.* at 504. In that case, a hospital characterized its claim as one challenging "methodology," rather than challenging the estimates themselves. *Id.* at 505. According to the hospital, *McNary* permits such a collateral challenge. *Id.* at 507. Rejecting this argument, the *DCH* court explained that "a challenge to the methodology … is unavoidably a challenge to the estimates themselves," and "DCH's proposed distinction between methodology and estimates would eviscerate the statutory

bar, for almost any challenge to an estimate could be recast as a challenge to its underlying methodology." *Id.* at 506. In that circumstance, "*McNary* is inapplicable." *Id.* at 507.

In *Jackson,* the D.C. Circuit reached the same conclusion, pointing to the Supreme Court's decision in *Heckler v. Ringer*, 466 U.S. 602 (1984), for guidance in determining when a challenge is sufficiently "collateral" to avoid a specific review provision. *Jackson,* 610 F.3d at 126. *Ringer* addressed a Medicare statute under which the district court lacked jurisdiction over individual claims for reimbursement. *Id.* In *Ringer*, "four plaintiffs seeking Medicare reimbursement challenged a policy adopted by the Secretary of Health and Human Services …, but in doing so they also sought to establish a right to reimbursement in their particular cases[.]" *Jackson*, 610 F.3d at 126 (citing *Ringer*, 466 U.S. at 614). The Supreme Court concluded that such claims were not "collateral" because "the plaintiffs' claims were, at bottom, … claim[s] that they should be paid for their particular procedures—which, under the statute, … the district court had no jurisdiction to review[.]" *Jackson*, 610 F.3d at 126 (alterations in original) (citing *Ringer*, 466 U.S. at 614). The Supreme Court explained that the *Ringer* plaintiffs' claims "were neither separate from nor collateral to [the plaintiffs'] individual Medicare determinations: the relief they sought to redress their supposed 'procedural' objections included a substantive declaration" with respect to their own reimbursements. *Id.* (alterations in original; quotation marks omitted).

A ruling in Plaintiffs' favor here would also "have the effect of establishing their entitlement to" naturalization. *McNary*, 498 U.S. at 495. Plaintiffs contend that "but for the Policy, each Plaintiff already would be a U.S. Citizen." Pls.' Mot. for Summ. J. at 25. By seeking to overturn the so-called "Policy," Plaintiffs attempt to remove what they contend is the only thing standing between them and naturalization. Thus, the "collateral" challenge would have "the practical effect of also deciding" the question for which Congress enacted § 1421(c). *Fornaro,*

416 F.3d at 68. Indeed, the Plaintiffs' requested relief includes a substantive declaration with respect to their own naturalization. *See* Compl. ¶ 146(b) (requesting an order enjoining USCIS from applying the supposed "Policy" to "each Plaintiff's application[.]"). In such circumstances, *McNary* is unavailable. *See Jackson*, 610 F.3d at 126. It is thus unsurprising that multiple courts have considered and rejected the same argument Plaintiffs make about *McNary* in the § 1421(c) context. *See* Mot. at 9 (citing cases). This Court should do likewise.

ii. The remaining cases on which Plaintiffs attempt to rely are irrelevant

Plaintiffs also place significant weight on *O.A. v. Trump*, No. 18-cv-2838 (RDM), 2019 WL 3536334 (D.D.C. Aug. 2, 2019). Opp. at 11–12. But *O.A.* arises in a markedly different context—a class of plaintiffs sought to challenge agency rulemaking where the defendants had argued that "the individual plaintiffs will have an opportunity to challenge the Rule if they are eventually subject to final orders of removal[.]" *Id.* at *8. Unlike Plaintiffs here, the *O.A.* plaintiffs argued that they were advancing a facial challenge to a particular rule and that it did not "arise from" any removal proceedings. *Id.* at *9; *see also id.* *10 (suggesting that the plaintiffs did not "challenge anything that has occurred in the course of a removal proceeding"). Rather, the *O.A.* plaintiffs "challenged the validity of the Rule … without regard to any particular application," and argued further that "the rule 'affects' individuals beyond just those involved in removal proceedings." *Id.* at *9. Thus, removal proceedings were an insufficient mechanism for advancing their claims. *See id.* In contrast, Plaintiffs' claims here are directly and narrowly related to the naturalization application review process. They do not argue that the alleged "Policy" "affects" individuals beyond the naturalization application review process. And Plaintiffs cannot argue that they do not "challenge anything that has occurred in the course of" USCIS denying a naturalization application as their filings in this Court are replete with claims and arguments about their specific

applications. Instead, Plaintiffs are clearly challenging the basis for their naturalization application denials, which stands in stark contrast to the general allegations the *O.A.* plaintiffs made.[8]

More broadly, Plaintiffs point to a series of decisions where courts "have found APA jurisdiction to be proper for a challenge to a policy collateral to an INA decision." Opp. at 10. As noted, none of these decisions addressed § 1421(c) and the Court should find them far less persuasive than the cases discussed above that addressed the specific question of whether § 1421(c) precludes APA claims. Moreover, none of these cases helps Plaintiffs. In *R.F.M v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019), for instance, the court addressed whether a particular jurisdiction-stripping statute (8 U.S.C. § 1252(a)(2)(B)(ii)) precluded judicial review. Finding that the challenged action fell outside the types of action for which § 1252(a)(2)(B)(ii)'s jurisdiction-stripping provision applied, the court found that it did not prohibit an APA claim. In contrast, § 1421(c) provides for *exactly* the claims Plaintiffs seek to advance.[9]

[8] Additionally, the *O.A.* court found that the specific review statute did not preclude an APA claim because the "administrative record on which the order of removal is based" would have "nothing to do with the challenges Plaintiffs have brought in this case." *O.A.*, 2019 WL 3536334, at *1. Not so here, where Plaintiffs rely exclusively on the same materials that would be relevant if they brought their challenges in a § 1421(c) proceeding.

[9] The other cases Plaintiffs cite are equally irrelevant. *See* Opp. at 10. For instance, *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296 (D.D.C. 2017), is not relevant because the Court permitted an APA claim to proceed where the plaintiffs "raise[d] claims that [were] outside of the scope of the administrative process," and where they wished to challenge a specific process … that they were not "given opportunity to challenge" during the administrative process. *Id.* at 309; *see also id.* at 310 ("Plaintiffs and the government agree that at no point in the administrative proceedings … would [plaintiffs] be able to raise their constitutional and APA challenge"). In contrast, Plaintiffs would not have been precluded from arguing that their discharges should be considered "under honorable conditions." In fact, the thrust of the claim in *Jafarzadeh* was that the plaintiffs were not even aware that a policy existed and thus they could not have challenged it. *See id.* The remainder of the cases Plaintiffs cite are equally irrelevant. *Campos v. INS*, 32 F. Supp. 2d 1337 (S.D. Fla. 1998), addressed a claim not made here—that the INA superseded the APA entirely. *See id.* at 1344. Likewise, this Court's decision in *Nio v. USCIS*, 270 F. Supp. 3d 49 (D.D.C. 2017), responded to the Government's argument that this Court lacked jurisdiction to review discretionary agency action. Again, that argument has not been made here.

II. Plaintiffs Concede That They Have Not Exhausted Their Administrative Remedies

As USCIS argued, and Plaintiffs concede, three of the four Plaintiffs have not exhausted the administrative requirements that Congress created. *See* Mot. at 13–14; Opp. at 17–18. And as USCIS has explained, this is fatal to those Plaintiffs' claims (whether they are called challenges to the "policy" or otherwise; the claims may only be made in § 1421(c) proceedings after exhaustion). *See* Mot. at 13–14. As expected, Plaintiffs' only argument is that the Court should excuse their failure and ignore this Congressional requirement. *See* Opp. at 17. At the outset, at least two courts have held that § 1421(c)'s exhaustion requirement is jurisdictional, and thus perceived futility is irrelevant. *See* Mot. at 13 (quoting *Escaler*, 582 F.3d at 292 (holding that § 1421(c) exhaustion is mandatory); *Karem v. USCIS*, 373 Fed. App'x 956, 957–58 (11th Cir. 2010) (same)). Moreover, Plaintiffs' futility argument does not save their claims even if § 1421(c)'s exhaustion requirement were deemed prudential. *See* Mot. at 13–14. In their Opposition, Plaintiffs rely primarily on the D.C. Circuit's decision in *Communications Workers of America v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994) ("*CWA*"). Opp. at 18. Plaintiffs suggest that, under *CWA*, the "futility exception" applies anywhere administrative remedies appear "clearly useless." *Id.* But Plaintiffs fail to note the earlier statement in *CWA*, that "[t]he futility exception is … quite restricted." *CWA*, 40 F.3d at 432; *see also id.* (noting that futility is not an exception unless the plaintiff shows that "it is *certain* that their claim will be denied") (emphasis in original). Relying on *CWA*, Plaintiffs speculate that the outcome of the appeal is "a foregone conclusion." Opp. at 17. While USCIS has maintained its position that an "uncharacterized" discharge does not satisfy the "under honorable conditions" requirement, Plaintiffs are still able to advance their arguments through the administrative process that Congress established, and they should await the final determination before being permitted to proceed to challenge the decision (or the reason underlying it).

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

For more than a decade, USCIS has followed the relevant military branch's determination regarding characterization of discharge when applying 8 U.S.C. § 1440(a). Mot. at 15. If the Court accepts Plaintiffs' recasting of their claim as one brought challenging a "Policy" or the method by which the "Policy" was promulgated, that supposed "Policy" has been in place for more than a decade. Such a policy claim is thus barred by 28 U.S.C. § 2401(a)'s six-year statute of limitations. *See Terry v. U.S. Small Bus. Admin.*, 699 F. Supp. 2d 49, 53–54 (D.D.C. 2010) (Huvelle, J.) (the statute of limitations provided for in § 2401 "is jurisdictional and must be strictly construed") (quotation marks omitted); *see also Peri & Sons Farms. v. Acosta*, 374 F. Supp. 3d 63, 70–71 (D.D.C. 2019) (same). Indeed, USCIS stated this position publicly at least as early as 2009 in the *Oyebade* litigation. *See* Young Decl., Ex. 6 (ECF No. 15-2). The public, including Plaintiffs, were on notice of this and the right to challenge the "Policy" accrued over a decade ago. *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010). Accordingly, Plaintiffs' claims are barred by the statute of limitations. Plaintiffs' arguments to the contrary only serve to highlight that they are not in fact challenging a "Policy," or the method by which it was promulgated, but rather the denial of their particular naturalization applications and the analysis supporting each denial.

IV. Plaintiffs' Constitutional Claim Fails

As multiple courts have held, a naturalization applicant may not circumvent § 1421(c) by recasting their claim as a constitutional claim. *See Azan-Khan*, 2019 WL 5653653, at *8; *Hong Yin*, 265 F.R.D. at 463–64 (challenges to naturalization denials must be brought in § 1421(c) "'regardless of what the general federal venue statutes might otherwise provide'") (quoting *Omari v. Ashcroft*, No. 04-cv-1740, 2005 WL 475345, at *2–3 (D. Minn. Feb. 18, 2005)); *see also Aparicio*, 302 F.3d at 443 (addressing constitutional claims). In response, Plaintiffs recycle their

McNary argument. Opp. at 22–23. But that argument fails here for the same reason it did earlier—Plaintiffs' claims are not "collateral." *See supra* Part I.C.i. For this reason alone, the Court should dismiss Plaintiffs' constitutional challenges, as Congress directed such challenges to be made under § 1421(c). Further, in response to USCIS's standing argument with respect to this claim, Plaintiffs offer no substantive response, other than to argue that it has been considered previously by this Court in another matter. *See* Opp. at 24. In response, USCIS reiterates its arguments from its Motion, explaining why Plaintiffs lack standing to make this constitutional claim. *See* Mot. at 16–18. Yet, the Court need not decide that claim here, as the proper course of action is to dismiss as improperly brought outside of § 1421(c).[10]

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint.

December 11, 2019

Respectfully submitted,

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[10] As Plaintiffs' APA and constitutional claims fail, the Court must also dismiss Plaintiffs' Declaratory Judgment Act ("DJA") claim. *See* Mot. at 18–19 (citing cases).