UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUNAY MIRIYEVA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-03351-ESH**
	)	**Oral Argument Requested**
U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs, by and through undersigned counsel, respectfully submit this memorandum in opposition to Defendants' Motion to Dismiss (Dkt. 15-1) ("MTD"). For the reasons set forth below, Plaintiffs request that Defendants' motion be denied.

I. INTRODUCTION

Plaintiffs are U.S. Army veterans who are being harmed by an unlawful USCIS policy (the "Policy") that is precluding a proper adjudication of their military naturalization applications.[1] In their Motion to Dismiss, Defendants do not deny the existence of the Policy – which bars naturalization based on military service to soldiers who receive uncharacterized discharges – nor do they deny that it has been applied to each Plaintiff. Instead, Defendants acknowledge the Policy, confirming that it is exactly as alleged in the Complaint, and claim that it has been in effect for more than a decade and will not be changed absent judicial intervention.

Faced with these facts, Defendants nevertheless argue that there can be no judicial intervention since (1) this action is barred because these veterans have an alternative means to pursue relief under the Immigration and Nationality Act ("INA"), (2) the claims for relief cannot be brought while Plaintiffs' INA § 336 reviews are pending, and (3) Plaintiffs' claims for relief are barred by the statute of limitations. But none of these arguments for dismissal has merit. Indeed, Defendants' entire motion rests on an artifice. Rather than challenge the actual allegations and causes of action in the Complaint, Defendants build their defense on the false foundation that Plaintiffs are seeking to have this Court grant each Plaintiff's individual naturalization application.

But Defendants' straw man theory deserves no credit. The Complaint in this case does ***not*** ask this Court to reverse the individual naturalization denials. Nothing in 8 U.S.C. § 1421(c), or

[1] While the validity of each Plaintiff's "uncharacterized" discharge is questionable, and even though Plaintiff Kadel has been offered and has accepted reinstatement in the Army, USCIS continues to apply the Policy to each Plaintiff's naturalization application.

any other part of the INA, or the Administrative Procedure Act ("APA") strips this Court of jurisdiction to adjudicate this type of challenge, which is to the unlawful policy that has affected each one of the Plaintiffs.

Nor is there any merit to Defendants' contention that Plaintiffs, who allege ongoing harm due to the Policy, must await the outcome of their INA § 336 proceedings before they can mount a challenge to the Policy. Defendants rest their argument on the same flawed § 1421(c) foundation that undermines their jurisdictional argument. Moreover, Defendants do not contest the Complaint allegations that the INA § 336 administrative review process here is futile, since the reviewers are bound to apply the Policy. Indeed, that is the precise outcome of Plaintiff Kulkarni's INA § 336 review, wherein USCIS denied her appeal, citing the Policy as the sole ground for the decision. Complaint ¶ 83; Dkt. 2-19, at 3 of 5.

Finally, Defendants' contention that Plaintiffs' APA challenge is barred by the statute of limitations is easily defeated. The notion that Plaintiffs' right to challenge the Policy expired before they enlisted in the military and before they even applied for naturalization is nonsensical and has no legal support whatsoever. Moreover, Defendants never reconcile this argument, which is dependent on the Policy being subject to an APA challenge based on a "final agency action" that purportedly occurred years ago, with their arguments that only individualized challenges are allowed here and only after exhaustion of all administrative remedies. To accept Defendants' theories here would mean that neither Plaintiffs nor any MAVNI soldier ever would be allowed to challenge the Policy because by the time each could bring a § 1421(c) suit, after denial and exhaustion of administrative remedies, the statute of limitations would have run years earlier. The law does not permit such a purportedly unreviewable "Catch-22" situation.

This Complaint should move forward. Plaintiffs' challenges to the Policy are timely and properly stated, this Court has jurisdiction to hear them, and each Plaintiff has standing to raise them. USCIS is not exempt from having its naturalization policies challenged under the APA and the Constitution. Defendants' Motion to Dismiss should be denied.

II. ARGUMENT

A. This Court Has Jurisdiction to Hear Plaintiffs' APA Claims

An APA challenge falls within the general federal question jurisdiction of the district courts. *See Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 185 (D.C. Cir. 2006). Defendants nevertheless argue that this particular District Court lacks jurisdiction to hear an APA challenge to an unlawful, nationwide USCIS policy because 8 U.S.C. § 1421(c), which provides that denied naturalization applicants "may seek review of such denial" before the district court where they reside, (1) "is the sole means for challenging naturalization denials," MTD at 5, and (2) provides an alternative "adequate remedy," *id.* at 4. Defendants' arguments are wrong and do not deprive this Court of jurisdiction to hear Plaintiffs' claims.

1. The Complaint Seeks Review of a Policy, Not Naturalizations

In an attempt to align their arguments with purported jurisdiction-stripping language, Defendants repeatedly mischaracterize this action as one challenging individual denials and seeking each Plaintiff's naturalization. But the actual Complaint bears no resemblance to the portrait Defendants have drawn. And, for purposes of this Motion to Dismiss, the language of the Complaint controls. *See Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

In the Complaint, Plaintiffs challenge the USCIS "policy that improperly holds that an applicant for naturalization based on their military service is ineligible for citizenship if the applicant received an entry-level (*e.g.*, where the soldier has served less than 180 days of what is referred to as 'active duty' service) or 'uncharacterized' discharge from the military." Complaint

¶ 6. *See, e.g.*, *id.* ¶ 7 ("The Policy is directly contrary to federal law and must be set aside."); ¶ 13 ("The Policy is unlawful and must be set aside."); ¶ 15 ("bring this action . . . to set aside the Policy"); ¶ 120 ("the Policy is unlawful"); ¶¶ 122-30 (seeking to set aside the Policy because the Policy is not accordance with law, the Policy is arbitrary and capricious, Defendants did not quantify or consider harms in enacting Policy, Defendants exceeded delegation of statutory authority, and Defendants did not comply with notice and comment rulemaking). Moreover, the "materials outside of the pleadings" which Defendants include as exhibits to their Motion do not undercut the fact that Plaintiffs are challenging a Policy. Instead they confirm the existence of a nationwide USCIS policy, not just some local field office application or misapplication of a policy or abuse of discretion. *See, e.g.*, Dkt. 15-2, Exhs. 1-3 (USCIS PowerPoints summarizing the Policy). *See also* MTD at 15 ("[T]he interpretation Plaintiffs challenge has been applied for more than a decade[.]").

While Plaintiffs believe and have alleged that they would have been naturalized by now but for the challenged Policy,[2] nowhere do Plaintiffs seek to have their individual denials reviewed by this Court or to have this Court grant them naturalization. Rather, Plaintiffs seek to enjoin Defendants from applying the Policy to deny or maintain the denial of any naturalization application. Complaint ¶ 146.

As noted, Defendants do not deny the existence of the Policy or that it has been applied to each of the Plaintiffs (and others). Thus, this is not the type of individualized determination of naturalization eligibility by local field office personnel that § 1421(c) lawsuits are well suited to address. Instead, this is a question of ***statutory*** interpretation – a legal issue that requires no

[2] Plaintiffs' beliefs are well-founded, as the unlawful Policy is the only ground for denial for each Plaintiff. *See* Complaint ¶¶ 45, 68, 81, 83, 95.

individualized assessment of an applicant's eligibility. Such questions are the regular subject of APA and constitutional challenges.

2. <u>Section 1421(c) Is Not an APA-Jurisdiction-Stripping Statute</u>

There is a "strong presumption" in favor of judicial review of administrative action. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). "Although the Congress is authorized to preclude judicial review of agency action, we assume that the Congress has not done so absent 'clear and convincing evidence of a contrary legislative intent.'" *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

Thus, in order to strip this Court of jurisdiction to hear an APA challenge, the Supreme Court has made clear that § 1421(c)'s text would have to expressly do so. It does not. Defendants' argument to the contrary relies on out-of-circuit, non-precedential decisions and, as those decisions do, misapplies the Supreme Court's *McNary* test (as elucidated by the D.C. Circuit).

a. <u>The *McNary* Test Confirms Plaintiffs' Right to Bring Their Claims</u>

Under the Supreme Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the statutory language controls. Thus, "claims falling outside the text of a jurisdiction-channeling provision . . . may proceed in the district court" having jurisdiction under the general federal question jurisdiction of the district courts. *General Elec. Co. v. Jackson*, 610 F.3d 110, 127 (D.C. Cir. 2010). In *McNary*, the Supreme Court concluded that a statute prohibiting courts from reviewing denials of individual applications for a special immigration status did not bar those same courts from considering "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." 498 U.S. at 492.

While the *McNary* Court observed the lack of alternative routes for judicial review in the circumstance before it, its conclusion was that jurisdiction "rested entirely on the Court's analysis

of the jurisdictional provision's text," in particular, the distinction between "collateral and particularized claims." *Jackson*, 610 F.3d at 126 (finding jurisdiction to hear pattern and practice challenge under the APA and earlier finding jurisdiction to hear facial constitutional challenge, despite statute that "[n]o Federal court shall have jurisdiction . . . to review . . . any [unilateral administrative order]," because the provision did not explicitly bar a pattern and practice challenge and plaintiff sought no relief with respect to any particular unilateral administrative order). Section 1421(c) refers only to the "review of such denial" of a naturalization application. This "such denial" language is virtually identical to the "such a denial" language in the statute at issue in *McNary*, which the Supreme Court explained refers to a single act and thus describes "the process of direct review of individual denials" rather than "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." 498 U.S. at 492. *See also O.A. v. Trump*, Nos. 18-2718 & 18-2838, 2019 WL 3536334, at *10 (D.D.C. Aug. 2, 2019) (Moss, J.) (finding jurisdiction to consider APA challenge to asylum eligibility Interim Final Rule because INA exclusive jurisdiction provision applies only to challenges to specific actions – review of an order of removal – not APA "facial challenge[s] to the validity of a regulation of general applicability"), *appeal pending*.

In § 1421(c), Congress did not declare that ***any*** legal challenge relating to the immigration laws and regulations or collateral to a naturalization application must be brought in the district court where the petitioner resides. Indeed, it is "implausible to construe" the mention of a single act, here the denial of an application, "as shorthand for any agency action that might ultimately facilitate" that act – "this reading is not implausible 'because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.'" *O.A.*, 2019 WL 3536334, at *13 (quoting *Reno v. Am.-Arab Anti-*

Discrimination Comm., 525 U.S. 471, 482 (1999)). *See also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) ("[G]iven the APA's presumption of reviewability for all final agency action, the mere fact that permitting decisions are reviewable [only under a particular administrative process] should not suffice to support an implication of exclusion as to other agency actions, such as approved [Jurisdictional Determinations]." (internal quotation marks and citation omitted; alterations added)).

Moreover, § 1421(c) speaks in terms of "may," not "must,"[3] underscoring that it does not employ the requisite clear and convincing language necessary to evidence legislative intent that it be the sole means for review of a collateral policy challenge.[4] *See Rusk v. Cort*, 369 U.S. 367, 375 (1962) ("[INA § 360] subsections (b) and (c) by their very terms simply provide that a person outside of the United States who wishes to assert his citizenship 'may' apply for a certificate of identity and that a holder of a certificate of identity 'may' apply for admission to the United States. . . . The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies." (internal quotations and citations omitted)), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 302-03 (D.D.C. 2018) (applying *Cort* to find that statute's text and legislative history did not preclude an APA challenge). Congress

[3] Perhaps compensating for § 1421(c)'s permissive language, Defendants repeatedly substitute their own "should" and "must" language. *See, e.g.*, MTD at 3 ("Congress provided that challenges to naturalization . . . should be brought in 'United States district court for the district in which [the] person resides[.]'" (bracketed alterations in original)).

[4] The D.C. Circuit has not decided whether § 1421(c) is "mandatory or permissive" in terms of ***venue*** for ***individual application*** challenges. *See Yuanxing Liu v. Lynch*, No. 14-cv-01516, 2015 WL 9281580, at *2 (D.D.C. Dec. 8, 2015). Plaintiffs make no argument in that respect because they are not challenging their individual denials.

knows how to provide for exclusive jurisdiction, and has done so elsewhere in the INA. *See, e.g.*, 8 U.S.C. § 1252(a)(5) ("Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section ***shall be the sole and exclusive means for judicial review*** of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)." (emphasis added)). In *R.I.L-R v. Johnson*, the court explained that through this language "Congress has expressly limited APA review over individual deportation and exclusion orders." 80 F. Supp. 3d 164, 186 (D.D.C. 2015).

Section 1421(c), by contrast, contains no such express language precluding other judicial review, much less review of over-arching, nationwide policies. Defendants' arguments otherwise cannot be squared with the plain language of the statute. Under *McNary*, Plaintiffs' claims are not jurisdictionally barred.

b. Defendants Ignore D.C. Circuit Precedent and Rely on Non-Binding Decisions That Misapply *McNary*

Defendants cite *Huang v. Napolitano*, 721 F. Supp. 2d 46 (D.D.C. 2010), for the proposition that § 1421(c) "clearly indicates Congress' intent that the United States district court located in the district in which an applicant resides" has jurisdiction. MTD at 5. But the *Huang* court did not determine that § 1421(c) was the "sole means" for review, as Defendants assert. MTD at 5. In fact, that court explicitly "decline[d] to address an argument . . . that this Court lacks jurisdiction to consider Plaintiff's Complaint and/or venue is improper in the District of Columbia pursuant to 8 U.S.C. § 1421(c), such that transfer of this case to the Southern District of Florida is mandatory." *Huang*, 721 F. Supp. 2d at 51 (exercising discretion to transfer venue and refusing to consider whether language of § 1421(c) is jurisdictional in nature).

With no actual support from a court within the D.C. Circuit, Defendants principally rely on two non-precedential, out-of-Circuit cases that did not involve clear policy challenges and, moreover, are at odds with the D.C. Circuit's interpretation of *McNary* in *Jackson*. *See* MTD at 9 (citing *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002) and *De Dandrade v. Dep't of Homeland Sec.*, 367 F. Supp. 3d 174 (S.D.N.Y. 2019)).[5] The *Aparicio* court addressed a putative class challenge to a ***single*** field office's practice of reviewing individual information in applications to deny naturalization, despite confidentiality provisions,[6] and found that "appellants may not take the *McNary* escape route from this dilemma because section 1421 provides an adequate review for their challenge." 302 F.3d at 448. And the *De Dandrade* court addressed the application of discretion in processing English language waivers for a number of individual applications[7] and likewise focused on the ability to obtain meaningful judicial review and another adequate remedy in foreclosing an APA challenge in light of § 1421(c). *See* 367 F. Supp. 3d at 184. These factual scenarios are not analogous. Moreover, the D.C. Circuit has held that the unavailability of an alternative means of judicial review is ***not*** a required showing to refute jurisdiction-stripping under a proper reading of *McNary*. *See Jackson*, 610 F.3d at 126. And, in any event, § 1421(c) does not provide an adequate alternative remedy to Plaintiffs' challenge, as discussed in Section A.3 below.

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[5] *De Dandrade* is pending appeal in the Second Circuit.

[6] The *Aparicio* court principally was concerned with ripeness and that it was actually being asked to review individual applications. 302 F.3d at 446 ("[C]onsideration of [one plaintiff's] claim in this suit would be reviewing the denial of her application . . . . [and] once we begin to look at the specifics of [another plaintiff's] case we will be allowing him to seek review of his application in the district court without it having been 'denied.'") (emphasis omitted). Neither concern is present here.

[7] Seven of the individual plaintiffs in *De Dandrade* subsequently had their waivers approved, and the court thus found their claims moot. 367 F. Supp. 3d at 185 n. 4. Only two individual plaintiffs still had been denied waivers.

Meanwhile, numerous other courts, including in this District, have found APA jurisdiction to be proper for a challenge to a policy collateral to an INA decision. *See O.A.*, 2019 WL 3536334, at *13; *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 373 (S.D.N.Y. 2019) (permitting APA challenge to a policy involving Special Immigrant Juvenile Status, in part because "[t]he plaintiffs in this case do not seek review of such individual decisions. Rather, they contest the agency policy on which the revocation decisions rest."); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 134, 136 (D.D.C. 2018) (finding that statutory provision containing explicit jurisdictional bar – "no court shall have jurisdiction to review" discretionary parole decisions – did not bar APA claims challenging the policies governing those decisions and distinguishing cases involving challenges to individual determinations); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 328 (D.D.C. 2018) (finding challenge to overarching agency action under the APA was not the same as asking court to review the propriety of an individual decision and "do[es] not fall within the jurisdictional bar of [§] 1252(a)); *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 309 (D.D.C. 2017) (applying *McNary* to find that INA provision governing adjustment of status "does not encompass plaintiffs' [APA] challenge to the process USCIS used to adjudicate [plaintiff's] application.") (footnote omitted); *Campos v. I.N.S.*, 32 F. Supp. 2d 1337, 1345 (S.D. Fla. 1998) ("[T]his Court declines to find that the APA has been superseded by the INA in naturalization proceedings. This finding is consistent with the decisions of other courts in this district which have permitted challenges to INS practices and procedures to be brought under the APA."). And, of course, this Court has reviewed such collateral policies. *Nio v. U. S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 63 n.19 (D.D.C. 2017) ("Because defendants raised jurisdictional arguments in their first opposition to plaintiffs' motion for a preliminary injunction, this Court notes that it has general federal question jurisdiction, 28 U.S.C. § 1331, to consider plaintiffs' claims under the APA.").

c. <u>The Remainder of Defendants' Arguments Are Based on Inapposite Cases</u>

Defendants' case citations beyond *Aparicio* and *De Dandrade* similarly are unavailing. The majority of these cases, from which Defendants misleadingly extract language that § 1421(c) supposedly provides the "exclusive" or "sole" means for review, raised only claims challenging the denial of an application, not a USCIS policy;[8] did not even involve an APA claim;[9] or decided a completely separate, non-jurisdictional issue.[10] Plaintiffs do not need to argue here that they could bring a claim challenging their individual application denials in this Court. The Complaint challenges the Policy, which is collateral to the individual application denials.

In *O.A. v. Trump*, Judge Moss explained why a challenge to an agency rule or policy is not the same as a challenge to a denial determination based on that rule or policy:

> Plaintiffs ask that the Court consider a series of questions of law "arising from" a rulemaking of general applicability. Among other things, they ask that the Court consider whether the Attorney General and the Secretary of Homeland Security acted lawfully when they (1) promulgated the Rule without providing a timely opportunity for public notice and comment and without publishing the rule thirty days in advance of its effective date, (2) adopted a regulation limiting the eligibility of a class of aliens to seek asylum based on their entry into the United States outside a designated port of entry; and (3) sought to adopt additional "conditions or limitations on the consideration of an application for asylum" *by regulation*, while ceding to

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[8] *See, e.g.*, *Heslop v. Attorney General of the United States*, 594 F. App'x 580, 584 (11th Cir. 2014) (attempt to challenge individual denial of naturalization application, not a policy); *Azan-Khan v. Barr*, No. 3:18-cv-1393, 2019 WL 5653653, at *1 (D. Conn. 2019) (same); *Lezzar v. Heathman*, No. 4:11-CV-4168, 2012 WL 4867696, at *10 (S.D. Tex. 2012) (same).

[9] *See, e.g.*, *Escaler v. U.S. Citizenship and Immigration Servs.*, 582 F.3d 288, 291 n.1 (2d Cir. 2009) ("We therefore do not speculate as to whether issues involving the APA have arisen in this matter."); *Hong Yin v. Frazier*, 265 F.R.D. 460 (D. Minn. 2010) (challenge to individual denial; no APA claim); *Mobin v. Taylor*, 598 F. Supp. 2d 777 (E.D. Va. 2009) (challenge to individual denial; no APA claim).

[10] *See, e.g.*, *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000) (addressing validity of time limit on filing a § 1421(c) action); *Gill v. Chertoff*, No. 1:07cv0516, 2007 WL 4190810 (E.D. Cal. 2007) (deciding motion to augment record to introduce expert testimony; no APA claim).

> the President the authority to define the scope and timing of those conditions or limitations *by proclamation*. None of these questions arise "from [removal] proceedings'" or from the "many . . . decisions or actions that may be part of the [removal] process." Rather, they "arise from" the challenged rulemaking.

2019 WL 3536334, at *14 (alterations and emphasis in original) (internal citations omitted). Nothing in the language of § 1421(c) strips this Court of jurisdiction to hear these collateral APA challenges to the Policy.

3. No Alternative Adequate Remedy Exists to Bar an APA Claim

Defendants argue that the presence of "another adequate remedy available to Plaintiffs for exactly the relief they seek" undermines this Court's jurisdiction. MTD at 1. But this is not a valid jurisdictional argument. *See Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017) ("[W]e have several times recognized that the finality requirement and adequate remedy bar of § 704 determine whether there is a cause of action under the APA, not whether there is federal subject matter jurisdiction.").[11]

Moreover, Defendants cannot show that an APA cause of action is lacking. "The Supreme Court has long construed the 'adequate remedy' limitation on APA review narrowly, emphasizing that it 'should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" *R.I.L-R*, 80 F. Supp. 3d at 185 (quoting *Bowen*, 487 U.S. at 903). When considering whether an alternative remedy is "adequate," courts must look for "clear and convincing evidence" of "legislative intent" to create a special, alternative remedy and thereby bar APA review. *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009); *see also Chacoty v. Pompeo*, 392 F. Supp. 3d 1, 9 (D.D.C. 2019) ("The ultimate question, accordingly, is one of

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[11] Defendants' remedy argument has no bearing on the non-APA claims pled in the Complaint, including the constitutional claims.

congressional intent: that is, would permitting Plaintiffs to assert an APA cause of action promote the APA's goal of establishing 'generous review provisions,' or would it frustrate the APA's goal of avoiding a crazy quilt of judicial review provisions?" (quoting *Abbott Labs.*, 387 U.S. at 141)).

Review under § 1421(c) does not provide an adequate alternative remedy to challenging a nationwide USCIS policy. First, as explained above in Section A.2, the language of § 1421(c) does not provide clear and convincing evidence of an attempt to create a substitute for APA claims. There is additional support in the legislative history that § 1421(c) was not intended to replace or bar any other review. Referring to the language establishing the administrative regime in what later became § 1421, Congress explained that the proposed statute "does not take away any of the judicial review rights accorded applicants today." 135 Cong. Rec. H4539, H4542 (1989). And the House Report, speaking with respect to § 1421(c), confirms: "[C]itizenship is the most valued governmental benefit of this land and applicants should receive full recourse to the Judiciary when the request for that benefit is denied." H.R. Rep. No. 101-187, at 14 (1989).

Second, the § 1421(c) remedy, despite providing for district court *de novo* review, is not "of the same genre" as an APA review. *Garcia*, 563 F.3d at 522. Section 1421(c) provides only for the review of an individual application. Among other things, 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. *See, e.g.*, *Nat'l Ass'n of Waterfront Emp'rs. v. Chao*, 587 F. Supp. 2d 90, 98 (D.D.C. 2008) (finding FOIA remedies allowing requests involving a particular individual are not adequate alternative remedies to enforce right to notice and comment rule making under the APA or challenge to rule-making authority).

And even were a district court reviewing under § 1421(c) to find that an individual application should have been approved because the Policy is unlawful, USCIS will not consider

this finding as setting aside the entire Policy.[12] The APA, on the other hand, expressly allows vacatur of the unlawful Policy. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that [under the APA] 'when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated--not that their application to the individual petitioners is proscribed.'" (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). A district court's ability to "issue an order approving the naturalization application" of an individual is ***not*** "precisely this same relief," Dkt. 15-1, at 9, as vacatur of a nationwide Policy under the APA. For instance, granting each of the individual Plaintiffs naturalization but leaving the Policy standing would not correct the reputational impacts of USCIS's impermissible attempts to re-characterize the service of these veterans, which the Army already repeatedly has recognized as under honorable conditions, as something derogatory and negative, as something less than or other than honorable. Dkt. 15-2, at 12 of 39 (divorcing uncharacterized discharges from "honorable" and "under honorable conditions" discharges and bucketing them with "other than honorable," "bad conduct," and "dishonorable" discharges); *id*. at 6 of 39 (including "uncharacterized" discharge on same slide as "dishonorable" discharge, which is defined as "Punitive in nature and given through Court Martial for offenses like murder, rape, desertion as part of the sentence"); *id.* at 23 of 39 (USCIS decision denying naturalization on basis of uncharacterized discharge states "[b]ecause you have been separated ***other than honorably*** . . ." (emphasis added)).

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[12] Defendants' counsel has asserted to this Court that under the purported "proper" § 1421(c) course here, should a Plaintiff's denial be overturned, "what happens is the federal judge will make a decision that USCIS improperly denied someone. And one or two of those decisions starts coming out, then USCIS starts to sort of see the writing on the wall and then they change their approach to this." Transcript pf Teleconference at 16:3-7. This is not an adequate alternative. *See Garcia*, 563 F.3d at 522 (alternative remedy "will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief'" (quoting *Bowen*, 487 U.S. at 901)).

Moreover, before even availing themselves of review under § 1421(c), applicants must have their naturalization applications denied and then, according to Defendants, engage in the often long and arduous process[13] of exhausting administrative remedies under § 1447(a), all while being stuck in immigration limbo. Three of the four Plaintiffs have not yet completed their INA § 336 reviews and thus, according to Defendants, cannot bring a § 1421(c) action, despite the fact that they already have been injured by the unlawful Policy. This is not a "ready avenue for judicial review," as Defendants contend, MTD at 10. Instead, the Supreme Court has found that this type of process provides an unsuitable alternative:

> Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long. … And whatever pertinence all this might have to the issuance of a permit, none of it will alter the finality of the approved ["Jurisdictional Determination" being challenged], or affect its suitability for judicial review. The permitting process adds nothing to the ["Jurisdictional Determination"].

Hawkes Co., 136 S. Ct. at 1815-16. *See also R.I.L-R*, 80 F. Supp. 3d at 185 ("While it is true that an alien who is denied release by ICE may seek *de novo* review of that denial from an immigration judge, Defendants' reliance on this potential redetermination ignores the fact that it occurs weeks or months after ICE's initial denial of relief. It thus offers no adequate remedy...." (internal citations omitted)).

[13] For example, as USCIS disclosed during a hearing in the related *Nio* action, Mr. Kadel already has been waiting for several months since his denial to even have an INA § 336 interview scheduled, much less heard. Transcript of Status Hearing at 9:3-14, *Nio v. U.S. Dep't of Homeland Sec.*, No. 17-998-ESH (D.D.C. Nov. 20, 2019). And this was after it took nearly two years for Mr. Kadel's naturalization application to be denied in the first place (even though he had an "uncharacterized" discharge (according to USCIS) and was not subject to any military background checks, MSSR, or MSSD decision during this period). Complaint ¶¶ 85-86, 93.

Denial of even one day of naturalization and being forced into the legal limbo of the administrative process amounts to irreparable injury. *See Nio*, 270 F. Supp. 3d at 62-63. Forcing individual veterans to obtain denials and then challenge them in individualized § 1421(c) lawsuits when those second denials already are a foregone conclusion under the Policy simply prolongs this injury and limbo and does not accord with the intent of Congress in the language and history of §§ 1440 or 1421(c) or in enacting the APA to allow unlawful administrative policies to be challenged and set aside.

4. Defendants' Venue Arguments Are Irrelevant to the Question of Jurisdiction

Defendants' attempt to use the statutory change of venue provision, 28 U.S.C. § 1404, to bolster their arguments is unavailing. Section 1404 provides for a discretionary transfer and says nothing about whether a court has subject-matter jurisdiction or whether a claim has been stated under the APA, as the cases cited by Defendants recognize (even if Defendants do not). *See, e.g.*, *Bourdon v. U.S. Dep't of Homeland Sec.*, 235 F. Supp. 3d 298, 304, 306-07 (D.D.C. 2017) (holding that transfer of immigration case was not required but ordering it as a matter of discretion because allegations focused on individualized determinations made by field office, not a nationwide policy).

Defendants have not moved for a transfer of venue. In any event, venue is proper in this District because the "gravamen" of the Complaint, and indeed the only action challenged, is not four individual naturalization denials made in field offices based on officer discretion but the unlawful Policy, emanating from USCIS in this District and applicable nationwide. *See generally Gyau v. Sessions*, No. 18-407, 2018 WL 4964502, at * 2 (D.D.C. Oct. 15, 2018) ("[T]o determine where the claim arose in cases brought under the APA, courts generally focus on where the decisionmaking process occurred[.]"); *Abusadeh v. Chertoff*, No. 06-2014, 2007 WL 2111036, at

*6 (D.D.C. July 23, 2007) (transferring venue because "Plaintiff's Complaint does not assert a general, broad-based challenge to immigration policies or regulations.").

Defendants' argument that the general venue provision of 28 U.S.C. § 1391(e) is not applicable because venue is "otherwise provided by law" in § 1421(c), MTD at 12, fails because Plaintiffs have not brought an action pursuant to § 1421(c), nor were they required to, for all the reasons explained above.

B. The Claims Here Do Not Require an INA § 336 Denial

Defendants also contend that the claims here are unreviewable until Plaintiffs are denied relief under 8 U.S.C. § 1447(a) (INA § 336). MTD at 13. This argument fails on multiple grounds.

First, Defendants' "exhaustion" argument is pegged entirely to its artificial re-characterization of Plaintiffs' claims as seeking judicial approval of their ***individual*** naturalization applications. *See* MTD at 14. But, as described above, Plaintiffs seek no such relief and instead challenge the Policy as unlawful. Thus, the implementing regulation cited by Defendants, which only applies to the review of "determination[s] denying an application," does not apply to Plaintiffs' claims here. 8 C.F.R. § 336.9(d). "The APA requires exhaustion of administrative remedies '*only* when expressly required by statute or ... an agency rule.'" *Xia v. Tillerson*, 865 F.3d 643, 658 (D.C. Cir. 2017) (emphasis and alteration in original) (quoting *Darby v. Cisneros*, 509 U.S. 137, 154 (1993)). Defendants can cite to no law requiring a final ruling on an INA § 336 appeal before challenging a policy as unlawful. *See Jafarzadeh*, 270 F. Supp. 3d at 308, 311 (finding that "[t]he government's arguments regarding ripeness, finality, and exhaustion with respect to the agency's final decision on [plaintiff's] application are therefore inapposite" because plaintiff brings APA challenges to unlawful process and practices employed in adjudicating applications). Thus, all that the APA requires for a challenge to be ripe is final agency action, 5 U.S.C. § 704, and Defendants do not dispute that the Policy is a final agency action – in fact they

admit it. *See* MTD at 15 (characterizing the Policy as final agency action for statute of limitations purposes).

Second, even if this Court entertains the idea that exhaustion of administrative appeals is necessary here, that requirement would be prudential, not jurisdictional. *See Shweika v. Dep't. of Homeland Sec.*, 723 F.3d 710, 715-17 (6th Cir. 2013) (holding that § 1421(c) exhaustion "does not speak in jurisdictional terms" and instead functions as a "nonjurisdictional claim-processing rule"); *Eche v. Holder*, 694 F.3d 1026, 1028 (9th Cir. 2012) ("[Section 1421(c)] does not contain the 'sweeping and direct jurisdictional mandate' that the Supreme Court and we have required before concluding an exhaustion requirement is jurisdictional.").[14] The D.C. Circuit recognizes a "discretionary exception to [prudential] exhaustion requirement[s] where resort to administrative remedies 'would be futile because of the certainty of an adverse decision.'" *Commc'ns Workers of Am. v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994) (internal quotations omitted).

For the futility exception to apply, resort to administrative remedies must be "clearly useless." *Commc'ns Workers of Am.*, 40 F.3d at 432. That is the precise circumstance here. The Policy states and USCIS officials repeatedly have confirmed their position, including in an INA § 336 decision for one of the Plaintiffs, that uncharacterized discharges from the Army are not sufficient evidence of an "under honorable conditions" discharge for purposes of 8 U.S.C. § 1440(a). *See, e.g.*, Complaint ¶¶ 44, 67, 80, 83, 93, 117; Dkt. 2-19, at 3 of 5. Notably, Defendants

[14] The cases Defendants cite, MTD at 4, 13 (citing *Karam v. U.S. Citizenship and Immigration Servs.*, 373 F. App'x 956, 957 (11th Cir. 2010); *Escaler*, 582 F.3d at 290-91), are not persuasive because they do not hew to the Supreme Court's directive that exhaustion is a jurisdictional prerequisite "[o]nly when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *I.A.M. Nat'l Pension Fund Benefit Plan C. v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984) (citing *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)). As explained above, the exhaustion requirement also is irrelevant to an APA challenge, and neither *Karam* nor *Escaler* involved APA challenges to a USCIS policy but instead only individual application challenges.

never contend in their Motion to Dismiss that there is any chance that an INA § 336 appeal could possibly reverse the Policy. As such, the outcome of any INA § 336 appeals – denial – is a foregone conclusion (just as occurred with Plaintiff Kulkarni), absent the unlawful Policy being set aside through this lawsuit. *See Foster v. Gueory*, 655 F.2d 1319, 1323 (D.C. Cir. 1981) ("We conclude that the appellants have asserted claims … that are so similar to those asserted by the original plaintiffs [who exhausted administrative remedies] that no purpose would be served by requiring appellants to [exhaust administrative remedies].").

Finally, even if exhaustion under § 1447(a) was required for Plaintiffs' APA claims and was jurisdictional, Plaintiff Kulkarni has exhausted her administrative remedies: She filed an INA § 336 appeal, had her hearing, and USCIS denied her appeal on the basis of the Policy. Complaint ¶ 83. Thus, her claims are ripe for review even under Defendants' flawed construct. "Where multiple plaintiffs assert claims seeking precisely the same declaratory or injunctive relief, moreover, and where the court has subject matter jurisdiction to consider the claims of at least one of those plaintiffs, the court need not address its jurisdiction to consider the claims of the remaining plaintiffs." *O.A.*, 2019 WL 3536334, at *17 (citing *Clinton v. City of New York*, 524 U.S. 417, 434-35 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n. 3 (1984)).

C. <u>Plaintiffs' Claims Are Not Barred by the Statute of Limitations</u>

Defendants next argue that Plaintiffs' claims are barred by the statute of limitations. MTD at 14-15. This argument is frivolous. On Defendants' theory, the statute of limitations for any challenge to the Policy expired in 2014, (1) ***before*** Plaintiffs enlisted in the Army, (2) ***before*** Plaintiffs applied for naturalization, (3) ***before*** Plaintiffs received uncharacterized discharges, and (4) ***before*** Plaintiffs had an opportunity to exhaust the administrative remedies that Defendants now claim are necessary. The law does not support Defendants' proposition.

"[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). According to Defendants, the six-year limitations period began to run in 2008, when USCIS first interpreted the military naturalization statute "to mean that the term 'separated under honorable conditions' does not include an uncharacterized discharge," at which point the Policy constituted final agency action. MTD at 15.[15] But that analysis is not in accord with the law because it ignores the status of the parties bringing suit. While "final agency action" may be one relevant factor in triggering the limitations period in an APA challenge, Defendants ignore the requirement that the plaintiff bringing suit must have been injured by the challenged agency action. In other words, the limitations period begins to run only when (1) the challenged agency action becomes final, ***and*** (2) the plaintiff suffers an actual injury. As the Sixth Circuit recently observed:

> Some courts, it is true, have suggested that an APA claim "first accrues on the date of the final agency action." But these cases show why we don't read precedents like statutes. These cases all involved settings in which the right of action happened to accrue at the same time that the final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured. ... But that is not the case when, as here, the party does not suffer any injury until *after* the agency's final action.

Herr v. U.S. Forest Serv., 803 F.3d 809, 819-20 (6th Cir. 2015) (emphasis in original) (internal citations omitted) (distinguishing *Hardin v. Jackson*, 625 F.3d 739 (D.C. Cir. 2010)).

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[15] Defendants assert that that their statute of limitations defense is jurisdictional and submit materials outside of the pleadings. MTD at 15. But the D.C. Circuit has questioned whether *P&V Enters. v. U.S. Army Corps. of Eng'rs*, 516 F.3d 1021 (D.C. Cir. 2008), cited by Defendants, remains valid given subsequent Supreme Court decisions. *See Mendoza v. Perez,* 754 F.3d 1002, 1018 n.11 (D.C. Cir. 2014) (declining to rule on the jurisdictional question). In any event, this Court need not reach this jurisdictional issue. Defendants' factual assertions as to when the Policy first became final are irrelevant to the statute of limitations question because Plaintiffs could not have commenced suit to challenge the Policy until they were subjected to it – a time well within the limitations period. However, to the extent that Defendants' factual assertions are deemed relevant to this question, Plaintiffs would seek discovery to explore the full set of internal USCIS guidance and application of the Policy to service members seeking naturalization.

Herr illustrates this basic principle. In that case, the Forest Service issued an order in 2007 that banned non-electric motorboats from a lake, and in 2010, the plaintiffs purchased lakefront property and used a gas-powered boat. 803 F.3d at 812-13, 818. In 2014, the plaintiffs sued under the APA to enjoin the Forest Service from enforcing the restriction against them. *Id.* at 813. The district court dismissed the case, reasoning that the six-year clock began when the Forest Service first issued its order in 2007. *Id.* The Sixth Circuit reversed, holding that the limitations period began in 2010, when the plaintiffs first acquired a property right on which the Forest Service infringed. *Id.* at 819. "Only at that point could the [plaintiffs] meet both requirements to bring this lawsuit under the APA by pleading final agency action and an injury to their rights." *Id.*

Thus, in addition to a final agency action, Plaintiffs "must know or have reason to know that the challenged agency action caused them to suffer a legal wrong or adversely affected or aggrieved them within the meaning of a relevant statute" before the six-year clock begins to run. *Herr*, 803 F.3d at 818-19. Notably, in discussing the longevity of this Policy, Defendants do not reference the current USCIS Policy Manual as they previously have to this Court. Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment (Dkt. 14) ("SJ Mot.") ¶ 13. Of course, the Policy Manual section previously referenced does not use the term "uncharacterized," and any soldier reading the Policy Manual and familiar with military law, regulations, and practice would have assumed that an "uncharacterized" discharge falls within the "under honorable conditions" descriptions in the Policy Manual. SJ Mot. ¶¶ 21-22. Instead, Defendants offer only (partial) non-public documents and a decade-old USCIS brief plus an individualized court decision, *see* Dkt. 15-2, all of which fail to discuss any language within the Policy Manual, 10 U.S.C. § 12685, Department of Defense Instruction 1332.14, and the military's treatment of "uncharacterized" discharges as "under honorable conditions" discharges and fail to

consider any notice-and-comment rulemaking, statutory authority, and notice challenges to the Policy. Beyond that, Plaintiffs had not even enlisted or applied for naturalization, much less had the Policy applied to them, in 2008 or even in 2014. Accordingly, the cause of action for the individual Plaintiffs in this case did not accrue in 2008, when USCIS alleges that its Policy was finalized. Rather, Plaintiffs' rights of action first accrued when they were injured and could "institute and maintain a suit in court." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56-57 (D.C. Cir. 1987).[16] Therefore, Plaintiffs' APA cause of action is not barred by the statute of limitations.

D. Defendants' Argument Regarding Plaintiffs' Constitutional Claim Fails for the Same Reasons Previously Cited by This Court

Defendants also attempt to defeat Plaintiffs' constitutional claims by reliance on § 1421(c). MTD at 16. The *McNary* test applies equally to APA claims and constitutional claims. Indeed, it was a constitutional claim at issue in *McNary* itself. 498 U.S. at 492 (confirming jurisdiction to hear "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications"). Thus, for the same reasons already explained in Section A.2, § 1421(c) cannot strip this Court of jurisdiction to hear Plaintiffs' constitutional claims. Defendants are wrong that upholding jurisdiction here would mean that "any individual whose naturalization application was denied" could challenge it on constitutional grounds, MTD at 16. Plaintiffs are not challenging their individual denials; they are challenging the Policy. That Policy is unconstitutional, *inter alia*, because USCIS has usurped the authority that Congress delegated to the Army in 8 U.S.C. § 1440 to declare whether service was under honorable conditions and in so

[16] Notably, Defendants' own argument for the exhaustion of administrative remedies would defeat its statute of limitations argument. *Spannaus*, 824 F.2d at 56-57 ("Tautologically, a suit cannot be maintained in court—and a cause of action does not 'first accrue'—until a party has exhausted all administrative remedies whose exhaustion is a prerequisite to suit.").

doing has imposed additional, non-statutory, substantive preconditions to naturalization. *See* Complaint ¶¶ 133-34.

Defendants' jurisdictional argument, if successful, would force four separate § 1421(c) proceedings – one for each Plaintiff – plus separate suits for any other similarly-situated veterans affected by the Policy. This outcome is contrary to the INA's goal of uniformity in naturalization determinations. *See* U.S. Code Cong. & Ad. News, pp. 2981-82 (1961) ("[T]he requirements and provisions of the Immigration and Nationality Act will be uniform and will apply to all petitioners for naturalization."); USCIS, Policy Manual, Vol. 12, Part B, Chap. 1, *available at* https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-1. (last visited Dec. 3, 2019) ("Uniformity in decision-making and application processing is vital to the integrity of the naturalization process. Consistency in the decision-making process enhances USCIS' goal to ensure that the relevant laws and regulations are applied accurately to each case.").

Defendants' standing argument likewise lacks merit and already has been considered and rejected by this Court. *See Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 273 (D.D.C. 2018) (finding standing for MAVNI soldiers to bring a claim for violation of the Naturalization Clause). In so doing, the Court was persuaded, in part, by the reasoning of the district court in *Wagafe v. Trump*, No. C17-0094, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017) ("For once Congress 'establishes such uniform rule [of naturalization], those who come within its provisions are entitled to the benefit thereof as a matter of right, not as a matter of grace.'" (quoting *Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944))). Defendants offer no new cases in support of their argument that post-date this Court's consideration – twice given defendants' motion for reconsideration in *Kirwa* – of the same issue. And, in *Jafarzadeh v. Nielsen*, another court in this District adopted the reasoning of *Kirwa* and *Wagafe* to find that naturalization applicants had standing to bring a

claim for violation of the Naturalization Clause. 321 F. Supp. 3d 19, 35 (D.D.C. 2018). As Judge Bates explained, "it is not the constitutional violation alone that provides plaintiffs with standing in separation of powers cases. Rather, that violation must itself cause a separate injury to a plaintiff's interests, and it is that harm that provides standing to sue." *Id.* (collecting cases as part of a "list as long as one's arm … in which private parties alleged injuries sufficient to bring separation of powers claims" and finding sufficient injuries in deprivation of right to travel and work and to maintain a family unit in the United States). Similarly, while addressing a slightly different constitutional problem, the Supreme Court in *INS v. Chadha* found that an individual had standing to challenge a one-House veto provision that usurped the authority delegated by Congress through proper legislative means to the Attorney General because the individual had suffered an injury that would be redressed by the requested relief. 462 U.S. 919, 935-36 (1983). As persons suffering injuries as a result of Defendants' constitutional violations, including the deprivation of the fundamental rights and benefits that come along with citizenship, Plaintiffs here have standing to bring their claims under the Naturalization Clause.

E. The Declaratory Judgment Act Claim Is Not Subject to Dismissal

Defendants' only challenge to the Complaint's Declaratory Judgment Act claim is that it cannot remain if all of the other causes of action are dismissed. MTD at 18-19. Because Plaintiffs' APA and constitutional claims are not subject to dismissal for the reasons explained above, their Declaratory Judgment Act claim also is not subject to dismissal.

III. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny the Motion to Dismiss.

Dated: December 4, 2019

/s/ *Jennifer M. Wollenberg*
Jennifer M. Wollenberg (D.C. Bar No. 494895)
Douglas W. Baruch (D.C. Bar No. 414354)
Kayla Stachniak Kaplan (D.C. Bar No. 996635)
Neaha P. Raol (D.C. Bar No. 1005816)
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004-2541
T: 202.739.3000
jennifer.wollenberg@morganlewis.com
douglas.baruch@morganlewis.com
kayla.kaplan@morganlewis.com
neaha.raol@morganlewis.com

Counsel for Plaintiffs