APPENDEX A

23-817
Saleh v. Garland

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of April, two thousand twenty-four.

PRESENT:

GUIDO CALABRESI,
BARRINGTON D. PARKER,
MICHAEL H. PARK,
Circuit Judges.

Tarek Youssef Hassan Saleh,

Plaintiff-Appellant,

v. **23-817**

US Attorney General Merrick Garland, Attorney General, U.S. Department of Justice, Christopher A. Wray, Director, Federal Bureau of Investigation, Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Ur M. Jaddou, Director, U.S. Cititzenship and Immigration Services, District Director Thomas M. Cioppa, District Director, USCIS New York District Office, Susan Quintana, USCIS New York City Field Office Director, Gina Pastore, Brooklyn Field Office Director,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: TAREK YOUSSEF HASSAN SALEH, *pro se*, Staten Island, NY.

FOR DEFENDANTS-APPELLEES: DAVID J. BYERLEY, Trial Attorney, Office of Immigration Litigation, District Court Section (William C. Peachey, Director, Yamileth G. Davila, Acting Deputy Directory, Steven A. Platt, Acting Assistant Director, Sean L. King, Trial Attorney, *on the brief*) *for* Brian M. Boynton, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, Washington, D.C.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Chen, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-Appellant Tarek Youssef Hassan Saleh, proceeding pro se, appeals the district court's order granting the government's motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"When reviewing the dismissal of a complaint for lack of subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo,* accepting all material facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Id.* (quotation marks omitted).

The district court correctly dismissed as moot Saleh's challenge to the denial of his application for naturalization after his application was granted and he took the oath of allegiance,

and became a citizen. This claim became moot once his injury—the denial of his naturalization application—was relieved. *See, e.g., Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 444 (2d Cir. 2021) ("If, as a result of changed circumstances, a case that presented an actual redressable injury at the time it was filed ceases to involve such an injury, it ceases to fall within a federal court's Article III subject matter jurisdiction and must be dismissed for mootness."). Saleh is now a U.S. citizen, so he cannot claim any particularized future injury that could arise from the government's naturalization procedures. *Cf. Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) ("A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."). And Saleh's claims of future injury should he file immigration or naturalization petitions for unnamed siblings or a potential wife are speculative. Without a concrete current or future injury, Saleh's claim for naturalization became moot when he became a citizen.

Saleh argues that the agency's decision to naturalize him is void because his filing of this lawsuit divested the agency of jurisdiction to naturalize him. But nothing in 8 U.S.C. § 1421(c) supports Saleh's claim that the filing of a lawsuit under that section divests the agency of jurisdiction to consider an application for naturalization. To the contrary, once the agency naturalized him, Saleh ceased to be "[a] person whose application for naturalization . . . is denied," § 1421(c). Saleh's naturalization by the agency is not void simply because this action was pending in district court when he became a citizen.

Saleh also sought to have his purportedly void citizenship backdated to the date of the agency's initial denial. Courts cannot naturalize aliens except in accordance with the rules Congress has prescribed. *Fedorenko v. United States*, 449 U.S. 490, 506 (1981); *Hizam v. Kerry*,

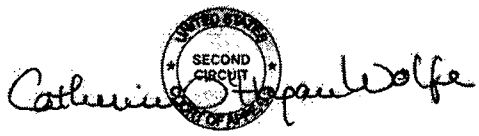
747 F.3d 102, 111 (2d Cir. 2014) ("Well-settled case law bars a court from exercising its equity powers to naturalize citizens."). One such rule is that would-be citizens take an oath of allegiance. 8 U.S.C. § 1448(a). Saleh did not take an oath of allegiance when his initial application was denied, so the district court could not have backdated his citizenship to that date because he had not satisfied each of the requirements Congress has prescribed for naturalization. Even assuming such relief were available, we agree with the district court that it was unwarranted here because Saleh faces no extraordinary circumstances because of his allegedly delayed naturalization. *See Edwards v. INS*, 393 F.3d 299, 310-11 (2d Cir. 2004) (holding that "an award of *nunc pro tunc* relief ordinarily be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of deportation relief"); *see also Xue Yong Zhang v. Holder*, 617 F.3d 650, 667 (2d Cir. 2010) (denying *nunc pro tunc* relief where petitioner failed to establish significant error, undue delay, or misconduct).

Saleh's remaining arguments fail. An apology is seldom an available form of relief, *see, e.g.*, *Birnbaum v. United States*, 588 F.2d 319, 335 (2d Cir. 1978), and Saleh has identified no authority to order the government to apologize for its initial denial of his naturalization application. The district court did not abuse its discretion in denying Saleh leave to amend to add a claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because Saleh cites no legal authority for extending *Bivens* and does not explain how his Fifth Amendment rights were violated. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022) ("[R]ecognizing a [new] cause of action under *Bivens* is a disfavored judicial activity."); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) (reviewing denial of leave to amend for abuse of discretion). Finally, because Saleh never filed an amended notice of appeal following the denial

of his request for reconsideration and fees, we lack appellate jurisdiction to consider those issues. Fed. R. App. P. 4(a)(4)(B)(ii).

We have considered Saleh's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 5/11/2023 at 7:16 PM EDT and filed on 5/11/2023

Case Name: Saleh v. Garland et al

Case Number: 1:21-cv-05998-PKC-LB

Filer:

Document Number: No document attached

Docket Text:

ORDER: The Court denies the Government's [52] request for a pre-motion conference as unnecessary. The Court is also is in receipt of *pro se* Plaintiff's [50] letter and the subsequent filings from both parties regarding the letter. (See Dkts. [50], [53], and [54].) In addition, the Court has reviewed the parties' [56] joint status report. The Court liberally construes Plaintiff's filings as stating three requests: (1) for the Court to re-issue Plaintiff's April 2023 certification of naturalization *nunc pro tunc* and backdate it to August 31, 2020 (Dkt. 51, at 1; Dkt. 56 at 1); (2) for the Government to write an apology letter to Plaintiff (Dkt. 51, at 3; Dkt. 56, at 2); and (3) to allow Plaintiff to add a *Bivens* claim against "low rank" immigration officers (Dkt. 51, at 3; Dkt. 56, at 2). For the reasons set forth below, Plaintiff's requests are denied in their entirety.

First, regarding Plaintiff's *nunc pro tunc* request, "[i]n the immigration context, the purpose of the [*nunc pro tunc*] doctrine is to enable the court to return applicants 'to the position in which they would have been, but for a significant error in their immigration proceedings.'" *Constantino v. U.S. Citizenship and Immigration Servs.*, No. 14-CV-8753 (AT) (DF), 2015 WL 13659483, at *5 (S.D.N.Y. May 11, 2015) (quoting *Edwards v. I.N.S.*, 393 F.3d 299, 308-09 (2d Cir. 2004)). "[C]ourts have typically awarded *nunc pro tunc* relief where the applicant would otherwise be subject to the extraordinary harm of deportation, removal, or permanent exclusion from the United States." *Id.* at 310-11 (emphasis added). Plaintiff argues that Defendants' alleged use "of the CARRP [policy]" led to the delay and denial of his naturalization petition back in August 2020. (Dkt. 51, at 2.) Plaintiff claims that the delay in granting his naturalization petition makes it "very tough" for him to run for Congress because he will need to wait until he is 67 to run. (*Id.* at 2-3 (explaining that an individual must be a U.S. citizen for seven years before they can run for Congress).) Additionally, Plaintiff adds it is now "hopeless" for his six siblings to join him in the United States because they will be too old by the time he can secure visas for them. (*Id.* at 3.) Although the Court sympathizes with Plaintiff's position, the Court does not find that the five-year period between the filing of Plaintiff's naturalization petition in May 2018 and the ultimate granting of Plaintiff's naturalization in April 2023 constitutes "the extraordinary harm" *nunc pro tunc* relief is reserved for. *See Panchishak v. U.S. Dep't of Homeland Sec. Neb. Serv. Ctr. U.S.C.I.S.*, F. App'x 361, 363 (2d Cir. 2011) (finding that a five-year delay in granting petitioner legal permanent resident status did not warrant *nunc pro tunc* relief because he was ultimately granted citizenship and could "still petition to bring his daughter to the United States, albeit he [needed to] wait longer" than he otherwise would have). Second, regarding Plaintiff's request for "the court to order the government to write an official apology" (Dkt. 50, at 3), the Court cannot find any legal authority for granting such relief. Thus, the Court finds it cannot order the Government to issue an apology. Third, regarding Plaintiff's request to add a *Bivens* claim, the Court denies the request because amendment would be futile. The Supreme Court has greatly constrained the causes of action recognized under *Bivens* and "emphasized that recognizing a cause of action under *Bivens* is 'a disfavored judicial activity.'" *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017)). Plaintiff's proposed claim against

various FBI officers and other immigration officials (Dkt. 56, at 2) is not a previously recognized *Bivens* cause of action and would not withstand a motion to dismiss given the current state of *Bivens* jurisprudence. *See generally Egbert v. Boule*, 142 S. Ct. 1793 (2022). Thus, Plaintiff's request to add a *Bivens* claim is denied as futile. *See Kiarie v. Dumbstruck, Inc.*, 473 F. Supp. 3d 350, 352 (S.D.N.Y. 2020) (denying motion to amend complaint because "the proposed [amendment] is futile... [and] could not survive a motion to dismiss"). Ordered by Judge Pamela K. Chen on 5/11/2023. (LC)

1:21-cv-05998-PKC-LB Notice has been electronically mailed to:

Sean Lynden King sean.king@usdoj.gov

David J. Byerley david.byerley@usdoj.gov

1:21-cv-05998-PKC-LB Notice will not be electronically mailed to:

Tarek Youssef Hassan Saleh
46 Richard Lane
Staten Island, NY 10314

APPENDIX C

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 5/11/2023 at 7:25 PM EDT and filed on 5/11/2023

Case Name: Saleh v. Garland et al

Case Number: 1:21-cv-05998-PKC-LB

Filer:

Document Number: No document attached

Docket Text:

ORDER DISMISSING CASE: For the reasons set forth in this docket order, the Court dismisses the case pursuant to Federal Rule of Civil Procedure ("FRCP") 12(h)(3). Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Plaintiff's Complaint seeks declaratory and injunctive relief pursuant to the Naturalization Clause and asks the Court to declare that "CARRP violates... the United States Constitution" and to "[e]njoin Defendants... from applying CARRP to the processing and adjudication of any [N-400] applicant[.]" (Dkt. [1], at 76.) However, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998); see also *Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 64 (S.D.N.Y. 2000) ("For a plaintiff to have standing to request injunctive or declaratory relief, the injury alleged must be capable of being redressed through injunctive relief at that moment." (citation omitted)). Here, Plaintiff's naturalization petition was granted on April 7, 2023 (Dkt. 52, at 1), and thus he cannot establish that he personally will be injured in the future by CARRP. Plaintiff also seeks relief for other naturalization petitioners who may be injured by CARRP. (Dkt. 55, at 1 ("I want to stop this policy [of] CARRP which injured the petitioners who are similar [to] my case[.]").) But because he is proceeding *pro se*, he cannot assert claims on behalf of others or represent a class. *See Chapman v. U.S. Dep't of Just.*, 558 F. Supp. 3d 45, 49 (E.D.N.Y. 2021) ("Plaintiff is proceeding *pro se* and cannot bring a class action on behalf of others."). Moreover, the Court is further required to dismiss this case because Plaintiff is a member of a mandatory class litigating the same issues and thus cannot opt out of the class to bring his own action. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (explaining that FRCP Rule 23(b)(2) "provides no opportunity for... (b)(2) class members to opt out"). To that end, the Court advises Plaintiff that he is, in fact, a member of the mandatory class certified pursuant to FRCP 23(b)(2) in *Wagafe v. Trump*. *See Wagafe v. Trump*, No. 17-CV-00094, 2017 WL 2671254, at *4 (W.D. Wash. June 21, 2017) (certifying the "Naturalization Class" as "[a] national class of all persons currently and in the future (1) who have or will have an application for naturalization pending before USCIS, (2) that is subject to CARRP or a successor "extreme vetting" program, and (3) that has not been or will not be adjudicated by USCIS within six months of having been filed."). The Naturalization Class in Wagafe is seeking to "[d]eclare that CARRP or any successor 'extreme vetting' program violated the Constitution, the INA, and the APA", "[o]rder [the Government] to rescind CARRP or any successor 'extreme vetting' program because they failed to follow the process for notice and comment by the public, and enjoin the Government from applying "CARRP or any successor 'extreme vetting' program" to future immigration applicants. Second Amended Complaint at 51, *Wagafe v. Trump*, 2017 WL 2671254 (No. 47). Thus, Plaintiff should understand that virtually all the declaratory and injunctive relief Plaintiff seeks in this dismissed action are being sought in *Wagafe v. Trump*. The Court will mail Plaintiff copies of the Second Amended Complaint, the unreported opinion certifying the class, and the latest joint status report from the *Wagafe v. Trump* docket so that Plaintiff can

be apprised of that case. The Clerk of Court is respectfully requested to enter judgment accordingly and close this case. Ordered by Judge Pamela K. Chen on 5/11/2023. (LC)

1:21-cv-05998-PKC-LB Notice has been electronically mailed to:

Sean Lynden King sean.king@usdoj.gov

David J. Byerley david.byerley@usdoj.gov

1:21-cv-05998-PKC-LB Notice will not be electronically mailed to:

Tarek Youssef Hassan Saleh
46 Richard Lane
Staten Island, NY 10314

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

TAREK YOUSSEF SALEH,

Plaintiff,

- against -

MEMORANDUM & ORDER
21-CV-5998 (PKC) (LB)

MERRICK GARLAND, Attorney General, U.S. Department of Justice; CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation; ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security; UR JADDOU, Director, U.S. Citizenship and Immigration Services; THOMAS CIOPPA, District Director, USCIS New York District Office; SUSAN QUINTANA, USCIS New York City Field Office Director; and GINA PASTORE, Brooklyn Field Office Director,

Defendants.

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PAMELA K. CHEN, United States District Judge:

Plaintiff Tarek Youssef Saleh, proceeding *pro se*, brought this case against Defendants Merrick Garland, Christopher A. Wray, Alejandro Mayorkas, Ur Jaddou, Thomas Cioppa, Susan Quintana, and Gina Pastore (collectively, "Defendants") on October 28, 2021, seeking *de novo* review of the denial of his naturalization application and challenging both the United States Citizenship and Immigration Services' ("USCIS") Controlled Application Review and Resolution Program ("CARRP") and multiple absences policy ("MAP"). On September 28, 2022, Defendants' motion to dismiss was granted in part and denied in part. Then, following Plaintiff's naturalization on April 7, 2023, the Court dismissed Plaintiff's remaining claims as moot on May 11, 2023. Plaintiff now moves for reconsideration of the final dismissal and for recovery of costs. For the reasons discussed here, Plaintiff's motion is denied in its entirety.

BACKGROUND[1]

I. Permanent Resident Application

Plaintiff is a citizen of Egypt who has resided in the United States since 1998 and has worked primarily as an Imam since his arrival. (Compl., Dkt. 1, ¶¶ 18, 75, 161.) In 2003, Plaintiff submitted an I-485 application for permanent resident status. (*Id.* ¶ 122.) On numerous instances while his I-485 application was pending between 2003 and 2008, the FBI solicited information from Plaintiff about his suspected ties to terrorism (*id.* ¶¶ 79–80), which, according to Plaintiff, are limited to a "distant relative [who was] the third [highest ranking] leader of Al-Qaeda in Afghanistan" (*id.* ¶ 79), with whom Plaintiff claims to have had no contact since 1990 (*id.* ¶ 211). FBI agents allegedly communicated to Plaintiff on multiple occasions that the approval of his I-485 application depended on his cooperation with government efforts to pursue terrorist suspects abroad. (*E.g.*, *id.* ¶¶ 80, 90, 93.) Nevertheless, Plaintiff declined the government's requests but allegedly made clear that he "condemns Al-Qaeda's terrorist and inhumane activities" (*id.* ¶ 80) and also gave the FBI "his opinion on how to deal with Al-Qaeda" on multiple occasions (*id.* ¶ 78). In 2009, six years after Plaintiff had applied for permanent resident status, USCIS denied his I-485 application. (*Id.* ¶ 60.) Plaintiff then promptly challenged the denial in immigration court, and after more than four years of litigation, in 2013, the immigration court awarded him permanent resident status. (*Id.* ¶¶ 99 (challenge), 109 (relief awarded).)

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[1] In addition to deriving the relevant facts from Plaintiff's Complaint, the Court takes judicial notice of two prior decisions (and the public dockets in those cases) closely related to this case: *Saleh v. Pastore*, 19-CV-11799 (KPF), 2021 WL 1640449, at *1 (S.D.N.Y. Apr. 27, 2021) ("*Saleh I*") and *Saleh v. Pastore*, No. 21-1073, 2021 WL 4978574, at *1 (2d Cir. Oct. 17, 2021) (summary order) ("*Saleh II*"). *See Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012) (explaining that courts may "take judicial notice of relevant matters of public record"); *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes.").

II. Naturalization Application

Similar to Plaintiff's path to permanent residency, Plaintiff's path to naturalization has been lengthy and contested. Plaintiff commenced the process by submitting an N-400 application to USCIS in May 2018. (*Id.* ¶ 3.) The agency did not take any adjudicatory action on that application until December 2019. (*See id.*) Plaintiff alleges that the delay resulted from the inappropriate subjection of his application to CARRP, which he describes as an "extreme vetting" process that subjects individuals deemed potential national security threats—predominantly Muslims—to "heightened, generally insurmountable" reviews that effectively ensure the indefinite delay or outright denial of their immigration-related applications. (*Id.* ¶ 2.)

On December 26, 2019, Plaintiff commenced an action in the Southern District of New York, seeking to compel the adjudication of his N-400 application and additionally challenging CARRP under the Immigration and Nationality Act ("INA"), Administrative Procedure Act ("APA"), and United States Constitution. *Saleh I*, 2021 WL 1640449, at *2. On August 31, 2020, while the case was underway, USCIS issued a denial of Plaintiff's application, citing Plaintiff's multiple absences spent in Morocco that amounted to "approximately 903 days between 2016 and the end of 2018." *Id.* The court held that, since USCIS had adjudicated Plaintiff's N-400 application, all of his claims were now moot and any subsequent challenges to USCIS's denial should be filed in this Court. *Id.* at *6, *10–11. Plaintiff appealed the Southern District's decision to the Second Circuit, which affirmed the district court. *Saleh II*, 2021 WL 4978574, at *3. While the appeal was pending, USCIS reissued its denial of Plaintiff's N-400 application on alternate grounds, alleging Plaintiff failed to disclose contacts with his distant relative who was in Al-Qaeda. (Compl., Dkt. 1, ¶¶ 5, 128.) USCIS represented to both Plaintiff and the Second Circuit that this denial constituted its "final administrative denial," and advised Plaintiff that he could seek relief

in this Court. *See Saleh II*, Dkt. 52-2, at 6 ("This decision constitutes a final administrative denial of your naturalization application. To request judicial review of this final determination, file a petition for review in the United States District Court having jurisdiction over your place of residence. See INA 310(c).").

III. Procedural History

On October 28, 2021, Plaintiff commenced this suit pursuant to 8 U.S.C. § 1421(c)[2], seeking *de novo* review of his N-400 application denial. (Compl., Dkt. 1, ¶ 1.) Plaintiff sought declarations that his N-400 application was reviewed with unreasonable delay and that CARRP violates the INA, APA, Naturalization Clause of the United States Constitution, and Fifth Amendment to the United States Constitution. (*Id.* at 76.) Plaintiff also sought a declaration that MAP—a policy that considers multiple absences from the U.S. of less than six months as potentially breaking an applicant's continuous residence—violates the INA and APA. Finally, Plaintiff sought injunctions prohibiting USCIS from enforcing both CARRP and MAP. (*Id.*)

On February 25, 2022, Defendants filed a motion to dismiss all of Plaintiff's claims. (Dkt. 24.) By Memorandum & Order, on September 28, 2022, the Court dismissed Plaintiff's APA claims, but allowed Plaintiff's challenges to the N-400 denial, CARRP, and MAP to proceed under § 1421(c) and the Naturalization Clause. *Saleh v. Garland*, 21-CV-5998 (PKC), 2022 WL 4539475, at *6–7 (E.D.N.Y. Sept. 28, 2022). The Court then granted Defendants' request for discovery. (10/13/2022 Docket Order.)

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[2] 8 U.S.C. § 1421(c) corresponds to Section 310(c) of the INA. The Section provides, in relevant part: "A person whose application for naturalization . . . is denied, after a hearing before an immigration officer . . . may seek review of such denial before the United States district court for the district in which such person resides . . . . 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).

On February 10, 2023, the parties requested to stay discovery while "settlement discussions [took] place[.]" (Dkt. 44, at 1.) On March 7, 2023, Defendants requested a settlement conference with a Magistrate Judge (Dkt. 45, at 4), and the Court referred the matter to the Honorable Lois Bloom the following day (3/8/2023 Docket Order). On March 21, 2023, Magistrate Judge Bloom reported that the parties were unable to settle the case after three telephone conferences. (*See* 3/16/2023 Docket Order; 3/20/2023 Docket Order; Dkt. 47.)

Just three days after the final settlement conference, Defendants notified the Court that USCIS intended to reopen and further adjudicate Plaintiff's N-400 application. (Dkt. 48.) Plaintiff objected to Defendants' motion, arguing that the Court had exclusive jurisdiction over his N-400 application and therefore USCIS could not reopen its adjudication. (*See* Dkt. 49.) However, Plaintiff recognized that USCIS's independent approval of Plaintiff's N-400 application could moot his challenges to CARRP and MAP. (*See id.*) Plaintiff vowed to "challenge [] CARRP to the end" after it had "destroyed [his] life . . . for more than 20 years." (*Id.*) The Court agreed with Plaintiff that it had exclusive jurisdiction over his N-400 application but "[n]evertheless, in the interest of expeditiously providing Plaintiff with his requested relief[,] . . . permit[ted] USCIS to reopen the application and grant it."[3] (3/29/2023 Docket Order.)

Plaintiff became a naturalized citizen on April 7, 2023. (Dkt. 51, at 1.) On April 16, 2023, Plaintiff reiterated his belief that USCIS had no jurisdiction over his N-400 application and requested that the Court find his citizenship certificate "[n]ull and [v]oid." (Dkt. 50, at 1.) Plaintiff

[3] The Court notes that it erred in the March 29th Docket Order when it concluded that it had exclusive jurisdiction over Plaintiff's N-400 application. (*See* 3/29/2023 Docket Order ("The Court recognizes that it has exclusive jurisdiction over Plaintiff's naturalization application.").) Rather, courts in this Circuit hold that USCIS has *concurrent* jurisdiction with district courts over N-400 applications during the pendency of Section 1421(c) proceedings. *See infra* Discussion Section I.A.

alternatively asked the Court to "order the defendants to re-issue [his] certificate of naturalization Nunc Pro Tunc [on] the same day [as] the USCIS final denial . . . [on] 8/31/20" because his lack of citizenship between August 2020 and April 2023 had delayed his eligibility to run for Congress. (*Id.* at 1–3.) Plaintiff also alleged that Defendants' delays and denials have harmed his prospects of securing visas for six siblings and a potential "overseas" bride. (*Id.* at 3.) Plaintiff sought "an official apology" from Defendants for making him "suffer for more than 20 years," explaining that Plaintiff will have received nothing to compensate him for Defendants "mak[ing] his life [] Hell" if he receives neither *nunc pro tunc* relief nor an official apology. (*Id.* at 3.) Plaintiff further requested to add a *Bivens* claim against government officials. (*Id.*) On April 20, 2023, Defendants moved to dismiss Plaintiff's remaining claims, which challenged CARRP under the INA and Naturalization Clause. (Dkts. 52, 56.)

On May 11, 2023, the Court rejected Plaintiff's requests for *nunc pro tunc* relief, an official apology, and the addition of the *Bivens* claim. (5/11/2023 Docket Order.)[4] The Court subsequently dismissed the case, finding that Plaintiff lacked proof of any present or future personal injury to sustain his CARRP claims because he is naturalized and therefore no longer subject to the policy. (*See* 5/11/2023 Order.)

On May 15, 2023, Plaintiff filed a letter that the Court liberally construes as two motions: (1) a motion for reconsideration; and (2) a motion for costs, fees, and expenses. (Dkt. 58.) First, Plaintiff seeks reconsideration of the Court's determination that USCIS had the authority to re-adjudicate Plaintiff's N-400 application, citing the Court's reference to its exclusive jurisdiction

[4] The Court issued two orders on May 11, 2023; the first order ruled on the parties' outstanding letters (Dkts. 50, 51, 53, 54, 56) and the second order dismissed the case. The Court will refer to the first order as "5/11/2023 Docket Order" and the order dismissing the case as "5/11/2023 Order" throughout this Memorandum & Order.

over the application in the March 29, 2023 Docket Order. (*Id.* at ECF[5] 2; *see also* Dkt. 62, at 1–2.) Second, Plaintiff argues that the Court failed to rule on his claims concerning MAP in the May 11, 2023 Order and therefore must reconsider them now. (Dkt. 58, at ECF 1 ("The [C]ourt overlooked in the order, dated on 5/1[1]/23[,] whether the USCIS regulation of multiple absence[s] outside the USA of the [naturalization] applicant[] . . . is legal or illegal[.]"); *see also* Dkt. 62, at 2.) Third, in his motion for costs, fees, and expenses, Plaintiff seeks "about $10,000[.]" (Dkt. 58, at ECF 3.) On May 16, 2023, Plaintiff filed a notice of appeal. (Dkt. 59.)[6] On May 30, 2023, Defendants submitted their opposition to Plaintiff's motions. (Dkt. 61.) On June 3, 2023, Plaintiff replied to Defendant's opposition, further explaining, *inter alia*, that the $10,000 figure encompasses everything Plaintiff has incurred after USCIS's denial of his N-400 application on August 31, 2020, including his $402 filing fee in this Court and his $505 fee on appeal. (*See* Dkt. 62, at 4.)

LEGAL STANDARDS

I. Motion for Reconsideration

"Reconsideration is 'an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce and judicial resources.'" *Hoeffner v. D'Amato*, --- F. Supp. 3d ---, 2023 WL 2632501, at *1 (E.D.N.Y. 2023) (quoting *Butto v. Collecto Inc.*, 845 F. Supp. 2d 491, 494 (E.D.N.Y. 2012). "[A] party may move for reconsideration and obtain relief only when

[5] Citations to "ECF" refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

[6] The Court notes that Plaintiff's motion for reconsideration rendered the Court's dismissal of Plaintiff's case as "not final" for purposes of an appeal. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019) ("A timely motion for reconsideration filed within a window to appeal does not toll anything; it 'renders an otherwise final decision of a district court not final' for purposes of appeal." (quoting *United States v. Ibarra*, 502 U.S. 1, 6 (1991))).

the party identifies an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 108 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked[—]matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cho v. Blackberry Ltd.*, 991 F.3d 155, 170 (2d Cir. 2021) (citation omitted); *see also LPD N.Y., LLC v. Adidas Am., Inc.*, 295 F. Supp. 3d 275, 284 (E.D.N.Y. 2017) ("In order to prevail on a motion for reconsideration, 'the moving party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before the Court on the underlying motion.'" (quoting *Lichtenberg v. Besicorp. Grp. Inc.*, 28 F. App'x 73, 75 (2d Cir. 2002))).

II. Motion for Attorney's Fees

The Equal Access to Justice Act ("EAJA"), provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a *prevailing party* other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). "To be considered a 'prevailing party,' a plaintiff must have achieved a judicially-sanctioned material alteration of the legal relationship between the parties." *McKay v. Barnhart*, 327 F. Supp. 2d 263, 266 (S.D.N.Y. 2004) (citing *Roberson v. Giuliani*, 346 F.3d 75, 79 (2d Cir. 2003) (interpreting *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001))); *see also IME WatchDog, Inc. v.*

Gelardi, No. 22-CV-1032 (PKC) (JRC), 2022 WL 16636766, at *2 (E.D.N.Y. Nov. 2, 2022) ("[A] 'prevailing party' is one who has favorably effected a 'material alteration of the legal relationship of the parties' by court order." (quoting *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 102 (2d Cir. 2009))).

DISCUSSION

Plaintiff seeks reconsideration of the Court's May 11, 2023 Docket Order and Order on two grounds: (1) USCIS had the authority to re-adjudicate Plaintiff's N-400 application; and (2) the Court failed to rule on his claims concerning MAP. Plaintiff separately seeks to recover costs, fees, and expenses, totaling "about $10,000," that he allegedly incurred as a result of these proceedings. The Court considers each of these issues in turn, and finds, as discussed below, that none have merit.

I. Plaintiff's Motion for Reconsideration Fails in Its Entirety

A. USCIS Had Jurisdiction to Re-Adjudicate Plaintiff's Naturalization Application

Plaintiff's request to have the Court re-approve his naturalization petition is denied because Plaintiff's suit never stripped USCIS of the authority to re-adjudicate Plaintiff's N-400 application. The Court erred previously when it stated that it had exclusive jurisdiction over Plaintiff's § 1421(c) petition. (*See* 3/29/2023 Docket Order.) Although federal courts have generally reached consensus that the Court has exclusive jurisdiction over § 1447(b) petitions, they are split on whether the Court has exclusive jurisdiction over § 1421(c) petitions. *See* Claudia Catalano, Annotation, When Naturalization Case Becomes Moot Under Immigration and Nationality Act (8 U.S.C.A. § 1101 et seq.), 68 A.L.R. Fed. 3d Art. 4 (2022), §§ 28–30. District courts in this Circuit hold that the Court has concurrent jurisdiction with USCIS over § 1421(c) petitions. *See Gizzo v. I.N.S.*, 510 F. Supp. 2d 210 (S.D.N.Y. 2007) (holding that a plaintiff's § 1421(c) appeal of his

naturalization denial was mooted by USCIS's decision to vacate INS's prior determination and reconsider plaintiff's N-400 application); *Jimenez v. U.S. I.N.S.*, No. 02-CV-9068 (RWS), 2003 WL 22461806, at *1–2 (S.D.N.Y. Oct. 30, 2003) (same); *Jacobo v. Reno*, No. 99-CV-4609 (SHS), 1999 WL 34768747, at *1 (S.D.N.Y. Oct. 20, 1999) (same). Thus, the Court finds that USCIS had concurrent jurisdiction to approve Plaintiff's naturalization petition, even as his § 1421(c) claim was pending before this Court, and Plaintiff's Certificate of Naturalization is therefore valid. Although Plaintiff points to cases in other circuits that have ruled differently (*see* Dkt. 62, at 1), these cases are not controlling and do not bind this Court. *See Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 151 (W.D.N.Y. 2003) (explaining that district courts are "not bound to follow . . . non-circuit caselaw"); *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("[R]econsideration will generally be denied unless the moving party can point to *controlling* decisions or data that the court overlooked[.]" (emphasis added)). Thus, the Court denies Plaintiff's motion to reconsider the Court's refusal to re-approve his naturalization petition.

B. The Court Properly Considered and Dismissed Plaintiff's MAP Challenge

Plaintiff's request for reconsideration of his MAP claim is also denied. Plaintiff argued that the Court's May 11, 2023 dismissal failed to consider his MAP claim entirely. (*See* Dkt. 58, at ECF 1 ("The court overlooked . . . whether [MAP] is legal or illegal as it was one of the two main grounds of denial of my N-400 application[.]"); Dkt. 62, at ECF 2 ("No doubt, the court overlooked the issue of [MAP], so the court should rule on the multiple absence issue as . . . the multiple absence issue is not part of any class action case.").) But Plaintiff misunderstands the record. Plaintiff's MAP claims under both the APA and INA were previously considered and dismissed by the Court.

Plaintiff initially sought a declaratory judgment that MAP is illegal and an injunction against USCIS's enforcement of the policy under both the APA and INA. (Compl., Dkt. 1, at 76.) *See also Saleh*, 2022 WL 4539475, at *2 (liberally construing Plaintiff's MAP claims as being brought pursuant to the INA and APA). The Court dismissed all of Plaintiff's APA claims in its September 28, 2022 Memorandum & Order. *Saleh*, 2022 WL 4539475, at *6. The Court then dismissed Plaintiff's remaining INA claims for lack of standing in its May 11, 2023 Order. (5/11/2023 Order.) The Court's dismissal is especially clear when read in conjunction with its September 28, 2022 Memorandum & Order. That Memorandum & Order identified Plaintiff's MAP claims as "requests for declaratory judgment and injunctive relief relating to his § 1421(c) claims." *Saleh*, 2022 WL 4539475, at *7; *see also id.* at *2 ("Plaintiff seeks a declaration that . . . the USCIS policy of treating an applicant's multiple absences of less than six months from the United States as potentially breaking an applicant's continuous residence . . . violates the INA and the Administrative Procedure Act[.]"). Hence, when the Court subsequently held in its May 11, 2023 Order that Plaintiff no longer had standing sufficient to seek any "injunctive or declaratory relief," that holding necessarily applied to Plaintiff's MAP claims. (May 11, 2023 Order.) Plaintiff does not raise any "intervening change of controlling law" or "new evidence" that would render the Court's prior dismissals erroneous and thus his motion for reconsideration fails. *See Hicksville Water Dist. v. Jerry Spiegel Assocs.*, No. 19-CV-6070 (PKC) (RML), 2022 WL 4072683, at *2 (E.D.N.Y. Sept. 2, 2022) (citations omitted). Accordingly, Plaintiff has not met the standard required for reconsideration and his motion is denied.

II. Plaintiff is Not a Prevailing Party and Cannot Recover Any Fees or Costs

Finally, Plaintiff's request to recover costs, fees, and expenses is denied because Plaintiff is not a "prevailing party" as is required for recovery under the EAJA. Moreover, Plaintiff is

separately precluded from recovering nearly all of the costs, fees, and expenses he seeks because he is a *pro se* litigant.

Under the EAJA, only a "prevailing party" may recover § 2412(a) costs or § 2412(d) fees and expenses. 28 U.S.C. § 2412(a)(1), (d)(1)(A). Plaintiff appropriately looks to *Buckhannon*'s definition of a "prevailing party" and correctly notes that it requires there to have been "a material alteration" in the parties' legal relationship (Dkt. 58, at ECF 3), but Plaintiff overlooks *Buckhannon*'s added requirement that this alteration be "judicially sanctioned." *See Buckhannon*, 532 U.S. at 605 (referring to a "*judicially sanctioned* change in the legal relationship of the parties" (emphasis added)); *Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008) (holding that *Buckhannon*'s definition of "prevailing party," including the requirement that "change must . . . be judicially sanctioned[,]" applies to the EAJA). Nevertheless, the Court discerns two arguments Plaintiff makes that arguably support finding a "judicially sanctioned" change, both of which fall short.

Plaintiff first contends his N-400 application approval was "judicially sanctioned" by the Court's March 29, 2023 Order staying proceedings and discovery, which he claims granted USCIS "permission for the defendants to reopen [Plaintiff's] N-400 [a]pplication." (Dkt. 58, at ECF 3.) But as today's Memorandum & Order clarifies, USCIS never lost jurisdiction over Plaintiff's N-400 application, so USCIS needed no "permission" to make a re-determination. (*See supra* Discussion Section I.A.) Moreover, when Defendants requested the stay, USCIS was already "in the process of reopening and approving" Plaintiff's N-400 application without any prior direction or "permission" from the Court. (Dkt. 48, at ECF 1.) Therefore, the Court's March 29, 2023 Order granting the stay did not grant Plaintiff any relief, let alone "actual relief on the merits" required to render Plaintiff a "prevailing party." *See Melamud v. U.S. Dep't of Homeland Sec.*, No. 06-CV-1698, 2007 WL 2870978, at *2 (D. Conn. Sept. 25, 2007).

Alternatively, Plaintiff alleges his N-400 application's approval was "judicially sanctioned" because it would "never" have happened but for his appeal to the Court. (Dkt. 58, at ECF 3 ("[W]ithout . . . my filing the case and my going and back [sic] for few years in the courts, I will never get approval . . . .").) However, the fact that litigation prompts a defendant to grant a plaintiff's requested relief, on its own, does not transform a defendant's actions into "judicially sanctioned" relief. *See Buckhannon*, 532 U.S. at 605; *Melamud*, 2007 WL 2870978, at *3 (holding that a naturalization applicant that received an approval shortly after suing USCIS was not a "prevailing party" even though USCIS had informed the applicant that suing was the only way the plaintiff would receive a timely determination); *Abiodun v. McElroy*, No. 01-CV-0439 (LAK), 2002 WL 31999342, at *1 (S.D.N.Y. Mar. 6, 2002) (applying *Buckhannon* to explain that a party is not "prevailing" under the EAJA merely because their "lawsuit was a catalyst that led to their obtaining [] relief"). Accordingly, while the Court sympathizes with Plaintiff for the seemingly avoidable delays and litigations that have significantly burdened him in his path to citizenship, Plaintiff's argument is legally inapposite. Even assuming Plaintiff's N-400 application would not have been approved but for this lawsuit, Plaintiff still would not have "prevailed" under the EAJA. *See Melamud*, 2007 WL 2870978, at *3.

Because Plaintiff is not a "prevailing party," he cannot recover any costs, fees, or expenses under the EAJA. But notably, even if Plaintiff were a "prevailing party," nearly all of his $10,000 in requested relief would be unattainable. As a *pro se* litigant, he is precluded from recovering attorney's fees and has not demonstrated he falls within the narrow set of circumstances that allow *pro se* plaintiffs to recover for other § 2412(d) fees. *See SEC v. Price Waterhouse*, 41 F.3d 805, 808–09 (2d Cir. 1994) (holding that a *pro se* plaintiff can never recover attorney's fees and can only recover § 2412(d) fees and expenses that stem from a "loss of income" or other "consequential

expenses (in the nature of hiring others to replace him in other activities)"). Plaintiff cannot recover for tasks for which attorneys would typically be compensated, including the "copying and printing and posting and many discoveries" that Plaintiff asserts contributed to his largely unsubstantiated request to recover $10,000. (Dkt. 62, at 4.) Thus, even if Plaintiff were a "prevailing party"—which he is not—the Court would still be unable to award Plaintiff any attorney's fees.

In sum, Plaintiff's request for fees is denied in full.

CONCLUSION

For the reasons stated above, Plaintiff's motion for reconsideration and costs is denied in its entirety.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: July 26, 2023
Brooklyn, New York

APPENDIX E

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 3/29/2023 at 2:09 PM EDT and filed on 3/29/2023

Case Name: Saleh v. Garland et al

Case Number: 1:21-cv-05998-PKC-LB

Filer:

Document Number: No document attached

Docket Text:

ORDER: The Court grants Defendants' [48] motion to stay for 21 days. Defendants represent that they will grant Plaintiff's naturalization petition in the next 21 days. (See Dkt. [48], ECF 1, ("Defendants now believe there is a path to granting [Plaintiff] U.S. citizenship without further need of the Court's and the parties' resources... Accordingly, Defendants request that the Court stay any other proceedings in this case and stay discovery for 21 days pending USCIS's decision on Mr. Saleh's naturalization application.").) The Court finds that this is the most efficient way to grant Plaintiff the relief he seeks regarding his denied naturalization application. (*See* Compl., Dkt. 1, at ECF 76 ("Plaintiff respectfully requests that the Court... [r]eview de novo Petitioner's application for naturalization and grant him naturalization[.]").) The Court recognizes that it has exclusive jurisdiction over Plaintiff's naturalization application. *See* 8 U.S.C. § 1421(c) (authorizing federal courts to "make its own findings of fact and conclusions of law" and requiring courts to "conduct a hearing de novo" "at the request of the petitioner" for denied naturalization applications); *see also Bustamente v. Napolitano*, 582 F.3d 403, 407-08 (2d Cir. 2009) (explaining that after an individual files a Section 1447(b) petition "the district court acquires jurisdiction that is 'exclusive' in the sense that USCIS is no longer empowered to decide the [naturalization] application"). The Court is also in receipt of Plaintiff's objection to Defendants' request to reopen and grant his petition. (*See* Dkt. [49].) Nevertheless, in the interest of expeditiously providing Plaintiff with his requested relief, the Court permits USCIS to reopen the application and grant it. The case is accordingly stayed until 4/19/2023 to allow for the agency to grant Plaintiffs petition. Defendants shall file a status report apprising the Court of the status of Plaintiff's naturalization application on or before 4/20/2023. Separately, the Court notes that even if Plaintiff's claims under Section 1421(c) are resolved, Plaintiff's Naturalization Clause claims will proceed after the stay is lifted. Thus,

the Court directs the parties to file a joint status report by 5/10/2023, apprising the Court of their positions regarding discovery and motions for summary judgment. Defendants' counsel is respectfully requested to e-mail this Order to Plaintiff. Ordered by Judge Pamela K. Chen on 3/29/2023. (LC)

1:21-cv-05998-PKC-LB Notice has been electronically mailed to:

Sean Lynden King sean.king@usdoj.gov

David J. Byerley david.byerley@usdoj.gov

1:21-cv-05998-PKC-LB Notice will not be electronically mailed to:

Tarek Youssef Hassan Saleh
46 Richard Lane
Staten Island, NY 10314

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TAREK YOUSSEF SALEH,

Plaintiff,

- against -

MEMORANDUM & ORDER
21-CV-5998 (PKC)

MERRICK GARLAND, *Attorney General, U.S. Department of Justice*, CHRISTOPHER A. WRAY, *Director, Federal Bureau of Investigation*, ALEJANDRO MAYORKAS, *Secretary, U.S. Department of Homeland Security*, UR JADDOU, *Director, U.S. Citizenship and Immigration Services*, THOMAS CIOPPA, *District Director, USCIS New York District Office*, SUSAN QUINTANA, *USCIS New York City Field Office Director*, and GINA PASTORE, *Brooklyn Field Office Director*,

Defendants.

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PAMELA K. CHEN, United States District Judge:

Plaintiff Tarek Youssef Saleh, proceeding *pro se*, commenced this case against Merrick Garland, Christopher A. Wray, Alejandro Mayorkas, Ur Jaddou, Thomas Cioppa, Susan Quintana, and Gina Pastore (collectively, "Defendants") on October 28, 2021, seeking *de novo* review of the denial of his application for naturalization and challenging the United States Citizenship and Immigration Services' ("USCIS") Controlled Application Review and Resolution Program ("CARRP"). Defendants move to dismiss, asserting lack of subject matter jurisdiction and failure to state a claim. For the reasons discussed here, Defendants' motion is granted in part and denied in part.[1]

[1] Plaintiff's request for oral argument (Dkt. 17) is denied as unnecessary.

BACKGROUND[2]

Plaintiff is a citizen of Egypt and a lawful United States permanent resident. (Complaint "Compl."), Dkt. 1, ¶¶ 18, 74, 159). Plaintiff obtained his permanent resident status after a protracted administrative adjudication process and litigation in federal courts. (*Id.* ¶¶ 79, 83, 96–110); *see also Saleh I*, 2021 WL 1640449, at *2 ("Following protracted litigation in federal court and immigration court, Plaintiff's Form I-485 application was granted on August 15, 2013, on which date Plaintiff became a lawful resident of the United States.").

Plaintiff applied to become a naturalized United States citizen on May 18, 2018, by filing Form N-400 with USCIS. (Compl., Dkt. 1, ¶¶ 3, 111.) Plaintiff's application was not adjudicated for over a year, a delay Plaintiff attributes to USCIS subjecting him to CARRP—a policy pursuant to which applicants undergo an "extreme vetting" process when seeking immigration benefits. (*Id.* ¶¶ 118, 122–23, 125); *see also Saleh I*, 2021 WL 1640449, at *2. Plaintiff thus commenced an action in the Southern District of New York on December 26, 2019. (Compl., Dkt. 1, ¶¶ 3, 124). On August 31, 2020, while that case was pending, USCIS denied Plaintiff's Form N-400 application finding that Plaintiff failed to satisfy the residency and good moral character requirements of the Immigration and Nationality Act ("INA"). (*Id.*, ¶¶ 4, 5, 125.) The next day, Plaintiff administratively appealed the denial by filing a request for a hearing ("Form N-336"). (*Id.* ¶¶ 5, 126.) USCIS scheduled Plaintiff's Form N-336 hearing for February 24, 2021. *Saleh I*,

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[2] In addition to deriving the relevant facts from Plaintiff's Complaint, the Court takes judicial notice of two prior decisions (and the public dockets in those cases) closely related to this case: *Saleh v. Pastore et al.*, 19-CV-11799 (KPL), 2021 WL 1640449, at *1 (S.D.N.Y. Apr. 27, 2021) ("*Saleh I*") and *Saleh v. Pastore et al.*, No. 21-1073, 2021 WL 4978574, at *1 (2d Cir. 2021) (summary order) ("*Saleh II*"). *See Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012) (courts may "take judicial notice of relevant matters of public record"); *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes.").

2021 WL 1640449, at *4. Plaintiff "purposefully and intentionally" did not attend his Form N-336 hearing because he was "pretty sure without any doubt [that] USCIS lost the jurisdiction and the power to adjudicate his application." *Id.* (brackets in original). On April 27, 2021, the Southern District of New York dismissed Plaintiff's Form N-400 claim as moot and dismissed the remaining claims for lack of subject matter jurisdiction, citing Plaintiff's failure to exhaust his administrative remedies. *Id.* at *8, 10. Plaintiff appealed to the Second Circuit, which affirmed in a summary order on October 27, 2021. *See Saleh II*, 2021 WL 4978574, at *1. While the appeal before the Second Circuit was pending, USCIS issued its final decision on Plaintiff's naturalization application, vacating its prior denial of Plaintiff's Form N-400, but denying naturalization on different grounds. (Compl., Dkt. 1, ¶¶ 5, 128.) USCIS advised Plaintiff that the "decision constitute[d] a final administrative denial of [Plaintiff's] naturalization application," and also advised Plaintiff and the Second Circuit that Plaintiff could "request judicial review" of the denial by filing a petition in this District. *See Saleh II*, Dkt. 52-2, at 6.[3]

On October 28, 2021, Plaintiff commenced the present action pursuant to 8 U.S.C. § 1421(c)[4], seeking *de novo* review of the denial of his naturalization application. (Compl., Dkt. 1.) Plaintiff also challenges CARRP and any other successor "extreme vetting" program, and their application to him and other Form N-400 applicants. Plaintiff seeks a declaration that (1) his

[3] As explained by USCIS, judicial review is appropriate in this District, as opposed to the Southern District of New York, where Plaintiff's earlier petition was adjudicated, because Plaintiff resides in Staten Island. *See Saleh II*, Dkt. 52-1, at 1.

[4] Section 1421(c) provides, in relevant part: "A person whose application for naturalization . . . is denied, after a hearing before an immigration officer . . ., may seek review of such denial before the United States district court for the district in which such person resides. . . . 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).

naturalization application was reviewed with unreasonable delay, (2) the USCIS policy of treating an applicant's multiple absences of less than six months from the United States as potentially breaking an applicant's continuous residence ("multiple absences policy") violates the INA and the Administrative Procedure Act ("APA"), and (3) CARRP is unlawful because it violates the Naturalization Clause of the United States Constitution, Fifth Amendment to the United States Constitution, the INA, and the APA. (*Id.* at 76.) Plaintiff also seeks injunctive relief "rescinding" CARRP and enjoining USCIS from applying CARRP and the multiple absences policy to any Form N-400 applicants. (*Id.* at 77.)

On December 27, 2021, Defendants filed a motion for a pre motion conference seeking to file a motion to dismiss. (Dkt. 9.) Plaintiff filed a response, arguing that Defendants' motion to dismiss should be denied. (Dkt. 11.) The Court denied Defendants' motion for a pre motion conference as unnecessary and set a briefing schedule for the motion to dismiss. (01/05/2022 Docket Order.) Plaintiff sought an expedited briefing schedule citing his "need to get marri[ed] overseas and apply for my wife as I am single, no kids until now and my age is about 59 years old." (Dkt. 12.) The Court granted Plaintiff's request for expedited briefing and set an amended briefing schedule. (01/07/2022 Docket Order.) Plaintiff subsequently sought leave to file excess pages for a combined filing that would include his opposition to Defendants' motion to dismiss and his own motion for summary judgment. (Dkt. 14.) The Court denied Plaintiff's request to file excess pages but construed it as additionally requesting leave to file a motion for summary judgment; that request was granted, and an amended briefing schedule issued. (02/02/2022 Docket Order.) However, upon further reviewing the record, the Court concluded that Plaintiff's summary judgment motion was premature and directed the parties to abide by the earlier briefing schedule. (02/03/2022 Docket Order; *see also* 02/16/2022 Docket Order ("[T]he Court reiterates that

Plaintiff's motion for summary judgment is premature at this time.").) Defendants' motion to dismiss was fully briefed on February 25, 2022. (*See* Dkts. 24, 25, 26.)

On June 14 and 15, 2022, parties filed letters regarding the Second Circuit's decision issued on June 14, 2022—*Donnelly v. Controlled Application Review & Resolution Program Unit*, 37 F.4th 44 (2d. Cir. 2022)—and its effect on the present action. (Dkts. 30, 31.) In his letter, among other things, Plaintiff requested a stay of the proceedings to allow him another opportunity to exhaust his administrative remedies and appear at his Form N-336 hearing. (Dkt. 31.) The Court urged Defendants to consider this request. (June 17, 2022 Docket Order.) While the Court was awaiting response from Defendants, Plaintiff filed a motion to expedite the Court's decision on Defendants' motion to dismiss arguing that "the delay of issuing the opinion and the decision destroy my future to try to get a wife from overseas, observing my age is almost 60 years, no wife, no kids." (Dkt. 32.) On July 1, 2022, Defendants informed the Court that they were declining Plaintiff's request for another opportunity to exhaust his administrative remedies. (Dkt. 33.) On the same day, the Court issued an order denying Plaintiff's motion to expedite the Court's decision and advising the parties that it would take their letters regarding the effect of *Donnelly* under advisement together with the parties' briefing on Defendants' motion to dismiss.[5] (July 1, 2022 Docket Order.)

[5] The Court's order also included a warning to Plaintiff, based on a phone call received by chambers that day wherein Plaintiff raised his voice and demanded to speak with Judge Chen directly, that any further harassment of chambers staff and needless calls would result in sanctions. (07/01/2022 Docket Order.) In a July 3, 2022, letter, Plaintiff argued that the Court misrepresented the call and that Plaintiff had instead placed a "polite" call. (*See generally* Dkt. 35.) The Court does not accept Plaintiff's revisionist version of the phone call.

STANDARD OF REVIEW

Defendants move to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. Rule 12(b)(1)

Rule 12(b)(1) allows a defendant to move to dismiss a complaint for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). In reviewing a motion to dismiss under Rule 12(b)(1), courts must "accept as true all material factual allegations in the complaint," *Shipping Fin. Serv. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (citation omitted), while refraining from "drawing from the pleadings inferences favorable to the party asserting [jurisdiction]," *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (citation omitted). The party "asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "Notwithstanding the liberal pleading standard afforded *pro se* litigants, federal courts are courts of limited jurisdiction and may not preside over cases if subject matter jurisdiction is lacking." *Chestnut v. Wells Fargo Bank, N.A.*, No. 11-CV-3369 (JS) (ARL), 2012 WL 1657362, at *3 (E.D.N.Y. May 7, 2012) (citing *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700–01 (2d Cir. 2000)). District courts may consider evidence outside of the pleadings when resolving a motion to dismiss under Rule 12(b)(1). *See Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *Makoraova*, 201 F.3d at 113)). "The task of the district court is to determine whether the [p]leading alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (cleaned up).

II. Rule 12(b)(6)

Rule 12(b)(6) allows a defendant to move to dismiss a complaint for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under

Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citation omitted). "In addressing the sufficiency of a complaint, [the Court] accept[s] as true all factual allegations and draw[s] from them all reasonable inferences; but [the Court is] not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). Courts "liberally construe pleadings and briefs submitted by *pro se* litigants, reading such submissions to raise the strongest arguments they suggest." *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017).

DISCUSSION

I. Plaintiff's § 1421(c) Claim (Counts I and VII)

Plaintiff's § 1421(c) claim is not explicitly asserted in any of Plaintiff's numbered causes of action. However, because Plaintiff seeks review under the INA in Count I and seeks *de novo* review in Count VII, the Court construes those two counts to be asserting Plaintiff's § 1421(c) claim. Defendants seek to dismiss these claims pursuant to Rule 12(b)(6), based on Plaintiff having failed to exhaust his administrative remedies by not attending his Form N-336 hearing.

The parties agree that Plaintiff did not attend his Form N-336 hearing. As the Second Circuit recently held, this amounts to failure to exhaust administrative remedies and prevents

Plaintiff from raising his § 1421(c) claim because "§ 1421(c) is a mandatory claim-processing rule." *Donnelly*, 37 F.4th at 53. However, because "[o]bjections based on nonjurisdictional claim-processing rules may be waived or forfeited," *id.* at 54 (quoting *In re Indu Craft, Inc.*, 749 F.3d 107, 112 n.7 (2d Cir. 2014) (brackets in original)), the parties dispute whether Defendants properly preserved the objection, having waited until after Plaintiff filed the instant Complaint to raise it.

"The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017). "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Id.* (brackets omitted). Defendants have asserted an objection based on the claim-processing rule in their motion and therefore did not intentionally waive a known right. However, despite prior litigation, Defendants did not raise their objection until after Plaintiff filed this case. "[M]andatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point." *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (internal quotation marks omitted)). Thus, the sole question here is whether Defendants "forfeited [their] right to assert" that Plaintiff's refusal to attend his Form N-336 hearing bars his § 1421(c) claim "by failing to raise the issue" on two prior occasions: USCIS's final adjudication of Plaintiff's naturalization application and previous related litigation. *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004).[6] Plaintiff argues that Defendants' prior statements demonstrate their concession that Plaintiff had exhausted his administrative remedies. The Court agrees. As discussed, on June 24, 2021, USCIS issued its final decision denying Plaintiff's naturalization application. USCIS advised Plaintiff that the "decision constitute[d] a final administrative denial

[6] To be sure, "this issue easily could have been avoided" "[b]ut unfortunately . . . the government has chosen to stand firm in enforcing the [exhaustion] requirement in this matter." *United States v. Bess*, 455 F. Supp. 3d 53, 59 (W.D.N.Y. 2020).

of [Plaintiff's] naturalization application" and that Plaintiff could "request judicial review" of the denial by filing a petition in this District. *See Saleh II*, Dkt. 52-2, at 6. While appearing before the Second Circuit, government counsel reiterated this in a letter that advised the court that Plaintiff's naturalization application had been denied, that the denial "complete[d] the administrative adjudication of [Plaintiff's] naturalization application," and that Plaintiff could "now seek judicial review of USCIS's determination pursuant to 8 U.S.C. § 1421(c)." *See Saleh II*, Dkt. 52-1, at 1.

Defendants have offered no explanation to justify their late objection except that these prior statements are "boilerplate" and irrelevant because Plaintiff's "failure to attend his hearing was not at issue" in the prior litigation. (Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def. Mem."), Dkt. 24-1, at 9; Defendant's Reply Memorandum ("Def. Reply"), Dkt. 26, at 6.) That argument is disingenuous. Although Plaintiff's refusal to attend his Form N-336 hearing may not have been at the center of Plaintiff's earlier case, it clearly was an issue litigated by the parties. In *Saleh I*, Plaintiff sought an order from the Southern District of New York "directing USCIS to hold a hearing on his Form N-336 application within the 180-day statutory period for doing so," which USCIS opposed because Plaintiff's hearing had been scheduled. *Saleh I*, 2021 WL 1640449, at *4. The district court denied Plaintiff's motion, *id.*, at *7, and "inform[ed] him that failure to attend could result in further delays in his case," *Saleh II*, 2021 WL 4978574, at *3. After the date for Plaintiff's administrative hearing had passed, Plaintiff informed the court "that he had 'purposefully and intentionally' forgone his scheduled Form N-336 hearing, as he was 'pretty sure without any doubt [that] USCIS lost the jurisdiction and the power to adjudicate his application.'" *Saleh I*, 2021 WL 1640449, at *4. The court found that Plaintiff had failed to exhaust his administrative remedies because, among other things, Plaintiff did "not demonstrate[]

that his application [was] denied pursuant to a hearing on his Form N-336 application." *Id.* at 10. The Second Circuit affirmed. *See Saleh II*, 2021 WL 4978574, at *2.

Having previously administratively adjudicated Plaintiff's naturalization application on the merits to its conclusion, litigated closely related issues in federal courts, and advised Plaintiff (and the Second Circuit) that he could now seek review in this Court—all while fully aware that Plaintiff did not appear at his Form N-336 hearing—Defendants have waited too long to argue that Plaintiff failed to exhaust his administrative remedies. Defendants have thus forfeited their claim-processing rule objection to Plaintiff's § 1421(c) claim. *See Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1848 (2019) (defendant forfeited its argument that plaintiff failed to exhaust administrative remedies because defendant "did not raise it until after an entire round of appeals all the way to the Supreme Court." (internal quotation marks omitted)); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005) (because the government failed to raise a mandatory claim-processing defense "until after the District Court had reached the merits, it forfeited that defense."). Defendants' motion to dismiss Plaintiff's § 1421(c) claim (Counts I and VII) for failure to state a claim is therefore denied.[7]

II. Remaining Claims (Counts II-VI)

Defendants argue that all of Plaintiff's CARRP-related claims must be dismissed pursuant to Rule 12(b)(1) for lack of standing because Plaintiff cannot demonstrate injury-in-fact and traceability. Defendants' argument appears to be based on their conclusion that Plaintiff's allegations regarding USCIS subjecting him to CARRP are "speculative and conclusory." (Def. Mem., Dkt. 24-1, at 11.) But the Complaint—which is detailed and describes Plaintiff's lengthy

[7] Defendants also argue that Plaintiff's failure to exhaust his administrative remedies is a jurisdictional bar to his claims. Those arguments are now precluded by *Donnelly*. 37 F.4th at 54.

history with USCIS and other government agencies—certainly contains enough factual allegations to survive a motion to dismiss. This is especially true given that the Court must accept the allegations in the complaint as true and the allegedly secretive nature of CARRP makes it virtually impossible for an applicant to determine with any certainty that he is in fact subject to it. *See DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1248 (2d Cir. 1987) ("[W]here . . . information needed to fill out plaintiff's complaint lies peculiarly within the opposing parties' knowledge, the general rule disfavoring allegations founded upon belief ought not to be rigidly enforced.").

Defendants further argue that even if Plaintiff suffered harm from CARRP, the Court cannot fashion a remedy "when any alleged delay" of Plaintiff's naturalization application "has ended and USICS [has] reached a decision." (Def. Mem., Dkt. 24-1, at 11.) But Plaintiff does not challenge CARRP solely based on the delay in USCIS adjudicating his Form N-400 application; Plaintiff also challenges the CARRP "extreme vetting" process applied by USCIS to adjudicate his application, which he asserts resulted in the final denial of his naturalization application. *See Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 33 (D.D.C. 2018) ("This is a case in which the claimed injury arises from an alleged failure on the part of [defendants] to adhere to a prescribed process in adjudicating the plaintiff's" application. (internal quotation marks omitted)). The Court *can* redress these injuries by finding that CARRP and its application to Plaintiff are unlawful.

Defendants next attack certain claims on various separate grounds. The Court addresses each in turn. First, Defendants argue that Plaintiff's APA claims must be dismissed pursuant to Rule 12(b)(1) because § 1421(c) is an adequate remedy to challenge CARRP and its application. (Def. Mem., Dkt. 24-1, at 11–12.) The Court agrees. The APA provides for judicial review of a

"final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "Section 1421(c) offers an expansive form of judicial review through which [p]laintiffs [can] raise systemic challenges . . . ." *Moya v. United States Dep't of Homeland Security*, 975 F.3d 120, 127 (2d Cir. 2020). Under section 1421(c), the "district court review[s] an agency decision de novo and make[s] its own findings of fact." *Chan v. Gantner*, 464 F.3d 289, 291 (2d Cir. 2006). This encompasses "systemic constitutional or statutory challenges to the naturalization process," and "the district court has the factfinding and record-developing capabilities to create an adequate record as to the pattern of systemic violations." *Moya*, 975 F.3d at 127 (internal quotation marks omitted); *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 19 (2012) (holding that plaintiffs could not circumvent an administrative review scheme that "fully accommodates [their] potential need to establish facts relevant to [their] constitutional challenge"). Accordingly, Plaintiff's claims brought under the APA (Counts III, IV, V,[8] and VI) are dismissed with prejudice.

[8] Plaintiff's procedural due process claim is asserted under the APA and is therefore dismissed together with the other APA claims. Moreover, courts are divided on whether applicants have a liberty or property interest in seeing their immigration applications adjudicated pursuant to a specific procedure, and the Second Circuit has not decided the issue yet. *Compare Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) ("The decision of whether to approve the I-130 petition is a nondiscretionary one because determinations that require application of law to factual determinations are nondiscretionary." (citations and internal quotation marks omitted)), and *Shoaibi v. Mayorkas*, 20-CV-7121 (FPG), 2021 WL 4912951, at *6 (W.D.N.Y. Oct. 21, 2021) ("[O]nce Congress—or, in this case, its delegee, USCIS—sets forth a process for adjudicating immigration decisions, it must, at the least, follow that process. In other words, it is not that Shoaibi is *entitled* to a grant of his I-130 Petition, but that he is entitled to a *fair adjudication* of the I-130 Petition.") (emphasis in original), and *Wagafe*, 2017 WL 2671254, at *8 ("Here, Plaintiffs allege that all the statutory requirements have been complied with, and the application of CARRP's extra-statutory requirements deprives Plaintiffs of the right to which they are entitled. This is sufficient to allege a violation of due process."), *with Parella v. Johnson*, 15-CV-863 (LEK) (DJS), 2016 WL 3566861, at *7 n.7 (N.D.N.Y. Jun. 27, 2016) (no protected liberty interest "[b]ecause Plaintiff is not entitled to approval of his I-130 petition, and in fact is barred from approval in the absence of discretionary relief from the Secretary."), *and Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 313 (D.D.C. 2017) ("[T]he [c]ourt has not found any support for the proposition that [an I-130 applicant] has a constitutionally protected liberty or property interest in his application being

However, because the Court can decide Plaintiff's challenges to CARRP based on the Court's *de novo* review pursuant to § 1421(c), and because Plaintiff's constitutional claims survive as discussed below, Plaintiff's claims for declaratory and injunctive relief survive as well. *See Ahmed v. Mayorkas*, No. 21-CV-362 (GLS), 2022 WL 1567291, at *1 n.4 (N.D.N.Y. May 18, 2022) ("[B]ecause [plaintiff] has an independent source of jurisdiction under Section 1421(c), his claim for declaratory relief cannot be dismissed under Fed. R. Civ. P. 12(b)(1).").

Second, Defendants argue that Plaintiff cannot rely on the Naturalization Clause—Article I, Section 8, Clause 4 of the U.S. Constitution—otherwise known as the "uniformity requirement," because that clause does not grant a private right of action and, even if CARRP violated that clause, Congress, not Plaintiffs, would be the injured party. Other district courts have recently rejected this argument. For example, in *Wagafe v. Trump*, the district court found that plaintiffs have standing to challenge CARRP as "an extra-statutory, unlawful, and unconstitutional program" applied to the adjudication of their naturalization applications. No. C-17-0094 (RAJ), 2017 WL 2671254, at *1, *12 (W.D. Wa. Jun. 17, 2017). In another suit challenging CAARP, the district court in Washington, D.C. found that "plaintiffs had standing to assert a violation of the Naturalization Clause because they suffered injury from having to undergo additional requirements not imposed by Congress." *Kirwa v. United States Dep't of Defense*, 285 F. Supp. 3d 257, 273 (D.D.C. 2018). Similarly, in *Jafarzadeh*, the plaintiffs, who were lawful permanent residents seeking to adjust their status to U.S. citizenship, sought "invalidation of CARRP and a new adjudication free of CARRP." 321 F. Supp. 3d at 26. The district court found the government's claim that "only Congress would be injured by" a violation of the Naturalization Clause "odd"

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adjudicated in accordance with the law, given that the ultimate determination of whether his application will be granted is discretionary."). The Court does not need to reach that issue here.

because "[h]istory provides a list as long as one's arm of cases in which private parties alleged injuries sufficient to bring separation of powers claims—and, indeed, often obtained relief." *Id.* at 35 (collecting cases). The Court finds the reasoning of *Wagafe*, *Kirwa*, and *Jafarzadeh* to be persuasive. Defendants' motion to dismiss the Naturalization Clause (Count II) claim is therefore denied.

CONCLUSION

For the reasons stated in this Memorandum and Order, Defendants' motion to dismiss is granted in part and denied and in part. Plaintiff's claims in Counts I, II, and VII may proceed, along with his requests for declaratory judgment and injunctive relief relating to his § 1421(c) claims. All other claims are dismissed with prejudice.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: September 28, 2022
Brooklyn, New York