UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROSHANAK ROSHANDEL; VAFA GHAZI-MOGHADDAM; HAWO AHMED; and LIN HUANG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security; EMILIO GONZALEZ, Director, U.S. Citizenship and Immigration Services; ANN CORSANO, Director, District 20, U.S. Citizenship and Immigration Services; JULIA HARRISON, Director, Seattle Field Office, U.S. Citizenship and Immigration Services; MICHAEL MUKASEY, Attorney General, U.S. Department of Justice; ROBERT MUELLER III, Director, Federal Bureau of Investigation; and the UNITED STATES OF AMERICA,

Defendants.

No. C07-1739 MJP

PLAINTIFFS' OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS AND/OR REMAND TO USCIS

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION AND SUMMARY

Plaintiffs are longtime lawful permanent residents of the United States seeking to be naturalized as U.S. citizens. They seek to pledge allegiance to the United States and participate fully in civic society, but have been prevented from doing so by unlawful and unreasonable delays in the naturalization process. They challenge the delays, both individually and on behalf of other similarly situated naturalization applicants residing in this judicial district (the "Proposed Class").[1]

Defendants are legally required to adjudicate naturalization applications within 120 days of their examination:

> A decision to grant or deny the application ***shall be made*** at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization under § 335.2.

8 C.F.R. § 335.3(a) (emphasis added). Yet defendants have unlawfully and unreasonably delayed rendering a decision on plaintiffs' naturalization applications ***for several years.*** They did so on the ground that a so-called "name check"—a security procedure implemented without requisite public notice and comment—remains pending.

As in other similar cases, within a few weeks of being served with the complaint in this action, defendants completed plaintiffs' name checks. Defendants' transparent attempt to moot plaintiffs' claims only underscores the need for classwide relief. Defendants simply cannot justify the systemic delays in processing plaintiffs' naturalization applications and those of the Proposed Class. Indeed, they have not moved to dismiss plaintiffs' claims under the

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[1] Plaintiffs have moved the Court for an order certifying the Proposed Class as follows:

> All lawful permanent residents of the United States residing in the Western District of Washington who have submitted naturalization applications to [U.S. Citizenship and Immigration Services ("CIS")] but whose naturalization applications have not been determined within 120 days of the date of their initial examination due to the pendency of a "name check."

(Motion for Class Certification (Dkt. No. 4) at 2.)

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Immigration and Nationality Act (the "INA"), effectively conceding liability. Instead, presumably in an effort to evade judicial review, they ask this Court to remand plaintiffs' applications to CIS to be adjudicated, thus mooting the class representatives' claims, within 30 days. But systemic problems require systemic relief. In keeping with its prior practice in similar cases, the Court should retain jurisdiction over plaintiffs' applications and order defendants to show cause why the Court should not naturalize them after the Court rules on plaintiffs' pending motion for class certification.

Defendants' motion should be denied.

II. LEGAL FRAMEWORK

A. The Naturalization Process.

Federal immigration law allows lawful permanent residents to become U.S. citizens through a process known as naturalization. The naturalization process is administered by CIS, a division of the U.S. Department of Homeland Security.

Under the INA, an applicant for naturalization must meet specified requirements. First, in most cases, an applicant must be a lawful permanent resident for at least five years and meet certain residence and continuous physical presence requirements. 8 U.S.C. § 1427(a)-(c). Second, the applicant must be of good moral character. 8 U.S.C. § 1427(d). Finally, the applicant must demonstrate an understanding of the English language and U.S. history and government. 8 U.S.C. § 1423.

An applicant demonstrates eligibility for naturalization through a process set forth in the INA and related implementing regulations. The applicant first submits a naturalization application, known as Form N-400. 8 U.S.C. § 1445; 8 C.F.R. §§ 334.1, 334.2. The applicant must then appear for an interview, referred to in the statute and regulations as an "examination," before a CIS officer. 8 U.S.C. § 1446(b); 8 C.F.R. § 335.2. If the CIS officer confirms that the applicant has complied with all statutory requirements, naturalization is mandatory. 8 C.F.R. § 335.3(a) ("The Service officer ***shall grant*** the application if the applicant has complied with all

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requirements for naturalization under this chapter." (emphasis added)). Whatever the outcome of the examination, CIS ***must*** render a decision on a naturalization application within 120 days of the date of the examination:

> A decision to grant or deny the application ***shall be made*** at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization under § 335.2.

8 C.F.R. § 335.3(a) (emphasis added).

When CIS fails to timely render a decision on a naturalization application, the applicant "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. § 1447(b). If a naturalization application is not granted at the time of the naturalization examination, CIS is required to inform the applicant of the remedies available under 8 U.S.C. § 1447(b). 8 U.S.C. § 1446(b) (CIS officer "shall, ***at the examination***, inform the applicant of the remedies available to the applicant under section 1447 of this title") (emphasis added).

If a naturalization applicant seeks judicial review under 8 U.S.C. § 1447(b), the district court gains exclusive jurisdiction over the application. See United States v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004). Remedies available under § 1447(b) are limited—the district court may either determine the matter itself or remand the application back to CIS with appropriate instructions. See 8 U.S.C. § 1447(b).

B. Name Checks.

While the naturalization application is pending, CIS conducts a "personal investigation" of the applicant in the "vicinity or vicinities" in which the applicant has lived and worked. 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1. Such investigation "shall consist, at a minimum, of a review of all pertinent records, police department checks, and a neighborhood investigation," although the last procedure may be waived by CIS. 8 C.F.R. § 335.1. A separate regulation requires CIS to complete a "criminal background check" ***before*** scheduling the naturalization

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examination.[2] 8 C.F.R. § 335.2(b). The substantive content of a "criminal background check" is not defined in the INA or regulations.

In 2002, without promulgating any regulations, CIS dramatically altered the naturalization process by requiring that all applicants pass a "name check" conducted by the FBI before an application would be approved. (Complaint ¶ 41.) A name check is a search of law enforcement records based on the applicant's name. (Id.) Name checks do not appear to be designed to determine whether an applicant has a criminal history, but rather whether any permutation of the applicant's name appears in any law enforcement record for any reason, e.g., because the applicant witnessed a crime.

Requiring name checks for naturalization applicants has led to well-documented, systemic delays in the naturalization process. According to the government's own statistics, as of May 2007, there were 211,341 naturalization applications nationwide that had been pending for more than 90 days due to the FBI name check; 106,738 applications had been pending for more than one year. See CIS Ombudsman's 2007 Annual Report to Congress at 37, available at http://www.dhs.gov/xabout/structure/gc_1183751418157.shtm. As of June 2007, there were 31,144 naturalization cases nationwide that had been pending for more than 33 months due to the FBI name check. Id. The number of delayed applications increased by 93,358 from 2006 to 2007. Id.

[2] Defendants admit that plaintiffs' naturalization examinations preceded processing of their name checks. See Government's Motion to Dismiss and/or Remand to USCIS ("MTD") (Dkt. No. 9) at 3.). This suggests that CIS itself did not view a name check as part of the Criminal Background Check that must be completed ***before*** the examination.

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III. FACTUAL BACKGROUND[3]

A. Named Plaintiffs.

1. Roshanak Roshandel.

Plaintiff Roshanak Roshandel is a citizen of Iran. Dr. Roshandel came to the United States on a student visa in 1996[4] and earned her undergraduate, masters, and doctoral degrees in this country. She lives in Bellevue and works as an assistant professor in the Computer Science and Software Engineering Department at Seattle University.

Dr. Roshandel has been a lawful permanent resident of the United States since May 12, 2001. She applied for naturalization on March 16, 2004 and passed her naturalization examination on July 22, 2004. Though more than ***three years*** have elapsed since her naturalization examination, Dr. Roshandel's application remains pending. She was not informed of the remedies available under 8 U.S.C. § 1447(b) at the time of her naturalization examination.

2. Vafa Ghazi-Moghaddam.

Plaintiff Vafa Ghazi-Moghaddam is a citizen of Iran. Dr. Ghazi-Moghaddam came to the United States on a student visa in 1991 to pursue a doctoral degree at the University of Minnesota. He lives in Seattle and works as an electrical engineer for a California software company developing wireless technologies.

Dr. Ghazi-Moghaddam has been a lawful permanent resident of the United States since 1999. He applied for naturalization on March 15, 2004 and passed his naturalization examination on October 25, 2004. Though more than ***three years*** have elapsed since his naturalization examination, Dr. Ghazi-Moghaddam's application remains pending. He was not

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[3] Unless otherwise noted, the following background facts are taken from plaintiffs' complaint.

[4] In their complaint, plaintiffs alleged that Dr. Roshandel came to the United States in 1999. The correct year is 1996.

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informed of the remedies available under 8 U.S.C. § 1447(b) at the time of his naturalization examination.

3. Hawo Ahmed.

Plaintiff Hawo Ahmed is a citizen of Somalia. Ms. Ahmed came to the United States as a refugee in 2000 at age 14, along with her mother and sisters. Her status was later adjusted to lawful permanent resident retroactive to March 15, 2000. Ms. Ahmed resides in SeaTac and is studying education at Highline Community College.

Ms. Ahmed applied for naturalization on July 25, 2005 and passed her naturalization examination on November 17, 2005. Though more than ***two years*** have elapsed since her naturalization examination, Ms. Ahmed's application remains pending.

4. Lin Huang.

Plaintiff Lin Huang is a citizen of China. Ms. Huang has been a lawful permanent resident of the United States since December 29, 1996. She resides in Renton with her husband and their two children.

Ms. Huang applied for naturalization on March 22, 2005 and passed her naturalization examination on September 20, 2005. Though more than ***two years*** have elapsed since her naturalization examination, Ms. Huang's application remains pending.

B. Plaintiffs' Name Checks Are Complete.

This case was filed on October 29, 2007. (See Complaint (Dkt. No. 1).) According to defendants, plaintiffs' name checks were all completed by November 17, 2007. (See Cannon Decl. (Dkt. No. 9-3) ¶¶ 41-44.)

Defendants have not disclosed the results of plaintiffs' name checks and have resisted providing this information to plaintiffs. Defendants did not provide copies of documents concerning the results of plaintiffs' name checks in their initial disclosures. See Fed. R. Civ. P. 26(a)(1)(B) (requiring disclosure of documents that party "may use" to support defense). Plaintiffs have requested that defendants supplement their initial disclosures to include this

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information. (See Day Decl., Ex. A (letter from Day to Safavi and Cohen dated January 23, 2008), at 1.) To date, defendants have refused to do so. (See id., Ex. B (letter from Cohen to Day dated January 24, 2008), at 1.)

Perhaps more troubling is defendants' apparent failure to produce complete copies of the administrative record. Defendants purported to produce complete copies of plaintiffs' A-files—the CIS files related to plaintiffs' naturalization applications—as part of their initial disclosures. (See Day Decl., Ex. D (excerpt from defendants' initial disclosures).) Yet the copies produced appear to be incomplete, as they contain no information concerning the results of plaintiffs' name checks. (Cf. Walk Decl. (Dkt. No. 10) ¶¶ 3-6 (stating that "administrative file" reflects completion of plaintiffs' name checks); Cannon Decl. (Dkt. No. 9-3) ¶¶ 41-44 (results of plaintiffs' name checks forwarded to USCIS).) Plaintiffs have raised this issue on two occasions and have requested complete copies of plaintiffs' A-files, but have received no response. (See Day Decl., Exs. B & C (letters from Day to Safavi and Cohen dated January 23, 2008 and January 31, 2008.)

Plaintiffs recently issued discovery requests seeking the results of plaintiffs' name checks. (See id., Ex. E.) Defendants' response is due on February 25, 2008, several days after defendants' motion to dismiss is noted for consideration. Plaintiffs respectfully request leave to supplement their opposition to defendants' motion to remand, if necessary, once they receive defendants' discovery responses.

IV. ARGUMENT

A motion to dismiss under Rule 12(b)(6) should be granted only if the complaint fails to set forth facts sufficient to establish a plausible right to relief. See Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). For the purposes of a motion to dismiss, the complaint is construed in a light most favorable to plaintiffs and all material factual allegations are taken as true. Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).

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A. Defendants Concede That Plaintiffs Have Stated a Claim Under the INA.

In Count I of their complaint, plaintiffs allege that CIS failed to adjudicate their naturalization applications, and those of the Proposed Class, within 120 days of their naturalization examinations. (Complaint ¶¶ 65-68.) Defendants have not moved to dismiss Count I. Instead, they ask the Court to remand plaintiffs' naturalization applications to CIS to be adjudicated within 30 days. (MTD at 7.)

Defendants' arguments in support of remand should be rejected. First, defendants are simply wrong that "nothing . . . compels USCIS to adjudicate a naturalization petition within 120 days." (MTD at 6.) The plain text of the regulations governing the naturalization process set forth a mandatory, nondiscretionary timeline for CIS to act on naturalization applications:

> A decision to grant or deny the application ***shall be made*** at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization under § 335.2.

8 C.F.R. § 335.3(a) (emphasis added); see W. Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996) ("[R]egulations have the force and effect of law.").

Second, defendants argue that remand is appropriate "in deference to the agency's expertise with respect to adjudicating the issues inherent in such applications." (MTD at 6.) Naturalization, however, is ***mandatory and nondiscretionary*** when an applicant meets all statutory eligibility criteria. 8 C.F.R. § 335.3(a). Moreover, district courts have long had authority over naturalization. Congress created a statutory remedy under 8 U.S.C. § 1447(b) to address the problem of agency inaction and preserve the longstanding role of the federal courts in the naturalization process. See, e.g., Etape v. Chertoff, 497 F.3d 379, 386 (4th Cir. 2007) ("Congress recognized the long-standing power the district courts had possessed over naturalization applications and so provided in the new statute that district courts retained their power to review an application if an applicant so chose."). To date, defendants have not

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disclosed the results of plaintiffs' name checks and identify no "issues" in plaintiffs' applications that require special "agency expertise."[5]

Finally, defendants contend that the Court should not reach the merits of plaintiffs' applications because it "does not have the benefit of discovery by USCIS or a recommendation by USCIS." (MTD at 7.) In a similar vein, defendants suggest that CIS should be permitted to "complete the required investigations to create records on which any review of any of its decisions, if necessary, could be based[.]" (Id.) Defendants fail to explain, however, why they cannot provide the Court with such a recommendation or disclose the results of plaintiffs' name checks, nor do they explain what "required investigations" remain to be completed. Plaintiffs' name checks, by defendants' own admission, are complete, leaving no further hurdles to naturalization.

Defendants' motion to remand should also be denied to avoid prejudice to the Proposed Class. Defendants may attempt to moot the named plaintiffs' claims before the Court can reach a decision on plaintiffs' pending motion for class certification. See Reynolds v. Giuliani, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) ("The danger of mootness is magnified by the fact that defendants have the ability to moot the claims of the named plaintiffs, thereby evading judicial

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[5] Such an absence of evidence has been described by another court in this district as "fatal" to a defendant's position:

> The most salient feature of the Government's evidence is that there is no evidence whatsoever that explains why Mr. Amirparviz's application has languished at USCIS for almost four years. Has the FBI discovered something about Mr. Amirparviz's background that has required years of additional investigation? Is Mr. Amirparviz in a category of applicants who are subjected to a more extensive name check process? Is there some reason that Mr. Amirparviz's name check has yielded no results in more than three years, while his wife's name check cleared in seven days? The court has no answers to these questions, because the Government has presented no evidence to answer them. The lack of evidence explaining the delay in adjudicating Mr. Amirparviz's application is fatal to the Government's position.

Amirparviz v. Mukasey, No. C07-1325, slip op. at 12 (W.D. Wash. Feb. 4, 2008) (Jones, J.) (copy attached as Ex. 1).

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review of their conduct."). Noting this very problem in naturalization delay cases, Judge Baylson of the Eastern District of Pennsylvania held:

> Because the government is consistently taking steps to make cases moot before a merits resolution is reached, the Court will temporarily enjoin the government . . . from taking any action on the above-captioned cases moot. This action is necessary because, otherwise, this judicial revolving door will continue form case to case and judge to judge.

Mocanu v. Mueller, No. 07-0445, slip op. at 12 (E.D. Pa. Jan. 14, 2008) (copy attached as Ex. 2). The delays experienced by the plaintiffs in this case are not isolated events but part of an unlawful pattern that deprives numerous lawful permanent residents in this judicial district of the opportunity to participate fully in civic society. This systemic problem calls out for a systemic solution. The Court should retain jurisdiction over named plaintiffs' claims to prevent defendants from derailing classwide relief.

Specifically, plaintiffs request that the Court determine their naturalization applications in lieu of remand. (Complaint ¶ 67 ("This Court should grant proposed plaintiff class members' naturalization applications pursuant to 8 U.S.C. § 1447(b), because each proposed plaintiff class member meets all requirements for naturalization and is therefore entitled to be naturalized as a United States citizen.").) This Court has authorized the following procedure in similar cases:

> The Court's standard practice in naturalization cases like this one is to require Defendants to show cause why Plaintiff should not be naturalized. The Court therefore ORDERS Defendants to show cause within 30 days why the Court should not grant Plaintiff's application for naturalization by the authority of the Immigration and Nationality Act, which confers jurisdiction to this Court to compel agency action on a naturalization application or make a ruling on the merits "[i]f there is a failure to make a determination . . . before the end of the 120-day period after the date on which the examination is conducted . . . ." 8 U.S.C. § 1447(b). Defendants shall respond to this order with a written pleading that states: (1) all reasons that Plaintiff's naturalization application has not been approved; (2) all reasons that the Court should not approve the application immediately; and, if appropriate (3) a proposed plan for promptly deciding Plaintiff's naturalization application.

Kumar v. Gonzalez, No. C07-1335-MJP, Order to Show Cause (Oct. 16, 2007) (copy attached as Ex. 3). In keeping with this Court's prior practice, plaintiffs request that the Court order

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defendants to show cause why plaintiffs' naturalization applications should not be granted as soon as the Court rules on plaintiffs' motion for class certification.[6]

B. Plaintiffs State a Claim of Unreasonable Delay Under the APA.

In Count II of their complaint, plaintiffs assert that the unlawful and unreasonable delays in the naturalization process caused by name checks violate the Administrative Procedures Act (the "APA"). (Complaint ¶¶ 69-73.) The APA authorizes the Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "Agency action" includes "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, ***or failure to act***." 5 U.S.C. § 551(13) (emphasis added). Even when no timeframe is specified in a statute or regulation, agencies are required to conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555(b).

The Ninth Circuit has adopted a six-factor test for determining when an agency delay is unreasonable:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Brower v. Evans, 257 F.3d 1058, 1068 (9th Cir. 2001) (brackets in original) (quoting Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (quoting Telecomms. Research & Action v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (setting forth six factors commonly

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[6] In the alternative, if the Court is inclined to remand plaintiffs' applications to CIS before a ruling on class certification, plaintiffs intend to amend their complaint to add new class representatives. See Fed. R. Civ. P. 15(a)(1).

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referred to as "TRAC factors"))). "What constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." Gelfer v. Chertoff, No. C 06-06724, 2007 WL 902382, at *2 (N.D. Cal. Mar. 22, 2007) (internal quotation marks and citation omitted).

The undisputed multiyear delay in adjudicating plaintiffs' naturalization applications alone establishes a prima facie case of unreasonable delay, especially when measured against the 120-day deadline for CIS to act on naturalization applications. See Aslam v. Mukasey, No. 1:07-CV-331, 2008 U.S. Dist. LEXIS 5616, at *18 (E.D. Va. Jan. 25, 2008) ("As the third anniversary of his application submission nears, the Court concludes that Aslam has established a prima facie case of unreasonable delay." (citing Yu v. Brown, 36 F. Supp. 2d 922, 932 (D.N.M. 1999))). Plaintiffs have also pleaded facts which, if proven, entitle them to relief under the TRAC factors. Plaintiffs allege, inter alia, that they have experienced unexplained and unreasonable multiyear delays in the naturalization process due to pending name checks (see Complaint ¶¶ 2, 8-27); that CIS has far exceeded the 120-day deadline to adjudicate their naturalization applications (see Complaint ¶¶ 2, 38); that the FBI has a policy, pattern, and practice of unlawfully withholding and unreasonably delaying the completion of name checks, with the full knowledge that CIS will not adjudicate the naturalization applications of the proposed plaintiff class until name checks are completed (see Complaint ¶ 51); and that plaintiffs have suffered injury to their welfare as a result of defendants' unlawful conduct (see Complaint ¶¶ 3, 12, 17, 22, 27). By these allegations, plaintiffs have stated a cause of action for unreasonable delay under the APA. See Fed. R. Civ. P. 8(a)(2) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief").

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1. Plaintiffs Have Properly Alleged Claims Against CIS Under Both 8 U.S.C. § 1447(b) and the APA.

Ironically, after arguing that plaintiffs' claims under 8 U.S.C. § 1447(b) are essentially moot, defendants go on to claim that plaintiffs' unreasonable delay claim under the APA fails because § 1447(b) provides "an adequate remedy in court." (MTD at 9.)

Section 1447(b) provides judicial review for individuals whose applications are not adjudicated within 120 days of their interviews, but does not provide the systemic relief sought in this proposed class action. Plaintiffs have put into issue defendants' policy and practice of unreasonably delaying naturalization adjudications for hundreds of applicants. This Court's consideration of plaintiffs' unreasonable delay claim will necessarily include discovery and presentation of evidence concerning defendants' practices and policies, analysis of whether the same objectives could be met in a more efficient and timely manner, evaluating the current practices' actual value to national security, and balancing the relative hardships to the parties. Resolution of these questions on a classwide basis will save judicial, government, and private resources that might otherwise be devoted to seriatim 1447(b) petitions and provide opportunities for addressing root causes of the delay that would be outside the scope of an individual § 1447(b) petition. See, e.g., Mocanu, slip op. at 7-8, 11 (holding that it is "necessary and proper" for court to "inquire into the availability and reasonableness of administrative remedies to these cases" under APA and noting that naturalization delay cases would benefit from "class action treatment, MDL consolidation, [or] single district consolidation"). Most importantly, the remedies available under the APA—including the Court's power to "compel agency action"—can provide relief to members of the Proposed Class who do not have the resources to bring individual petitions that prompt the government to expedite their name checks, and who are unaware of the remedies available under § 1447(b) due to defendants' failure to provide statutorily required notice. See infra Part IV.D.

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When, as here, a class of plaintiffs seeks systemic relief, the existence of a more specific remedial scheme does not thwart district court jurisdiction. See, e.g., McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (statute providing for administrative review and precluding district court review of agency decisions denying "special agricultural worker" status did not strip district court of jurisdiction over class action due process claim challenging agency's practices and procedures in processing of such applications).

Other district courts have assumed APA jurisdiction over claims challenging delays in the adjudication of naturalization petitions. In Yakubova v. Chertoff, No. 06-CV-3203 (E.D.N.Y. Nov. 2, 2006), the district court retained jurisdiction over class claims of unreasonable delay under the APA without ruling on the government's argument that 8 U.S.C. § 1447(b) provided an exclusive remedy. Slip op. at 7 (retaining jurisdiction of related claim to avoid waste of judicial resources) (copy attached hereto as Ex. 4); Mocanu, slip op. at 11 (reaching "tentative conclusion that summary judgment as to liability will likely be granted in favor of Plaintiffs in these cases under the [APA]. 5 U.S.C. § 706(1).") (copy attached as Ex. 2). Section 1447(b) does not provide meaningful relief as to the broad systemic challenges brought on behalf of the Proposed Class, and therefore does not preclude review of plaintiffs' unreasonable delay claim under the APA.

Defendants cite United States v. Fausto, 484 U.S. 439 (1988), for the proposition that the availability of individual relief under § 1447(b) defeats plaintiffs' APA challenge. (MTD at 9.) Fausto involved a "comprehensive system for reviewing personnel action taken against federal employees" under the Civil Service Reform Act (the "CSRA"). 484 U.S. at 455. Under the CSRA, certain employees were excluded from "provisions establishing administrative and judicial review." Id. The Supreme Court held that employees excluded from the administrative and judicial review provisions could not circumvent that statutory scheme by bringing claims under another statute. Id. Here, unlike Fausto, plaintiffs are not ***excluded*** from seeking judicial review of agency action under the INA. To the contrary, 8 U.S.C. § 1447(b) ***creates*** district

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court jurisdiction. Allowing plaintiffs' claims under the APA to go forward does not undermine the INA's remedial scheme—the central concern in Fausto—but is entirely consistent with it.

Defendants' motion to dismiss plaintiffs' unreasonable delay claim against CIS on the ground that it is inconsistent with the INA should be denied.

2. Plaintiffs State a Claim of Unreasonable Delay Against the FBI.

The FBI has a mandatory duty to timely complete name checks. Even when no timeline is specified in a statute or regulations governing agency action, the APA imposes on ***all*** agencies a duty to conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555(b); see Dawoud v. Dep't of Homeland Sec., No. 3:06-CV-1730, 2007 WL 4547863, at *6 (N.D. Tex. Dec. 26, 2007) (denying motion to dismiss unreasonable delay claim against FBI); Ahmadi v. Chertoff, 522 F. Supp. 2d 816 (N.D. Tex. 2007) (same).

The FBI's mandatory duty to timely complete name checks also flows from the 1997 funding legislation and the implementing regulations that injected the FBI into the naturalization process by requiring that the FBI conduct a full criminal background check of a naturalization applicant before the CIS can complete its adjudication of the application. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448-49 (1997); 8 C.F.R. § 335.2(b). Other regulations require applicants to submit their fees to CIS, which in turn provides a portion of the fees to the FBI to complete the fingerprint and name checks. 8 C.F.R § 334.2; 72 Fed. Reg. 4888, 4899 (Feb. 1, 2007) (proposing increased fees for applicants based, in part, to "costs due to the FBI for background checks"). "[W]here Congress has conditioned CIS's mandatory action on the FBI's completion of background checks, and where applicants must pay the FBI, through CIS, to complete the background checks, the Court holds that Congress has, by implication, imposed on the FBI a mandatory duty to complete the background checks." Kaplan v. Chertoff, 481 F. Supp. 2d 370, 401 (E.D. Pa. 2007); see Al Daraji v. Monica, No. 07-1749, 2007 WL 2994608, at *3-*5 (E.D. Pa. Oct. 12, 2007); Dawoud, 2007 WL 4547863, at *6.

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C. Defendants' Arguments That the Name Check Delays Are Reasonable Should Be Rejected.

Relying on materials outside the complaint, defendants argue that the Court should dismiss (1) plaintiffs' unreasonable delay claim under the APA (Count II) on the ground that the delay is justified and (2) plaintiffs' notice claim under the INA (Count IV) on the ground that notice was properly given. (See MTD, Parts III.B.3, III.B.4, and III.D; Cannon Decl. (Dkt. No. 9-3) ¶¶ 4-40; Walk Decl. (Dkt. No. 10) ¶¶ 7-14.) The court may not consider materials outside the complaint unless the motion to dismiss is converted to a motion for summary judgment. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001). In a similar case in this district, the court refused to consider materials outside the pleadings on a motion to dismiss an unreasonable delay claim under the APA. See Chen v. Heinauer, No. C07-103RSL, 2007 WL 1468789, at *2 (W.D. Wash. May 18, 2007) (Lasnik, C.J.) ("[T]he question of whether the delay in adjudication of plaintiff's application has been reasonable is best left for another day."). Plaintiffs therefore respectfully request that the Court strike the following materials:

- Motion to Dismiss (Dkt. No. 9-1), Parts III.B.3, III.B.4, and III.D;
- Declaration of Michael Cannon (Dkt. No. 9-3) ¶¶ 4-40; and
- Declaration of Susan Walk (Dkt. No. 10) ¶¶ 7-14 and attached Exs. 1-8.[7]

If the Court chooses to consider these materials and treat the motion as one for summary judgment, plaintiffs must be provided an opportunity to discover and present evidence relevant to the motion. See Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated

[7] Plaintiffs are not moving to strike paragraphs 41-44 of the Declaration of Michael Cannon nor paragraphs 1-6 of the Declaration of Susan Walk, as the information therein is directed to defendants' motion to remand.

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as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

In any event, defendants offer only general information on the name check process. (See Cannon Decl. (Dkt. No. 9-3).) Nothing in Mr. Cannon's declaration explains why ***plaintiffs'*** name checks have taken so long. See Gelfer, 2007 WL 902382, at *2 (requiring showing of why applications were "particularly troublesome"); Sun v. Mueller, No. C07-0083RSL, 2007 WL 2751372, at *4-*5 (W.D. Wash. Sept. 19, 2007); Guoping Ma v. Gonzales, No. C07-122RSL, 2007 WL 2743395, at *7 (W.D. Wash. Sept. 17, 2007); Sun v. Gonzales, No. CV-07-0180-AMJ, 2007 WL 3548280 (E.D. Wash. Nov. 15, 2007); Chen v. Chertoff, No. C06-1760Z, 2007 WL 2570243, at *7 (W.D. Wash. Aug. 30, 2007) (more than three-year delay, without any particularized explanation, is unreasonable); Konchitsky v. Chertoff, No. C-07-00294, 2007 WL 2070325, at *6 (N.D. Cal. July 13, 2007) ("[W]ithout a particularized explanation for the delay, . . . more than two year delay of plaintiff's application [is] unreasonable as a matter of law."); Liu v. Chertoff, No. 2:06-cv-2808-RRB-EFB, 2007 WL 2023548, at *4 (E.D. Cal. July 11, 2007) (two-and-a-half-year delay not reasonable as matter of law, noting absence of "a more particular explanation by Defendants as to the cause of the delay," despite evidence of large volume of applications received and extensive background checks required to process them); Qiu v. Chertoff, No. C07-0578, 2007 WL 1831130, at *3 (N.D. Cal. June 25, 2007) (no explanation, other than pending FBI name check, why application "stagnant" for three years); Huang v. Chertoff, No. C 07-0277, 2007 WL 1831105, at *2 (N.D. Cal. June 25, 2007) (despite national security concerns and increased security checks since 9/11, more than two-year delay is unreasonable as matter of law if there is no particular explanation as to cause of delay); Singh v. Still, 470 F. Supp. 2d 1064, 1069 (N.D. Cal 2006) (noting that "the mere invocation of national security is not enough to render agency delay reasonable per se").

The Court should also reject defendants' argument that CIS cannot complete naturalization applications until a definitive response is received from the FBI. (MTD at 13.)

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See Singh, 470 F. Supp. 2d. at 1068 ("The critical issue is not whether a particular branch of the federal government is responsible for the delay; it is whether the individual petitioner versus the government qua government is responsible."); Paunescu v. INS, 76 F. Supp. 2d 896, 903 n.2 (N.D. Ill. 1999) (rejecting defendants' attempts "to deftly transfer blame and responsibility from one governmental entity to another" as a "shell game"; noting that defendants "are all arms of the United States of America, a defendant in the instant case"). Any other conclusion could result in the indefinite suspension of a naturalization application should the FBI fail to complete a name check.

Moreover, the regulations specifically provide for the completion of applications in situations in which even the fingerprint cards have been determined to be unclassifiable. 8 C.F.R. § 335.2(b)(3) (defining such situation as satisfying "definitive response").

Finally, defendants' invocation of national security as a justification for delay has been roundly rejected:

> The court readily acknowledges the importance of public safety and national security, but sees no connection between these concerns and this case. Mr. Amirparviz is living and working in the United States, and has been for almost thirteen years. If Mr. Amirparviz presents a threat to national security and public safety, the Government does not ameliorate that threat by delaying a decision on his I-485 application. . . . If the Government is concerned about public safety and national security, it should find a way to process name checks more rapidly, thereby revealing threats to security more quickly. The Government protects no one by delaying a decision on Mr. Amirparviz's application while his name check languishes with the FBI.

Amirparviz, slip op. at 12 (copy attached as Ex. 1); see Aslam, 2008 U.S. Dist. LEXIS 5616, at *23-*24 (rejecting national security concerns as justification for delay).

Underscoring the unnecessary prejudice to plaintiffs and the Proposed Class occasioned by name check delays, CIS recently jettisoned the name check requirement for nearly every category of immigration benefit ***except*** naturalization applications. (See CIS Policy Memorandum dated Feb. 4, 2008 (copy attached as Ex. 5).) If name checks are not required to protect national security with respect to persons who are applying for lawful permanent resident

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status, it is unclear how they are necessary for lawful permanent residents applying for naturalization.

D. Defendants Concede That CIS Failed to Give Statutorily Required Notice of Remedies.

If a naturalization application is not granted at the time of the naturalization interview, CIS is required to inform the applicant of the remedies available under 8 U.S.C. § 1447(b). See 8 U.S.C. § 1446(b) (CIS officer "shall, at the examination, inform the applicant of the remedies available to the applicant under section 1447 of this title" (emphasis added)). In Count IV of their complaint, plaintiffs allege that defendants failed to give members of the Proposed Class, including two of the named plaintiffs, statutorily mandated notice of the remedies available under 8 U.S.C. § 1447(b). (Complaint ¶¶ 79-82.)

Defendants concede that before January 14, 2005, the form CIS provided to applicants at their examination did not contain the required notice of remedies. (MTD at 16.) Defendants nevertheless speculate that even though CIS failed to give written notice of remedies before January 14, 2005, "it does not mean that [applicants] were not provided any information regarding what to do if they had not received a decision from USCIS." (Id.) Defendants' vague speculation that other forms of notice that may have been given must be tested by discovery.

Defendants cannot downplay failure to give notice as "harmless error." (Id. at 25-26.) This case and many similar cases show that individuals who know their rights and have the wherewithal to file a complaint prompt the government to complete their name check immediately. Those who do not are left waiting, underscoring the need for classwide relief. Defendants' motion to dismiss Count IV should be denied.

E. Plaintiffs State a Claim for Failure to Abide by the APA's Notice and Comment Requirement.

In 2002, without promulgating any regulations and without statutory authorization, CIS dramatically altered the naturalization process by requiring that all applicants pass a name check

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conducted by the FBI before final approval. (Complaint ¶ 41.) These name checks were implemented without requisite public notice and comment. See 5 U.S.C. § 553 (providing that certain agency rules cannot be given effect unless promulgated through notice and comment procedures). A regulation not promulgated pursuant to the proper notice and comments procedures has no "force and effect of law," Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979), and "therefore is void ab initio," United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 384 (8th Cir. 1992).

A "rule" is defined in the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Agency rules subject to the notice and comment requirements are termed "substantive" rules and they are distinguished from "interpretive" rules or "general statements of policy," which are exempt from such requirements. 5 U.S.C. § 553(b)(3)(A).

A substantive rule is one that "modifies existing rights, law, or policy. If the rule 'effect[s] a change in existing law or policy' or '"affect[s] individual rights and obligations,"' the rule is substantive." W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir. 1987) (brackets in original; citations omitted). The Ninth Circuit has further explained that if the rule is "promulgated pursuant to statutory direction or under statutory authority, it is a substantive rule." Id. at 1504 (citing Cubanski v. Heckler, 781 F.2d 1421, 1426 (9th Cir. 1986)).

In 1997, Congress required a complete FBI criminal background investigation for every applicant for naturalization:

> [D]uring fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to the Immigration and Naturalization Service shall be used to complete adjudication of an application for naturalization unless the Immigration and Naturalization Service has received confirmation from the Federal Bureau of Investigation that a full criminal background check has been completed, except for those exempted by regulation as of January 1, 1997.

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Pub. L. 105-119, 111 Stat. at 2448-49. Congress thus mandated that INS create a program to ensure that the FBI complete a criminal background check for all naturalization applicants. In March 1998, INS promulgated a rule consistent with this mandate through the notice and comment process. See Requiring Completion of Criminal Background Checks Before Final Adjudication of Naturalization Applications, 63 Fed. Reg. 12,979 (Mar. 17, 1998). The criminal background check requirement was therefore treated (by Congress and by the agency) as a substantive rule for which notice and comment were required.

In December 2006, CIS went through notice and comment rulemaking to create a new office charged with carrying out the name check program. See Background Check Services System of Records, 71 Fed. Reg. 70,413 (Dec. 4, 2006). In the notice, CIS explains that the name checks "will be used to make eligibility determinations, which will result in the approval or denial of a benefit." Id. at 70,414. Thus, by CIS's own admission, the name check program affects "approval or denial of a benefit," including, ultimately, the naturalization application itself, and is therefore a substantive rule. Yet, despite providing notice and comment for the fingerprinting component of the background check program in 1998, and for creation of the BCS in 2006, CIS provided no public notice or opportunity to comment in 2002 when it created the portion of the program that has caused the greatest delay and hardship to naturalization applicants. See Mocanu v. Mueller, No. 2:07-CV-00445-MMB (E.D. Pa. Feb. 8, 2008) (name check program is substantive rule subject to notice-and-comment rulemaking) (copy attached as Exhibit 6).

F. Plaintiffs Have Properly Asserted a Right to Injunctive Relief.

Defendants' final argument that plaintiffs are not entitled to injunctive relief (MTD at 18-19) is inappropriate for a motion to dismiss. The traditional four-factor test applied when considering the appropriateness of injunctive relief requires the prevailing plaintiff to demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships

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between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc., v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006).

Plaintiffs have alleged that they have sustained and will continue to sustain irreparable injury unless the Court grants injunctive relief. (Complaint ¶¶ 12, 17, 22, 27, 63-64) (describing prejudice to named plaintiffs and to all individuals whose applications for naturalization are unreasonably delayed).) As explained above in Part IV.B.1, 8 U.S.C. § 1447(b) does not provide an adequate remedy for the systemic delays that are the subject of this proposed class action. The remaining two elements—the balance of hardships and public interest implications—require the benefit of discovery and additional development. Defendants' motion to dismiss is premature and should be denied. See Yakubova, slip op. at 8-9 (refusing to dismiss claim for injunctive relief on motion to dismiss (citing Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1576 (5th Cir. 1988))) (copy attached as Ex. 4).

G. Plaintiffs Should Be Given an Opportunity to Amend Their Complaint if the Court Perceives Any Pleading Deficiencies.

Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, plaintiffs are entitled to amend once as of right before defendants answer and by leave of the court, which "should freely give leave when justice so requires." This case involves issues affecting numerous individuals in this judicial district and thousands nationwide. In the interest of justice, plaintiffs respectfully request an opportunity to amend their Complaint if the Court perceives any pleading deficiencies.

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V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant plaintiffs' motion to strike and deny defendants' motion to dismiss.

DATED: February 13, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2008 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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