The Honorable Lauren King

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of himself and other similarly situated, Plaintiffs, v. JOSEPH R. BIDEN, President of the United States, *et al.*, Defendants.	CASE NO. C17-00094-LK **REPLY RE: MOTION FOR LEAVE TO FILE A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

INTRODUCTION

Defendants' motion (Dkt. # 623) seeks the Court's leave to file a motion to dismiss that will raise new issues going to the Court's subject-matter jurisdiction to hear the claims of the Naturalization Class. The proposed motion will set forth three distinct arguments: (1) the Immigration and Nationality Act's ("INA") special judicial review scheme for naturalization applicants precludes jurisdiction under the general federal question statute for the claims of the Naturalization Class; (2) the claims of the Naturalization Class are not ripe until they can be brought under 8 U.S.C. §§ 1447(b) or 1421(c); and (3) because 8 U.S.C. §§ 1447(b) and 1421(c) provide members of the Naturalization Class with an adequate alternative remedy, the Administrative

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Procedure Act's waiver of sovereign immunity does not apply to their APA-based claims, and so sovereign immunity bars the Court's jurisdiction over those claims.

Plaintiffs' opposition to Defendants' Motion for Leave does not dispute that these proposed arguments are jurisdictional; indeed, Plaintiffs' opposition does not even discuss the latter two proposed arguments. Instead, focusing on only the first of the three proposed jurisdictional arguments, Plaintiffs assert that Defendants have already been heard on the issue, and that it has been adjudicated by this Court. As explained below, that assertion mischaracterizes the argument Defendants actually made in their prior motion, which pertained to Plaintiffs' lack of standing. Plaintiffs do not dispute that Defendants' two other proposed jurisidictional arguments (ripeness and APA-related sovereign immunity) are newly-raised. Rather, Plaintiffs mischaracterize Defendants' proposed motion as a belated "motion for reconsideration" and ask that leave to file the proposed motion be denied on that basis.

Defendants' motion is squarely in line with the Federal Rules of Civil Procedure and blackletter law. *See* Fed. R. Civ. P. 12(h)(3); *Emerich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988) (noting that "[i]t is elementary that the subject matter jurisdiction of the district court is not a waivable matter and may be raised at anytime by one of the parties, by motion or in the responsive pleadings, or *sua sponte* by the trial or reviewing court"). And while Plaintiffs complain that the arguments raised by Defendants in their proposed motion should have been presented to the Court sooner, they make no showing that they will be prejudiced if the Court examines them now. In any event, motions to dismiss based on subject matter jurisdiction may be made at anytime (and this Court is obligated to consider its subject matter jurisdiction even if the arguments are not presented by the parties). Accordingly, leave should be granted for Defendants to file their proposed motion to dismiss.

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ARGUMENT

I. DEFENDANTS HAVE NOT PREVIOUSLY RAISED ANY OF THE THREE PROPOSED JURISIDICTIONAL ARGUMENTS

Defendants have never before raised in this case any of the three issues they seek to present in their proposed motion to dismiss. Plaintiffs' response does not contest this point with respect either to whether the Naturalization Class claims are ripe or whether the class claims can avail themselves of the APA waiver of sovereign immunity. Singling out Defendants' proposed argument that the INA's special judicial review scheme forecloses general federal question jurisdiction over the claims of the Naturalization Class, Plaintiffs assert that Defendants plan to re-argue a ground for dismissal that they made unsuccessfully in their first motion to dismiss. Specifically, Plaintiffs point to Defendants' previous argument that the Naturalization Class lacks standing to argue that CARRP violates the statutory criteria for a grant of naturalization set forth in 8 U.S.C. § 1427 because Congress did not create or intend to create a "private right of action" for the enforcement of § 1427. Dkt. # 56, p. 17, *l.* 9 – p. 20, *l.* 15; *see also* Dkt. # 624. Defendants asserted then that if § 1427 "do[es] not provide [a] private right[] of action, then Plaintiffs lack standing, and the Court lacks jurisdiction over that claim." Dkt. # 56, p. 20, *ll.* 13-15. Defendants' "private right of action" argument was addressed to only a single claim in the Complaint. It did not raise the fundamental jurisdictional question affecting all of the claims of the Naturalization Class that *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and its progeny present, and the Court did not analyze it as such.[1] Indeed, Defendants' previous motion to dismiss never cited *Thunder Basin* nor did it make any argument based on the *Thunder Basin* factors.

In denying Defendants' prior motion to dismiss, the Court rejected Defendants' lack of standing argument, concluding that even if Congress did not afford Plaintiffs a cause of action to sue Defendants directly for an alleged violation of 8 U.S.C. § 1427, the Court still could consider the claim because it challenged "agency action" and was therefore cognizable as an APA claim.

[1] The Supreme Court announced the criteria for identifying an implied private right of action in *Cort v. Ash*, 422 U.S. 66 (1975), and that analysis is entirely distinct from *Thunder Basin*, which makes no reference to *Cort v. Ash*. *See Thunder Basin*, generally. *Cort* also pertains to individual causes of action, and is thus unrelated to *Thunder Basin*'s analysis of special statutory frameworks that implicitly demonstrate congressional intention to preclude judicial review under general federal question jurisdiction. *See Axon Enterprise*, 143 S. Ct. at 900.

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Dkt. # 69, p. 17, *l.* 21 – p. 18, *l.* 26. In other words, because the jurisdictional question presented by *Thunder Basin* was not argued at the time of the first motion to dismiss, the Court simply assumed that the APA was available to hear the claims of the Naturalization Class without considering the underlying jurisdictional question. But an *assumption* of subject matter jurisdiction is not the same thing as a *determination* of subject matter jurisdiction. *See Indian Oasis-Baboquivari v. Kirk*, 91 F.3d 1240, 1242-43 (9th Cir. 1996) ("the exercise of jurisdiction in a case is not precedent for jurisdiction."). And *Thunder Basin*, the basis of Defendants' first proposed argument, puts the soundness of that former assumption in considerable doubt.[2]

Defendants' new jurisdictional motion will not repeat the argument that Plaintiffs lacked standing because there is no implied right of action under 8 U.S.C. § 1427. Indeed, Defendants' proposed motion will not address standing at all. Rather, Defendants will argue that there is no subject matter jurisdiction to adjudicate *any* of the claims of the Naturalization Class – including their APA claims – which are all based on 28 U.S.C. § 1331. This is because, under *Thunder Basin*, the special statutory scheme enacted in the INA precludes such claims.

That *Thunder Basin* was decided in 1994 has no bearing on the propriety of Defendants' proposed motion. Moreover, as evidenced by a Supreme Court case just decided in April, *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023) (applying *Thunder Basin* factors to determine whether a special statutory scheme displaced subject matter jurisdiction premised on 28 U.S.C. § 1331), the parameters of *Thunder Basin* are still being fleshed out and refined in the caselaw. And, as demonstrated by *Miriyeva v. United States Citizenship & Immigr. Servs.*, 9 F.4th 935 (D.C. Cir. 2021) (dismissing federal question jurisdiction based claims of naturalization applicants for lack of subject matter jurisdiction), which was decided more than four years after Defendants filed their first motion to dismiss, the *Thunder Basin* doctrine has obvious implications for the subject-matter jurisdiction of the Court to hear the claims of the Naturalization Class here,

[2] Defendants' first motion to dismiss observes in a footnote that 8 U.S.C. § 1421(c) provides an "adequate alternate remedy at law" for the claims of *denied* naturalization applicants. See Dkt. # 56, p. 18, n. 6. The argument was neither developed by Defendants nor addressed or ruled upon by the Court. *See* Dkt. Nos. 56 & 69, generally. And as Plaintiffs emphasize here, "the members of the Naturalization Class do not challenge the denials of their applications . . . ." Dkt. # 624, p. 5, *ll*. 4-5. Regardless, the argument that the INA provides adequate remedies for the claims of the Naturalization Class is but one of the three jurisdictional arguments Defendants propose to make and is plainly unrelated to Defendants' *Thunder Basin* argument.

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which notably became the sole focus of these proceedings late last year. *See* Dkt. # 612 (stipulating to a stay of the adjustment class claims in October 2022).

Plaintiffs are therefore incorrect in their assertions both that the *Thunder Basin* argument has previously been raised and considered by the Court and that Defendants now only seek reconsideration of a prior Court order. Because subject matter jurisdiction is so fundamental, federal courts are impressed with a "continuing duty" to dismiss an action whenever it appears that such jurisdiction is lacking. *Billingsley v. Comm'r*, 868 F.2d 1081, 1085 (9th Cir. 1989). Plaintiffs' arguments provide no reason why that continuing duty should be ignored here, or why hearing the full contours of the foregoing jurisdictional arguments through an adversary presentation by both parties would not aid the Court in discharging that responsibility.

II. THE COURT SHOULD DEFER CONSIDERATION OF PLAINTIFFS' ARGUMENTS IN OPPOSITION TO THE MERITS OF DEFENDANTS' JURISDICTIONAL DEFENSES

Plaintiffs assert that Defendants' *Thunder Basin* argument cannot be correct because *Miriyeva v. United States Citizenship & Immigration Services*, 9 F.4th 935, 945 (D.C. Cir. 2021), concerned an applicant for naturalization whose application was denied, and they imply that the INA's special statutory scheme only encompasses denied applicants. Dkt. 624, p. 5, *ll.* 3-13. However, 8 U.S.C. § 1447(b) affords a judicial remedy to naturalization applicants prior to a denial of their applications, so the INA's special statuory scheme sweeps more broadly than Plaintiffs concede.

In any event, the motion before the Court only requests leave to file a motion to dismiss. Assuming the motion is granted, Defendants' argument will be fully briefed in their proposed motion to dismiss and Plaintiffs will, of course, be afforded a full opportunity to make their arguments against dismissal in their opposition memorandum. The Court should defer consideration of the competing positions of the parties on these jurisdictional questions until the arguments have been fully briefed by both sides.

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CONCLUSION

For the foregoing reasons, and for those reasons stated in their principal memorandum, Defendants respectfully request that their motion be granted and that they be granted leave to file their proposed motion to dismiss for lack of subject-matter jurisdiction.

We certify that this memorandum contains 1,724 words, in compliance with the Local Civil Rules.

Respectfully Submitted,

Dated: August 18, 2023

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