UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:17-cv-01793-ESH**
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,	)	**[Oral Argument Requested]**
Defendants.	)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 23.1(b) of the Local Rules of the U.S. District Court for the District of Columbia, and as directed by the Court (Dkt. 31 at ¶ 2), Plaintiffs Mahlon Kirwa, Santhosh Meenhallimath, and Ashok Viswanathan (collectively, "Plaintiffs") hereby provide this Supplement in support of their Motion for Class Certification and Appointment of Class Counsel (Dkt. 12) ("Motion"), wherein they ask that the Court (1) certify the requested class; (2) appoint the requested class representatives; and (3) appoint the requested class counsel.

In particular, Plaintiffs seek an order certifying this case as a class action, with the class consisting of all persons who:

(i) have enlisted in the U.S. military through the Military Accessions Vital to the National Interest ("MAVNI") prior to October 13, 2017;

(ii) have served in the Selected Reserve of the Ready Reserve ("Selected Reserve"); and

(iii) have not received a completed Form N-426 from the military (as of October 25, 2017).

As described briefly below and more fully in Plaintiffs' Memorandum of Points and Authorities in Support of the Motion (Dkt. 12), this Court's prior order and opinion (Dkt. 29 (PI/Class Opinion); Dkt. 32 (Amended Order)), and this Court's class certification opinion in a related action (*Nio*, Dkt. 73 (Class Certification Opinion)) (collectively the "Prior Class Briefing and Decisions"), all of which are incorporated herein by reference, Plaintiffs satisfy the requirements set forth in Federal Rule of Civil Procedure 23.

BACKGROUND

Plaintiffs commenced this litigation on September 1, 2017. The complaint primarily challenged Defendants' withholding of Form N-426 certifications from Plaintiffs and other Selected Reservists who had served honorably in the Selected Reserve but had not yet served in an active-duty capacity. On September 6, 2017, in the related action captioned *Nio, et al. v. United States Department of Homeland Security, et al.*, No. 17-cv-998-ESH (D.D.C.) (the "*Nio* Action"), the Court issued a memorandum decision in which it questioned the lawfulness of DoD's assertions that Selected Reservists are not eligible for naturalization under 8 U.S.C. § 1440 until they have served in an active-duty status. The Court expressed similar views during court hearings in the *Nio* Action.

Shortly thereafter, on September 19, 2017, Plaintiffs filed a motion for preliminary injunction that would order Defendants to issue N-426s to Plaintiffs and others without waiting for them to serve in an active-duty capacity and without imposing other unlawful requirements. At that same time, Plaintiffs filed the Motion. The Court, with Defendants' express agreement that the issues in the original complaint were purely legal, converted the preliminary injunction motion to a summary judgment motion and set a briefing schedule followed by a hearing on the merits for October 18, 2017.

On October 10, 2017, Defendants filed their opposition to the motion for summary judgment. On October 13, 2017, the date set for Plaintiffs' summary judgment reply brief, DoD issued a new policy regarding the issuance of N-426s (the "New DoD N-426 Policy"). The Government "notified" the Court of the New DoD N-426 Policy by attaching it to a Weekly Status Report filing in the *Nio* Action on October 13, 2017. Thereafter, the Court issued an order directing

the parties to address the New DoD N-426 Policy and converting the pending motion back to a preliminary injunction motion.

On October 25, 2017, after further briefing and argument, the Court granted Plaintiffs' motion for a preliminary injunction and provisionally certified a class with the same characteristics as those described in the Motion. Dkt. 29 (PI/Class Opinion); Dkt. 32 (Amended Order).

Following the Court's preliminary injunction order, as amended/clarified on October 27, 2017 (Dkt. 32 ("PI Order")), Defendants issued new policies in response to the PI Order. Those new policies imposed additional obligations/administrative burdens on eligible service members who are seeking N-426s from Defendants following and pursuant to their rights under the PI Order. Those new policies did not comply with the PI Order. Defendants also failed to take reasonable and necessary steps to communicate the PI Order to members of the class and personnel within their chain of command, despite their "best efforts" obligations imposed by the PI Order and their independent statutory obligations to communicate such information to members of the Selected Reserve (*see* 10 U.S.C. § 10210).

Following the PI Order, each individually-named Plaintiff immediately submitted an N-426 to DoD. More than two business days afterwards (and only after multiple attempts by each Plaintiff to obtain the completed N-426), DoD provided each Plaintiff with an electronic version of a signed and completed N-426 certifying his honorable service in the Selected Reserve. As of the date of this supplemental filing, more than one week after the PI Order, (1) multiple members of the provisional class who submitted N-426s to DoD for certification have not received completed certifications from DoD in any format, even though those requests were made more than two business days ago, and (2) Defendants' counsel, as of the date of this filing, were unable

to identify any soldiers, other than the three named Plaintiffs, who had been issued N-426s (in any format) following the PI Order.

ARGUMENT

Notably, the standard for provisional class certification and final class certification are the same. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 179-80 (D.D.C. 2015) (finding that to grant "provisional certification, the Court must still satisfy itself that the requirements of Rule 23 have been met"). As this Court stated in its October 25, 2017 opinion: "[i]n granting provisional class certification the Court must still satisfy itself that the requirements of Rule 23 have been met.. . . After reviewing the record, the Court has concluded that the requirements of Rule 23 have been met." Dkt. 29 (PI/Class Opinion) at 34 (internal quotations and citations omitted). Thus, this Court already has determined that class action treatment is appropriate here.

As evidenced by the grant of provisional class certification *following* the New DoD N-426 Policy, nothing has changed from Plaintiffs' original briefing in terms of the appropriateness and necessity of class certification in this case. The New DoD N-426 Policy applies broadly to Plaintiffs and similarly-situated soldiers seeking naturalization through 8 U.S.C. § 1440. And, it is the common attributes and claims of Plaintiffs – and similarly-situated soldiers – that form the bases for this litigation.

As set forth in the Amended Complaint (filed contemporaneously with this Supplement), these soldiers – as a class or group – are the targets of unlawful conduct by Defendants who are impeding the orderly and lawful processing of their naturalization applications. With respect to Selected Reservists who enlisted prior to October 13, 2017, but who had not yet received N-426s as of October 13 (including Plaintiffs) the new policy – in "Section II" – specifies that no service member is eligible to receive an N-426 honorable service certification until certain criteria are met.

Among other actions, Defendants unlawfully are conditioning Plaintiffs' ability to proceed with their naturalization applications on their completion of "background investigation and suitability vetting" and certain "military training and required service." In other words, the claims here are common among Plaintiffs and similarly-situated soldiers – numbering approximately 2,000 pursuant to DoD estimates – and warrant final class action certification under Rule 23.

As demonstrated below and in the Prior Class Briefing and Decisions, all of the criteria for class certification are present here. A nationwide class should be approved because of this showing and especially because "anything less than a nationwide class would run counter to the constitutional imperative of 'a uniform Rule of Naturalization.'" *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *16 (W.D. Wash. June 21, 2017) (quoting U.S. CONST. art. I, § 8, cl. 4); *see also* Amended Complaint at Count V (Constitutional claim).

Joinder is impracticable due to the number of class members and it would be too expensive, burdensome, and inconvenient – for the parties and the Court – to litigate the claims of each class member on an individualized basis. Here, the proposed class consists of approximately 2,000 "Section II" soldiers. Thus, the numerosity requirement is easily satisfied.

Commonality and typicality exist for all the reasons discussed in the Prior Class Briefing and Decisions. The proposed class meets the commonality requirement of Rule 23(a)(2) because there are questions of law and fact common to the class, including, for example, whether DoD has a mandatory duty to complete N-426 Forms and whether DoD's "active-duty service" and/or background check, military suitability determination, and other generally-applied requirements for certification of a Form N-426 are contrary to law. The New DoD N-426 Policy presents the question common to the class of whether, under 8 U.S.C. § 1440, DoD can withhold N-426 forms as described in "Section II" of the New DoD N-426 Policy.

The claims of the proposed class representatives arise from the same practices and are based on the same legal theories. Regardless of any individual or factual differences among the class members, each member is subject to the same unlawful DoD N-426 policies and faces the same injuries as a result. In the immigration context, this Court has held that "commonality is satisfied when there is 'a uniform policy or practice that affects all class members.'" *R.I.L-R*, 80 F. Supp. 3d at 181(internal citations omitted); *see also Wagafe*, 2017 WL 2671254, at *12-16 (designating class action status to applicants challenging lawfulness of USCIS's Controlled Application Review and Resolution Program that allegedly resulted in halting of and delays in adjudication of class members' naturalization applications).

Plaintiffs' claims in this case are not dependent on an individualized assessment of honorable duty service, nor are they dependent on an individualized showing of eligibility for naturalization. The primary question here is the legality of DoD's policy of withholding N-426 certifications from Selective Reservists who have not yet met DoD-imposed requirements, such as service in active-duty status, completion of background checks, completion of so-called military suitability determinations, and the like.

Finally, there remains no conflict of interest between the named Plaintiffs and the proposed class. The New DoD N-426 Policy does nothing to change this analysis. Plaintiffs have demonstrated the alignment of their interests with those of the class. In addition, Plaintiffs are not seeking monetary damages, so no financial conflict can arise from the claims. Further, named Plaintiffs, through their counsel, are prepared and committed to continue to vigorously pursue the

class members' interests.[1] And, for the reasons described in the Prior Class Briefing and Decisions, Plaintiffs' counsel qualify for class counsel appointment in this case.

For the reasons discussed in the Prior Class Briefing and Decisions, this action qualifies for class certification under either Rule 23(b)(1) or Rule 23(b)(2). Specific to the New DoD N-426 Policy, certification remains appropriate under Rule 23(b)(1)(A) because "the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class." *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore's Fed. Practice § 23.41[4] (3d ed. 2000)). Likewise, with respect to the New DoD N-426 Policy, injunctive or declaratory relief provides relief to the class as a whole.

With respect to Rule 23(b)(2) and the New DoD N-426 Policy, Plaintiffs are challenging the policy, which is aimed at all MAVNI soldiers seeking naturalization who have not completed the preconditions that DoD now is trying to impose for N-426s and, therefore, as a pre-condition to naturalization itself.

CONCLUSION

For these reasons, Plaintiffs' Motion should be granted. The provisional class certification already granted should become a final grant of class certification.

[1] As of the filing of this Supplement, Plaintiffs already have demonstrated their ability to serve as class representatives by filing a motion for preliminary injunction on behalf of themselves and the class – which the Court granted – and having the Court provisionally certify the class and provisionally certify Plaintiffs as class representatives. Plaintiffs are committed to continuing to represent the class until their claims for permanent injunctive and other relief are fully and finally adjudicated and all eligible class members who seek to obtain completed N-426s receive them from DoD in a form and manner that DHS requires for purposes of naturalization.

Respectfully submitted,

/s/ Joseph J. LoBue

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