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.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs are enlisted soldiers in the United States military. They serve in the Selected Reserve of the Ready Reserve, have taken an oath to support and defend the Constitution of the United States, and have committed at least eight years of their lives to military service in support of this Nation. Through this action, they ask for one thing only: They seek to have the Department of Defense ("DoD") sign a standard Form N-426 – one that has been used and signed without incident or fanfare for thousands of soldiers before them – certifying, based on their existing military records, their honorable service. DoD certification of that N-426 form is necessary for these soldiers to pursue their express statutory right – as members of the Selected Reserve – to apply to become naturalized U.S. citizens. Regrettably, DoD changed the rules midstream and through newly minted N-426 policies has imposed preconditions to the issuance of N-426s that are arbitrary and capricious and otherwise contrary to law. DoD openly admits that it has enacted these policies because DoD wants to control whether and when these soldiers can be naturalized. Plaintiffs – and the similarly situated service members they represent – were compelled to initiate this litigation in an effort to force DoD to issue their N-426s.

Initially, Plaintiffs challenged DoD's mandate that no new N-426s issued until soldiers had served on active duty and sought injunctive relief on that basis. Then, after this Court signaled its intent to enjoin that policy, DoD issued the New DoD N-426 Policy. After extensive briefing and argument, the Court issued a preliminary injunction enjoining Defendants from refusing to provide N-426 certifications to a provisionally certified class and directing Defendants to do so for these soldiers in the manner and within the short time periods that DoD routinely had accomplished this ministerial task in the past.

Now, following Plaintiffs' amendment of their complaint to specifically add reference to the New DoD N-426 Policy, Defendants seek dismissal of the complaint. Dkt. 39-1 ("Motion"). But, as described below, except for addressing a newly added cause of action (Count V), Defendants rely almost exclusively on the exact same arguments and legal theories as they advanced previously in the preliminary injunction proceedings. This Court already rejected those arguments in its preliminary injunction opinion (Dkt. 29), and Defendants offer no new arguments or justifications for a different outcome here. Indeed, under the Rule 12(b)(6) standard applicable to the Motion, the relevant inquiry is limited to the allegations in the complaint and the pleading sufficiency therein. Defendants barely mention the operative complaint allegations in their Motion, let alone describe how they are insufficient to state a claim. And, although Defendants alternatively seek "summary judgment" on the complaint allegations, they have not demonstrated entitlement to it, either under the rules, the facts, or the law. Defendants' Motion should be denied.

STANDARD OF REVIEW

A complaint is not subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) if it states a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Pena v. A. Anderson Scott Mortgage Group, Inc.*, 692 F. Supp. 2d 102, 106 (D.D.C. 2010). In deciding a Rule 12(b)(6) motion, the Court "must accept as true all of the factual allegations contained in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002)). Further, the Court must construe the complaint "in the light most favorable to the plaintiff and give the plaintiff the benefit of all inferences that can be derived from the facts alleged therein." *Zinda v. Johnson*, 463 F. Supp. 2d 45, 50-51 (D.D.C. 2006) (citing *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)).

The Court may only consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Materials outside the pleadings must be specifically referenced in the complaint and must be "integral to" Plaintiffs' claim to be considered on a motion to dismiss. *Speed v. Mills*, 919 F. Supp. 2d 122, 127 (D.D.C. 2013) (citing *Kaempe v. Meyers*, 367 F.3d 958, 965 (D.C. Cir. 2004)).

Likely because the Motion improperly looks outside of the Amended Complaint, it also purports to be a motion "in the alternative" for summary judgment. That "summary judgment" label, however, cannot salvage the Motion, as the claim for summary judgment is improper as well. Given Defendants' own claim that this case arises "in the APA context" (Dkt. 39-1 (Mot.) at 9) and their contemporaneous submission of an administrative record index under Local Rule 7(n) (Dkt. 38 (A.R.)), the Motion should include "a statement of facts with references to the administrative record." LCvR7(h)(2).[1] Yet, Defendants have not included a statement of facts in the Motion, nor have they cited any portion of the purported administrative record in setting forth the "background" for their motion (apart from their passing reference to the New DoD N-426 Policy itself in footnote 2). Dkt. 39-1 (Mot.) at 3-5. On the contrary, Defendants attempt to bolster their narrative by referring to documents and declarations which they have omitted from the purported administrative record, including the very materials that they attach to their Motion. *E.g.*, Dkt. 39-5 (Third Miller Decl.); Dkt. 39-4 (Thomas Decl.); Dkt. 39-1 (Mot.) at 3 (citing to Dkt. 20-1 (First Miller Decl.)); *id.* at 5 (referencing "consultations between DoD and USCIS"). In short, Defendants' purported "alternative" summary judgment motion contradicts their own contention

[1] Plaintiffs do not concede that review here is limited to the administrative record, much less the administrative record as currently identified by Defendants.

that this is a case limited to the administrative record that they have designated. Defendants cannot have it both ways – they cannot assert that this is an administrative record case only and then ignore the rules and requirements for summary judgment in such cases[2] and completely disregard the purported administrative record when it serves their own purposes.[3] For this reason, among others, the Court should reject Defendants' alternative summary judgment motion.[4]

ARGUMENT

I. DEFENDANTS' N-426 POLICY VIOLATES THE APA

A. The New DoD N-426 Policy Is Subject To Judicial Review

Defendants repeat their argument – already rejected by the Court – that the decision whether and when to certify a soldier's honorable service under 8 U.S.C. § 1440 is committed to agency discretion by law and, as a consequence, the Court has no power to review the New DoD N-426 Policy. *See* Dkt. 39-1 (Mot.) at 10 ("As the Government has previously argued, the decision whether and when to certify a soldier as having served honorably is committed to DoD discretion pursuant to § 1440."). Thus, Defendants continue to advance the bold proposition that DoD can do anything that it wants to do under § 1440 and there is nothing that this Court (or any other court)

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2 *See, e.g.*, LCvR7(h)(2); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 15 (D.D.C. 2010) (noting "the Court's review on summary judgment is limited to the administrative record.").

3 Defendants seek to have it both ways by profiting from the advantage of not having to submit to discovery, but then liberally citing to information outside of the designated administrative record. The federal rules state that where a nonmovant is unable to present facts essential to justify its opposition that the court may, *inter alia*, deny the motion or "allow time to obtain affidavits or declarations or to take discovery." *See* Fed. R. Civ. P. 56(d). Given Defendants' reliance on factual citations that are outside of the designated administrative record, the Court should either deny Defendants' Motion or grant Plaintiffs the opportunity to take discovery.

4 Beyond this, Defendants' supposed facts – from materials outside of the purported administrative record – are misleading, inaccurate, and very much in dispute. Moreover, as shown below, many of the claims here are pure legal issues on which Defendants do not prevail.

can do about it. As the Court concluded in its PI Opinion, Defendants' position lacks merit. Dkt. 29 (PI Op.) at 19-24. DoD's statutory role in the naturalization process under § 1440 is limited and ministerial. To the extent that DoD has any discretion at all, it certainly does not, and lawfully cannot, extend to imposing preconditions to naturalization that are contrary to the governing statute that is administered by a separate agency. And the notion that federal courts cannot review whether agency action exceeds statutory authority finds no support in Defendants' brief or in the law.

In determining whether action is "committed to agency discretion" under the APA, so that it is not subject to review, courts "consider both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002)). Reviewability "is determined not only from [the statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Importantly, "'there is a strong presumption that agency action is reviewable,' and Congress rarely draws statutes in terms so broad that there is no meaningful standard." Dkt. 29 (PI Op.) at 20 (quoting *Twentymile Coal Co.*, 456 F.3d at 156).

As the Court already has found, the text of the statute, the legislative history, and the statutory and regulatory scheme as a whole clearly show that the New DoD N-426 Policy is both reviewable by this Court and contrary to law. Dkt. 29 (PI Op.) at 20 ("Here, the nature of the administrative action involved, as well as 8 U.S.C. § 1440's statutory and regulatory regime, provide a meaningful standard for judging DOD's N-426 certification decisions.").

1. DoD Has No Discretion To Implement The New DoD N-426 Policy

As applicable in this case, the New DoD N-426 Policy provides the following:

> that the appropriate Military Department may certify a nonresident soldier's service as honorable only if three criteria are met: first, the soldier must not be the subject of pending disciplinary action or a criminal investigation; second, the soldier must satisfy all applicable screening and suitability requirements; and third, the soldier must have "served in a capacity, for a period of time, and in a manner that permits an informed determination that the [soldier] has served honorably."

Dkt. 39-1 (Mot.) at 5. DoD has no discretion to impose these additional substantive preconditions for naturalization in the guise of interpreting the phrase "has served honorably" under § 1440(a).

As the Court already has found, the plain language of § 1440(a) refers only to the past service of the soldier in question and not to future periods of service or future so-called military "suitability determinations" performed by DoD. Dkt. 29 (PI Op.) at 20 (the statute "specifically refers to *past service*, not to DOD's possible future suitability determinations.") (emphasis in original). The New DoD N-426 Policy directly conflicts with the plain language of the statute in that it requires, among other things, future service for an unspecified "period of time," completion of lengthy ongoing background checks and security screenings, and a future satisfactory military suitability determination.

Moreover, the New DoD N-426 Policy unlawfully requires satisfactory completion of high-level military security clearance screenings as a *precondition for eligibility for naturalization*. DoD admits this fact in the policy memorandum itself: "USCIS Form N-426, Request for Certification of Military or Naval Service, *is a necessary and indispensable part of the military naturalization application process*." Dkt. 20-3 (New DoD N-426 Policy) at 1 (emphasis added). Nothing in Section 1440 suggests that satisfactory completion of such high-level security clearance screenings can be imposed on applicants as a precondition for eligibility for naturalization. To the

contrary, as this Court recognized in its decision in the *Nio* action, Section 1440 was intended by Congress to expedite and "ease" the path to citizenship for soldiers who serve during times of armed conflict, not make that path more onerous. Dkt. 29 (PI Op.) at 4.

Furthermore, the statute makes clear that, in those areas where the statutory provisions do not specifically ease or relax the naturalization requirements for these soldiers, "[a] person filing an application under . . . this section shall comply in all other respects with the requirements of this subchapter." § 1440(b). Thus, Congress clearly intended that soldiers eligible for naturalization under the statute would be subject to no more stringent requirements than others seeking naturalization under the INA. No other class of individuals seeking naturalization under the INA is subject to any precondition that is remotely close to the high-level military security clearance requirement imposed by the New DoD N-426 Policy. This precondition is one of the most onerous requirements for naturalization that one could imagine. As such, DoD's imposition of this requirement cannot in any way be reconciled with a statutory scheme specifically designed to "ease" the path to citizenship for those willing to serve during time of war.

Finally, when Congress uses the same or similar term in the same statute, the phrase generally should be given the same meaning. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[E]very Act of Congress should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'"). In Section 1440(a), Congress used the term "honorable" in two places: first with respect to a person having "served honorably" and subsequently in the same sentence describing the qualifying separation from service, *i.e.*, "under honorable conditions." 8 U.S.C. § 1440(a). In this circumstance, the root-

phrase "honorable" must be read to have the same meaning in both places. And that reading forecloses DoD's clumsy "interpretation" of the term "honorable" as a matter of law.

Indeed, Congress expressly has provided, in 10 U.S.C. § 12685, that the service of a reserve soldier must be characterized as "honorable" as a matter of law unless there is a specific finding by a court-martial or other convened board of commissioned officers that the soldier's service is other than honorable. In particular, Section 12685 provides:

> A member of a reserve component who is separated for cause, except under section 12684 of this title [irrelevant here], is entitled to a discharge under honorable conditions unless—
>
> (1) the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned or
>
> (2) the member consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

None of the preconditions for "honorable" service imposed by the New DoD N-426 Policy could support a characterization of service under Section 12685 that is anything other than "honorable" because the preconditions do not result from, or provide protections remotely similar to, a specific finding of "other than honorable" service by a court-martial or other convened board of officers. Accordingly, these preconditions lawfully cannot be imposed for honorable service certifications under § 1440(a).[5]

[5] Defendants assert that if information revealed during the enhanced background checks results in an adverse military suitability determination, the reserve soldier in question would be "released from service under an uncharacterized entry level separation" thereby "preclud[ing] the soldier from engaging in honorable service." Dkt. 39-1 (Mot.) at 12. This is a flat misstatement of federal law and DoD regulations. As explained above, *as a matter of law*, Section 12865 entitles any such soldier to a characterization of service as under "honorable" conditions. Because of the mandatory nature of 10 U.S.C. § 12685, DoD's own regulations make clear that an uncharacterized entry level separation is deemed as a matter of law to be a separation under "honorable" conditions. Specifically, DoD Instruction No. 1332.14 directs that, "[i]n accordance with section 12685," an

By contrast, the practice used by the military branches for N-426 certifications prior to the unlawful New DoD N-426 Policy was consistent with the principles of Section 12685. For example, the written guidance promulgated by the Army Human Resources Command — a command of General Officer rank — and reissued repeatedly up until as recently as April of 2017, provided as follows:

> It is essential for the BN or BCT S-1, MPD, or MILPO to certify that the character of the Soldier's service is "honorable." *As a general rule, a Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier's commander or a court martial, to discharge him/her under less than honorable conditions.*
>
> In the *rare* cases where the character of a Soldier's service is questionable, ONLY the Soldier's commander can decide the issue, and *the sole criterion for the decision is: If the Soldier were being discharged today, based on his/her record, what type of discharge would the Soldier receive?* If Honorable or General or Under Honorable Conditions, the character of service on the N-426 will read "honorable." If Under Less than Honorable Conditions, the N-426 character of service item will NOT read "honorable."

Dkt. 22-7 (Soldier's Guide, Apr. 2017) at 11-12 (emphasis added); *see also* Dkt. 22-8 (Sept. 2011) at 11-12; Dkt. 22-9 (Apr. 2005) at 10-11.

The Section 12685 requirement of "findings," as well as the Army Human Resources Command procedure previously employed for N-426 certifications, are thus also consistent with

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entry-level separation of a reserve service member shall be "under honorable conditions." Dkt. 24-1 (DoD Instruction) at 33. Furthermore, for any administrative matters that require characterization of service as honorable or general (such as future benefits or naturalization eligibility, for example), an uncharacterized entry-level separation must be treated as such a separation. *Id.* at 32 ("With respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization."); *see also* 32 C.F.R. § 724.109(a)(4)(ii) (same, Navy regulations). In short, a reserve service member's service is "honorable" as a matter of law absent a specific finding by a court-martial or other board of officers that such service is "other than honorable," notwithstanding any uncharacterized entry-level label that is given to the discharge.

the express language of Section 1440 ("has served honorably") and the Court's conclusion that the plain language of § 1440(a) refers only to the past service of the service member, not to possible additional, future periods of service or future suitability determinations. Dkt. 29 (PI Op.) at 20.

DoD has no discretion to implement the New DoD N-426 Policy, which is directly contrary to the statute and Congressional intent. The policy is therefore reviewable and may be set aside under the APA.

2. The New DoD N-426 Policy Imposes A Minimum-Service Requirement In Contravention Of 8 U.S.C. §1440(a)

Eligibility for naturalization under Section 1440 is clear and unambiguous: an alien who has served honorably as a member of the Selected Reserve or in active-duty status during a period of armed conflict is entitled to seek naturalization. Thus, on its face, the statute is clear that there is no minimum-service requirement naturalization eligibility. The statutory scheme as a whole confirms this fact, particularly when comparing the text of Section 1440 with that of 8 U.S.C. § 1439, which provides a path to naturalization for those serving in the armed forces during peacetime. Notably, Section 1439 provides:

> A person who *has served honorably* at any time in the armed forces of the United States *for a period or periods aggregating one year*, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's application, in the United States for at least five years . . .

8 U.S.C. § 1439 (emphasis added).

Other enactments by Congress over the course of the last century likewise included period-of service requirements. For example, the amendment made during the Korean conflict provided that eligibility "was conditioned upon service of no less than 90 days." Dkt. 22-2 (S. Rep. No. 1268-1292, at 5 (2d Sess. 1968) ("Senate Rep.")) at 4. Congress plainly knows how to include a

period-of-service requirement as a condition of eligibility for naturalization, and did so expressly for those soldiers seeking naturalization through peacetime service, and in connection with other enactments. However, for those willing to serve during armed conflict during the present time, Congress plainly intended that no minimum service requirement be imposed.

The legislative history confirms the intent of Congress on this point. The 1968 Senate Report compares, for example, 8 U.S.C. § 1440 (Section 329 of the INA) with 8 U.S.C. § 1439 (Section 328 of the INA) and makes clear Congress's intent to remove any minimum-service requirement for those serving during wartime and naturalizing under Section 1440:

> The peacetime serviceman must have a minimum of 3 years' service, *the wartime serviceman has no minimum required*. The peacetime serviceman must petition while still in the service or within 6 months after its termination, the wartime serviceman has no limitation. The peacetime serviceman needs a lawful admission for permanent residence, while the wartime serviceman can substitute in its stead his induction or enlistment while in the United States.

Dkt. 22-2 (Senate Rep.) at 5 (emphasis added).[6] *See also Nolan v. Holmes*, 334 F.3d 189, 201 (2d Cir. 2003) (relying on the 1968 Senate Report and the differences between Sections 1440 and 1439 to determine Congressional intent); *Block*, 467 U.S. at 349 (reviewability analysis is guided by the "specific legislative history that is a reliable indicator of congressional intent," and the "inferences of intent drawn from the statutory scheme as a whole.").

The Senate Report likewise made clear that Section 1440(a) includes no "waiting period."

> Section 329 of the Immigration and Nationality Act deals with wartime service, and provides that an alien or noncitizen national who has served honorably . . . may be naturalized *without regard to* the requirements concerning age, residence, physical presence, court jurisdiction or *a waiting period*.

[6] Section 1439 subsequently was amended to reduce the minimum-service requirement for peacetime soldiers from 3 years to 1 year.

Dkt. 22-2 (Senate Rep.) at 4 (emphasis added).

In direct contravention of the statute, the New DoD N-426 Policy includes an express minimum service requirement as a prerequisite to naturalization eligibility:

> Military Training and Required Service: The Service Member *has served* in a capacity, *for a period of time*, and in a manner that permits an informed determination that the member has served honorably as a member of the Selected Reserve of the Ready Reserve or member of an active component of a military or naval force of the United States, as determined by the Secretary of the Military Department concerned.

Dkt. 20-3 at 3; *see also* Dkt. 39-1 (Mot.) at 5. DoD's high-level security clearance requirement likewise creates unlawful minimum-service period and waiting period requirements because the security screenings necessarily take time — indeed, a great deal of time — to perform.

Defendants' attempt to shoehorn this aspect of its new policy into the so-called definition of "honorable service" is unavailing. As demonstrated above, the statute expressly provides naturalization eligibility for any person who has "served honorably" as a member of the Selected Reserve of the Ready Reserve or in an active-duty status while at the same time providing no minimum-service requirement. 8 U.S.C. § 1440(a). The statute thus presumes that "honorable service" determinations can be made immediately upon the soldier seeking to apply for naturalization without any minimum service period or other waiting period. *Id*.[7] Thus, the DoD policy is unlawful on its face.

[7] There is no dispute that honorable service assessments can be made immediately upon commencement of service. DHS admitted this directly in sworn testimony to this Court: "As members of the U.S. Armed Forces during a period of hostilities, MAVNI recruits are eligible to apply for naturalization under § 329(a), 8 U.S.C. § 1440, *once they join the military*." *Nio*, Dkt. 19-6 (Renaud Decl.) ¶ 15 (emphasis added). Further confirming and emphasizing this point, the USCIS Policy Manual states that "[o]ne day of qualifying service is sufficient in establishing eligibility." Dkt. 11-2 (USCIS Policy Manual) at 1. And, that is precisely what DoD and the service departments understood prior to this and the *Nio* litigation, when they issued hundreds, if not thousands, of N-426s based on one day of service.

Further, DoD's new policy also is unlawful as applied to Plaintiffs. Under Section 1439, Congress expressly has specified a service requirement of only one year for service members seeking naturalization during peacetime. 8 U.S.C. § 1439. It would defy reason to find that Congress intended to impose (or permit) a period-of-service requirement greater than one year for those service members serving during times of armed conflict. Yet, as applied, that is precisely what DoD has done to the class, all of whom have served for a period longer than one year.

3. The New DoD N-426 Policy Imposes A Service "Capacity" Requirement In Contravention Of 8 U.S.C. § 1440(a)

The New DoD N-426 Policy also imposes an unlawful service "capacity" requirement as a precondition to naturalization by providing that no N-426 may issue unless the "Service Member *has served in a capacity*, for a period of time, and in a manner that permits an informed determination that the member has served honorably . . . ." Dkt. 20-3 at 3 (emphasis added); *see also* Dkt 39-1 (Mot.) at 5.

However, Section 1440 already specifies the exact service "capacity" for naturalization:

> *Any person who*, while an alien or a noncitizen national of the United States, has served honorably *as a member of the Selected Reserve of the Ready Reserve or in an active-duty* status in the military, air, or naval forces of the United States . . . may be naturalized as provided in this section . . . .

8 U.S.C. § 1440(a) (emphasis added). Thus, "[a]ny person" who serves in the capacity of "a member of the Selected Reserve of the Ready Reserve or in an active-duty status" is eligible thereby to seek naturalization. DoD's attempt to impose an additional "service-capacity" requirement is directly contrary to the statute. DoD's new policy is therefore reviewable and may be set aside under the APA for this reason as well.

4. The New DoD N-426 Policy Imposes Residence And Physical Presence Requirements In Contravention Of 8 U.S.C. § 1440(b)(2)

Section 1440(b)(2) provides:

> A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that . . . *no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required ...*

8 U.S.C. § 1440(b)(2) (emphasis added). The legislative history makes clear that these provisions cannot be circumvented by requiring service members to satisfy any other type of "waiting period." *See* Dkt. 20-2 (Senate Rep.) at 4 (stating that service members "may be naturalized without regard to the requirements concerning age, *residence, physical presence*, court jurisdiction or a waiting period.") (emphasis added). In contravention of Section 1440(b)(2), the New DoD N-426 Policy imposes unlawful residence and physical presence requirements on Plaintiffs and other MAVNIs.[8]

The New DoD N-426 Policy provides that no N-426 may issue unless the "Service Member has served in a capacity, for a period of time, and in a manner that permits an informed determination that the member has served honorably . . . ." Dkt. 20-3 at 3. In other words, according to DoD's new rule, service members (including the class here) must be with their units for periods of time that are sufficient for them to be evaluated. But all of the units in question are based in the United States. In order to be observed and evaluated, these service members (including Plaintiffs) must be physically present at their units. In addition, the New DoD N-426 Policy also requires soldiers to wait for and participate in the completion of lengthy and time-

[8] DoD tacitly acknowledges this problem by proclaiming that "[n]one of the standards set forth herein as applicable to certifications of honorable service create or imply the creation of a residency or physical presence requirement for the purpose of naturalization pursuant to 8 U.S.C. § 1440." Dkt. 20-3 (New N-426 Policy) at 1. But DoD's bald assertion does not make it so, and the policy does in fact "create" such unlawful requirements.

consuming high-level security screenings, conducted in the United States, while they serve with their reserve units. As a result, the DoD N-426 Policy unquestionably creates a physical presence requirement in the United States contrary to the express terms of the statute.[9]

The result that necessarily flows from the New DoD N-426 Policy is so confounding and irrational that it must be contrary to Congressional intent.

5. Case Law Supports Reviewability Of DoD's Actions Under 8 U.S.C. §1440

The case law establishes that DoD's actions are reviewable. The cases cited by Defendants on this issue are inapposite – not one of them remotely relates to the statute in question or to DoD's role with respect to the naturalization process generally. Instead, they relate to military operations issues, such as flight training, base closures, vessel registrations, and the like. *See* Dkt 39-1 (Mot.) at 17-18. But this case is not about military operations. Rather, it is about the naturalization process. Defendants admitted as much when they conceded that the New DoD N-426 Policy was part of *DoD's* effort to "set standards for a naturalization process." Dkt. 20 (PI Opp.) at 38.

That type of misguided DoD effort – to set standards for naturalization – has not only been reviewed before by courts, but it has been rejected by courts. For example, in *Cody v. Caterisano*, No. 09-cv-00687 (D. Md.), the Navy purported to (a) rescind and nullify previously-issued Form N-426s certifying honorable service for a foreign student attending the U.S. Naval Academy – on the grounds of administrative error because the student's service did not truly qualify as active-duty service, and then (b) issue a new N-426 claiming that the student had not honorably served

[9] The New DoD N-426 Policy also creates an unlawful residence requirement. Any notion that enlisted Selected Reserve soldiers should commute from outside the United States to attend drills with their units within the United States is nonsensical. But that is the only way that the New DoD N-426 Policy can survive the statute's prohibition against imposing a residency requirement in the United States.

because the service was not truly active-duty. The *Cody* court determined that it was not obliged to accept the military's revised N-426 interpretation and could take one of three possible approaches to the review: "consider itself bound (1) by the most recent N-426, (2) by the earlier Form N-426 or (3) by neither, and make an independent determination of [the foreign student's] active-duty status." Order Denying Mot. to Remand, *Cody v. Caterisano*, No. 09-cv-00687, at *11 (D. Md. May 12, 2009) (Dkt. 19-1). As this Court noted in its PI Opinion, the district court in *Cody* "independently determined the petitioner's honorable service under 8 U.S.C. § 1440(a) for naturalization purposes, even if the Navy's views differed." Dkt. 29 (PI Op.) at 23.

Thus, the *Cody* decision is a case about naturalization of a military service member and, in fact, is a case about N-426s and the military's changed position regarding the honorable service designation. And, the *Cody* decision demonstrates that DoD is not the sole arbiter of qualifying service under 8 U.S.C. § 1440, and that courts may review, and overrule, DoD's N-426 decisions.

Defendants' attempt to distinguish *Cody* falls short. In particular, Defendants assert that "*Cody* does not address § 1440(a)'s allocation of responsibility between USCIS and DoD; in fact, DoD was not even a party in *Cody*." Dkt. 39-1 (Mot.) at 15. Yet, USCIS did not take the N-426 actions at issue in the *Cody* case, the Navy did. And the *Cody* court exercised its judicial review function over the actions of that military department. Thus, the "allocation of responsibility" between USCIS and the military branches was not at issue in *Cody* for the same reason it is not at issue here: in neither case has USCIS attempted to issue or revoke N-426 certifications.[10]

[10] Moreover, the fact that DoD was not a party in the *Cody* case does nothing to bolster DoD's argument. Section § 1440 provides that the honorable service certification shall be made by "the executive department under which such person served." 8 U.S.C. § 1440(a). For the plaintiff in *Cody*, that department was the Department of the Navy. For the plaintiffs in this case, the pertinent department likewise is the military department under which each plaintiff serves — *i.e.*, Department of the Army, Department of the Navy, or Department of the Air Force. DoD has no

B. Defendants Have Violated § 706(1) Of The APA

Section 706(1) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C. § 706(1). In seeking dismissal of Plaintiffs' § 706(1) claims, Defendants make the same argument that this Court, for good reason, found unconvincing just a few weeks ago. In short, Defendants argue that Plaintiffs cannot show that DoD has a non-discretionary, ministerial obligation to certify N-426s for Selected Reservists. With respect to that argument, this Court already has found the following:

> [D]efendants have a ministerial duty to certify Form N-426s. Under 8 U.S.C. § 1440, certification of Form N-426s is a non-discretionary duty to the extent that it references *past* honorable service. . . Based on the record and for the reasons discussed herein, the Court concludes that plaintiffs are likely to succeed in proving . . . DOD must expeditiously certify or deny their N-426s based on their existing military records.

Dkt. 29 (PI Opp.) at 30. Defendants' Motion includes nothing that would disturb that finding.[11]

Section 1440(a) imposes a mandatory duty to act: "[t]he executive department under which such person [seeking naturalization] served ***shall*** determine" whether the applicant is honorably serving or has honorably served. 8 U.S.C. § 1440(a) (emphasis added).[12] Notably, the one change that Defendants have made to their § 706(1) argument since the Court's PI Order does not serve them well. Previously, Defendants argued that Congress' use of the word "shall" could not be construed as mandating action by DoD. Dkt. 20 (PI Opp.) at 21-22. Defendants now argue that

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statutory role in the honorable service certification process under § 1440. Instead, DoD's involvement flows solely from its general supervisory capacity over the military departments.

[11] Rather than repeat the arguments here, Plaintiffs incorporate by reference their PI briefing on this issue. *See, e.g.*, Dkt. 22 (PI Reply) at 24-30.

[12] The "determination" – as reflected on the N-426 itself – is a binary decision; thus, DoD has to act by reporting the result of the record lookup.

any ministerial obligation under Section 1440 pursuant to the word "shall" is owed only to soldiers who have served in active-duty status (and not Selected Reservists). Dkt. 39-1 (Mot.) at 20-21.

First of all, Defendants make that argument without explaining how it could possibly be that Congress amended the statute in 2003 specifically to "provide[] expedited naturalization for members of the Selected Reserves during military conflicts" (Dkt. 29 (PI Op.) at 27 n. 20), but then (through what are obviously drafting omissions) really intended to give DoD the power to completely undermine any possibility of expedited naturalization for Selected Reservists. The one case cited by Defendants does not support their position. Dkt. 39-1 at 20 n.9. In fact, in that case, the Supreme Court said that whether it is implausible that Congress meant for a statute to operate in a certain manner is a valid consideration for courts when construing a statute. *King v. Burwell*, 135 S. Ct. 2480, 2494 (2015). Further, the Supreme Court said that a court must read the words of the statute in context and with consideration for the overall statutory scheme. *Id.* at 2492.

Second, Defendants fail to note that, if one were to ignore the obvious drafting errors as Defendants urge this Court to do, a plain reading of the statute actually would allow Selected Reservists to naturalize without *any* service certification from the military, thus completely removing DoD from the equation here.[13]

Third, Defendants cannot explain how their reading of "shall" supports the New DoD N-426 Policy. Since there are Selected Reserve MAVNIs in the *Nio* and *Kirwa* classes who have served in active-duty status (including those who have attended annual training and "holdovers"

[13] And, one plausibly could argue the logic behind that reading of the statute, as the case law and evidence has shown that the question of whether someone has served in "active-duty status" may not be self-evident – for example, is ROTC active-duty, is the military academy active duty, what training is active duty? – and could benefit from military administrative assistance, whereas the question of whether someone is or is not a Selected Reservist readily could be determined by USCIS were the soldier to submit a copy of his/her enlistment contract to USCIS.

who currently are serving in active-duty status because they are stuck in basic training until their DoD background checks are complete), even under their own skewed reading of the 8 U.S.C. § 1440, Defendants are conceding § 706(1) violations.

Finally, Defendants' argument about the use of "shall" and "may" within the statute distorts the construction premise on which they purport to rely. *See* Dkt. 39-1 (Mot.) at 21. Yes, it makes sense for a court to read "may" as permissive when Congress instructs that an agency "shall" take some actions and "may" take others. But, there is no such clear juxtaposition in this statute, and Defendants' forced comparison is a bridge too far.

Beyond the statute's own language, context, and related legislative history, DoD's limited role is further confirmed by both DHS and Army guidance. Dkt. 22 (PI Reply) at 27-28.[14] Notably, Defendants completely fail to address this in their Motion.

Also not addressed in Defendants' Motion is the fact that, in addition to admitting the ministerial and "administrative" nature of their N-426 role through years of practice (Dkt. 22 (PI Reply) at 28-30), Defendants have admitted their ministerial role to this Court: "DoD serves a ministerial role in determining if an individual is serving honorably[.]" *Nio*, Dkt. 19 (PI Opp.) at 36; Dkt. 29 (PI Op.) at 23 ("Indeed, DOD has conceded that certifying Form N-426s is merely

[14] For example, as expressly stated in the N-426 instructions, DoD's role is limited to verifying the applicant's military service. Rather than ship the applicant's military service record to DHS, DoD provides the clerical function of looking at the applicant's service record and verifying the soldier's service. The legislative history of military naturalization statutes indicates that the N-426 is used as a substitute for transferring an applicant's service record from the military to USCIS. Several versions of the form include instructions to certifying military officials explaining the same. Dkt. 22 (PI Reply) at 25-28. And there is nothing in the legislative history or elsewhere that even suggests, much less confirms, that the certification being provided in lieu of transferring a service record was meant to bestow the military with complete discretion over who may apply for naturalization. For these reasons, Defendants' argument that Congress "intended to give the Military Departments an active role in determining honorable service" lacks merit. *See* Dkt. 39-1 (Mot.) at 12.

ministerial. . . . Accordingly, DOD's N-426 policy is subject to review as a ministerial task not committed to agency discretion . . . .").

Not one word in the statute (or the Form or anywhere else) confers upon DoD any obligation, right, or duty to determine for itself whether a soldier should be naturalized, nor to impose any preconditions to naturalization or to completion of the Form. DoD has a ministerial and non-discretionary duty to complete N-426 forms. Thus, Plaintiffs' claims are adequately pled and survive any attempt at summary judgment in Defendants' favor.

C. The DoD N-426 Policy Violates 5 U.S.C. § 706(2)

Section 706(2) of the APA provides that a court shall hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

1. The New DoD N-426 Policy Is "Not In Accordance With The Law"

For the reasons set forth above, the New DoD N-426 Policy is "not in accordance with the law." The policy imposes future background check requirements, future military suitability determination requirements, and future service period requirements, all in contravention of the plain language of § 1440(a). Dkt. 29 (PI Op.) at 20 (the text of the statute "specifically refers to *past service*, not to DOD's possible future suitability determinations.") (emphasis in original).

Further, the New DoD N-426 Policy imposes exceptionally onerous preconditions for naturalization — including satisfactory completion of high-level security clearance screenings — in contravention of the clear Congressional intent in § 1440 to "ease" the naturalization requirements for these soldiers.

Moreover, the New DoD N-426 Policy purports to permit the characterization of service of reserve soldiers as something less than honorable, in contravention of 10 U.S.C. § 12685, which

entitles reserve soldiers to an "honorable" characterization of service as a matter of law except where such service is determined to be "other than honorable" by specific findings of a court-martial or other convened board of officers.

The New DoD N-426 Policy also imposes a minimum-service requirement, a service "capacity" requirement, and physical presence and residence requirements in contravention of § 1440(a) and § 1440(b)(2).

Instead of addressing these dispositive issues, Defendants contend that Plaintiffs' claims under Section 706(2) fail because "Section 1440 imposes no obligation to certify a non-citizen's service as honorable within a specific period of time, and neither the statute nor the legislative history contain any criteria about what it means to serve 'honorably.'" Dkt. 39-1 (Mot.) at 23; *see also id*. at 24 ("The regulation does not purport to define for DoD what constitutes 'honorable' service, nor does it state that a soldier must receive honorable-service certification by a certain point in time.").

Defendants' reference to the absence of an express time limit in this context is irrelevant. Section 706(2) does not provide an action for "unreasonable delay" (that is in Section 706(1)), and Plaintiffs make no delay claim against DoD under Section 706(1) at this time. Nevertheless, Section 706(2) permits the Court to hold unlawful and set aside agency action that is "not in accordance with the law." Agency action is defined to include "the whole or a part of an agency rule, order, . . . or failure to act." 5 U.S.C. §§ 551(13), 701(b)(2). DoD has adopted a policy of general applicability — *i.e*., a rule — that precludes the service branches from certifying honorable service for members of the Selected Reserve (including Plaintiffs and the class) unless numerous unlawful preconditions are met. Accordingly, Plaintiffs properly challenge both DoD's new policy, as well as any failure to act (*i.e*., failure to issue N-426s) that would result from

implementation of the policy, because these actions are "not in accordance with the law." 5 U.S.C. § 706(2)(A).[15]

Defendants' contentions that the statute and legislative history "do not contain any criteria about what it means to serve 'honorably,'" (Dkt. 39-1 (Mot.) at 23) and that the "regulation does not purport to define for DoD what constitutes 'honorable' service," (*id.* at 24) likewise lack merit. As demonstrated above, the text of the statute, the legislative history and the statutory scheme as a whole make perfectly clear that the preconditions being used by DoD to deny "honorable service" cannot be used for that purpose.[16]

2. <u>The New DoD N-426 Policy Is Arbitrary, Capricious, An Abuse Of Discretion, And Outside Of DoD's Authority</u>

Although not necessary for decision because the New DoD N-426 Policy is "otherwise not in accordance with the law" for the numerous independent reasons set forth above, the Court also should set aside the New DoD N-426 Policy under 5 U.S.C. § 706(2) as arbitrary, capricious, an

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[15] Defendants do not contest and have consequently conceded that their actions are "final" agency actions for APA purposes. *See generally* Dkt. 39-1 (Mot.).

[16] Citing *Washington Hospital Center v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986), Defendants appear to suggest that they are entitled to so-called *Chevron* deference with respect to their purported "interpretation" of the term "honorable" in § 1440. For the same reasons as set forth above, Defendants' reliance on the *Chevron* doctrine is misplaced and actually undercuts their position. Under the *Chevron* doctrine, "[i]f the intent of Congress is clear, that is the end of the matter," and the agency may not act inconsistent with such intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Nor have Defendants shown that Congress entrusted the administration of the Immigration and Nationality Act ("INA"), including 8 U.S.C. § 1440, to DoD. *Chevron*, 467 U.S. at 843-44. Defendants have not shown that Congress delegated to DoD authority to generally make rules that carry the force of law under the INA or that DoD acted in a sufficiently formal way to earn *Chevron* deference. *See United States v. Mead Corp*., 533 U.S. 218 (2001). Finally, even if DoD could satisfy all of these requirements, it is clear that Congress gave *DHS* authority to administer the INA. *Chevron* deference is available only when a statute gives an agency exclusive authority over a particular set of regulated parties, and not when the statute gives two agencies potentially overlapping authority. *DeNaples v. Office of the Comptroller of the Currency*, 706 F.3d 481 (D.C. Cir. 2013).

abuse of discretion, and as outside of DoD's authority.[17] As the Court already found, DoD offered no reasoned explanation for its new policy regarding certification of honorable service, thereby presumptively rendering that policy arbitrary and capricious. Dkt. 29 (PI Op.) at 24. Further, the Court also found, that the New DoD N-46 Policy was implemented as a means for DoD to gain control over the criteria for naturalization, a subject that is outside of its authority as an agency. Dkt. 29 (PI Op.) at 26, quoting Dkt. 20 (PI Opp.) at 38 ("DoD's new policy marks an effort to …

[17] In a footnote, Defendants assert that the Amended Complaint does not challenge the New DoD N-426 Policy on the grounds that it is arbitrary and capricious. Dkt. 39-1 (Mot.) at 25 n.12. This is incorrect. The Amended Complaint specifically asserts that "5 U.S.C. § 706(2) authorizes a court to hold unlawful and set aside final agency action found to be arbitrary, capricious, an abuse of discretion (*e.g.*, irrational), or otherwise not in accordance with the law . . . ." Dkt. (AC) 33 ¶ 112. As the Court explained in its PI Opinion, an agency action is arbitrary and capricious if the agency makes a change in policy or issues a new policy without adequate justification. Dkt. 29 (PI Opinion) at 24-25. Furthermore, an agency acts without adequate justification when it acts for an improper purpose or outside of its authority. *Id*. at 26. The Amended Complaint contains numerous allegations that DoD has acted arbitrarily and capriciously in this regard. *See, e.g.*, Dkt. 33 (AC) ¶ 100 ("DoD has adopted N-426 policies, including the . . . New DoD N-426 Policy, that purport to preclude Plaintiffs and the class from obtaining N-426 honorable service certifications until Plaintiffs satisfy certain DoD requirements that have no legal justification."); *id.* ¶ 5 (Through its N-426 policies, "DoD has seized control over naturalizations under 8 U.S.C. § 1440 and has assigned to itself a naturalization gate-keeping role that it has no power or authority to assume."); *id.* ¶¶ 10-11 ("Defendants' policy of denying N-426 certifications to Plaintiffs and other Selected Reservists stands in stark contrast to past practices. Until recently – *i.e.*, before DoD implemented these policies and before it began otherwise interfering with the naturalization process for MAVNI applicants – soldiers in Plaintiffs' position sought (and obtained) naturalization through a well-established and orderly process that was consistent with the law . . . [T]hat once swift, orderly, lawful and straightforward process came to a screeching halt in late 2016 and has morphed into a process characterized by DoD disarray, delay, dishonor and a dereliction of duty."); *id.* ¶ 14 ("Defendants' N-426 policies are nothing more than a thinly-veiled effort – albeit poorly-reasoned and litigation driven – to deny U.S. citizenship to certain MAVNI soldiers because DoD's views about the MAVNI program have changed over time."); *id.* ¶ 62 ("DoD has a mandatory, non-discretionary duty to compete N-426 Forms for those soldiers (including Plaintiffs and the class) eligible to apply for naturalization under the statute, and DoD's refusal to perform this duty lacks rationality, coherence and consistency."); *id.* ¶ 65 ("Contrary to law, DoD is interfering with and manipulating the naturalization process for Selected Reservists – a process over which it has no more than a ministerial duty to issue N-426 certifications."); *id.* ¶ 113 ("The conditions imposed by the N-426 policies are contrary to the plain language of the statute, implementing regulations, and final rulemaking and exceed DoD's statutory authority and represent a departure from and change in the legal landscape vis-à-vis Defendants' prior N-426 policies and practices.").

set standards for a naturalization process that has been greatly challenged by national security threats."). As the Court explained, "despite its assertions to the contrary, DOD does not control the naturalization process. . . . So DOD's unfounded attempt to control criteria for naturalization does not constitute a reasonable explanation for the October 13, 2017 policy change here." Dkt. 29 (PI Op.) at 26; *see also Iceland S.S. Co. v. U.S. Dep't of the Army*, 201 F.3d 451, 461 (D.C. Cir. 2000) (agency action motivated by subjective bad faith is "arbitrary and capricious"); *Office of Foreign Assets Control v. Voices in the Wilderness*, 382 F. Supp. 2d 54, 55 (D.D.C. 2005) (same). Nothing has changed since the Court's prior decision on these issues and Defendants' Motion only serves to confirm the arbitrary and capricious nature of its actions.

For example, Defendants contend that the New DoD N-426 Policy is not a change in policy but rather simply a "new" policy, since DoD itself (as opposed to the individual military departments) did not previously have any "formal" policy in this area. *See, e.g.*, Dkt. 39-1 (Mot.) at 5 ("The October 13 Policy set forth new guidance for N-426 certification …"); *id.* at 26 ("Here, the October 13 Policy reflects DoD's desire to establish, for the first time, a clear and consistent process for N-426 certifications following a number of years in which the military was applying inconsistent standards for such determinations. . . . The policy is consistent with DoD's longstanding intent; DoD has now simply formalized it."). Yet, as the Court has explained, "[f]or purposes of arbitrary-and-capricious review, the APA 'makes no distinction … between initial agency action and subsequent agency action undoing or revising that action.'" Dkt. 29 (PI Op.) at 25, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).[18]

[18] Defendants' assertion that the New DoD N-426 Policy reflects DoD's "longstanding intent" also is demonstrably false. For months leading up to promulgation of this new policy, DoD maintained a totally different policy of refusing to certify honorable service for members of the Selected Reserve who had not served in an active-duty status. Indeed, as the Court noted, DoD changed its "active-duty" policy on the eve of the dispositive hearing on the lawfulness of *that* N-

Defendants also repeat their generalized "national security" mantra. *See* Dkt. 39-1 (Mot.) at 17 ("[A]s a general matter, courts should exercise great caution when adjudicating claims involving sensitive military and national-security matters."). However, the Court correctly dispelled Defendants' "national security" myth in its PI Opinion as well. *See* Dkt. 29 (PI Op.) at 25-26 ("In an attempt to explain the change, defendants' counsel repeated the now-familiar refrain that DOD has made the change for 'national security' purposes. . . . But DOD's guidance is not justified by any national security concerns. . . . Moreover, DOD fully controls what these enlistees do and have access to before the enhanced security screening is complete. Therefore, DOD has given no reasoned justification why a form N-426 for immigration and naturalization purposes implicates our national security."); *see also Wagafe v. Trump*, No. 2:17-cv-00094-RAJ, 2017 U.S. Dist. LEXIS 195315, at *5 (W.D. Wash. Nov. 28, 2017) ("The Government may not merely say those magic words—"national security threat"—and automatically have its requests granted in this forum."). Defendants' Motion makes no new arguments in this regard, nor does it explain how the Court's analysis on the national security issue is misguided or erroneous in any manner.

Finally, along with its Motion, Defendants submit a third Declaration of Stephanie Miller dated November 17, 2017 to provide a new purported justification for the New DoD N-426 Policy (the "New Miller Declaration"). As a preliminary matter, we note that the New Miller Declaration (Nov. 17, 2017) postdates the New DoD N-426 Policy (October 13, 2017) by more than a month and, in fact, is not part of the designated administrative record in this case. *See* Dkt. 38-2 (A.R.

426 policy. Dkt. 29 (PI Opinion) at 24 ("Early in the *Nio* and *Kirwa* litigation, DoD represented to this Court that it planned to change its N-426 policy to only permit certification for MAVNI enlistees who were serving in an active-duty status. On the eve of the October 18th hearing, DoD, facing the probability that such a policy would be found to violate 8 U.S.C. § 1440(a), changed course yet again, offering a new set of criteria that would allow it to further prolong certification of Selected Reservists' N-426s."). Defendants' lack of candor in its representations to the Court serves as further evidence of the arbitrary and capricious nature of its actions.

Index) at 1-3. As a result, it forms no part of the record that the agency may rely on to justify the New DoD N-426 Policy.

In any event, the New Miller Declaration only serves to confirm the arbitrary and capricious nature of DoD's action. An agency action is arbitrary and capricious under 5 U.S.C. § 706(2) "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). The New DoD N-426 Policy runs afoul of § 706(2) in all of these independent areas.

In stunning fashion, Defendants offer as their principal new contention that, until Plaintiffs and the other soldiers in the class have completed their enhanced background screenings and new military suitability determinations, they have not yet "served" as "soldiers." *See* Dkt. 39-1 (Mot.) at 2 ("The new N-426 policy serves the important purpose of ensuring that DoD does not vouch for the honorable service of enlistees *who may never serve* and, indeed, who would not even be permitted to enlist if the military had complete information about their backgrounds at the time of recruitment.") (emphasis added); *id*. at 26 ("Requiring the completion of suitability screening prior to making an honorable-service determination, moreover, fulfills multiple goals for DoD. . . . First, linking suitability screening to honorable-service certification ensures that DoD has sufficient information to determine whether the individual in question *is suitable to be accessed into the military in the first place*.") (emphasis added); *id*. ("The suitability screening thus gives DoD the opportunity to verify that an individual *is qualified to be a soldier* and that there does not exist any information to justify termination of the person's enlistment contract; only at that point in time is

DoD to certify that the person has served honorably.") (emphasis added); *id.* at 27 ("Plaintiffs' demand that DoD should certify individuals prior to the completion of suitability screening presents several concerns. To begin, only those MAVNI enlistees *who are eligible to serve* are able to apply for naturalization based on their service, but DoD must wait for the completion of the security screening to determine whether an individual is eligible to serve.").

Defendants' argument is wholly detached from reality. The Plaintiffs and the class already were "permitted to enlist in the military." They all in fact enlisted in the military and committed eight years of their lives to service during war time. They all have been "accessed into the military," have ranks, have been assigned to military units, have military identification cards, and have been given access to military bases. They all are subject to the orders of their superiors in rank, to the military justice system, to military discipline, and to military regulations. Obviously, all of the Plaintiffs and members of the class *are serving* as *soldiers* in the military and have been doing so for more than one year. The notion that these soldiers are not "serving" would come as a surprise to their commanders, their families, and themselves. It is offensive for Defendants to demean these soldiers' service in an attempt to gain a litigation advantage.

Indeed, in their Motion, Defendants cite to *military regulations* that Defendants claim apply to all of these individuals. *See* Dkt. 39-1 (Mot.) at 14 (citing AR 635-200, § 3-7(c) (2016)). Such application would be absurd if plaintiffs were not military service members.

Furthermore, Defendants ignore the fact that they repeatedly have conceded in their representations to the Court — and correctly so — that Plaintiffs and other similarly situated members of the Selected Reserve are "soldiers" who are currently "serving" in the military. *See, e.g.*, Dkt. 39-1 (Mot.) at 5, 6 (stating that "The October 13 Policy set forth new guidance for N-426 certification as applied to three discrete groups of nonresident *soldiers*," and later stating that

Plaintiffs are "three MAVNI enlistees *serving* in the Selected Reserve of the Ready Reserve") ") (emphasis added); Dkt. 39-4 (Thomas Decl.) at 2-5 (repeatedly referring to non-citizen "Soldiers" in the context of the Army's implementation of the Court's order; *see generally* Dkt. 20 (PI Opp.) (repeatedly referring to "MAVNI *soldiers*" throughout) (emphasis added).

For these reasons, among others, Defendants' newly-minted "Plaintiffs-have-not-yet-served" justification clearly "runs counter to the evidence before the agency" and otherwise "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. As such, the agency's action should be set aside under the arbitrary and capricious prong of 5 U.S.C. § 706(2).[19]

Indeed, Defendants' "Plaintiffs-have-not-yet-served" argument appears to be a thinly-veiled effort by DoD to re-institute the unlawful "active-duty service" requirement that DoD has long sought to impose, and which the Court warned from the outset was illegal. Dkt. 29 (PI Op.) at 24. Defendants effectively have admitted as much in their Motion: "Although Plaintiffs and members of the provisionally certified class have already enlisted, they are participating in the Delayed Training Program and there is no way to know until their screenings are complete whether they will be found suitable to access and attend IET [*i.e.*, active-duty training.]." Dkt. 39-1 (Mot.)

[19] Through carefully-crafted and often vague assertions, Defendants also appear to be attempting to leave the impression that MAVNI soldiers such as Plaintiffs and the class were not subject to a military suitability determination prior to their entry into service. That, too, would be false. MAVNI recruits were subject to the same military suitability determinations that all other U.S. service members experience. Dkt. 39-1 (Motion) at 3 ("A MAVNI enlistee must satisfy minimum standards that apply to all military recruits and must undergo a standard suitability-for-service determination."). DoD now simply desires to perform a second military suitability determination for these individuals based on a so-called "additional tier of scrutiny." *Id.* But the fact that DoD wants to perform a second round of determinations does not negate the fact that these individuals are "soldiers" who already have "served" in the military. In any event, to the extent that Defendants intend to press these "service" and "suitability" issues, the agency would need to include the individual service records of the soldiers in question as part of the administrative record in this case.

at 26. In other words, DoD does not consider Selected Reserve service by soldiers in the Delayed Training Program sufficiently worthy "service" for naturalization purposes, notwithstanding the clear statutory language in § 1440(a) stating otherwise.

Defendants' other purported justification for the New DoD N-426 Policy fares no better. Specifically, Defendants argue that DoD should be permitted to delay the N-426 certification process across the board just in case it wants to discharge some unspecified, unidentified individual soldier in the future under purportedly less than honorable conditions. *See* Dkt. 39-1 (Mot.) at 12 ("If such adverse information is identified while the enlistee is in the Delayed Training Program, the enlistee would be 'released from service under an uncharacterized entry level separation' and precluded from reenlisting."); *id*. at 26 ("If this information is discovered during [the enhanced screening] process and is not capable of being mitigated, DoD intends for the individual to be separated from the military."). But as the Court already has explained, the statute itself specifically addresses this issue and "provides for revocation should 'the person [be] separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years.'" Dkt. 29 (PI Op.) at 20-21, quoting § 1440(c). Thus, Congress already has made the policy determination on this issue and has provided the process for dealing with the situation where a service member, otherwise qualified for naturalization, subsequently is discharged under other-than-honorable conditions. The statute gives this class of individuals — *i.e*., those volunteering to serve during a period of armed conflict — the benefit of the doubt, allowing them to naturalize in the first instance and providing for revocation in the event of an subsequent unfavorable discharge. While DoD speculates that this process may prove inconvenient for the Government in the future, that provides no basis for ignoring Congressional intent.

Accordingly, in issuing the New DoD N-426 Policy, "the agency has relied on factors which Congress has not intended it to consider," and the policy should be set aside as arbitrary and capricious under § 706(2) for this reason as well. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

3. <u>Defendants' N-426 Policy Is Impermissibly Retroactive</u>

Less than three weeks after conceding in open court that the New DoD N-426 Policy changes the "legal landscape" under retroactivity principles,[20] Defendants now boldly assert the opposite. Dkt. 39-1 (Mot.) at 30 ("The new policy also does not change the legal landscape."). But Defendants offer no basis whatsoever to justify a reversal of this Court's finding – for preliminary injunction purposes – that the New DoD N-426 Policy has impermissible retroactive effect. Dkt. 29 (PI Op.) at 26-30.

As a preliminary matter, there is no merit to Defendants' contention that Plaintiffs are barred from arguing that the New N-426 Policy is impermissibly retroactive because "Plaintiffs' original Complaint did not allege that DoD's policy is impermissibly retroactive . . . and their Amended Complaint refers only in passing to the policy's alleged retroactive effects[.]" Dkt. 39-1 (Mot.) at 28 n.13. Indeed, the argument is bizarre. Defendants seem not to appreciate that Plaintiffs filed their original Complaint on September 1, 2017, seven weeks *before* DoD issued its

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[20] *See* Oct. 27, 2017 *Nio* Tr. 18:7-21 ([THE COURT:] The rules of the game have changed whether you have decided there's good reason for some of the rules and I've decided there's not good reason for some of the other rules. **You have to tell me that the legal landscape has changed**. MR. KISOR: **Yes, your honor**. And there's part of the enlistment contract that says I understand the laws and regulations may change at anytime and that that may affect me and they've all signed that.") (emphasis added). As the Court is aware, Department of Justice counsel, Mr. Kisor, represents the Department of Defense in connection with the *Nio* Action, which includes a challenge to the New DoD N-426 Policy. DoD likewise conceded that the New DoD N-426 Policy departed from their prior practice and was driven, not by DoD's long-held intent, but instead "recent" discoveries. *See* Oct. 18, 2017 *Kirwa* Tr. 41:15-42:2 ("[MR. SWINTON:] Again, *even though the prior practice* might have been to award that honorable service determination earlier . . . *DoD has recently discovered* . . .") (emphasis added).

new policy on October 13, 2017, making it rather difficult to raise the challenge at that time. And what Defendants characterize as a mere "passing" reference to retroactivity in Plaintiffs' Amended Complaint is anything but. Count III specifically alleges:

> The conditions imposed by the N-426 policies . . . represent a departure from and change in the legal landscape vis-à-vis Defendants' prior N-426 policies and practices. As such, Defendants' policies are unlawful on their face and otherwise are being unlawfully applied retroactively to Plaintiffs and the class.

Dkt. 33 (AC) at ¶ 113.[21]

"Generally, an agency may not promulgate retroactive rules without express congressional authorization." *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010). "In the administrative context, a rule is retroactive if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' The critical question is whether a challenged rule establishes an interpretation that 'changes the legal landscape.'" *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (internal citations omitted).

Given the plain text of the policy itself, Defendants' contention that the New DoD N-426 Policy "on its face does not apply retroactively" makes no sense. Dkt. 39-1 (Mot.) at 29. In fact, the New DoD N-426 Policy expressly states that it applies to MAVNIs enlisting "Prior to the Date of this Memorandum," and it explicitly imposes upon the *Kirwa* class new N-426 certification criteria that did not previously apply to them. By its own terms, the policy, retroactively changes

[21] The Federal Rules "require[] only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Plaintiffs have alleged, among other things, that DoD's litigation driven policy substantively changes DoD's prior practices and may not be applied to change the criteria applicable to Plaintiffs and the class as arbitrary and capricious. That is, DoD may not apply the new policy retroactively.

the legal landscape. In any event, the Court already has addressed and decided this question: "There can be no dispute that the [New DoD N-426 Policy] changes the legal landscape: DOD has never applied the criteria listed therein to MAVNI enlistees before now." Dkt. 29 (PI Op.) at 29. Every soldier enlisting prior to the October 13 policy (*i.e.* Plaintiffs and the Class) had the right to receive an N-426 based upon a simple service record check and begin the expedited naturalization process. As this Court recognized, the New DoD N-426 Policy takes that right away. Dkt. 29 (PI Op.) at 29 ("Before the October 13th Guidance MAVNI enlistees had a right to apply for an expedited path to citizenship and DOD's new procedures rob plaintiffs of this opportunity."). Furthermore, as noted above, Defendants likewise already have conceded the "critical question" that the new DoD N-426 Policy "changes the legal landscape." Oct. 27, 2017 *Nio* Tr. 18:6-21; *Nat'l Mining Ass'n*, 292 F.3d at 859.

Defendants cannot excuse or avoid DoD's past practice by claiming that it reflects the policy of only "*some* components and officials within DoD" and only at "*certain* points in time." Dkt. 39-1 (Mot.) at 30 (emphasis added). DoD has never before applied the criteria listed in the New DoD N-426 Policy. As this Court already held, "[t]he unrebutted evidence of DOD's past practice in certifying N-426s demonstrates that the honorable service determination consisted of a cursory records check." Dkt. 29 (PI Op.) at 8. Defendants point to no contrary evidence.

Notwithstanding their prior concessions and disregarding the Court's finding otherwise, Defendants now contend that the New DoD N-426 Policy does not change the legal landscape because "it had always been DoD's intent" to apply that policy to honorable service certifications. *See* Dkt. 39-1 (Mot.) at 30, citing to Dkt. 39-5 (Third Miller Decl.). This bald statement is belied by the documented history – including some 10,000 MAVNIs who made it through the system notwithstanding DoD's alleged long-standing intent. Oct. 18, 2017 *Kirwa* Tr. 41:10-14 ("[THE

COURT:] You've got 10,500 MAVNIs through."). This new statement from DoD is simply false. *See infra* n. 20. More importantly for present purposes, Defendants cite no authority for the absurd proposition that latent agency intent – left un-acted upon and never implemented – allows the agency to avoid the retroactivity bar for new policies that were never in fact previously promulgated. Indeed, the military departments were unable to read DoD's mind on this issue (since they at all times maintained their longstanding prior practices); how could the regulated public have been expected to do so? There is no evidence that the prior practice was undertaken in defiance of existing policies or due to some clerical mistake or administrative error. DoD admits that this is a new policy. *See, e.g.*, Dkt. 39-1 (Mot.) at 5 ("The October 13 Policy set forth new guidance for N-426 certification …"); *id.* at 26 ("Here, the October 13 Policy reflects DoD's desire to establish, for the first time. . ."). Rather, the past practices reflect the policy that was in place and used by soldiers and military departments alike to fulfill the statutory obligation to enable MAVNI enlistees to achieve an expedited path to naturalization. DoD has simply decided to change the policy. It may not do so retroactively.

Next, Defendants argue that the New N-426 Policy is not impermissibly retroactive because the new policy only "'upsets expectations' premised on the prior practice of some DoD components." Dkt. 39-1 (Mot.) at 31. Defendants made the same argument earlier (October 18, 2017 *Kirwa* Tr. 69:16-70:3) and the Court dispensed with it in open session on October 27, 2017. *See* October 27, 2017 *Nio* Tr. 25:2-10 ([THE COURT:] "[I]t's not an expectation . . . they would have a right to apply for expedited citizenship. And that's what you've not permitted here."). Among other things, under the previously existing legal rules, Plaintiffs and the class had the right to apply for naturalization after one day of Selected Reserve Service. Indeed, numerous MAVNIs

had done so and many were naturalized on that basis. DoD's new policy takes away that right. This is not an instance of mere upset expectations.

Finally, Defendants contend that even if the new policy has retroactive effect, it is permissible because class members were on notice that the rules could change and they signed up anyway. Dkt. 39-1 (Mot.) at 29 ("Plaintiffs [] were put on notice and acknowledged at the time of their enlistment that '[l]aws and regulations that govern military personnel may change without notice to me.'"). This is a gross mischaracterization of Plaintiffs' enlistment acknowledgements. Plaintiffs may have assumed the risk that laws and policies could change *prospectively* post-enlistment. Any such acknowledgement, however, could not reasonably be interpreted as granting permission for DoD to unlawfully impose a new policy, with *retroactive* effect, that strips them of pre-existing rights and benefits.

4. <u>The Relief Sought By Plaintiffs Is Appropriate</u>

Defendants argue that even if Plaintiffs prevail on their § 706(2) claims, they are not entitled to the relief sought. Dkt. 39-1 (Mot.) at 32-33. This argument is identical to that made by Defendants prior to the Court's order granting preliminary injunctive relief. Dkt. 17 (SJ Opp.) at 22-24. And once again Defendants' argument lacks merit. As Plaintiffs noted in Section II(b)(2) of their October 13, 2017 Reply Memorandum, incorporated herein by reference, the requested relief is proper under the APA. Dkt. 19 (SJ Reply) at 22-25. Section 706(2) provides that "[t]he reviewing court ***shall – hold unlawful and set aside agency actions***, findings, and conclusions found to be … not in accordance with the law." 5 U.S.C. § 706(2)(A) (emphasis added); *see also* Dkt. 19 (SJ Reply) at 22. Plaintiffs clearly have pled and demonstrated that the conditions imposed by the New DoD N-426 Policy are contrary to the plain language of the statute, implementing regulations, and final rulemaking, are arbitrary and capricious, and exceed DoD's statutory

authority. Consequently, Plaintiffs are entitled to the relief under § 706(2) that they have sought. Dkt. 33 (AC) at ¶ 114 (Plaintiffs "seek an order: (i) holding unlawful and setting aside Defendants' policies.").

The other forms of relief sought by Plaintiffs also are expressly contemplated by the APA, which provides for "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. § 703. Accordingly, Plaintiffs "seek to have the already-issued preliminary injunction converted to a final and permanent injunction," Dkt. 33 (AC) ¶ 107, and further seek a final order:

> (iii) enjoining Defendants from withholding issuance of N-426s and from refusing to certify honorable service except as related to the conduct of an individual soldier as reflected in that soldier's service record and based on sufficient grounds generally applicable to all members of the military; and (iv) enjoining Defendants from applying the policy to Plaintiffs and the class.

Dkt. 33 (AC) ¶ 114. Despite already having alerted Defendants to the types of relief available under § 703 and the longstanding precedent for granting injunctive relief under the APA (Dkt. 19 (SJ Reply) at 22-25; Dkt. 22 (PI Reply) at 36), Defendants fail to address why Plaintiffs are not entitled to the injunctive relief requested here. Instead, without addressing a single counter-argument made by Plaintiffs previously, Defendants repeat their argument that "[a] district court lacks authority to order specific relief." Dkt. 39-1 (Mot.) at 32.

This renewed argument that the district court does not have the authority to grant injunctive relief is at odds with this Court's decision preliminary injunction opinion, Dkt. 29 (PI Op.) at 35, and the cases in this circuit and others which have enjoined defendants pursuant to the APA. *See e.g. Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 12 (D.D.C. 2007) (vacating the rule and permanently enjoining the Food Safety and Inspection Service FSIS from implementing it after finding the rule was arbitrary and therefore in violation of the APA); *Analysas Corp. v.*

Bowles, 827 F. Supp. 20, 21-25 (D.D.C. 1993) (permanently enjoining the Small Business Administration's rule finding that it violated the APA's notice and comment rulemaking requirement and was arbitrary and capricious); *Dowty Decoto, Inc. v. Dep't of Navy*, 883 F.2d 774, 775-76, 781 (9th Cir. 1989) (affirming the entry of a permanent injunction in an administrative challenge of the Trade Secrets Act, finding that the Navy's data disclosure was "not in accordance with law" under § 706(2)); *see also* Dkt. 19 (SJ Reply) at 22-25, Dkt. 22 (PI Reply) at 36.[22]

II. THE AMENDED COMPLAINT PROPERLY ALLEGES CONSTITUTIONAL VIOLATIONS

Plaintiffs' Amended Complaint alleges that the Uniform Rule of Naturalization clause of the Constitution specifies that Congress – not the Executive Branch – establishes naturalization laws and that the New DoD N-426 Policy unlawfully interferes with that Constitutional mandate by creating preconditions to naturalization that Congress did not authorize. Plaintiffs further allege that the New DoD N-426 Policy violates their Due Process rights by denying or impairing their statutory right to seek naturalization. Dkt. 33 (AC) at Count V. This cause of action is neither novel nor new to Defendants. The same causes of action were advanced recently in *Wagafe v.*

[22] The bulk of the argument made by Defendants' in Section III of their Motion is repetitive of those made in Section I(4) of the same, where Defendants argue that the relief sought by Plaintiffs is unavailable. *Compare* Dkt. 39-1 (Mot.) at 32 *with id.* at 37. In addition to the arguments addressed above, in Section III of the Motion, Defendants once again contend that Plaintiffs are not entitled to invoke relief under the Mandamus Act because they also request relief under APA § 706(1). Dkt. 39-1 (Mot.) at 37. As Plaintiffs noted in Section II(b)(2) of their October 13, 2017 Reply Memorandum, incorporated herein by reference, the requested relief is proper under the APA and Mandamus Act. Dkt. 19 (SJ Reply) at 22-25. Plaintiffs have stated time and again, that the substantive standards for obtaining mandamus relief are generally coextensive with the requirements for relief under 5 U.S.C. § 706(1). Dkt. 20 (PI Opp.) at 25. Thus, for the same reasons as set forth above in relation to Section 706(1), Plaintiffs are entitled to mandamus relief. Although Plaintiffs acknowledge, as the Court did in its preliminary injunction opinion, that if they succeed on their APA claims that the Court need not reach their mandamus claims (Dkt. 29 (PI Opinion) at 30-31, *citing Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 379 (2004)), until the Court's final order granting APA relief on these grounds, Plaintiffs are not precluded from pleading their alternative relief.

Trump, and a federal court rejected – as this Court should do here – the Government's attempt to dismiss the allegations for the same reasons Defendants advocate here. No. 2:17-cv-00094-RAJ, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017). Where Defendants seek dismissal of this cause of action on a Rule 12(b)(6) motion, the sole inquiry for the Court is whether Count V of the Amended Complaint states a claim. Defendants identify no such pleading deficiency,[23] and there is none in any event. Accordingly, the Motion must be denied.

A. The Complaint States a Claim Under the Uniform Rule Of Naturalization Clause

The Constitution expressly assigns to Congress the authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4; Dkt. 33 (AC) at ¶¶ 31, 122. Not surprisingly, the Supreme Court repeatedly has acknowledged that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration and naturalization. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) (of the rule that formulating "[p]olicies pertaining to the entry of aliens and their right to remain here . . . is entrusted exclusively to Congress" and is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"); *Davis v. Dist. Dir., I.N.S.*, 481 F. Supp. 1178, 1183 n.8. (D.D.C. 1979) (explaining that the Naturalization Clause is a "Constitutional mandate [that] empowers Congress to define the processes through which citizenship is acquired or lost [and] to determine the criteria by which citizenship is judged . . . ") (internal quotations and citation omitted). Congress has done so. In enacting 8 U.S.C. § 1440, as part of the INA, Congress precisely defined the naturalization rights of Selected Reservists and it

[23] Indeed, Defendants completely disregard Rule 12(b)(6). Plaintiffs need only plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plausibility does not equate to probability; rather, it simply requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

provided the specific and exclusive criteria by which section 1440 naturalization applications are to be adjudicated. This statute – enacted pursuant to Congress's exclusive Constitutional authority – applies to Plaintiffs and the class here. The Constitution assigns no naturalization authority to the Executive branch or the military departments.

The Amended Complaint alleges that the New DoD N-426 Policy is constitutionally infirm precisely because it imposes new, extra-statutory preconditions to naturalization. Dkt. 33 (Count V). Under the policy, unless soldiers meet certain criteria that *DoD* believes to be necessary for naturalization purposes, otherwise eligible soldiers cannot obtain (or maintain) the N-426 honorable service certifications that are required for naturalization. All of this is laid out in the Amended Complaint. Defendants' assertion that the claim is "poorly defined" in the complaint (Dkt. 39-1 (Mot.) at 33) is at odds with the express words of the pleading.

In their Motion, Defendants contend that Plaintiffs lack standing to raise a Naturalization Clause claim because that clause does not confer a private right of action. Dkt. 39-1 (Mot.) at 33-34. The Government made the same argument in *Wagafe* and – as Defendants admit – the district court rejected it, along with the cases Defendants rely on to support their argument. *See Wagafe*, 2017 WL 2671254, at *7. The same result is warranted here. Defendants' reference to *Flores v. Baldwin Park* (Dkt. 39-1 (Mot.) at 33-34), is misplaced because that case was about remanding to state court and whether the Naturalization Clause preempted state law. *See Flores*, No. CV-14-9290-MWF, 2015 WL 756877, at *3 (C.D. Cal. Feb. 23, 2015). Likewise, *Korab* is irrelevant, as it does not suggest that individuals lack standing to claim that actions by the executive branch violate the Naturalization Clause. *See Korab v. Fink*, 797 F.3d 572, 580-81 (9th Cir. 2014). In fact, to the contrary, courts allow private party claims arising from violation of the Naturalization Clause. *See, e.g.*, *Nemetz v. INS*, 647 F.2d 432, 435 (4th Cir. 1981) (permitting naturalization

applicant to challenge state law prohibiting naturalization based on homosexuality because the Naturalization Clause was undermined by "resulting inconsistencies"); *Wagafe*, 2017 WL 2671254, at *7 (holding that naturalization applicants had standing to challenge USCIS's Controlled Application Review and Resolution Program ("CARRP") for violating the Naturalization Clause).

Next, Defendants claim that there is no constitutional violation because the INA (including 8 U.S.C. § 1440) does not "preclude DoD from implementing sensible procedural rules, including background investigations, in connection with its honorable-service determinations." Dkt. 39-1 (Mot.) at 34. This argument has no place in a motion to dismiss – which tests the sufficiency of the pleadings – because it assumes that DoD's rules are "sensible" and in accordance with the law. Plaintiffs' allegations here are precisely the opposite: Defendants are not authorized under the statute to impose any preconditions to naturalization, and Defendants' rules are otherwise unlawful, arbitrary, and capricious.[24] *See, e.g.*, AC ¶¶ 5, 8, 13, 59-65. Indeed, this Court already has found that DoD has a limited, "ministerial," and "non-discretionary" duty with respect to certifying and issuing N-426 certifications for honorable service for naturalization purposes." Dkt. 29 (PI Op.) at 23-24. The notion that the New DoD N-426 Policy meets constitutional muster is further undermined by this Court's finding that Plaintiffs are "likely to succeed in proving . . . DOD must expeditiously certify or deny their N-426s based on their *existing military records*." *Id.* at 30 (emphasis added). Again, the well-pled allegations of the Amended Complaint, which

[24] Defendants also claim that nothing in the INA prevents USCIS from "holding naturalization petitions in abeyance" until DoD completes its background screening. Dkt. 39-1 (Mot.) at 34. Of course, this is a central issue in the *Nio* case, where Plaintiffs and class members have naturalization applications pending. Here, Defendants' policies and practices with respect to the issuance (or lack thereof) of N-426s have prevented and/or delayed Plaintiffs from even submitting a naturalization petition to USCIS. *See* Dkt. 33 (AC) ¶¶ 45, 127; *see generally* Dkt. 35 (Mot. to Enforce).

must be accepted as true for purposes of a Rule 12(b)(6) challenge, expressly denote DoD's limited role with naturalizations. *E.g.*, Dkt. 33 (AC) ¶¶ 3, 42-44, 125.

As demonstrated above, Plaintiffs have stated a plausible case that Defendants have violated the Naturalization Clause of the Constitution, particularly by adopting and attempting to subject Plaintiffs to the New DoD N-426 Policy.

B. The Complaint Alleges Due Process Violations

Count V of the Amended Complaint also states a claim for violation of Plaintiffs' Fifth Amendment due process rights. *See* Dkt. 33 (AC) ¶ 129. Here, too, Plaintiffs make a short and plain statement of the constitutional violation and rely on the lengthy and detailed allegations in the pleading that establish the violation. There is no basis to dismiss this claim.

The due process claim arises from Plaintiffs' statutory right to apply to become naturalized U.S. citizens. *Id.* ¶¶ 126, 128. Plaintiffs specifically allege that the New DoD N-426 Policy subjects Plaintiffs to unauthorized, unlawful, and arbitrary conditions on their ability to apply for naturalization. *Id.* ¶¶ 7-8, 59-62, 127, 129. Defendants' interference with Plaintiffs' right to apply for naturalization implicates both procedural and substantive due process.[25] *Id.* ¶ 129.

Defendants limit their motion to challenging procedural due process and, in so doing, raise three points. Dkt. 39-1 at 34-36. None of Defendants' arguments warrants dismissal. First, Defendants claim that any due process challenge "is largely duplicative of [Plaintiffs'] 5 U.S.C. § 706(1) claim." *Id.* at 34. The point of this characterization is not clear, as it provides no grounds

[25] Here, the facts alleged in the Amended Complaint support both procedural and substantive due process claims, so the Amended Complaint properly pleads a due process violation generally. To the extent there is any confusion, it is of no moment here, where the "complaint is construed liberally in the plaintiffs' favor, and the Court should grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Alehegn Mehari v. D.C.*, No. 16-1889 (RJL), 2017 U.S. Dist. LEXIS 121087, at *8 (D.D.C. July 27, 2017) (omitting internal quotations and citations).

for dismissal and Defendants cite no authority holding otherwise. Indeed, the district court in *Wagafe* denied the Government's motion to dismiss APA and due process counts that arguably arose out of the same underlying conduct, policies, or procedures. *Wagafe*, 2017 WL 2671254, at *10 (rejecting defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claim that USCIS's CARRP policy violates the APA because it is unlawful, arbitrary and capricious), *8 (rejecting defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claim that subjecting them to CARRP's extra-statutory requirements when they otherwise meet the statutory criteria for naturalization violates their due process rights).

Second, Defendants are off-target with their contention that the alleged due process violation deals with the "general procedural rules" of the New DoD N-426 Policy rather than "any discrete decision by DoD to certify or refrain from certifying a particular Form N-426." Dkt. 39-1 at 34-35. Plaintiffs are not challenging general procedural rules in the abstract. They are challenging specific aspects of the New DoD N-426 Policy as they are being applied to them. And the challenged provisions are not procedural,[26] they are substantive – as they purport to prevent Plaintiffs' ability to obtain N-426 certifications and right to apply for naturalization until they satisfy certain substantive (and extra-statutory) preconditions to naturalization.[27]

[26] Defendants only challenge whether any process is due to Plaintiffs at all, citing a single case. Dkt. 39-1 at 35 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)). But that case – which concerned whether due process was required under the Fourteenth Amendment for a state's determination to increase the valuation of taxable property – has no relevance here.

[27] Defendants' suggestion that due process is not implicated in part because the three named Plaintiffs received their N-426s (Dkt. 39-1 at 35) is misguided. The named Plaintiffs obtained their N-426s only because this Court preliminarily enjoined DoD from implementing the challenged policy. It would be an odd result to conclude that process furnished pursuant to the Court's PI Order and over DoD's objection somehow negates a challenge to the policy that led to the preliminary injunction in the first place.

Third, Defendants claim that Plaintiffs "cannot claim a protected property or liberty interest" because they have not yet established their eligibility for naturalization. Dkt. 39-1 at 35. This, too, is an odd argument. Plaintiffs clearly allege that as soldiers serving honorably in the Selected Reserve, they are statutorily eligible to apply for naturalization and that they satisfy all other naturalization eligibility criteria. *E.g*. Dkt. 33 (AC) ¶¶ 126, 129. These allegations are presumed true for purposes of a Rule 12(b)(6) challenge. That the N-426 certification is only one threshold step in the naturalization process does not prevent Plaintiffs from claiming a violation of their protected interest in pursuing naturalization. Defendants point to no authority holding otherwise. Plaintiffs do have a protected interest in having their right to apply for naturalization preserved and their naturalization applications lawfully adjudicated. Because Defendants are depriving them of these interests, Plaintiffs have a valid procedural due process claim.

While this Court has not dealt with this specific issue, other courts have recognized that naturalization applicants have a protected interest in having their applications processed and adjudicated in accordance with the law. *See Brown v. Holder*, 763 F.3d 1141, 1147-50 (9th Cir. 2014) (concluding that plaintiff's right to due process would be violated if he could show that INS "arbitrarily and intentionally obstructed his application" or the Government was "deliberately indifferent to whether [plaintiff's] application was processed"); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013). More recently, the district court in *Wagafe* answered the precise question at issue here: whether plaintiffs claiming due process violations because they are subject to extra-statutory criteria with respect to the processing of their naturalization applications are

deprived of a protected due process interest.[28] In denying the Government's Rule 12(b)(6) motion there, the court held:

> 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.

Wagafe, 2017 WL 2671254, at *8. Early last century, the Supreme Court explained that, with regards to naturalization, "there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and if the requisite facts are established, to receive the certificate." *Tutun v. United States*, 270 U.S. 568, 578 (1926) (omitting internal citation); *see also Wagafe*, 2017 WL 2671254, at *8. The same principle applies here.

Finally, with respect to Plaintiffs' substantive due process claim, the New DoD N-426 Policy interferes with Plaintiffs' statutory right to seek naturalization by imposing unlawful, unauthorized, and/or arbitrary preconditions on Plaintiffs' right to proceed. Dkt. 33 (AC) ¶ 129. This right is one that courts have recognized as a protected interest as explained above, and it gives rise to a fundamental liberty interest. Again, Plaintiffs allege that they are statutorily eligible to apply for, and meet the lawful criteria necessary for, naturalization. *E.g.*, *id.* ¶ 128. As such, Plaintiffs have alleged sufficient facts to support their constitutional due process claim.

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[28] Defendants assert that the New DoD N-426 Policy "does not bar a class of otherwise qualified noncitizens from requesting expedited naturalization; it simply imposes some procedural requirements to bring order and uniformity to the N-426 certification process." Dkt. 39-1. at 36 n. 15. Not so. The notion that the new policy (if not enjoined) would not prevent soldiers from seeking expedited naturalization is divorced from reality. The same record that supported the PI Order, in addition to the detailed Amended Complaint allegations, shows the opposite. The New DoD N-426 Policy prevents expedited naturalization by imposing *substantive* new preconditions to obtaining the N-426 certification required to commence naturalization.

CONCLUSION

For these reasons, Defendants' Motion should be denied.[29]

Respectfully submitted,

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[29] While Plaintiffs believe Defendants' Motion is without merit, to the extent the Court decides to dismiss Plaintiffs' Amended Complaint in its entirety, or any cause of action contained therein, Plaintiffs respectfully request that any dismissal be without prejudice and with leave to amend.