UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:17-cv-00998-ESH**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	**[Oral Argument Requested]**
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs launched this litigation in May 2017 alleging that Defendants were impeding Plaintiffs' statutory right to pursue naturalization. As explained in the original complaint, the Department of Defense ("DoD") was seeking to wrest control of the naturalization process for Plaintiffs and similarly-situated non-citizen soldiers serving in the Selected Reserve of the Ready Reserve, and that the Department of Homeland Security ("DHS") and the United States Citizenship and Immigration Services ("USCIS") were acquiescing in DoD's campaign by placing holds on the adjudication of these soldiers' naturalization applications at DoD's behest. Over the course of the ensuing months, Defendants updated their policies in response to the litigation in an attempt to avoid an adverse ruling and to facilitate their agenda of preventing these soldiers from becoming citizens until DoD becomes satisfied that they meet DoD's "military" criteria for naturalization. The latest policy was the so-called New DoD N-426 Policy, issued on October 13, 2017, which purported to revoke the honorable service certifications previously issued to Plaintiffs with the result of further delaying adjudication of their naturalization applications.

Defendants' campaign of delay and interference with the naturalization process is persistent and undeterred. While Plaintiffs are very grateful that this Court certified this case as a class action and entered a preliminary injunction on October 27, 2017 enjoining DoD from rescinding or decertifying previously issued N-426s, the fact remains that – more than six months after this action commenced – the DHS adjudication process remains stalled and hundreds of soldiers with pending naturalization applications are left in limbo. The latest "Weekly Reports" issued by Defendants pursuant to Court order continue to reflect that DoD is not completing the security review process and is not providing to DHS the security investigation results DHS says it is waiting for to complete the adjudication process. Days have turned into weeks, and weeks have

turned into months, with virtually no progress. And Plaintiffs fear that this is precisely what DoD intended all along. No soldier is going to get naturalized until DoD gives its blessing.[1]

The problem with this story – as Plaintiffs have alleged from the outset – is that Defendants' actions are unlawful. DoD has nothing but a ministerial function in the naturalization process. Eligibility for naturalization for these soldiers is established by Congress in a clearly written statute that leaves no room for the shenanigans we are witnessing. As soldiers serving honorably in the Selected Reserve, Plaintiffs and the class are entitled to apply for naturalization on an expedited basis and their eligibility for naturalization – by law – is determined by factors having nothing to do with enhanced security screenings, revised military suitability determinations, or CAF adjudications. DHS is required to adjudicate Plaintiffs' naturalization applications in accordance with the law, not in accordance with DoD's extra-legal wishes or commands.

Plaintiffs' Second Amended Complaint spells all of this out in detail. It sets forth the applicable law. It establishes Plaintiffs' eligibility to pursue naturalization under the law. It describes the myriad policies and practices that the DoD and DHS Defendants have put in place in contravention of the law. And it lays out causes of action entitling Plaintiffs to injunctive and other relief.

Defendants have now filed what they call a "Partial Motion to Dismiss Plaintiffs' Second Amended Complaint." Dkt. 80 at 1. Defendants never explain what they mean by "partial," and

[1] As alleged in the Second Amended Complaint, this case stems from DoD's change of heart about the utility of the Military Accessions Vital to the National Interest ("MAVNI") program. This about-face occurred only after DoD recruited and enlisted thousands of non-citizen soldiers into the U.S. military under that program with the promise (backed up by a federal statute) of an expedited path to citizenship. And, as a result of the DoD agenda to control and manipulate the naturalization process for these soldiers, Defendants are acting contrary to the statute Congress enacted to reward these soldiers for enlisting/serving in the U.S. military during a time of armed conflict. *E.g.*, Dkt. 61 at ¶¶ 4-10.

it is not obvious from the face of the submission. Two things are clear, however: (1) Defendants bring their motion solely under Rule 12(b)(6), and (2) Defendants do not even attempt to address the non-constitutional complaint allegations against the DHS Defendants arising out of DHS and USCIS policies. Each of these points has significance here.

First, because Defendants raise a Rule 12(b)(6) challenge, the operative test is not whether Plaintiffs have proven their allegations, but only whether the properly pled factual allegations in the complaint state a claim. Plaintiffs' 65-page Second Amended Complaint clearly does so. Defendants point to no omission of an operative element or failure to allege facts necessary to the relief sought. Here, as explained below, the complaint easily satisfies the Rule 12(b)(6) standard.

Second, Defendants' failure to address the Second Amended Complaint allegations against the DHS Defendants appears to be the product of feigned confusion on Defendants' part. In a footnote, Defendants state: "*Insofar as* Plaintiffs' SAC challenges USCIS's requirement for enhanced background checks . . . ." Dkt. 80 at 2 n.1 (emphasis added). There is no legitimate basis for any such caveat. USCIS is a named party Defendant. The complaint seeks relief against the DHS Defendants (including USCIS) based on USCIS policies. *E.g., id.* at ¶ 142 (seeking declaratory relief against USCIS with respect to enhanced background checks); ¶¶ 147 and 148 (seeking injunctive relief against USCIS with respect to enhanced background checks); ¶ 159 (seeking APA relief against USCIS with respect to enhanced background checks). *Notably, Defendants have failed to produce any administrative record index in support of the challenged DHS/USCIS policies, as they were obligated to do by Local Rule along with their instant submission (and, actually, were obligated to provide months ago with their previous motion to dismiss the First Amended Complaint).* To the extent that Defendants are withholding such administrative record on the grounds that they were uncertain as to whether Plaintiffs were

pursuing claims based on such DHS/USCIS policies, that uncertainty is unfounded and cannot be grounds for further delay. Any DHS/USCIS administrative record index purportedly supporting the challenged policies is well past due.

Finally, with respect to the Rule 12(b)(6) challenges that Defendants actually assert, they lack merit for the reasons described herein. As shown below, the Second Amended Complaint properly alleges claims for which these soldiers can and should be granted relief. This case should now proceed to the merits so that we can put an end to the unlawful interference and delays that continue to plague what is supposed to be an expedited naturalization process for service members who have waited far too long already.

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). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (alteration omitted) (quoting *Iqbal*, 556 U.S. at 678).

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)). These well-established principles fully apply to Defendants' challenge here.

Defendants' current motion, ostensibly styled as a Rule 12(b)(6) motion (Dkt. 80), pays mere lip service to the Rule 12(b)(6) standard under which the sufficiency of Plaintiffs' pleading must be judged at this juncture. Instead of addressing the relevant standard, Defendants devote their "Partial Motion" to: (1) assertions that courts may not review and simply should defer to DoD and DHS on their judgments with respect to 8 U.S.C. § 1440, (2) red herring "national security" concerns, (3) and Defendants' merits arguments, which are not appropriate for purposes of a motion to dismiss. Defendants' contentions are wrong on every front, but most pertinent here is that they ignore the relevant inquiry – namely, whether the Second Amended Complaint allegations, as pled, state a claim.

ARGUMENT

I. THE DOD N-426 POLICY VIOLATES THE APA[2]

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. 80 (Mot.) at 3-12. Defendants rely on the same arguments on this issue that they previously advanced in connection with the parties' briefing on Plaintiffs' motion for preliminary injunction and on the arguments made by the defendants in the motion to dismiss (or for summary judgment) in the related *Kirwa* action. *Kirwa*, Dkt. 39-1 (MTD) at 10-18.

[2] In their Partial Motion, Defendants do not move to dismiss Plaintiffs' claims under 5 U.S.C. § 706(1). Regardless, any such motion would lack merit for the reasons set forth by plaintiffs in the related *Kirwa* action, which are incorporated herein by reference.

Accordingly, Plaintiffs incorporate by reference the arguments made in their PI briefing, Dkts. 63 (PI Mot.) and 68 (PI Reply), as well as the arguments made by the Plaintiffs in their opposition briefing in *Kirwa* filed on December 1, 2017 that address the same issues.

In addition, the generic arguments made by Defendants on this issue face additional obstacles in the specific context of this case. For example, here, in contrast to *Kirwa*, Plaintiffs and the members of the class already possess N-426 honorable service certifications duly issued by the military departments under the policies and procedures existing at the time they were issued. *See Kirwa*, Dkt. 39-1 (MTD) 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 . . . ."). The New DoD N-426 Policy as applied to the *Nio* Plaintiffs and class requires the military departments to revoke and de-certify these duly issued N-426s. Yet, nothing in § 1440 gives DoD or any of the military branches power to revoke and de-certify previously-issued honorable service certifications. Rather, the statute provides only that "[t]he executive department under which such person served shall determine whether persons have served honorably . . . ." The pertinent executive department already has done that for each of the Plaintiffs and the class. That ministerial task having been completed for the class here, the role of DoD and the military branches has ended.

For the same reasons, Defendants' principal argument on this issue is a *non-sequitur*. Specifically, Defendants contend that the "honorable" service determination purportedly is committed to agency discretion by law because "the plain meaning of § 1440 does not provide *any* standard, timeline, or deadline of how or when honorable service determinations are to be made . . . ." Dkt. 80 (Mot.) at 4 (emphasis in original). Although Defendants' analysis is wrong as a

matter of law, it has no application here, where the military departments already have made the honorable service determinations for the Plaintiffs and each of the members of the class.

With no way around this problem, Defendants weakly proclaim that § 1440(a) "inherently includes" "by extension" the power to "de-certify[] honorable service certifications that were issued in error or prematurely." *Id*. at 4, 5; *see also id.* at 5 ("[P]ursuant to Section 1440's language, the underlying determination of whether a soldier had served honorably — and by extension, the decision to de-certify honorable service certifications . . . is delegated to the Executive department under which the applicant served."). Yet, Defendants cite no support for their *ipse dixit* proclamation and instead cite (with a "See" introduction) an unpublished decision in which the court expressly states that it did not address this very question. *See id*. (citing *Bagheri v. INS*, No. 98-55177, 2000 WL 335712, at *5-6 (9th Cir. 2000) wherein the court explained that it did not review or address the Navy's actions in regard to honorable service certification because the Navy was not a party to the case).

Aside from the absence of statutory or case law support for Defendants' position, the record is clear that the honorable service certifications issued to Plaintiffs and the class were not "issued in error or prematurely." Rather, they were issued by the pertinent military departments under the practices and procedures in place at the time. Defendants seek to revoke and decertify those N-426s now simply because they have changed their policy. *See Kirwa*, Dkt. 39-1 (MTD) at 5 ("The October 13 Policy set forth new guidance for N-426 certification . . . ."); *see also Kirwa*, Dkt. 39-5 at 7 ("All existing Military Service policy is superseded by the policy guidance October 13 DoD policy.").

B. The New 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). On this issue, too, Defendants primarily repeat the same arguments that they previously made in their PI briefing. Accordingly, Plaintiffs incorporate by reference the arguments made in their PI briefing, Dkts. 63 (PI Mot.) and 68 (PI Reply), as well as the arguments made by the Plaintiffs in their opposition briefing in *Kirwa* filed on December 1, 2017 that address the same issues.

Here, too, Defendants' position on the lawfulness of the New DoD N-426 Policy faces additional obstacles. For example, Defendants contend that the New DoD N-426 Policy is not contrary to law because "Section 1440 imposes no obligation to certify a non-citizen's service as honorable within a specific time period, and neither the statute nor the legislative history contain any criteria about what it means to serve 'honorably.'" Dkt. 80 (Mot.) at 12; *see also id*. at 13 ("Congress left both the timing of and criteria used for honorable service certifications within the absolute discretion of DoD . . . ."). Yet, the military departments already have certified that Plaintiffs and the class have served honorably in the military. To the extent Defendants had any discretion, they exercised it when they evaluated each soldier's record and confirmed and certified to DHS – via the Form N-426 – that each soldier satisfied the honorable service standard.

Next, Defendants contend that "[t]he statute even permits DoD to make an honorable service determination at the time of the soldier's separation from the military," in an effort to suggest that the statue somehow authorizes DoD to ***wait*** until separation to make the honorable service determination. *See* Dkt. 80 (Mot.) at 6. Yet, that is not what the statute actually says. Instead, Section 1440 provides that "[a]ny person who . . . 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 . . . and who, ***if separated*** from such service, ***was separated*** under honorable conditions, may be naturalized as provided in this section . . . ." 8 U.S.C. § 1440(a) (emphasis added). Section 1440 merely provides that a person who already has been separated from the service must have been separated under honorable conditions in order to be eligible for naturalization. It does not purport to allow DoD or the military departments to wait until the service member is separated before making the honorable service certification.

C. The New DoD N-426 Policy Is Arbitrary And Capricious

With respect to the "arbitrary and capricious" prong of § 706(2), Defendants raise only their so-called "national security" rationale to justify the New DoD N-426 Policy. *See* Dkt. 80 (Mot.) at 15-16. However, the Court already has rejected this argument in its preliminary injunction decision. *See Kirwa*, 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.").

Notably, Defendants do not attempt to justify the New DoD N-426 Policy based on the belated third Declaration of Stephanie Miller dated November 17, 2017 filed in the *Kirwa* action, *see Kirwa*, Dkt. 39-5, which is not part of the administrative record for the agency action in any

event. *See* Dkt. 81 (A.R. Index); *Kirwa*, Dkt. 38-2 (A.R. Index). However, based on the first Declaration of Stephanie Miller, Defendants essentially re-affirm their position that DoD should control the naturalization process for MAVNI soldiers. *See* Dkt. 80 (Mot.) at 15 quoting Dkt. 19-7 (Miller Decl.) ¶¶ 15-17 ("DoD [] informed USCIS that it was concerned about the naturalization of individuals whose Office of Personnel Management (OPM) background investigation and DoD counterintelligence security reviews has not yet been completed. . . . DoD is undertaking a review of the entire MAVNI pilot program, its procedures, and the standards for certifying approximately 400 existing N-426s."). Yet, as the Court has already found, "DOD's unfounded attempt to control criteria for naturalization does not constitute a reasonable explanation for the October 13, 2017 policy change here." *Kirwa*, Dkt. 29 (PI Op.) at 26.

D. <u>The New DoD N-426 Policy Is Impermissibly Retroactive</u>

Defendants twist themselves into knots attempting to explain how a policy that, *en masse*, revokes, rescinds, and decertifies N-426 honorable service certifications that Plaintiffs and the class ***already have***, is not retroactive. For the most part, Defendants rely on the same arguments they previously made on this issue in connection with the PI briefing and on the arguments made by the Government in the related *Kirwa* action. Accordingly, Plaintiffs incorporate by reference the arguments made in their PI briefing as well as the arguments made by the plaintiffs in their opposition briefing in *Kirwa*.

Defendants incorrectly argue that "Plaintiffs do not bring a retroactivity challenge." Dkt. 80 (Mot.) at 16. But "retroactivity" is not a cause of action. And as a matter of pleading, 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.'" *Twombly*, 550 U.S. at 555 (citations omitted). Here, the Second Amended

Complaint is replete with well-pled and detailed allegations of the unlawful retroactive nature of the New DoD N-426 Policy, which purports to take away N-426 honorable service certifications that Plaintiffs and the class already have. *See, e.g.*, Dkt. 61 (SAC) ¶ 88 ("[T]he portion of the New DoD N-426 Policy that purports to revoke, recall, or decertify previously issued N-426s to Plaintiffs and the Class is unlawful. Nothing in the statute authorizes such revocation, recall, or decertification . . . ."); *id.* ¶ 142(iv)(c) (seeking declaratory judgment that DoD may not "revoke, rescind, or invalidate previously issued N-426 certifications"); *id.* ¶ 150(iii) (seeking permanent injunctive relief against DoD Defendants to prevent decertification of "existing and duly issued Form N-426s . . . pursuant to the New DoD N-426 Policy or otherwise").

The Second Amended Complaint also specifically alleges that the new policy substantively changes the N-426 policy that was in effect when their N-426s were issued. *See, e.g.*, Dkt. 61 (SAC) ¶ 9 ("Incredibly, to make matters worse, DoD recently has adopted new policies precluding the certification of honorable service of members of the Selected Reserve until these soldiers serve in active duty status and/or satisfy other preconditions to naturalization established by DoD."). This is the touchstone of unlawful retroactivity. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (internal citations omitted) ("The critical question [for retroactivity purposes] is whether a challenged rule establishes an interpretation that 'changes the legal landscape.'"). And of course, § 706(2) of the APA does not provide any cause of action for "retroactivity." Rather, § 706(2) provides a cause of action to set aside agency action that, among other things, is "not in accordance with law," "arbitrary and capricious," or "outside of [the agency's] authority." This is the legal rubric under which retroactivity is challenged because: (i) agency retroactive rules are "not in accordance with law"; (ii) an agency may promulgate retroactive rules only if the agency is specifically authorized to do so by Congress in the statute;

and (iii) an agency may not act arbitrarily or capriciously in promulgating any rule. *See Kirwa*, Dkt 29 (PI Op.) at 28 & n.21. The Second Amended Complaint specifically alleges, not only that the New DoD N-426 Policy runs afoul of § 706(2) in all of these areas, but that the agency's "N-426 recall" (*i.e.*, its retroactive application of the rule to Plaintiffs and the class) does so as well. *See* Dkt. 61 (SAC) ¶ 172 ("The purported N-426 recall and the new N-426 eligibility conditions are contrary to law, arbitrary, capricious . . . and the result of DoD acting outside of its authority, entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(2)."). These and other allegations – as well as all favorable inferences that may be drawn therefrom – are more than sufficient to place Defendants on notice that the policy as applied to Plaintiffs – *i.e.*, the rescission of their previously-issued N-426s – has unlawful retroactive effect.

Finally, Defendants contend that there can be no retroactivity harm here because "Plaintiffs cannot plausibly claim that they did not have fair notice that DoD could alter the terms of their existing contracts." Dkt. 80 (Mot.) at 19. As a preliminary matter, this argument is a *non-sequitur*. To the extent that Plaintiffs may have taken the chance that the rules might change *prospectively*, there is no basis for claiming that they knowingly assumed the risk that Defendants might unlawfully apply a new policy with *retroactive* application.[3] Moreover, Defendants here are not just changing the rules. They are purporting to take away N-426 honorable service certifications

[3] Not surprisingly, the cases Defendants cite to support this novel proposition have no bearing here, since they address the prospective – not retroactive – application of new rules. *See* Dkt. 80 (Mot.) at 19 (citing *Independent Petroleum Ass'n v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002) wherein the court addressed a "new rule that legally has only 'future effect,' and is therefore not subject to doctrines limiting retroactive effect"); *id.* (citing *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) wherein the court stated that "[i]t seems impossible to characterize the rule change here as 'alter[ing] the past legal consequences' of a past action."). These cases concern "secondary retroactivity," a concept that recognizes that some rules, while not retroactive, "may still have a serious impact on pre-existing transactions." *DeWitt*, 279 F.3d at 1039. That is not the circumstance here, where the New DoD N-426 Policy – as applied to Plaintiffs – has direct retroactive effect.

that Plaintiffs and the class already have and which were duly and properly issued by the pertinent military departments under the practices and procedures that were in place at the time.

Defendants have cited no authority or rationale for reversing the Court's prior finding that the New DoD N-426 Policy is impermissibly retroactive.

II. THE SECOND AMENDED COMPLAINT PROPERLY ALLEGES CONSTITUTIONAL VIOLATIONS

The Second Amended Complaint includes a cause of action against all Defendants (including the DHS and DoD parties) for constitutional violations arising out the policies that are impeding the adjudication of Plaintiffs' naturalization applications. Dkt. 61 (SAC) at Count V. The constitutional claims specifically allege violations of (a) the Uniform Rule of Naturalization Clause of the Constitution, and (b) Plaintiffs' rights to due process under the Fifth Amendment to the Constitution. *Id.* ¶¶ 180-184. These specific paragraphs are preceded by dozens of complaint allegations – including references to the constitutional claims – detailing the facts underlying these claims, all of which are incorporated by reference.

Defendants have filed a motion to dismiss under Rule 12(b)(6). With respect to the constitutional claims, Defendants' motion is notable at the outset for three reasons. *First*, Defendants address only the Naturalization Clause claim. Defendants' only mention of the due process clause violation is in a footnote and, even there, it makes no direct challenge.[4] As such,

[4] *See* Dkt. 80 at 21 n.7. In that footnote, Defendants suggest – without citation to any authority – that Plaintiffs' due process claim "is necessarily subsumed in their APA § 706(2) claim." Plainly, it is not. The counts are separately pled and they are not stated in the alternative. Nor should they be. Both are properly alleged and both can proceed. *See, e.g.*, *Wagafe*, 2017 WL 2671254, at *10 (rejecting defendants' motion to dismiss plaintiffs' claim that USCIS's CARRP policy violates the APA because it is unlawful, arbitrary and capricious for failure to state a claim), *8 (rejecting defendants' 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). With respect to the other arguments in Defendants' footnote 7, they appear identical (albeit shorter) to the points raised by DoD in their Motion to Dismiss in the *Kirwa* action. *Kirwa*, 39-1 (MTD) at 33-36. Plaintiffs addressed the points at length in their

Defendants have waived any Rule 12(b)(6) challenge to the due process violation alleged in the Second Amended Complaint. *Second,* Defendants never once address the actual allegations supporting Count V. Given that they are bringing a Rule 12(b)(6) motion which necessarily must test the sufficiency of the allegations in the pleading, Defendants' failure to cite – let alone seek to dispel – the pertinent allegations is fatal to their motion. And *third,* Defendants omit to mention – let alone address or distinguish – the recent district court decision in *Wagafe v. Trump* in which the court denied a Government motion to dismiss with comparable constitutional claims. The omission is all the more remarkable given that the defendant in *Wagafe* – USCIS – is also a Defendant here, including in Count V.

Count V of the Second Amended Complaint incorporates the prior paragraphs of the pleading and states as follows with respect to the Naturalization Clause claim:

> 180. Under the Constitution, namely, the "Uniform Rule of Naturalization" clause, Congress has the sole power to establish criteria for naturalization.
>
> 181. By enacting 8 U.S.C. § 1440, Congress has specified the naturalization eligibility conditions for Selected Reservists such as Plaintiffs and the Class.
>
> 182. Congress did not specify that persons seeking naturalization under Section 1440 must first complete enhanced military background investigations – including the Tier 5/SSBI requirements being imposed on Plaintiffs and the Class – nor did Congress make it a condition of naturalization that such persons – already serving in the military – undergo any further suitability vetting. The unlawful policies and practices here therefore constitute additional, non-statutory, substantive preconditions to naturalization that are being imposed by Defendants. As such, they violate the Constitution with resulting harm to Plaintiffs and the Class, and effectively deprive them of their right to pursue naturalization under the law.

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opposition brief in that matter, and incorporate those arguments by reference here. *See Kirwa v. Dept. of Defense*, Defendants' Opposition to Motion to Dismiss dated December 1, 2017.

Dkt. 61 (SAC) ¶¶ 180-183. The remainder of the Second Amended Complaint details the unlawful policies and practices and identifies the new preconditions to naturalization that form the basis for this cause of action. *E.g., id.* ¶¶ 67-70. These allegations are more than sufficient to state a claim.[5]

As Plaintiffs state in the Second Amended Complaint, the Constitution's Naturalization Clause expressly assigns to Congress the authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4; Dkt. 61 (SAC) ¶¶ 37, 68, 180. The Constitution assigns no such authority over naturalization rules to the Executive. The Supreme Court has made clear 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) (the rule that formulating "[p]olicies pertaining to the entry of aliens and their right to remain here . . . is entrusted exclusively to Congress" is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"); *Davis v. Dist. Dir., INS*, 481 F. Supp. 1178, 1183 n.8. (D.D.C. 1979) ("This Constitutional mandate empowers Congress to define the processes through which citizenship is acquired or lost, to determine the criteria by which citizenship is judged, and to fix the consequences citizenship or noncitizenship entail.") (omitting internal quotations and citation); *see also* Dkt. 80 (Mot.) at 21-22 (citing multiple Supreme Court cases holding that Congress has exclusive power over naturalization).

Under its constitutional mandate, Congress specified the rules for naturalization in the INA. And as applicable to Plaintiffs and the class here, Congress established the naturalization rules for

[5] Plaintiffs need plead only "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.

Selected Reservists in 8 U.S.C. § 1440. Defendants' Naturalization Clause violation arises from the fact – as alleged by Plaintiffs – that Defendants have imposed additional, non-statutory criteria that Plaintiffs must meet in order to have their naturalization applications adjudicated. *E.g.*, Dkt. 61 (SAC) ¶¶ 7-9, 67-68, 182-183.

As USCIS did in the *Wagafe* case, Defendants here contend that there is no private right of action under Naturalization Clause and that, consequently, Plaintiffs lack standing to assert their claim. Dkt. 80 (Mot.) at 22. The district court rejected the argument in *Wagafe,* and this Court should do the same. *Wagafe*, No. C17-0094-RAJ, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017). The three cases Defendants cite to support their standing argument were addressed in *Wagafe* and do not assist Defendants' cause. *Flores v. Baldwin Park* has no relevance as it dealt with a remand 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, the *Cazarez-Gutierrez v. Ashcroft* and the *Korab v. Fink* decisions are irrelevant, as neither court held – directly or indirectly – that individuals do not have standing to claim that actions by the executive branch violate the Naturalization Clause. *See Cazarez-Gutierrez*, 382 F.3d 905, 912 (9th Cir. 2004) (specific to the sentencing context); *Korab*, 797 F.3d 572, 580-81 (9th Cir. 2014). On the other hand, courts have affirmatively held that private litigants can pursue violations 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 "the 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") as violating the Naturalization Clause).

Next, Defendants mistakenly assert that Plaintiffs ask the Court to "ignore those requirements" for naturalization that have been statutorily set forth by Congress, and that Plaintiffs want the Court to "confer citizenship even if the statutory requirements are not met." Dkt. 80 (Mot.) at 24. Plaintiffs ask for no such things.[6] Instead, Plaintiffs want DHS to process Plaintiffs' pending naturalization applications in accordance with the statutory criteria set forth and delineated by Congress in 8 U.S.C. § 1440 and they want DoD to refrain from interfering with or delaying, in any way, the processing of Plaintiffs' naturalization applications. Dkt. 61 (SAC) ¶¶ 182-183.[7]

As demonstrated above, Plaintiffs have stated a plausible case that Defendants have violated the Naturalization Clause of the Constitution through the facts alleged by Plaintiffs with respect to the DHS Defendants' actions (including those taken pursuant to the USCIS July 7, 2017 directive, *see* Dkt. 61 (SAC) ¶¶ 63-72) as well as the DoD Defendants' actions (including those taken pursuant to the New DoD N-426 Policy, *see* Dkt. 61 (SAC) ¶¶ 81-85, 88).[8] The motion to dismiss should be denied.

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[6] Plaintiffs have stated as such several times in this action. *See, e.g.*, Dkt. 21 (PI Reply) at 6; Dkt. 52 (Class Reply) at 6-7 ("As Plaintiffs have made clear from the outset of this litigation, they are not asking this Court to adjudicate the naturalization application of any single individual or to grant any individual citizenship."). Defendants' repeated mischaracterization of the claims cannot change these facts.

[7] Defendants seek to cast the USCIS July 7, 2017 directive as consistent with its statutory authority to investigate "good moral character." *See* Dkt. 80 at 23-24 (stating that "USCIS has determined that [DoD's] background checks are pertinent to its investigation of the applicant's eligibility for naturalization" and that USCIS, in "requiring these background checks" is "complying with the uniform rule of naturalization that Congress has set out"). That may be Defendants' position, and they are entitled to attempt to prove it, but the question here is whether the allegations in the Second Amended Complaint state a cause of action. Defendants have identified no pleading deficiency with respect to the Naturalization Clause claim in the complaint.

[8] By its terms, Count V of the Second Amended Complaint asserts a cause of action against all Defendants. Indeed, the factual allegations underlying the Count extend to the actions of all

CONCLUSION

For these reasons, Defendants' Motion should be denied in its entirety.[9]

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Respectfully submitted,

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Defendants. Dkt. 61 (SAC) ¶ 182; *see also id.* ¶¶ 68-70, 84. Defendants' opposition appears not to separately account for the constitutional claims against the DoD Defendants.

[9] While Plaintiffs believe Defendants' Partial Motion is without merit, to the extent the Court decides to dismiss Plaintiffs' Second 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.