UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE and JAMES MATTIS, in his official capacity as Secretary of Defense, Defendants.	Civil Action No. 1:17-cv-01793 The Honorable Ellen Segal Huvelle

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AMENDED COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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INTRODUCTION

On October 13, 2017, the U.S. Department of Defense ("DoD") unveiled a new policy that brings order and uniformity to the Military Departments' honorable-service determinations under 8 U.S.C. § 1440 (the "October 13 Policy"). The Administrative Record ("AR") and agency declarations submitted in this case demonstrate that the October 13 Policy is a carefully reasoned solution to a long-standing problem. DoD determined that the offices responsible for making honorable service certifications were using inconsistent standards and procedures in making the certifications. DoD also concluded that, contrary to DoD's intent, some of those offices made the certifications before making a determination about an enlistee's suitability for military service. In adopting the October 13 Policy, DoD has established a standardized process and uniform standards that apply across all Military Departments.

Defendants' motion explained why the Court should reject Plaintiffs' attempt to interfere with DoD's reasoned decision-making process, and Plaintiffs' opposition does nothing to alter that conclusion. Section 1440 is silent with respect to the timing of N-426 certification, as well as the criteria to be used for determining honorable service, thereby reflecting Congress's intent to commit these matters to DoD's discretion. For similar reasons, the statute imposes no ministerial, non-discretionary obligation on DoD to certify N-426s, so Plaintiffs' claim under § 706(1) of the Administrative Procedure Act ("APA") necessarily fails. Because the October 13 Policy reflects a reasoned exercise of DoD's authority under § 1440, Plaintiffs' claim under § 706(2) must likewise fail. Nor does Plaintiffs' constitutional challenge to the policy have any merit. Accordingly, the Court should grant Defendants' motion and either dismiss the amended complaint or enter summary judgment for Defendants.

ARGUMENT

I. Standard and scope of review

A. Review of Defendants' October 13 Policy should be limited to the AR and any declaration used to illuminate DoD's contemporaneous reasoning

Plaintiffs' opposition makes various assertions about the scope of the record for Defendants' summary judgment motion, but these assertions are either untrue or without merit. Among Plaintiffs' claims is that Defendants are precluded from relying on the Third Declaration of Stephanie Miller, ECF No. 26-1, because it post-dates the October 13 Policy. *See* Pls.' Mot. at 25-26. That argument is contrary to the holdings of multiple cases in this circuit that the Government may provide the declaration of an agency official in an APA case to "illuminate reasons obscured but implicit in the administrative record." *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) (citations omitted); *see also Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (considering "post-hoc account" of agency decision in declaration form where it "furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review"); *Appeal of Bolden*, 848 F.2d 201, 207 (D.C. Cir. 1988) (admitting post-decisional document into the record in an APA case where it helped "to amplify the administrative record"). The Third Miller Declaration fulfills the same purpose here by addressing how the documents in the AR support the rationale for the October 13 Policy. Indeed, Defendants submitted this declaration in part to respond to the Court's concerns about the lack of explanation for the policy. *See* Mem. Op. in Supp. of Prelim. Inj. Order at 24, ECF No. 29. Defendants' reliance on the Third Miller Declaration is both proper and warranted.

Equally without merit are Plaintiffs' objections to documents cited by Defendants in their motion but not included in the AR. Plaintiffs object to Defendants' reference in the background section of their brief to the First Declaration of Stephanie Miller, ECF No. 20-1, (which was

previously cited by the parties and the Court in this case), a Declaration from Army Colonel Brian A. Thomas, ECF No. 39-4, and consultations between U.S. Citizenship and Immigration Services ("USCIS") and DoD officials. Defendants cited to these materials not to justify the challenged policy but rather to provide the Court with relevant background information about the Military Accessions Vital to the National Interest ("MAVNI") program as well Defendants' efforts to comply with the preliminary injunction. These documents are not part of the AR in this case, and Defendants have not argued otherwise. Plaintiffs also suggest that the AR is incomplete or that discovery is needed, *see* Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss Am. Compl. or in the Alternative for Summ. J. ("Pls.' Opp.") 3-4 n.1 & n.2, ECF No. 49, but at no point do Plaintiffs explain what documents are missing from the record, what discovery is necessary, or why the AR submitted by Defendants should not be entitled to a presumption of regularity.[1] *See Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) ("[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."). In sum, Defendants provided a properly certified AR in this case and submitted the Third Miller Declaration to amplify information contained in that record.[2]

[1] Discovery, moreover, would be inconsistent with the presumption against discovery in APA cases, *see Baptist Mem'l Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009) (observing the general rule of not permitting discovery in an APA case, with "narrow exceptions" for "when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review" (citation omitted)), as this Court has recognized, *see Nio*, 10/27/17 Tr. of TRO/Prelim. Inj. Hr'g 74:23-24, ECF No. 75 ("I mean that's what an APA claim is. The presumption is against discovery.").

[2] Contrary to Plaintiffs' assertions, Local Rule 7(h))(2) does not prevent Defendants from citing to other materials to provide background information.

B. The Court's preliminary findings and conclusions do not control at the summary judgment stage

Plaintiffs' suggestion throughout their opposition brief that the Court's findings and conclusions at the preliminary injunction stage are dispositive at this stage is incorrect. The Court is free to revise its analysis in light of the more developed arguments and the fuller evidentiary record available in the summary-judgment posture. *E.g.*, *Precision Links Inc. v. USA Prods. Grp., Inc.*, No. 3:08cv576, 2009 WL 4325221, at *1 (W.D.N.C. Nov. 24, 2009) (merits analysis at the preliminary injunction stage was "merely preliminary"); *Benisek v. Lamone*, No. JKB-13-3233, 2017 WL 3642928, at *3 (D. Md. Aug. 24, 2017) (same). Further consideration of the merits is particularly justified given the expedited nature of the previous proceedings. As the Court is aware, DoD issued its inaugural policy just five days before the hearing on Plaintiffs' preliminary injunction motion, when the opportunity for consideration of the matter was limited. For these reasons, the Court can examine the record and arguments at this stage as it sees fit.

II. The decision as to whether, when, and by what means to certify honorable service is committed to DoD's discretion by statute

In "determining 'whether a matter has been committed solely to agency discretion, [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) (citation omitted); *see also Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) ("Agency action is committed to agency discretion by law when 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" (citation omitted)). Here, Congress charged DoD with determining whether the soldier "served honorably in an active-duty status," or whether the soldier's "separation from such service was under honorable conditions," 8 U.S.C. § 1440(a), but

at no point defined what it means to serve honorably. Nor did Congress impose any procedure- or timing-related requirements or limitations, instead leaving these decisions to the expertise and discretion of DoD. Honorable-service determinations are thus committed to DoD's discretion.[3]

Plaintiffs mistakenly rely on *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481 (D.C. Cir. 2013) for the proposition that DoD's interpretation of § 1440 is not entitled to deference. *See* Pls.' Opp. at 22 n.16. As the D.C. Circuit noted in that case, agencies are not afforded deference in their interpretation of statutes where agencies have overlapping jurisdiction over regulated parties, thereby creating the risk of competing statutory interpretations by multiple agencies. *Id*. at 487. But that risk is not present where the statute gives "mutually exclusive authority" to multiple agencies. *Id*.; *see also Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003). In this case, § 1440 authorizes DoD only—and not DHS—to fulfill the responsibility of making honorable-service certifications. DoD's interpretation of what that duty entials is therefore entitled to *Chevron* deference.

Plaintiffs also argue that, because 8 U.S.C. § 1440(b) requires soldiers to "comply in all other respects" with most naturalization requirements, "Congress clearly intended that soldiers eligible for naturalization under [§ 1440] would be subject to no more stringent requirements than others seeking naturalization under the INA." Pls.' Opp. 7. This argument is a non sequitur. Section 1440(a) *itself* imposes special requirements (*e.g.*, service in the Selected Reserve or in

[3] Numerous cases have reached this bottom-line conclusion in analogous circumstances. *See*, *e.g.*, *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002) (statute silent as to criteria for payment of financial assistance to farmers; eligibility restrictions committed to agency discretion); *Action on Safety & Health v. FTC*, 498 F.2d 757, 761-62 (D.C. Cir. 1974) (statute silent as to right of intervention in consent negotiations; decision whether to allow intervention committed to agency discretion); *Roberts v. Napolitano*, 792 F. Supp. 2d 67, 73-74 (D.D.C. 2011) (statute silent as to criteria for participating in Global Entry program; eligibility determinations committed to agency discretion); *Aharonian v. Gutierrez*, 524 F. Supp. 2d 54, 55 (D.D.C. 2007) (statute silent as to criteria for USPTO deputy director; appointment committed to agency discretion).

active-duty status during a period of hostilities), but the statute nowhere precludes DoD from implementing procedures to facilitate honorable-service determinations.

Indeed, the requirements set forth in Section II of the October 13 Policy, including that a soldier must complete security screening and serve in a capacity, for a period of time, and in a manner that permits an informed determination, are consistent with DoD's statutory role. The agency cannot meaningfully sign off on an N-426 until it has gathered sufficient information about a soldier's background and conduct in service. As set forth in Defendants' opening brief, legislative history reinforces the view that Congress intended DoD to play an active, non-ministerial role in the naturalization process for noncitizen soldiers. *See* Mem. Points and Auth. in Supp. Defs.' Mot. to Dismiss Am. Compl. or in the Alternative for Summ. J. ("Defs.' Mot.") 10-22, ECF No. 39-1. While under prior law a soldier could submit an authenticated copy of his or her service record, Congress changed the rules in 1952 to require honorable-service certifications by the appropriate executive agency. *See* Immigration and Nationality Act, Pub. L. No. 82-414, §§ 328-29, 66 Stat. 163, 249-50 (1952). Plaintiffs insist that "there is nothing in the legislative history or elsewhere that even suggests . . . 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." Pls.' Opp. at 19 n.14. But Plaintiffs offer no other plausible explanation for Congress's decision to require active certification rather than a mere submission of records.

Plaintiffs further rely upon 10 U.S.C. § 12685 and DoD Instruction ("DoDI") No. 1332.14, which concern characterization of service upon discharge. The statute indicates that reservists who are separated for cause are generally "entitled to a discharge under honorable conditions" absent a court-martial or approved findings of a disciplinary board. The DoDI in turn provides

that, in "accordance with section 12685 . . . an entry-level separation of a Service member of a Reserve component for cause . . . will be 'under honorable conditions,'" and that 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." Neither of these authorities purports to define "honorable" service as referenced in § 1440. Neither authority even mentions § 1440; indeed, § 12685 was added to the U.S. Code in 1994, decades after § 1440 was added. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1662(i)(1), 108 Stat. 2663, 2998.

Nor do these authorities deprive DoD of its discretion to determine what constitutes honorable service for purposes of N-426 certifications and to implement reasonable procedures for effectuating such certifications. Section 12685 simply establishes a procedural framework for discharging soldiers; it says nothing about benefits (whether immigration benefits or otherwise). With respect to DoDI 1332.14, there is no basis on which to conclude that the "administrative matters" it contemplates would include naturalization petitions processed by an outside agency such as USCIS. Nor is it plausible that Congress would have required DoD to inform USCIS pursuant to § 1440 that a soldier was discharged under honorable conditions when, as a matter of fact, the soldier's discharge was uncharacterized. Given the many DoD service-related benefits available exclusively to soldiers whose discharges are characterized as honorable or general (under honorable conditions),[4] the DoDI is best understood as preserving access to such benefits for soldiers who have not been removed by court-martial or a disciplinary board, not as a requirement that DoD must report as honorable the service of soldiers who have not received that designation.

[4] Among the many benefits are payment for accrued leave, 37 U.S.C. § 501; health coverage, 10 U.S.C. § 1145; transitional housing, 10 U.S.C. § 1147; and relocation assistance, 10 U.S.C. § 1148.

Compare Army Regulation 135-178 § 2-7(a) (Jan. 12, 2017) (distinguishing between separation with characterization of service as honorable, general, or other than honorable, and separation with uncharacterized description of service for soldiers in entry-level status), *with* § 1-5(*l*) (interpreting § 12685 as precluding the discharge of Army reservists for cause "under *other than honorable* conditions unless such discharge is the result of an approved sentence of a court martial or approved findings of a board of officers" (emphasis added)).

Next, Plaintiffs complain that the October 13 Policy contains time, capacity, and residency requirements in contravention of § 1440. But Plaintiffs' argument improperly conflates the prerequisites for naturalization with the procedures DoD may employ to facilitate its honorable-service determinations. For instance, although § 1440 omits from the naturalization criteria any "minimum-service requirement for those serving during wartime," the statute does not preclude DoD from requiring soldiers to serve for a period of time sufficient to assess the quality of their service before they may qualify for an N-426 certification. For that matter, this Court has already recognized that Defendants are entitled to consider the "conduct of an individual . . . class member as reflected in that soldier's service record and based on sufficient grounds generally applicable to all members of the military," ECF No. 32 at 1, a process that necessarily takes *some* amount of time. Plaintiffs' argument that § 1440 impliedly forecloses *any* procedures beyond those expressly enumerated could make compliance with the Court's injunction impermissible under the statute.[5]

[5] Plaintiffs' argument that the October 13 Policy "imposes an unlawful service 'capacity' requirement," Pls.' Opp. at 13, similarly fails. While it is true that § 1440 specifies the "capacity" required for *naturalization*, it says nothing about the "capacity" in which a soldier must serve before DoD may assess *honorable service*. Plaintiffs' related argument that the October 13 Policy "imposes unlawful residence and physical presence requirements," *id.* at 14, is even more strained. Plaintiffs posit that because MAVNI soldiers are physically located in the United States, any required observation and screening of these soldiers is tantamount to a residency requirement. But even under Plaintiffs' preferred reading of the statute, *some* amount of processing would be

Finally, Plaintiffs contend that DoD's role in the naturalization process has been "reviewed before by courts" and "rejected by courts." Pls.' Opp. at 15. For this broad proposition, Plaintiffs cite *Cody v. Caterrisano*, No. 09-MJG-00687, 2009 WL 10684932 (D. Md. Aug. 12, 2009), an unpublished district court opinion that Defendants addressed in their opening brief. As explained, that case involved a circumstance not applicable here where a Military Department sought to withdraw a long-standing certification in the midst of litigation over that certification. *Cody* does not address the allocation of responsibility between DoD and the Department of Homeland Security ("DHS"), and the plaintiff in *Cody* brought his suit pursuant to 8 U.S.C. § 1447(b), which explicitly authorizes judicial review of delayed action by USCIS. The case offers little guidance on the information DoD may consider when determining whether a MAVNI enlistee has served honorably.

III. Because the October 13 Policy is both lawful and reasonable, Plaintiffs' APA claims must fail

A. DoD is not withholding any mandatory, non-discretionary duty

Defendants' motion established that they are not unlawfully withholding N-426 certifications because § 1440 contains no "clear legal duty" that Defendants make honorable-service certifications within a certain period of time or following a particular set of criteria. *See Citizens for Responsibility & Ethics in Wash. v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)). The only potentially mandatory obligation in § 1440 pertaining to honorable-service certifications is Congress's directive that DoD "shall determine" whether foreign and non-citizen soldiers have served

necessary while the soldier is present in the United States (*e.g.*, a soldier would request an honorable-service certification, and the soldier and his/her commander would fill out the relevant portions of the N-426).

honorably in an "active-duty status." *See* 8 U.S.C. § 1440(a), (b)(3). With respect to persons who, like Plaintiffs, have enlisted in the Selected Reserve of the Ready Reserve, the statute states only that such persons "may be naturalized." *Id*. § 1440(a). And even with respect to soldiers with active-duty service, the statute sets forth no time period by which DoD must make an honorable-service determination, nor does it set out any criteria that DoD must apply.[6] *See Beshir v. Holder*, 10 F. Supp. 3d 165, 176 (D.D.C. 2014) ("The absence of a congressionally-imposed deadline or timeframe" for an agency to act suggests that Congress left to "administrative discretion" the pace of the agency's decision-making process. (citation omitted)).

Plaintiffs also attempt to diminish DoD's role in the N-426 process to simply verifying that a MAVNI enlistee has enlisted and suggest that this task should be completed as soon as a MAVNI enlists. *See* Pls.' Opp. at 19 n.14. Not only does this construction lack any textual support in the statute, it also fails to account for Congress's decision that DoD must first confirm that an enlistee has served "honorably" before that individual is permitted to apply to become naturalized. DoD's imprimatur of honorable service helps fulfill the core purpose of the MAVNI program, which is to give foreign persons who are not legal permanent residents the opportunity to apply to become naturalized *in exchange* for qualifying military service. Plaintiffs' view of DoD's role as simply confirming that a MAVNI soldier has signed an enlistment contract thus not only lacks support in the statute itself, but would undermine the reciprocal underpinnings of the program. Congress's decision to require DoD certification of honorable service by its very nature means something

[6] The lack of a statutorily imposed deadline is also fatal to Plaintiffs' counterargument concerning the minority of Selected Reserve MAVNIs who have active-duty service. *See* Pls.' Opp. at 18-19. To the extent § 1440 requires DoD to certify N-426s for individuals who have active-duty status, the statute is silent with respect to when any such determination must be made. *See S. Utah Wilderness*, 542 U.S. at 63 (analogizing a § 706(1) claim to a mandamus remedy, which involves "the ordering of a precise, definite act about which an official had no discretion whatsoever" (citation and internal brackets, ellipses, and quotation marks omitted)).

greater than merely verifying that a soldier has enlisted. *See* Am. Order at 1, ECF No. 32 (permitting DoD to consider a MAVNI enlistee's conduct as reflected in service records when making honorable-service determinations); *see also supra* note 4.

The Court also should reject Plaintiffs' invitation to misread § 1440 in order to impose a ministerial obligation on DoD. Plaintiffs first suggest that § 1440(a), which was last amended in 2003, contains drafting errors and encourage the Court to adopt a reading of that provision that is inconsistent with the plain language. *See* Pls.' Opp. at 18. But "[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent"; courts are obligated to "determine [the] intent" of a law based on the language of a statute as it is written, not the way courts or advocates may wish it were written. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (further noting that "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result" (citation omitted)). Plaintiffs are also incorrect to argue that a plain reading of the statute would permit members of the Selected Reserve to apply for naturalization without any input from DoD whatsoever. *See* Pls.' Opp. at 18. The statute plainly states that, in order to be so eligible, a member of the Selected Reserve must have "served honorably," and it has historically been the exclusive province of the military to characterize soldiers' service. Plaintiffs identify nothing in § 1440 to suggest that this important role is optional or can be fulfilled by another agency.

Plaintiffs' reliance on guidance from DHS and the Army, as well as a statement by Government counsel in *Nio, et al. v. Department of Homeland Security, et al.*, 17-cv-00998 (D.D.C.), is misplaced. DHS's characterizations of DoD's role in the certification process do not purport to set standards by which DoD is to determine honorable service nor to require that DoD act on a request within a particular amount of time. Moreover, as Defendants have previously

explained in this case, *see* Defs.' Mot. at 24-25, even if there were a direct conflict between DHS's guidance documents or regulations and DoD's honorable-service-certification policy, that would not bind DoD as to how it should carry out its congressionally delegated obligations. *See Am. Bar Ass'n v. FTC*, 671 F. Supp. 2d 64, 81 (D.D.C. 2009) ("[I]n the end, as instructive as it might be, one agency's interpretation of a congressional statute is not controlling on another agency's interpretation of that same statute." (citation omitted)), *vacated and remanded on other grounds*, 636 F.3d 641 (D.C. Cir. 2011); *see also Old Colony R. Co. v. Comm'r*, 284 U.S. 552, 562 (1932) (holding that the rules of accounting enforced by the Interstate Commerce Commission are not binding upon the IRS). Nor is DoD bound by guidance materials or statements made by lower-level officials in the Department of the Army—a sub-component of DoD—for the reasons set forth in Defendants' motion. *See* Defs.' Mot. at 30-31.

The Court should similarly resist making a § 706(1) determination in this case based on an isolated phrase from a lengthy brief in *Nio*. As Defendants previously explained, the Government's passing reference in that case to a "ministerial obligation" was not a central feature of the Government's argument and was not relied upon by the Court in ruling on the *Nio* plaintiffs' motion for a preliminary injunction. *See* Defs.' Mot. 16-17. Furthermore, the Government's brief in that case demonstrates that the reference to "ministerial" was intended to emphasize USCIS's responsibility to exercise its own judgment when making naturalization decisions, not to diminish or eliminate DoD's statutorily-imposed role in the process. *Id*. at 17. Plaintiffs' reliance on this passing reference to "ministerial obligation" falls well short of establishing a § 706(1) violation here. *See Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 309 (6th Cir. 1988) (holding that statements in briefs did not constitute the concession of a particular issue because "briefs prepared for oral argument are not pleadings"); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24-25 (4th

Cir. 1963) ("The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them.").

B. The October 13 Policy is not contrary to law or in excess of DoD's authority under § 1440

For similar reasons, the October 13 Policy is not contrary to § 1440 or in excess of DoD's statutory authority. The relevant statutory provision states that DoD "shall determine whether persons have served honorably in an active-duty status" and further states that members of the Selected Reserve of the Ready Reserve "may be naturalized" if certain conditions are met. *See* § 1440(a). No language in the statute limits DoD's role to merely verifying whether a soldier has enlisted in the Selected Reserve nor requires DoD to certify a N-426 within days of enlistment. Rather, the statute properly recognizes that the military is best suited to assess whether an individual's service was honorable. Congress left the standard for "honorable" service, as well as the timing of such certifications, to the discretion of DoD. DoD cannot be said to be acting in violation of a statute by establishing a process for honorable-service certifications when that very statute does not purport to control the manner and pacing of DoD's decision-making process. *See Roberts v. Napolitano*, 792 F. Supp. 2d 67, 73-74 (D.D.C. 2011) (holding that, for statute authorizing Global Entry program, which included general mandates but was silent as to the criteria that should be applied for approving applications to join the program, such statutory silence "indicates that Congress committed to the [agency] the sole discretion to determine eligibility guidelines and evaluate applicants").

Plaintiffs contention that § 1440's lack of a deadline by which DoD must act on N-426 applications is "irrelevant" to the statutory authority, *see* Pls.' Opp. at 21, misses the mark. The fact that § 1440 does not prescribe a time period in which DoD must act on honorable-service certifications is further evidence that Congress left to DoD the discretion to implement a decision-making process for these certifications. Because the October 13 Policy was created as an exercise of that discretion, it cannot be said to exceed DoD's authority under the statute.

C. The October 13 policy is not arbitrary and capricious

DoD's October 13 Policy likewise satisfies the "narrow" arbitrary and capricious standard of review under § 706(2) of the APA. *See FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 513 (2009).[7] To pass muster under this standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Id*. (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Defendants' motion explains how the October 13 Policy advances DoD's goals of ensuring that, prior to determining whether an individual has served honorably or not, military officials have sufficient information to determine

[7] Defendants' original motion noted the absence of an arbitrary-and-capricious claim in Plaintiffs' Amended Complaint, *see* Defs.' Mot. at 25 n.12, and this point is reinforced by Plaintiffs' opposition brief. Plaintiffs suggest that an arbitrary-and-capricious challenge is implicit in their other claims, citing to various allegations scattered across the Amended Complaint. *See* Pls.' Opp. at 23 n.17. In several instances, however, Plaintiffs' selected excerpts from their new complaint actually undermine their assertion that they properly plead an arbitrary-and-capricious claim, because those allegations are directed towards their claim that the October 13 Policy was in excess of statutory authority and contrary to law. *See* Pls.' Opp. at 23 n.17 (citing Am. Compl. ¶ 65, ECF No. 33 ("*Contrary to law*, DoD is interfering with and manipulating . . . ."); Am. Comp. ¶ 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* . . . ." (emphasis addeded)). Plaintiffs' failure to plead an arbitrary-and-capricious claim is striking, given that the issue was discussed at length in the preliminary injunction order and is perhaps the quintessential APA claim.

whether an individual is suitable to be accessed into the military and whether an individual enlisted under false pretenses. *See* Defs.' Mot. at 26-27.

One of the driving factors for the policy was DoD's realization that, in recent years, MAVNI personnel were being accessed into the military prior to completing suitability and screening requirements—including MAVNI recruits who, like Plaintiffs, had enlisted to become part of the Army Selected Reserve and were part of the Delayed Training Program ("DTP"). *Id*. ¶ 8. Because DoD had always intended MAVNI enlistees to complete a suitability-for-service determination prior to being certified as having served honorably, and because there had been inconsistent standards in certifying N-426s in recent years, DoD issued the October 13 Policy to establish "a clear and consistent process for N-426 certification." *Id*. ¶¶ 5, 11. The fact that subordinate Military Departments such as the Army had informal practices of certifying MAVNI soldiers at an earlier point in time and had issued their own guidance to this effect does not invalidate the October 13 Policy, which supersedes any prior guidance. *See id*. ¶ 12. Nor does the conduct of lower-level officials within Army bind DoD in perpetuity to any prior informal and unauthorized practice, for reasons discussed previously in this case and elsewhere in this brief.

Plaintiffs imply that the rationale set forth in the Third Miller Declaration for the October 13 Policy demeans MAVNI soldiers. That is plainly not the case. The declaration recognizes that MAVNIs in the DTP are service members, and does not call into question their dedication to the military. *Id*. ¶ 8. At the same time, MAVNI enlistees in the DTP are, by law, not deployable in support of military operations because they have not completed initial entry training. *Id*. Moreover, most MAVNI enlistees in the DTP also have not completed a military-suitability determination, which is an evaluation that applies to all military recruits (MAVNI or not) based

on their character and conduct.[8] *Id.* ¶ 4. This security screening process is thorough and may reveal adverse information about a particular enlistee, such as the individual's prior criminal history, counter-intelligence information, and the existence of any counterterrorism threats, information that could be disqualifying from service. *Id.* ¶ 13. The October 13 Policy reflects DoD's common-sense belief that the military must first have sufficient information to know whether a MAVNI enlistee is qualified to serve (*i.e.*, the suitability screening did not reveal any information that would justify termination of the enlistment contract) before it certifies that the individual has served honorably. *Id.* ¶ 13.

Plaintiffs also seek to downplay DoD's need to confirm that a MAVNI's enlistment was not based on false or fraudulent information. *See* Pls.' Opp. at 29. But DoD's experience in recent years demonstrates that this risk is real, given that a number of individuals entered the military through the MAVNI program based on fraudulent information, including fake visas obtained from fictitious universities and falsified transcripts from universities owned by a foreign national-security agency and a state-sponsored intelligence organization. Third Miller Decl. ¶ 14. Had DoD been aware of this information at the time of enlistment, these individuals would not have been permitted to enlist in the military. *Id.* Waiting for the completion of security screening requirements thus enables DoD to confirm that a MAVNI enlistee was eligible to serve in the military in the first instance prior to characterizing that enlistee's service for N-426 purposes. *Id.*

[8] Plaintiffs mistakenly suggest that MAVNI recruits are subjected to two separate rounds of suitability screening. *See* Pls.' Opp. at 28 n.19. As the Third Miller Declaration makes clear, MAVNI enlistees, like all military recruits, must complete one military-suitability determination. Third Miller Decl. ¶ 4. Given the security concerns with the MAVNI program in recent years, the security screening requirements for MAVNI enlistees are stricter. *See id.* ¶ 6; *see also* Memorandum, Subject: (U) Military Accessions Vital to the National Interest Pilot Program Extension, dated September 30, 2016 (AR 0125-34).

By contrast, Plaintiffs' proposed scheme for N-426 certification—making eligible for honorable-service certification any individual who simply signs an enlistment contract to join the MAVNI program, in the absence of virtually any information about that individual's background and eligibility to serve—would undermine the military's authority and the MAVNI program in general. Until the suitability screening is completed, DoD lacks sufficient information to confirm that a MAVNI enlistee joined the program under truthful circumstances and to make a meaningful determination as to whether a MAVNI enlistee is suitable for accession into the military. *Id.* ¶¶ 13-14. Forcing DoD to operate otherwise could result in the Department misleading other federal agencies, such as USCIS, about the character of MAVNI service members who have not been properly vetted.[9] *Id.* ¶ 14. Plaintiffs' vision of the N-426 certification process, moreover, would undercut one of the foundations of the MAVNI program, which is to offer foreign-born persons who are not legal permanent residents the opportunity to apply to become naturalized citizens in exchange for military service. *Id.* ¶ 15.

D. The October 13 Policy is not impermissibly retroactive

Nor is the October 13 Policy impermissibly retroactive, because it does not "impose new duties with respect to transactions already completed." *See Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 158-59 (D.C. Cir. 2010). By its own terms, Section II of the policy does not apply to honorable-service determinations that were made in the past, but instead applies only prospectively to such determinations that post-date the policy. *See* Mem. From A.M. Kurta,

[9] Moreover, in the event USCIS were found to be without legal authority to hold naturalization applications in abeyance, forcing DoD to prematurely certify honorable service could lead to citizenship being granted to persons based on their "honorable" service who have not completed DoD's screening requirements. *See* Third Miller Decl. ¶ 16. This, in turn, could result in persons becoming U.S. citizens when they may ultimately be barred from service because they enlisted under false pretenses or otherwise failed to pass the security screening. *Id.*

Performing the Duties of the Under Secretary of Defense and Personnel and Readiness, to Secretaries of the Military Departments and Commandant of the Coast Guard (October 13, 2017) (AR0006). The fact that Plaintiffs enlisted prior to the date of the policy is irrelevant to this analysis because the certification process described in the policy does not apply retroactively to deprive any Plaintiff of an N-426 certification *already made*. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (holding that a retroactive effect involves "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions *already completed*").

Furthermore, like all MAVNI enlistees, Plaintiffs were put on notice when they enlisted that "[l]aws and regulations that govern military personnel may change without notice to me" and that "[s]uch changes may affect [a MAVNI enlistee's] status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces." *See* Defs.' Mot. at 29.[10] The fact that Plaintiffs and other MAVNI enlistees may have expected to receive certified N-426s more quickly and using criteria different than those set forth in the October 13 Policy is an insufficient basis to conclude that the policy is unlawful. *See Nat'l Petrochemical*, 630 F.3d at 159 (noting that a rule "that merely 'upsets expectations' . . . is secondarily retroactive and invalid only if arbitrary and capricious").

Left unaddressed by Plaintiffs' opposition brief is the notion that Defendants should not be bound by statements made by lower-level Army officials or any informal guidance documents or prior practices by those same officials for N-426 certifications. As Defendants' motion explained,

[10] Plaintiffs try to distinguish this language from their enlistment contracts by claiming that they did not agree to have an unlawful policy imposed upon them, *see* Pls.' Opp. at 34, but that argument simply assumes the issue to be decided, *i.e.*, whether the October 13 Policy is unlawful. For the reasons stated here and in Defendants' motion, it is not.

to so bind Defendants would rely on an estoppel-based rationale, which does not "lie against the Government as it lies against private litigants." *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419, 422 (1990) (further noting that the Court has "reversed every finding of estoppel that [it] ha[s] reviewed").

In sum, DoD was not precluded from enacting a DoD-wide policy to establish criteria for future N-426 certifications. Plaintiffs' retroactivity claim accordingly fails.

E. Any relief under § 706(2) should be limited to remand for further policymaking by DoD

Even if the Court concludes that the October 13 Policy fails to satisfy APA standards under 5 U.S.C. § 706(2), the correct remedy would be a remand for further proceedings by DoD. *See* Defs.' Mot. at 32-33. A permanent injunction, as Plaintiffs seek, is neither necessary nor appropriate. Plaintiffs' reliance on a handful of APA cases in which courts have granted, or affirmed, injunctive relief is misplaced. *See* Pls.' Opp. at 35-36. None of these cases involved sweeping relief equivalent to what Plaintiffs have requested here. *See Dowty Decoto, Inc. v. Dep't of Navy*, 883 F.2d 774 (9th Cir. 1989) (affirming an injunction prohibiting disclosure of one subcontractor's technical data); *Analysas Corp. v. Bowles*, 827 F. Supp. 20 (D.D.C. 1993) (enjoining the Small Business Administration from taking action on a particular contract solicitation until it reissued the solicitation using proper classification codes); *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007) (enjoining the Food Safety and Inspection Service from implementing an interim rule that was promulgated in violation of the National Environmental Policy Act).

Here, by contrast, Plaintiffs have not merely asked the Court to grant a particular MAVNI enlistee's Form N-426, or even to enjoin Defendants from enforcing the October 13 Policy as written. Instead, they seek a permanent injunction affirmatively requiring DoD to certify Forms

N-426 for all MAVNI enlistees who have served for one day or more in the Selected Reserve (except as related to conduct reflected in a soldier's service record and based on generally applicable grounds). Am. Compl. ¶¶ 105-06, ECF No. 33. Plaintiffs do not explain why they are entitled to such program-wide relief, nor do they explain why the normal remedy of remand, to develop a policy that would address the Court's concerns, would be improper. "Indeed, 'when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.'" *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 79 (D.D.C. 2016) (citation omitted), *appeal dismissed*, No. 17-5027, 2017 WL 2332634 (D.C. Cir. Feb. 27, 2017).

IV. Plaintiffs' constitutional claims are meritless

Plaintiffs' Amended Complaint contains a vague fifth count for "Constitutional Violations," seemingly addressing both the "uniform Rule of Naturalization" clause, *see* U.S. Const. art. I, § 8, cl. 4, and the Fifth Amendment's Due Process Clause. *See* Am. Compl. ¶¶ 121-130. Plaintiffs now assert that they intended this single count to encompass three claims: one claim concerning the Naturalization Clause; a second claim sounding in procedural due process; and a third claim sounding in substantive due process. Pls.' Opp. at 36-43. The Court should reject Plaintiffs' attempt to salvage their ambiguous Count V through subsequent briefing and should dismiss that count for noncompliance with Rule 8(a) and the Supreme Court's plausibility standard, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

If the Court is inclined to reach the merits of Plaintiffs' constitutional claims, dismissal would still be warranted. Assuming that Plaintiffs have standing to bring their Naturalization

Clause claim in the first instance,[11] such a claim fails because nothing about the October 13 Policy purports to deprive Congress of its authority over naturalization or otherwise violates any statute. Rather, Congress delegated authority in § 1440(a) to the "executive department under which [a soldier] served" to determine whether the soldier's service was honorable. DoD promulgated the October 13 Policy pursuant to that delegated power.

Plaintiffs' procedural due process claim fares no better. To begin, the governmental action at issue here—the October 13 Policy—does not implicate due process. *See* Defs.' Mot. at 36-38. The law is well-settled that agency rules and policies of broad application do not give rise to individual due process rights. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *see also id*. at 445 ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."); *Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017) ("In procedural-due-process cases . . . there is . . . a preliminary inquiry: Does the state action involve the kind of individualized determination that triggers due-process protections in the first place?"); *Sw. Airlines Co. v. TSA*, 554 F.3d 1065, 1074 (D.C. Cir. 2009) (recognizing that "due process is typically, and almost exclusively, applicable" in "adjudicative" proceedings only).

Further, Plaintiffs have not identified a protected property or liberty interest. They have no protected interest in a hypothetical grant of citizenship. *See Bd. of Regents v. Roth*, 408 U.S.

[11] As Defendants previously argued, it is unsettled whether private parties have standing to challenge alleged violations of this clause by the Executive Branch. No controlling precedent addresses this question, and courts in other jurisdictions have drawn different conclusions. *Compare, e.g.*, *Flores v. City of Baldwin Park*, No. CV 14-9290-MWF (JCx), 2015 WL 756877, at *3 (C.D. Cal. Feb. 23, 2015) *with Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017); *cf. Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996). Plaintiffs' reliance on *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981) is misplaced because that case did not involve a claim of executive usurpation of congressional power, nor did it address the allocation of immigration responsibilities across executive agencies.

564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Nor can they claim a protected interest in a procedure *per se, i.e.*, N-426 certifications executed on a particular timeframe or in a particular manner. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Allen v. Mecham*, No. 05-1007(GK), 2006 WL 2714926, at *4 (D.D.C. Sept. 22, 2006) (collecting cases) ("[A] number of courts have explicitly rejected [the] circular argument that procedures may constitute property subject to due process protection.").[12]

Finally, Plaintiffs' substantive due process claim—to which they devote just one conclusory paragraph, *see* Pls.' Opp. at 43—is meritless, as Plaintiffs have not come close to alleging the kind of arbitrary government misconduct that would support such a claim. *See Zevallos v. Obama*, 793 F.3d 106, 118 (D.C. Cir. 2015) ("[S]ubstantive due process forbids only 'egregious government misconduct,' involving state officials guilty of 'grave unfairness' so severe that it constitutes either 'a substantial infringement of state law prompted by personal or group animus,' or 'a deliberate flouting of the law that trammels significant personal or property rights."

[12] The Ninth Circuit cases on which Plaintiffs rely do not help them. *Brown v. Holder*, 763 F.3d 1141, 1147 (9th Cir. 2014), recognized a due process right in being able to apply for citizenship. *Cf. id.* at 1153 (Tallman, J., concurring) ("The Supreme Court has merely assumed, without deciding, that the Due Process Clause . . . may be implicated when procedures limit an alien's ability to apply for citizenship."). *Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013), recognized a due process right to the grant of an I-130 petition for eligible applicants. Here, of course, Defendants have not deprived Plaintiffs of the opportunity to apply for expedited naturalization. Instead, they have implemented a general timeframe and procedures to carry out their role in the naturalization process. *Brown* and *Ching*, both of which involved plaintiffs whose requests for immigration benefits were actually denied, do not stand for the unlikely proposition that citizenship applicants are constitutionally entitled to a particular set of procedures.

(citations omitted)); *George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 206 (D.C. Cir. 2003) (substantive due process "normally imposes only very slight burdens on the government to justify its actions"), *as amended* (Feb. 11, 2003). As discussed in Part III, the October 13 Policy was amply justified.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' opening brief, the Court should grant Defendants' motion to dismiss or, in the alternative, should enter summary judgment for Defendants.

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Respectfully submitted,

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