UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiffs respectfully move this Court to grant Plaintiffs leave to file Third Amended Complaint.

In accordance with Local Civil Rule 7(m), undersigned counsel for the Plaintiffs met and conferred with counsel for the Defendants, but Defendants did not consent to this motion.

For the reasons set forth in the Plaintiffs' Memorandum of Points and Authorities in Support of this Motion, new conduct by Defendants since the Second Amended Complaint gives rise to additional claims and relief.

WHEREFORE, Plaintiffs respectfully request that this Motion be granted.

/s/ Joseph J. LoBue

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

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Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiffs, by and through their undersigned counsel, hereby file this Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Leave to File Third Amended Complaint. Per Local Civil Rule 15.1, a copy of the Third Amended Complaint is attached to this Memorandum. For the reasons set forth below, new conduct by Defendants since the Second Amended Complaint gives rise to additional claims and relief. Plaintiffs therefore request that the Motion be granted.[1]

I. INTRODUCTION

Plaintiffs are non-citizen United States Army soldiers who enlisted in the Selected Reserve of the Ready Reserve ("Selected Reserve") under the Military Accessions Vital to the National Interest ("MAVNI") program prior to September 2016 and have served honorably in the military since their enlistment. Under 8 U.S.C. § 1440(a), by virtue of their honorable service, each Plaintiff is eligible to apply to become a naturalized United States citizen, and each has a naturalization application pending before the Department of Homeland Security ("DHS"). Section 1440, by design and by its terms, provides the opportunity for expedited naturalization to Plaintiffs (and similarly-situated soldiers) – as a reward and benefit for their commitment to the Nation – by easing the naturalization eligibility criteria generally applicable to non-citizens.

A. The Original Complaint and Amendments

Plaintiffs commenced this class action lawsuit in May 2017 to challenge Defendants' failure and refusal to adjudicate their naturalization applications. As alleged in the original

[1] Plaintiffs brought their concerns about the post-Second Amended Complaint policies and practices to Defendants as they came to Plaintiffs' attention. Unable to resolve these concerns through discussions, Plaintiffs sought to confer with Defendants about the present Motion and the related relief motion that Plaintiffs anticipate filing with this Court in the upcoming days. On February 26, Plaintiffs requested a meet and confer with Defendants to discuss these issues. However, Defendants' first availability for the meet and confer was two weeks later, on the afternoon of March 12, 2018. Thus, pursuant to Local Civil Rule 7(m), Plaintiffs conferred with Defendants on March 12, 2018, and Defendants stated that they would oppose a motion to amend the complaint.

complaint, Dkt. 1, DHS had instituted a "hold" on the final adjudications of Plaintiffs' applications at the behest of the Department of Defense ("DoD"), stalling their applications and causing tremendous hardship to Plaintiffs and similarly-situated soldiers (the "Class").

In July 2017, in response to this litigation, DHS implemented a new policy (the "July 7 Policy"), which sought to justify the "hold" on MAVNI naturalization adjudications. In particular, the July 7 Policy required DHS to await the completion of enhanced security checks by DoD ("DoD Enhanced Background Investigations") on the rationale that those investigations could provide information relevant to DHS's assessment of a Class member's "good moral character" for naturalization purposes. Plaintiffs promptly challenged the lawfulness of the July 7 Policy and included causes of action pertaining to this post-original complaint conduct in their August 4, 2017 First Amended Complaint. Dkt. 27.

In October 2017, with Plaintiffs' naturalization applications effectively still on hold, Defendants implemented yet another policy aimed at delaying or denying naturalizations for the MAVNI Class. Specifically, on October 13, 2017, DoD implemented a policy which purported to rescind or revoke previously-issued N-426 certifications of honorable service for members of the Class whose naturalization applications remained pending (the "New DoD N-426 Policy"). This same policy also purported to prevent other MAVNI Selected Reservists from obtaining the N-426 certifications in the first instance, at least until those soldiers had completed their DoD Enhanced Background Investigations and satisfied other unlawful requirements.

Shortly after it was issued, the Court preliminarily enjoined implementation of the New DoD N-426 Policy by orders in this action and the related *Kirwa* action, concluding that "despite its assertions to the contrary, DOD does not control the naturalization process" so its "unfounded attempt to control criteria for naturalization" does not provide a reasonable explanation for its

new policies. Dkt. 74; *Kirwa v. United States Dep't of Def.*, No. CV 17-1793 (ESH)(RMM) (D.D.C. Oct. 25, 2017), Dkt. 29 at 26.

Further, Plaintiffs in this action amended their complaint again, pursuant to the Court's authorization but without the need for any formal motion, to account for the New DoD N-426 Policy and Plaintiffs' causes of action pertaining thereto. Dkt. 61 (Second Amended Complaint).

B. Defendants' Post-Second Amended Complaint Conduct Gives Rise To New Claims

As this Court is well aware and already has noted in its decisions, Defendants' conduct in this action and the related *Kirwa* action has been a moving target, largely implemented as a reaction to these litigations. *E.g.*, *Kirwa*, No. CV 17-1793 (Oct. 25, 2017), Dkt. 29 at 18 ("In the meantime, the legal landscape shifted dramatically. . . . DOD had just issued its new N-426 policies . . . it retreated from any express requirement of 'active-duty' service, but instead imposed the numerous additional requirements . . . . In light of this significant and abrupt change by DOD, the case was no longer about a single legal issue."); *id.* (Jan. 1, 2018), Dkt. 60 at 14, n.11 ("As best as can be determined, Miller's explanation for the October 13th Guidance is a post-hoc rationalization that was adopted after litigation was instituted and after the Court expressed its skepticism that imposition of an active-duty requirement would comport with 8 U.S.C. § 1440.").

For instance, the July 7 Policy was issued after and in reaction to the filing of the original complaint. Then, the May 2017 "Action Memo" (which would have led to the military "separation" and discharge of all of the Class members prior to naturalization) was orally "modified" after Plaintiffs brought the Action Memo to the attention of the Court, pointing out that USCIS was claiming to wait for enhanced background checks that were never going to be completed (and that DoD acknowledged it didn't have the resources to complete). Thereafter, DoD's two-year separation/discharge rule was extended, but again, only after it was brought to

the attention of the Court. And, when Plaintiffs (and the Court) made clear that Defendants were unlawfully interpreting 8 U.S.C. § 1440(a) as requiring Plaintiffs and the Class to serve in an "active duty" status as a precondition to naturalization, Defendants changed course in October 2017 by implementing the New DoD N-426 Policy that would have enabled Defendants to effectively require "active duty" service as a condition of obtaining the N-426 certifications necessary for naturalization. *Kirwa*, No. CV 17-1793 (Oct. 25, 2017), Dkt. 29 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.").

As a consequence, this case is anything but a typical Administrative Procedure Act case that arises solely out of and relates to one fixed agency decision in the past. Rather, it has been necessary for Plaintiffs to continue to add new claims as Defendants have scrambled to react to this litigation with patchwork rules and policies, while still maintaining their campaign of preventing these soldiers from becoming naturalized unless and until DoD, itself, deems a soldier worthy of naturalization.

Unfortunately, Defendants' shifting of positions has continued unabated since Plaintiffs filed their Second Amended Complaint. In recent weeks and months, Defendants have implemented additional unlawful policies and undertaken further unlawful actions that have compounded and exacerbated the harm experienced by Plaintiffs and the Class. As such, Plaintiffs are compelled yet again to amend their complaint in response to new misconduct by

Defendants. Among other things – and as set forth in the proposed Third Amended Complaint – Defendants are:

(a) Failing to comply with the July 7 Policy by withholding and/or further delaying naturalization adjudication for those soldiers who have satisfied all of the policy requirements; *see, e.g.*, Exh. 1, Third Amended Complaint ("TAC") at ¶¶ 88-102;

(b) Refusing to request and review, or unreasonably delaying the request for and review of, information gathered during the DoD Enhanced Background Investigations, which has resulted in the withholding or unreasonable further delaying of naturalizations; *see, e.g.*, TAC at ¶¶ 103-110;

(c) Failing to comply with the July 7 Policy by withholding and/or further delaying naturalization adjudications pending DoD's completion of separate, irrelevant and military-specific National Security Determination ("NSD") and Military Service Suitability Determination ("MSSD") adjudications; *see, e.g.*, TAC at ¶¶ 103-110, 228;

(d) Imposing a new precondition to naturalization, namely that the FBI perform a second, superfluous FBI check identical to the FBI check conducted as part of the enhanced military background checks so as to withhold and/or further delay the naturalization of eligible soldiers; *see, e.g.*, TAC at ¶¶ 111-113, 231; and

(e) Systematically imposing a wide array of unlawful additional criteria for naturalization eligibility such as: requiring the completion of Basic

> Combat Training ("BCT"), Advanced Individual Training ("AIT") and/or other active-duty service; submission by the applicant of a Form DD-214 (Certificate of Release or Discharge from Active Duty); and/or satisfaction of the criteria set forth in a now-enjoined New DoD N-426 Policy; *see, e.g.*, TAC at ¶¶ 88-102, 115-126, 234.

As Plaintiffs repeatedly have alleged, Defendants' policies are unlawful and the delays are causing immense harm to these soldiers as they struggle to survive in immigration limbo and without the citizenship rights they claim entitlement to, even as they continue to serve in the military. It is an untenable and grossly unfair situation for Plaintiffs, but they remain committed to serving the country in the United States Army and exercising and vindicating their rights.

By all measures, Defendants' campaign has been effective. Pursuant to Defendants' court-ordered reporting as of February 28, 2018, since the July 7 Policy was enacted only 23 Class members (and none of the named Plaintiffs) had been naturalized and Defendants had completed the DoD Enhanced Background Investigations for only a small fraction of the Class. *E.g.,* Dkts. 108 and 109.

Plaintiffs therefore seek leave to address these new facts and claims via their proposed Third Amended Complaint.

II. ARGUMENT

A. Legal Standard for Granting Leave to File Amended or Supplemental Complaint Is Liberal

Rule 15 of the Federal Rules of Civil Procedure governs this Motion. As a general rule, amendments based on events prior to the initial complaint fall within Rule 15(a), while amendments prompted by conduct occurring after the commencement of the litigation are considered supplemental amendments under Rule 15(d). *See United States v. Hicks*, 283 F.3d

380, 386 (D.C. Cir. 2002) (explaining this distinction); *see also* Fed. R. Civ. P. 15(d) ("[T]he court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence or event that happened after the date of the pleading to be supplemented."). Here, where the Third Amended Complaint adds allegations based on new conduct since the Second Amended Complaint, Rule 15(d) would apply. *See Human Genome Scis., Inc. v. Kappos*, 738 F. Supp. 2d 120, 122-23 (D.D.C. 2010) (Huvelle, J.) (Rule 15(d) is "used, *e.g.*, to set forth new facts that update the original pleading or provide the basis for additional relief; to put forward new claims or defenses based on events that took place after the original complaint or answer was filed . . . .") (internal quotations and citations omitted); *see also Hicks*, 283 F.3d at 386 (same).

Even so, the relevant standard is the same under Rule 15(a) and Rule 15(d), and Plaintiffs' Motion easily satisfies the standard.

> [M]otions to amend under Rule 15(a) and motions to supplement under Rule 15(d) are subject to the same standard. Under either, the decision is within the discretion of the district court, but leave should be freely given unless there is a good reason, such as futility, to the contrary.

Xingru Lin v. District of Columbia, 319 F.R.D. 1, 1 (D.D.C. 2016) (internal quotations and citations omitted).

Indeed, Rule 15(a)(2) mandates that the "court should freely give leave" to amend a complaint "when justice so requires." As the Supreme Court has emphasized, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citation omitted); *McWilliams Ballard, Inc. v. Broadway Mgmt. Co.*, 636 F. Supp. 2d 1, 4 (D.D.C. 2009) (Huvelle, J.) ("The decision to grant leave to amend a complaint is left to the court's discretion, but the court must heed Rule 15's mandate that leave is to be freely given when justice so requires.") (internal quotations and citations omitted); *Driscoll v. George Washington Univ.*, 42 F. Supp. 3d 52, 56 (D.D.C. 2012)

(Huvelle, J.) ("Rule 15 instructs courts to freely give leave to amend when justice so requires, and the rule is to be construed liberally.") (internal quotations and citations omitted). As the Supreme Court has noted in the Rule 15 context: "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

In fact, although leave to amend is committed to the discretion of the district court, denial is "inconsistent with the spirit of the Federal Rules" and amounts to abuse of discretion, unless there is a sufficient reason for the denial – none of which exists here – such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . ." *Id.* "In the absence of [such valid reasons,] the leave sought should, as the rules require, be 'freely given.'" *Id.*; *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) ("Although the grant or denial of leave to amend is committed to a district court's discretion, it is an abuse of discretion to deny leave to amend unless there is sufficient reason" for the denial); *Jackson v. Teamsters Local Union 922*, 991 F. Supp. 2d 64, 67 (D.D.C. 2013) ("In this Circuit, it is an abuse of discretion to deny leave to amend unless there is sufficient reason.") (quotations and citation omitted).

Moreover, a Rule 15 motion should be "freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." *Powell v. Internal Revenue Serv.*, 263 F. Supp. 3d 5, 7 (D.D.C. 2017) (quotation and citations omitted). "[T]he court has broad discretion in determining whether to allow supplemental pleadings in the interests of judicial economy and convenience." *Fund For*

Animals v. Hall, 246 F.R.D. 53, 54 (D.D.C. 2007) (citations omitted); *see id.* ("The basic aim of the rules [is] to make pleadings a means to achieve an orderly and fair administration of justice.") (quotation and citation omitted); *Lannan Found. v. Gingold*, No. CV 13-01090 (TFH), U.S. Dist. LEXIS 176671, at *12-13 (D.D.C. Oct. 25, 2017) (Rule 15(d) motion "may be granted where it serves the interests of judicial economy and convenience") (citations omitted).

Further, because leave to amend or supplement should be liberally granted, the party opposing amendment "bears the burden of showing why an amendment should not be allowed." *Driscoll*, 42 F. Supp. 3d at 57 (quotation and citation omitted); *see also Jackson*, 991 F. Supp. 2d at 67 (Under Rule 15, "the non-movant generally carries the burden in persuading the court to deny leave to amend.") (quotation and citation omitted); *Lannan Found.*, U.S. Dist. LEXIS 176671, at *13 ("It is the opposing party's burden to demonstrate why leave should not be granted" under Rule 15(d)) (citation omitted).

B. <u>The Court Should Grant Leave Under Rule 15</u>

Plaintiffs' Motion seeks to add factual allegations and claims to their existing complaint based on facts and circumstances that have occurred since the filing of the Second Amended Complaint. These events both give rise to new and related claims and further inform pre-existing claims.[2] As such, Plaintiffs are entitled to raise them in this litigation via an amended complaint.[3]

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[2] As Plaintiffs are presenting these new facts within weeks (and, in some instances, days) of their occurrence, such that Plaintiffs could not present them earlier, Defendants cannot claim that Plaintiffs delayed their filing.

[3] While the proposed amendment would be the third amended complaint in this action, the prior two amendments were undertaken at the Court's direction to ensure that the pleading accounted for Defendants' fast-paced policy enactments, including the July 7 Policy and the New DoD N-426 Policy. As such, Plaintiffs never exercised their right to voluntarily amend under Rule 15(a) and they were not obligated to – and did not – seek leave to file their previous amended complaints under Rule 15. This current Motion is Plaintiffs' first Rule 15 Motion in

Here, the allegations in the Third Amended Complaint – while new and stand-alone for relief purposes – are part and parcel of the continuum of Defendants' conduct in unlawfully preventing and/or unreasonably delaying Plaintiffs' naturalizations, and they further demonstrate the arbitrary and capricious nature of Defendants' policies. Whereas the Second Amended Complaint addressed the unlawfulness of the July 7 Policy and the New DoD N-426 Policy, the Third Amended Complaint continues to assert challenges to those policies, but adds related claims showing that Defendants both have failed to comply with their July 7 Policy and that they have enacted new unlawful policies and taken additional unlawful actions to prevent Plaintiffs and the Class from becoming naturalized citizens in the expedited manner provided for by law. *See supra* at pp. 5-6.

Amendment would enable this Court to address all of these issues in context and to enter a final judgment that would provide complete relief for these Plaintiffs.

Although Plaintiffs and Class members would have the right to file a new complaint – and designate it as a related action – there is no requirement that they do so, nor would such a separate filing serve the interests of justice or judicial economy. "The interests of judicial economy and convenience would be served where, as here, the plaintiffs' motion to supplement their complaint raises similar legal issues to those already before the court, thereby averting a separate, redundant lawsuit." *Fund For Animals*, 246 F.R.D. at 55 (citation omitted); s*ee also id.* at 54, 55 ("[T]he court has broad discretion in determining whether to allow supplemental pleadings in the interests of judicial economy and convenience" and noting "the judicial interest in hearing all similarly situated claims together") (citation omitted); *Aftergood v. C.I.A.*, 225 F. Supp. 2d 27, 30 (D.D.C. 2002) ("[L]eave to file a supplemental pleading should be freely

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this case and it, too, is the product of recent events and conduct by Defendants that arise out of and relate to Plaintiffs' existing causes of action.

permitted when the supplemental facts connect it to the original pleading.") (quotation and citation omitted); *Estate of Gaither ex rel. Gaither v. District of Columbia*, 272 F.R.D. 248, 252 (D.D.C. 2011) ("Amendments that do not radically alter the scope and nature of the action . . . are especially favored.") (citation omitted); *Powell*, 263 F. Supp. 3d at 7 (finding that equities favored supplementing complaint and noting that "dealing with the controversy as one is far preferable to requiring Powell to open yet another case.").[4]

Under these circumstances, Defendants cannot point to any undue prejudice to them that might warrant denial of Plaintiffs' motion. As mentioned, if amendment were denied, Plaintiffs would simply initiate a new complaint to raise the precise same claims and obtain the same relief as they seek in the Third Amended Complaint, and Defendants would be compelled to defend against the same claims in that action.

Nor can Defendants complain that the proceedings have advanced too far to allow amendment at this juncture. First, notwithstanding their obligation to do so far earlier, Defendants only first filed their Certified Administrative Record Index for the July 7 Policy on March 1, 2018 (Dkt. 111), and Defendants still have not produced a full Administrative Record to Plaintiffs' counsel. Second, there has been no discovery that would have to be reopened, and Defendants have only filed an Answer to one of the three prior versions of the Complaint.

[4] *See also Kas v. Fin. Gen. Bankshares, Inc.*, 105 F.R.D. 453, 458-59 (D.D.C. 1984) ("The amendment which plaintiffs propose is clearly related in substance to the thrust of plaintiffs' original complaint and the first amended complaint . . . Therefore, plaintiffs proposed amendment would not necessarily change the direction of this trial altogether, although as previously noted, it may call for some additional discovery. Any hardship defendant might suffer from allowing the complaint to be amended does not amount to the 'undue prejudice' which would justify denial of the motion, and to deny it would not be in the interest of justice. The Court finds that the claims set forth in the second amended complaint are not frivolous and that plaintiffs ought to be afforded an opportunity to test these claims on the merits. Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such motion.") (citation omitted).

Dkt. 100 (filed on Feb. 2, 2018). Moreover, the Third Amended Complaint does not change or withdraw any previous claims or legal theories asserted in the case. Rather, the Third Amended Complaint retains all of the claims and legal theories from the Second Amended Complaint and simply adds new claims based on additional events that have occurred since the time the prior pleading was filed. As a result, Defendants can easily incorporate its prior Answer in its answer to the Third Amended Complaint. Third, to the extent Defendants claim prejudice from having prepared their summary judgment motion on the claims in the Second Amended Complaint, no such claim would be warranted. Again, *Plaintiffs have not withdrawn any of their Second Amended Complaint allegations.* Instead, they seek to add new and related claims based on conduct occurring since the Second Amended Complaint. As such, if Defendants' summary judgment motion would still serve as a motion for partial summary judgment on the claims that were in the Second Amended Complaint (all of which remain in the Third Amended Complaint), the efforts Defendants have expended on that briefing will not have been impacted whatsoever.

Finally, as noted, Defendants cannot plausibly claim that Plaintiffs delayed in seeking to amend. Many of the actions alleged in the Third Amended Complaint occurred within the last several days and weeks. Plaintiffs needed to investigate the allegations and then meet and confer with Defendants prior to filing this Motion. As noted earlier, Plaintiffs sought to do so expeditiously. In any event, any delay, in and of itself, cannot be the sole reason for denying a motion to amend. *See Fund For Animals*, 246 F.R.D. at 55 (stating that the time elapsed cannot serve as the sole reason for denying a motion to supplement complaint, and granting leave to supplement complaint four years after the original complaint filing); *Paxton v. Washington Hosp. Ctr. Corp.*, 299 F.R.D. 335, 338 (D.D.C. 2014) (granting leave to amend complaint four months before trial to add new allegations based on new evidence learned during discovery); *Driscoll*, 42

F. Supp. 3d at 57-58 ("[T]he prolonged nature of a case does not itself affect whether the plaintiff may amend its complaint. Moreover, where, as here, the party opposing amendment has not put forward a colorable basis of prejudice, the contention of undue delay is even less persuasive.") (internal quotations and citations omitted); *Kas*, 105 F.R.D. at 458-59 (D.D.C. 1984) (noting "the strong policy to permit the amending of pleadings," and granting leave to amend complaint to add newly discovered facts and circumstances and new claims not known earlier by plaintiffs).

III. CONCLUSION

For these reasons, Plaintiffs request that their Motion be granted.

Respectfully submitted,

/s/ Joseph J. LoBue

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*, PLAINTIFFS, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES: KIRSTJEN M. NIELSON, in her official capacity as Secretary of the U.S. Department of Homeland Security; L. FRANCIS CISSNA, in his official capacity as Director of United States Citizenship and Immigration Services; UNITED STATES DEPARTMENT OF DEFENSE; and JAMES MATTIS, in his official capacity as Secretary, U.S. Department of Defense. DEFENDANTS.	**No. 1:17-cv-00998-ESH-RMM** **THIRD AMENDED CLASS ACTION COMPLAINT**

COMPLAINT

1. On behalf of a group of United States soldiers who deserve much more, this action seeks to restore honor, transparency, and the rule of law to a once-orderly military naturalization process that has become plagued by a continuous stream of bureaucratic dishonor, irrationality, and lawlessness. Until the actions complained of herein began, naturalization of non-U.S. citizen military enlistees was swift and straightforward, as Congress intended and specified. Eligible enlistees sought and obtained certifications of their honorable service in the military, immigration officials expedited the paperwork, and immigration personnel rendered eligibility determinations based on the same fundamental citizenship factors that apply to all

persons seeking to become naturalized U.S. citizens. Indeed, naturalization for those soldiers who apply and satisfy the eligibility requirements is mandatory – the naturalization at issue here is not a discretionary immigration benefit. Under the law, non-citizens who enlist in the military, serve honorably, and satisfy the naturalization criteria, have a right to become U.S. citizens. Before the events described herein, on average, the process for naturalizing soldiers took about three to four months. That orderly and fair process – applied to thousands of soldiers – came to a screeching halt in early 2017. Since then, even though they otherwise satisfy the necessary eligibility criteria and are serving honorably in the military, many hundreds of enlistees have had their naturalization applications placed on "hold" – and their lives upended – as a result of ill-considered and ultimately unlawful policy decisions by agency bureaucrats, and by subsequent actions that do not comply with the policies. The conduct complained of herein is a disservice to these soldiers, who have sworn allegiance to the United States and committed to defend this Nation during a time of military conflict – and it is well past time for this unlawful conduct to end.

2. Plaintiffs are enlisted non-citizen United States Army soldiers who have served honorably in the Selected Reserve of the Ready Reserve ("**Selected Reserve**"). By virtue of their honorable service in the Selected Reserve, federal law, including 8 U.S.C. § 1440, affords each Plaintiff-soldier the absolute right to apply to become a naturalized United States citizen and it requires immigration officials to adjudicate those applications in accordance with the law. Plaintiffs have upheld their end of the bargain. Defendants have not.

3. Instead, via improper inter-agency instructions, unlawful agency guidance and final agency actions, failure to comply with their own policies, and other unlawful means, Defendants are impeding and delaying the naturalization of these soldiers by imposing on them

additional citizenship qualifications/criteria which have no lawful basis. And, by so doing, Defendants are acting unlawfully and depriving Plaintiffs of the valuable rights due to them under the law. Through this action, on behalf of themselves and all similarly-situated United States soldiers, Plaintiffs seek injunctive, declaratory, and other relief from this Court in order to compel and enjoin Defendants as necessary to process and adjudicate Plaintiffs' naturalization applications as required by law.

4. The United States recruited and enlisted each Plaintiff into the Armed Forces of the United States under the Military Accessions Vital to the National Interest ("**MAVNI**") program, a program touted by Defendant United States Department of Defense ("**DoD**") as "vital to the national interest," under which certain lawfully present non-U.S. citizens with critical language skills and/or specialized medical training enlist and serve in the United States Armed Forces. DoD recruits individuals into the MAVNI program by, among other things, representing that enlistees will be granted an "expedited" path to U.S. citizenship via naturalization. Indeed, DoD mandates – via written enlistment contracts – that Plaintiffs and other MAVNI recruits apply for U.S. citizenship as soon as the service branch (*e.g.*, the Army) has certified their honorable service.

5. Each Plaintiff-soldier has made the commitment and followed the law. Each Plaintiff enlisted in the U.S. Army after the Army determined him/her to be suitable for military service. And, post-enlistment, the military has certified – via a duly-issued N-426 Form from DoD – whether the soldier has served honorably in the Selected Reserve. And each soldier has applied for naturalization with Defendant United States Department of Homeland Security ("**DHS**").

6. As enlisted soldiers in the Selected Reserve, Plaintiffs are and have been serving in the United States military, have sworn an oath to support and defend the Constitution of the United States, and are obliged to serve this Nation at the direction of their military commanders. However, in violation of federal law, including 8 U.S.C. § 1440, Defendants have reneged on the representations and commitments made to these soldiers and are failing to process their naturalization applications as the law requires. Thus, Defendants are blocking and delaying the valuable benefit afforded by law to these highly sought after military enlistees – namely, the prospect of expedited United States citizenship.

7. Among other actions, in mid-2017, following discussions with DoD officials who expressed their view that non-citizen soldiers should not be naturalized until DoD gives its blessing, Defendant United States Citizenship and Immigration Services ("**USCIS**"), implemented policies and practices that placed Plaintiffs' naturalization applications on "hold" pending the successful completion of DoD "enhanced" background investigations ("**DoD Enhanced Background Investigations**") that are not required by the laws governing naturalization (the "**July 7 Policy**"). DoD has no legal basis for dictating the terms and conditions for naturalization and DHS/USCIS have no legal basis for submitting to DoD's direction and making the completion of DoD background investigations a condition for naturalization under 8 U.S.C. § 1440(a). The DoD enhanced background criteria being applied to Plaintiffs' naturalization applications have never before been applied to citizenship applications and are not found in any naturalization statute. In fact, this new and additional screening being imposed by DoD (and enabled and adopted by DHS) has nothing to do with citizenship eligibility, but instead is reserved for persons applying for high-level governmental security clearances. In other words, there is no U.S. law that conditions naturalization on an

applicant's ability to obtain or otherwise satisfy the criteria for obtaining a high-level security clearance, yet Defendants are imposing that condition on Plaintiffs.

8. Since Plaintiffs filed their Second Amended Complaint, Defendants' misconduct has continued and, in many ways, has worsened. Among other things, Defendants are:

- Failing to comply with the July 7 Policy by withholding and/or further delaying naturalization adjudication for those soldiers who have satisfied all of the policy requirements;
- Refusing to request and review, or unreasonably delaying the request for and review of, information gathered during the DoD enhanced background investigations, which has resulted in the withholding or unreasonable further delaying of naturalizations;
- Failing to comply with the July 7 Policy by withholding and/or further delaying naturalization adjudications pending DoD's completion of separate, irrelevant and military-specific National Security Determination ("**NSD**") and Military Service Suitability Determination ("**MSSD**") adjudications;
- Adding a new precondition to naturalization, namely that the FBI perform a second, superfluous FBI check identical to the FBI check conducted as part of the enhanced military background checks so as to withhold and/or further delay the naturalization of eligible soldiers; and
- Systematically imposing a wide array of unlawful additional criteria for naturalization eligibility such as: requiring the completion of Basic Combat Training ("**BCT**"), Advanced Individual Training ("**AIT**") and/or other active-duty service; submission by the applicant of a Form DD-214 (Certificate of Release or Discharge from Active Duty); and/or satisfaction of the criteria set forth in a now-enjoined October 13, 2017 DoD policy memorandum.

As a result of the unlawful conduct outlined above, Plaintiffs are facing imminent and irreparable harm due to the withholding of and/or extended delay in the processing of their naturalization applications.

9. Defendants' policies and practices do not arise from any individualized concerns with any soldier, but instead are being applied across the board to the entire class. Indeed, each Plaintiff believes that he/she is eligible to be naturalized and would be naturalized but for the hold and the new, unlawful, and extra-statutory preconditions to naturalization that Defendants have imposed on Plaintiffs as described herein.

10. DoD also adopted policies purporting to preclude the certification of honorable service of members of the Selected Reserve until these soldiers serve in an active duty status and/or satisfy other preconditions to naturalization established by DoD. DoD's policies – and naturalization conditions – are contrary to the plain language of 8 U.S.C. § 1440 and implementing regulations. And, pursuant to a final DoD policy issued on October 13, 2017, the military branches must revoke or decertify previously-issued N-426 honorable service certifications for Selected Reserve MAVNIs, including Plaintiffs (the "**New DoD N-426 Policy**"). Upon information and belief, DoD's policies with respect to these honorable service certifications were implemented in whole or in part in order to further delay, interfere with, and/or prevent the naturalization of Selected Reserve MAVNIs and, ultimately, to facilitate their discharge from the military. Simply put, DoD wants to control the naturalization process and set its own conditions for naturalization for these soldiers.

11. For its part, DHS is facilitating this improper DoD conduct, including by continuing to "hold" the final adjudication of naturalization applications pending DoD's implementation of these policies. Shortly after it was issued, the Court preliminarily enjoined implementation of the New DoD N-426 Policy, concluding that "despite its assertions to the contrary, DoD does not control the naturalization process" so its "unfounded attempt to control criteria for naturalization" does not provide a reasonable basis for its new policies.

12. Undeterred and in dereliction of their duties to these soldiers, on February 14, 2018, DoD promulgated yet another new policy that will result in the discharge of many non-citizen MAVNI soldiers prior to their naturalization (the "**DoD Discharge Policy**"). Under this policy, "Service members who have been non-deployable for more than 12 consecutive months, for any reason, will be processed for administrative separation in accordance with Department of Defense Instruction (DoDI) 1332.14 . . . ." With respect to Selected Reserve MAVNIs, DoD takes the position that such soldiers are non-deployable at least until such time that they complete BCT. And under DoD's policies, Selected Reserve MAVNI soldiers cannot commence BCT until their enhanced DoD security checks are complete, which take several years. The DoD Discharge Policy provides an exception for pregnant and post-partum service members but no other categories of exceptions. Pursuant to the DoD Discharge Policy directive, non-deployable soldiers are subject to discharge immediately and must be processed for discharge no later than October 1, 2018.

13. Accordingly, Plaintiffs bring this civil action on behalf of themselves in their individual capacities, and on behalf of a class of all similarly-situated individuals (the "**Class**"), to obtain Administrative Procedure Act ("APA"), mandamus, declaratory, constitutional, and temporary, preliminary, and permanent injunctive relief to compel and enjoin Defendants so that they comply with their obligations pursuant to the Constitution and the mandates and directions specified in federal law, including 8 U.S.C. §§ 1440 and 1571, to properly and timely act upon, and to otherwise cease interfering with, the processing of Plaintiffs' naturalization applications.

JURISDICTION

14. This action arises under the Immigration and Nationality Act of 1952 ("**INA**") and the U.S. Constitution. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the APA, 5 U.S.C. § 701 et seq.

VENUE

15. Venue is proper in the Court under 28 U.S.C. § 1391(e) because the individual Defendants are officers of the United States acting in their official capacities, and the United States Department of Homeland Security, the United States Citizenship and Immigration Services, and the United States Department of Defense are all present in this district. Further, the individual Defendants perform official duties in Washington, D.C.

PARTIES[1]

16. Plaintiff Dr. Kusuma Nio resides in Springfield, Illinois. Dr. Nio enlisted in the Selected Reserve through the MAVNI program in August 2015 and serves with the 1st Forward Surgical Team in Fort Hamilton, New York.

17. Plaintiff Wanjing Li resides in St. Louis, Missouri. Ms. Li enlisted in the Selected Reserve through the MAVNI program in February 2016 and serves with the 325th Combat Support Hospital.

[1] Following the initiation of this action, as previously acknowledged in Court filings, Plaintiffs Nio and Park became naturalized United States citizens. As such they no longer are seeking some of the relief they originally sought, namely related to the final processing of their naturalization applications, and the allegations by "Plaintiffs" in this Third Amended Complaint with respect to such relief should not be deemed to include them. Plaintiffs remain in this case in order to obtain the benefit of all other relief sought in this action that remains available to them.

18. Plaintiff Jae Seong Park resides in Auburn, Washington. Mr. Park enlisted in the Selected Reserve through the MAVNI program in October 2015 and completed BCT at Fort Jackson, South Carolina in December 2016.

19. Plaintiff Haendel Crist Calisto Alves de Almeida resides in West New York, New Jersey. Mr. Almeida enlisted in the Selected Reserve through the MAVNI program in May 2016 and serves with the 405th Combat Support Hospital located in West Hartford, Connecticut.

20. Plaintiff Prashanth Batchu resides in Union City, New Jersey. Mr. Batchu enlisted in the Selected Reserve through the MAVNI program in June 2016 and serves with the 419th Transportation Company.

21. Plaintiff Lucas Calixto resides in Somerville, Massachusetts. Mr. Calixto enlisted in the Selected Reserve through the MAVNI program in February 2016 and serves with the 743rd Transportation Company in Roslindale, Massachusetts.

22. Plaintiff Shu Cheng resides in Temple City, California. Ms. Cheng enlisted in the Selected Reserve through the MAVNI program in February of 2016 and serves with the 349th Combat Support Hospital in Bell, California.

23. Plaintiff Seung Joo "Josh" Hong resides in Germantown, Maryland. Mr. Hong enlisted in the Selected Reserve through the MAVNI program in May 2016 and serves with the 392nd Signal Battalion.

24. Plaintiff Ye Liu resides in Dearborn, Michigan. Mr. Liu enlisted in the Selected Reserve through the MAVNI program in March 2016 and serves with the 1001st Quartermaster Company in Columbus, Ohio.

25. Plaintiff Emeka Udeigwe resides in Cleveland, Ohio. Mr. Udeigwe enlisted in the Selected Reserve through the MAVNI program in March 2016 and serves with the 463rd Engineer Battalion unit in Wheeling, West Virginia.

26. Defendant United States Department of Homeland Security is responsible for the administration and enforcement of immigration laws of the United States.

27. Defendant Kirstjen M. Nielson is sued in her official capacity as Acting Secretary of the United States Department of Homeland Security.[2] The Secretary of DHS is responsible for the administration and enforcement of immigration laws of the United States.

28. Defendant United States Citizenship and Immigration Services is responsible for the overall administration and the implementation of the immigration laws of the United States.

29. Defendant L. Francis Cissna is sued in his official capacity as Director of the United States Department of Homeland Security, United States Citizenship and Immigration Services. The Director of USCIS is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

30. Defendants DHS, Ms. Nielson, USCIS, and Mr. Cissna are collectively referred to as the "**DHS Defendants**."

31. Defendant United States Department of Defense is responsible for the overall administration of military policy, which includes the MAVNI program.

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[2] Following the commencement of this action, Ms. Duke transitioned to a new position. As Ms. Duke was sued solely in her official capacity based on her official duties as DHS Secretary, it is appropriate that Ms. Nielson, or her successor – acting or permanent – is substituted as the "DHS Secretary" party to this action.

32. Defendant James Mattis is sued in his official capacity as Secretary of Defense of the United States Department of Defense. As Secretary of Defense, Gen. Mattis is responsible for the overall administration of DoD, which includes the MAVNI program.

33. Defendants DoD and Gen. Mattis are collectively referred to as the "**DoD Defendants**."

BACKGROUND AND FACTS

The MAVNI Program and Plaintiffs' Service Commitments

34. Typically, U.S. Armed Forces enlistees must meet U.S. citizenship or permanent residence requirements. 10 U.S.C. § 504(b). However, 10 U.S.C. § 504(b)(2) authorizes the Secretary of Defense and the Secretaries of the military service departments to enlist certain non-U.S. citizens and non-permanent residents if enlistment of such individuals is "vital to the national interest." Under this authority, DoD initiated the MAVNI program in 2008.

35. The MAVNI program is designed to attract two types of recruits into the military: (a) health care professionals and (b) individuals who possess critical foreign language and cultural skills. DoD officials acknowledge that soldiers with these skills "are necessary to sustain effective military operations." The MAVNI pilot program was initiated in 2008, and operated from 2009 through the present, with brief interruptions and enlistment suspension periods.

36. Under MAVNI, DoD encouraged qualified individuals to enlist, in large part, by touting the opportunity of an "expedited" path to U.S. citizenship, and DoD even has contractually mandated that MAVNI enlistees – including Plaintiffs – apply for citizenship "as soon as the [service branch (*e.g.*, the Army)] has certified [the MAVNI recruit's] honorable service." This citizenship opportunity – the right to apply for naturalization on a path not otherwise available to them – was a powerful enticement and material representation to Plaintiffs

and other such qualified individuals who contemplated MAVNI enlistment. Easing and expediting the path to citizenship for such individuals is also the right thing to do. The United States has maintained special naturalization laws favoring service members for more than 150 years.

37. Plaintiffs (and the members of the Class) are soldiers who possess the skills that DoD has deemed "vital to the national interest." They enlisted under the MAVNI program, were found by DoD to be suitable for military service in order to enlist, signed MAVNI enlistment contracts, and are serving or have served honorably in the Selected Reserve. Each Plaintiff (and Class member) took the military service oath. Each Plaintiff's (and Class member's) enlistment contract obligates him/her to eight years of service in the Army Reserve, six years of which must be served in the Selected Reserve. Each Plaintiff (and Class member) is or was assigned to a U.S. Army Selected Reserve unit and each served with his/her unit by participating in multiple Selected Reserve drill periods or by serving in an active-duty status. Finally, a responsible and authorized Army official executed a Form N-426 for each Plaintiff (and Class member), certifying his/her honorable service in the military as a member of the Selected Reserve. Indeed, as a result of their service, the Army already has promoted in rank many Class members.

38. The commitment that each Plaintiff and member of the Class has undertaken to serve as a soldier in the U.S. Army Reserve is serious and substantial. As the standard MAVNI Army Reserve enlistment contract states, an agreement to enlist "is more than an employment agreement. It effects a change in status from civilian to military member of the Armed Forces." As such, per the Enlistment/Reenlistment Document Armed Forces of the United States (DD Form 4/1), each soldier (a) is "[r]equired to obey all lawful orders and perform all assigned duties," (b) is "[s]ubject to the military justice system" and, among other things, "may be tried by

military courts-martial," (c) may be "[r]equired upon order to serve in combat or other hazardous situations," and (d) must otherwise "meet acceptable military standards" such that any failure to meet their service obligations as Selected Reservists can result in demotion and/or discharge from the service under other than honorable conditions.

39. As a member of the Army Reserve, each soldier "may at any time, and without [his/her] consent, be ordered to active duty to complete a total of 24 months of active duty." In times of war or national emergency declared by Congress, these soldiers "may, without [his/her] consent, be ordered to serve on active duty for the entire period of the war or emergency and for six (6) months after its end." As members of the Selected Reserve, these soldiers may, without their consent, be ordered to 365 days of consecutive active duty whenever "the President determines that it is necessary to augment the active forces for any operational mission or for certain emergencies."

40. Finally, as members of the U.S. military, Plaintiffs may be required to compromise individual liberties that are considered fundamental in ordinary American society. As their enlistment contracts provide, a service member's freedom of religious expression may be curtailed: "I understand that the Army cannot guarantee accommodation of religious practices, and that religious accommodations may be modified or revoked based on changes in military necessity." A service member's freedom of speech, expression, and association also may be curtailed. Consequently, prior to enlistment, the Army provides recruits with USMEPCOM Form 601-23-4 – "Restrictions on Personal Conduct in the Armed Forces" – which specifies that military service entails behavioral limitations not applicable to civilians in America:

> Military life is fundamentally different from civilian life. The military has its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society. These are necessary because military units and personnel must maintain high standards for morale, good order and discipline, and unit cohesion that are essential for combat effectiveness.

The Statutory and Regulatory Framework Applicable to Plaintiffs' Naturalization Applications

41. The Constitution confers upon Congress the power to establish a uniform Rule of Naturalization. U.S. Constitution, Art. I, Sect. 8, Cl. 4. One naturalization statute enacted by Congress pursuant to its Constitutional authority and applicable to Plaintiffs here is plain and simple. The INA, at 8 U.S.C. § 1440(a), provides that:

> [a]ny 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 . . . during any . . . period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force . . . may be naturalized as provided in this section . . . .

42. On July 3, 2002, the President determined by Executive Order that the military is engaged in armed conflict for the purposes of 8 U.S.C. § 1440. Exec. Order No. 13269, 67 Fed. Reg. 45,287 (July 3, 2002). Executive Order No. 13269 has remained in effect through the present.

43. Section 1440 substantially eases the path to U.S. citizenship for certain non-U.S. citizens who serve in the Selected Reserve or on active duty in the United States Armed Forces during a time of armed conflict. Such service members qualify for naturalization under this section with honorable service "as a member of the Selected Reserve of the Ready Reserve ***or*** in

an active-duty status." 8 U.S.C. § 1440 (emphasis added). This disjunctive language of the statute is clear and unequivocal: Selected Reserve service alone qualifies a person to naturalize, and citizenship is not dependent on an individual performing active-duty service.

44. The statute significantly shortens and facilitates the path to citizenship in at least three specific ways. First, service members may be naturalized "regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability and the provisions of section 1442 of this title." 8 U.S.C. § 1440(b)(1). Second, "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). Third, "no fee shall be charged or collected from the applicant for filing a petition for naturalization or for the issuance of a certificate of naturalization" granted under this section. 8 U.S.C. § 1440(b)(4).

45. DoD's role under this statute is limited, ministerial, and non-discretionary. Congress did not grant DoD the authority to set any naturalization eligibility conditions nor did it authorize DoD to make naturalization recommendations or determinations. DoD's sole role in naturalizations under section 1440(a) is for the soldier's service branch (primarily the Army in this case) to confirm to DHS that the service member is or has served honorably. DHS – not DoD – is the sole agency authorized by Congress to adjudicate and confer citizenship in accordance with naturalization eligibility laws and standards.

46. The statute contains an express revocation provision that provides, in pertinent part, the following: "Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." 8 U.S.C. § 1440(c).

47. The regulations implementing 8 U.S.C. § 1440 are located at 8 C.F.R Part 329, entitled "SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: PERSONS WITH ACTIVE DUTY OR CERTAIN READY RESERVE SERVICE IN THE UNITED STATES ARMED FORCES DURING SPECIFIED PERIODS OF HOSTILITIES." Section 329.2 provides that a service member is eligible for naturalization under 8 U.S.C. § 1440 upon establishing that he or she has "served honorably in the Armed Forces of the United States as a member of the Selected Reserve of the Ready Reserve or in an active duty status in the Armed Forces of the United States during . . . [a]ny other period as may be designated by the President in an Executive Order pursuant to section 329(a) of the Act . . . ." Like the statute, the disjunctive language of the implementing regulations makes clear that "active duty service" is not required if the soldier has served in the Selected Reserve.

48. Volume 12 of the USCIS Policy Manual, the agency's centralized repository for USCIS's immigration policies, explains the laws and policies that govern United States citizenship and naturalization, and further confirms that service in the Selected Reserve counts as qualifying service; indeed, *"[o]ne day of qualifying service is sufficient in establishing eligibility.*" USCIS Policy Manual Volume 12, Part I, Chapter 3, current as of July 26, 2017 (emphasis added).

49. The regulations also confirm that the honorable service requirement can be satisfied either through current service that is honorable or a separation from military service under honorable conditions: "*[h]onorable service and separation* means service and separation from service which the executive department under which the applicant served determines to be honorable . . . ." 8 C.F.R 329.1 (emphasis in original). *See also* 10 U.S.C § 12685; Army Regulation 135-178 ("Army National Guard and Reserve, Enlisted Administrative Separations").

The service department "under which the applicant served or is serving" certifies the member's honorable service to USCIS officials. 8 C.F.R. 329.4.

50. USCIS has established an official form for this purpose – "USCIS Form N-426: Request for Certification of Military or Naval Service" – wherein the military service branch certifies whether or not the applicant is serving or has served honorably.

51. Notably, the Army recited the statutory framework for citizenship in the standard enlistment contract that each Plaintiff signed, confirming the Army's limited role in certifying the service under Section 1440 and making clear that *the military does not make citizenship determinations*:

> 3. I understand that I am enlisting under a federal law that allows the Secretary of the Army to authorize the enlistment of certain non-citizens of the United States (10 U.S.C. 504(b)(2)). I also understand that I am enlisting during a period of time in which any alien who serves 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 apply for United States Citizenship (8 U.S.C. 1440).
>
> 4. *In exchange for being permitted to enlist in the Army, I agree to apply for U.S. citizenship as soon as the Army has certified my honorable service. I understand that the Army does not grant U.S. citizenship*, and the Army does not guarantee that my application for U.S. citizenship will be approved. [Emphasis added.]

Defendants' Violations of Applicable Law

52. Plaintiffs and the Class have fulfilled their obligations under the law and their enlistment contracts. They possess the language and/or medical skills deemed "vital" by DoD. They enlisted as members of the Selected Reserve during a period of armed conflict, thereby serving a "vital national interest." They are or have served honorably. They obtained N-426

certifications from DoD confirming their honorable service. And, they have applied to become naturalized United States citizens.

53. Defendants have failed to fulfill their statutory and regulatory duties and have improperly and unlawfully interfered with and/or delayed the lawful naturalization adjudication process through a series of unlawful policies and misconduct.

DoD's Improper Interference in the Naturalization Process

54. Impeding Plaintiffs' "expedited" path to citizenship, DoD (as described below) improperly instructed DHS to suspend the processing of Plaintiffs' naturalization applications. This instruction is improper and unlawful because it exceeds DoD's lawful authority and interferes with DHS's duties. Rather, as noted, DoD's sole role in Plaintiffs' naturalization process is ministerial and non-discretionary. The relevant military department simply certifies whether the service member seeking naturalization is serving, or has served, honorably. That task is simple, objective, and quick. It involves no investigation, security screenings, research, or subjectivity. Historically filled out by the soldier's immediate command authority who have direct knowledge of the soldier's service status and/or access to the soldier's service record, it routinely is accomplished in minutes.

55. Although the Army unlawfully sought to delay and impede issuance of N-426 certifications to many members of the Class, all members of the Class received duly executed forms certifying their honorable service. Even in those narrow and rare circumstances when DoD is unable to confirm that the service member's service was honorable, the military department nevertheless must complete the N-426 Form, verifying the period of service and stating – in the block provided on the Form for this very purpose – the reasons why the service was not honorable, if applicable. DoD has no further role in the naturalization application

process. DoD has no legal authority to refuse to provide N-426 certifications to MAVNIs who request them, to de-certify, recall, or revoke N-426 certifications, or to direct or request DHS to suspend or "hold" final adjudication of Plaintiffs' naturalization applications, to recommend (for or against) or approve (or deny) naturalization with respect to any MAVNI. Nor is DoD permitted by law to impose additional military conditions or requirements for naturalization.

56. On September 30, 2016, the Under Secretary of Defense for Personnel and Readiness (Acting) promulgated policy guidance directing the military departments to delay orders to active-duty training for MAVNI enlistees until DoD completed security clearance investigations, such as Tier 5 (formerly known as SSBI) investigations and Counterintelligence Security Interviews ("**CI**"), for such enlistees (*i.e.*, the DoD Enhanced Background Investigations). And, notwithstanding its sharply limited and purely ministerial role in the naturalization process for Plaintiffs per statute – *i.e.*, the confirmation of honorable service – in an improper attempt to delay or prevent the final adjudication of their applications, DoD (and its service branch, the Army) instructed DHS to stop processing MAVNI applications for naturalization pending completion of the DoD Enhanced Background Investigations and active-duty service by the soldier. For their part, DHS and USCIS complied with, or acquiesced in DoD's improper instruction, or otherwise agreed, and halted the full processing of all MAVNI naturalization applications contrary to its duties under law. The result has been massive and prolonged cessations and delays in the processing and final adjudication of Plaintiffs' naturalization applications for impermissible and unlawful reasons. Prior to September 30, 2016, the naturalization applications of MAVNI service members were processed to completion, and citizenship was conferred, independent of any DoD background investigations.

57. There is no doubt that Defendants implemented these naturalization adjudication holds or that DoD was the instigator of them. Indeed, since September 2016, numerous officials (from both DoD and USCIS) have admitted that DHS and USCIS implemented this "hold" pursuant to DoD's instruction. For example, on March 14, 2017, in response to a Congressional inquiry on behalf of a MAVNI service member whose naturalization application had been delayed, a USCIS field office reported that "Ms. [X's] case is pending due to military background checks required by the Department of Defense. USCIS is unable to render a decision on Ms. [X's] application at this time." In April 2017, another USCIS field office supervisor confirmed that there was a "new DoD memo" issued in recent months stating that all applications from MAVNI soldiers who have not started initial active-duty training are "now on hold."

58. USCIS representatives on the "military hotline" likewise informed MAVNI Class members that MAVNI naturalization applications were on "hold" pending completion of the DoD Enhanced Background Investigations. These USCIS communications occurred, at least, in February, March, April, and May 2017.

59. On February 6, 2017, a U.S. Army Human Resources Command official – who claims to have consulted with "senior DoD officials" – stated that "[t]he Army does not have any plans of letting a USAR [*i.e.*, U.S. Army Reserve] MAVNI get naturalized" before he/she is ordered to initial active-duty training upon completion of the DoD Enhanced Background Investigations.

60. Neither the Army nor DoD has any legal authority to "let" or "not let" MAVNI soldiers serving honorably as members of the Selected Reserve "get naturalized." Indeed, Defendant officials have admitted that DoD serves only "a ministerial role in determining if an individual is serving honorably" through the issuance of a Form N-426: "The submission of this

form confirms whether the applicant served honorably as a member of the SRRR [Selected Reserve of the Ready Reserve] or in an active-duty status." The Army already has made that certification, in writing, for each Plaintiff through duly issued N-426s.

61. Nevertheless, the evidence is overwhelming that DoD further insinuated itself into the naturalization process by instigating, directing, and driving the unlawful naturalization "holds." Some of the additional evidence on this point is summarized (with emphases added) in the table below:

Feb. 2017	A USCIS official states: "If any field office has MAVNI Select Reserve of the Ready Reserve who are drilling and have no ship date for Basic Training, ***please hold the case as we are awaiting guidance from DOD*** regarding what constitutes serving in the armed forces."
Feb. 2017	A USCIS official states: "We are working with OCC to determine what to do with ***MAVNI N-400s who are on hold pending the DOD enhanced BGC*** while in Basic Training."
Feb. 2017	Director, DoD Consolidated Adjudication Facility, states: "In exchange for military service, the Department of Defense ***(DoD) grants U.S. citizenship*** on an expedited basis."
Apr. 2017	A DoD official admits that: "Knowing that …failure of these background checks could lead to discharge from the military and make an individual unable to meet the honorable service requirements that the N-426 certifies, ***a strategic pause was prudent*** with respect to the MAVNI pilot program. As a result, DoD and USCIS mutually agreed that ***USCIS would slow down the Form N-400 adjudication*** of the MAVNI pilot program applicants."
Apr. 2017	A USCIS official states: "These cases should also be ***placed on hold pending the OSD*** [Office of the Secretary of Defense] response. ***Please advise field offices of the hold***. Once we receive guidance from OSD, CB will forward it ASAP as we understand the extensive impact the hold has on both the USCIS Field and the DOD Field."
Apr. 2017	A USCIS Congressional Liaison informs the Office of Senator Sheldon Whitehouse of the following: "On April 13, 2017, ***we received guidance from our Headquarters to place a temporary hold*** on certain military cases pending further guidance from the Office of the Secretary of Defense."

Apr. 2017	A MAVNI doctor relays to Army personnel what USCIS informed him about the hold on his N-400 application, including the following: "***All MAVNI applications are currently on hold*** [because] the office has become aware of ambiguities in the law, which they believe indicates the need for soldiers to do at least a day of active duty, such as attending Basic training.... [and] they couldn't move forward until the secretary of defense clarified what constituted active duty."
May 2017	A news organization comments on the DoD hold and also references an Army document which explains the immigration status predicament that the DoD hold is causing: "His citizenship oath was postponed indefinitely April 13 by the United States Citizenship Immigration Service, who told him the ***Defense Department has suspended all applications*** from foreign-born recruits looking to serve."
May 2017	The Department of the Army informs Congressman Jeff Duncan of the following: ***"[Your constituent's] naturalization application cannot be forwarded to [USCIS] at this time***. Current US Army policy states that [MAVNI] applicants will be processed for expedited naturalization upon arrival at their Basic Combat Training unit…. In addition to the required SSBI, a National Intelligence Agency Check and a Counterintelligence Interview must also be performed and with favorable results prior to permitting these applicants to depart for active duty. These required actions can take 8-24 months to complete and render a decision."
May 2017	A USCIS Congressional Liaison relayed the following information to the Office of Senator Sheldon Whitehouse: "[USCIS officials] are certainly aware of [the MAVNI naturalization applicant's] situation and that of others but ***they are unfortunately stuck at a standstill until they receive word from DoD that it is ok*** to go forth in processing [the MAVNI naturalization applicant's] N-400….The reason DoD is in a standstill is because there are various types of MAVNI cases, each with different specialties. When the DoD decides when/which certain specialties are needed, they will process those security clearances and coordinate with USCIS. [USCIS] unfortunately cannot give a timeframe on this for now."
May 2017	A USCIS official states that "USCIS is currently working with DOD on the intent of the MAVNI extension memo as it relates to these cases. With the memo in mind, ***the following N-400 applications should be held*** until we receive further guidance on these cases."

June 2017	A news article quotes a USCIS spokesperson: "USCIS spokeswoman Jane Cowley said …the agency is 'reviewing' the policy on whether service before basic training counts toward eligibility for citizenship. '***The current hold (on the MAVNI program) applies to all recruits who have not attended basic training or whose security or suitability screening requirements*** have not been completed'…."
July 2017	A DoD official admits that "[o]n or around April of 2017, senior leaders from DoD's USD (P&R) informed USCIS that it was concerned about the naturalization of individuals whose Office of Personnel Management (OPM) background investigation and DoD counterintelligence security review has not yet been completed."
July 2017	A DoD official admits that "***DoD and USCIS mutually agreed that USCIS would slow down the Form N-400 adjudications***."
July 2017	A DoD official admits that "***DOD and USCIS jointly determined*** that it was in the best interest of the United States to ensure the naturalization decision of USCIS was informed by the outcome of the completed OPM background investigation and the DoD counterintelligence security review."
July 2017	A DoD official states that ***DoD "actually call[ed] up USCIS" to "tell them to slow down the process"*** for the MAVNI naturalization applications.

DHS Accepts and Adopts the Unlawful Naturalization "Hold"

62. Beginning no later than February 2017, and at the behest of DoD, USCIS's Field Operations Directorate ("**USCIS FOD**") issued a string of directives to USCIS field offices providing "final agency guidance" and "setting national policies regarding the processing of N-400 applications filed by MAVNI recruits." These directives established an unbroken series of "holds" on the processing and final adjudication of naturalization applications filed by MAVNI Selected Reserve soldiers.

63. On February 28, 2017, USCIS FOD verbally instructed field offices to "hold" the processing of naturalization applications filed by "MAVNI Select Reserve of the Ready Reserve who are drilling and have no ship date for Basic Training" pending "guidance from DOD

regarding what constitutes serving in the armed forces." This "hold" was unlawfully, improperly, and irrationally applied to Plaintiffs (and other members of the Class) because DoD had already issued each of the Plaintiffs (and these members of the Class) an N-426 certifying their honorable service for naturalization under 8 U.S.C. § 1440.

64. On April 13, 2017, via e-mail, USCIS FOD issued a directive entitled "Reservist N-400 Hold." The directive stated that the National Benefits Center had imposed a "hold" on applications from members of the Selected Reserve of the Ready Reserve "at such time as the cases become interview ready" and instructed the field offices to do the same. The fact that such cases had become "interview ready" establishes that any and all necessary USCIS background investigations required for naturalization had been completed as to these applicants. Nevertheless, USCIS directed that the processing of "[t]hese cases should be placed on hold pending the OSD [Office of the Secretary of Defense] response" regarding the definition of "active duty." USCIS applied the hold to Plaintiffs (as well as Class members) even though the directive otherwise acknowledged that, with respect to already-signed N-426s, "USCIS field offices should proceed as 'business as usual' unless suspicion of abuse of authority {e.g. Academy cadets are not eligible under 328 or 329} is suspected." This "hold" was unlawfully, improperly, and irrationally applied to Plaintiffs (and other members of the Class) who already had obtained duly and properly issued N-426s certifying their honorable service.

65. On May 19, 2017, via email, USCIS FOD issued a directive entitled "MAVNI Hold." This directive reiterated that a hold was in place on the processing of naturalization applications filed by members of the Selected Reserve of the Ready Reserve in the Delayed Training Program who had not yet been to basic combat training.

66. On May 25, 2017, via email, USCIS FOD repeated its directive to field offices that "N-400 applications should be held" on cases for "MAVNI SRRR recruits who have attended drill but have not attended Basic per the September 30, 2016 [DoD] memo." USCIS applied the hold to Plaintiffs (as well as other members of the Class) even though this directive likewise acknowledged that: "The N-426 should be completed by the commanding officer or a person authorized to sign on his/her behalf. Only if the form is blank or signed by someone obviously not performing in the capacity of a commander or acting for the commander should we make a call or R[equest] F[or] E[vidence]."

67. On July 7, 2017, after the filing of the original Complaint in this action, USCIS FOD issued another directive (the "July 7 Policy") to field offices:

> USCIS has determined that the completion of DOD background checks is relevant to a MAVNI recruit's eligibility for naturalization. As such, all pending and future MAVNI cases may not proceed to interview, approval or oath until confirmation that all enhanced DoD security checks are completed.

68. According to statements by Defendant officials, the newly-required DoD Enhanced Background Investigation includes a Tier 5 (formerly SSBI) investigation, a National Intelligence Agency Check ("**NIAC**"), a CI review, and a CI interview. Defendant officials also asserted the possibility of "an issue-oriented interview and/or issue-oriented polygraph." USCIS has ordered its field offices "not to complete naturalization adjudications under section 329(a), 8 U.S.C. § 1440(a), for MAVNI recruits until after these checks have been completed." USCIS has made clear that this directive applies to "all currently pending and future MAVNI naturalization applicants applying for naturalization under section 329(a), 8 U.S.C. § 1440(a)," which includes Plaintiffs and the members of the Class.

69. The DoD Enhanced Background Investigations conflict with existing USCIS background investigation guidelines. The published USCIS Policy Manual sets forth the background checks required for military members who apply for naturalization, specifying that military applicants require only those background checks that are required for "all applicants for naturalization" as well as a "Defense Clearance Investigative Index (DCII) query." At least as late as May 25, 2017, USCIS followed its published guidance (in this respect, while holding the naturalization applications for a different unlawful active-duty service reason) as USCIS officials acknowledged that "USCIS should not request SSBI results for any military naturalization applications . . . [and that] USCIS should proceed with the standard background and security checks we currently run." And Defendant officials have admitted in filings with the Court that USCIS's "longstanding policy" with respect to military background checks has been limited to DCII queries. Thus, the USCIS July 7, 2017 Policy directive conflicts with USCIS's own published guidance and longstanding prior practice. Moreover, on information and belief, USCIS (including in particular the USCIS official who issued the July 7 Policy directive) did not have an understanding of what a Tier 5 or Tier 3 background check covers or entails or how that check differs from the DCII query already called for in the USCIS published guidance.

70. Defendants' "hold" on the processing of MAVNI applications adversely has impacted Plaintiffs. USCIS representatives have admitted to members of Congress that "all military applications" for naturalization are supposed to be expedited. Moreover, data published by USCIS in its May and June 2017 National Performance Reports (reflecting primarily the period prior to the "holds") show that the "estimated average gross cycle time" for applications for naturalization filed by military members (including MAVNI soldiers) ranged from 3.8 months (May report) to 4.4 months (June report). The data further show that "estimated average active

case cycle time" for military applications (including applications by MAVNI soldiers) ranged from 3.7 months (May report) to 4.2 months (June report). Furthermore, to the extent that these data do not account for the fact that the active-duty service "hold" was in place by at least February 2017, the reported cycle times may be inflated (*i.e.*, longer than in prior months and years). Regardless, Plaintiffs' naturalization applications already have been pending for periods far longer than these prior averages.

71. Indeed, Defendant officials previously have stated that the Tier 5 background investigations for MAVNI applicants alone are "tak[ing] on average 422 days" to complete. This figure does not include any additional time it would take to complete the NIAC, CI review, CI interview, and so-called "issue-oriented interview and/or issue-oriented polygraph." Additional data provided by Defendants pursuant to their Court-ordered reporting obligations in this case show that ***the DoD Enhanced Background Investigations as applied to Class members here already have been pending anywhere from over 600 to over 900 days***. And Defendant officials have admitted that they cannot estimate the additional amount of time it will take to complete all of these requirements.

72. These naturalization application adjudication periods greatly exceed the length Congress intended: The INA specifically states: "***It is the sense of Congress that the processing of an immigration benefit application [defined to include naturalization applications] should be completed not later than 180 days after the initial filing of the application***." 8 U.S.C. §1571(b).

The MAVNI Naturalization "Hold" Is Unlawful, Irrational, and Contrary to the Statute

73. Defendants' imposition of a military-specific, uber-investigation condition on MAVNI soldiers' naturalization is improper. The DHS Defendants' application of the hold to Plaintiffs and the members of the Class is unlawful, irrational, and contrary to the INA. The investigative protocol being imposed on the naturalization process for MAVNIs never before has been applied to any type of application for naturalization. Rather, the investigative protocol being imposed typically has been used only in connection with granting security clearances, a process separate and distinct from naturalization conditions. As one DoD official explained: "Per the Federal Investigative Standards, established by the Office of Personnel Management (OPM), Tier 5 investigations are required for positions designated as critical sensitive, special sensitive, or access to Top Secret or Sensitive Compartmented Information (SCI)."

74. Defendants have imposed a new, substantive eligibility condition for naturalization not set forth in the law. The Constitution specifies that Congress – not the Executive – has the power to set forth naturalization law. U.S. Constitution, Art. I, Sec. 8, Cl. 4. As relevant here, naturalization preconditions are set forth in 8 U.S.C. § 1440. In that statute, Congress did not impose security clearance screenings as part of the naturalization process for Selected Reserve or active duty soldiers, and nothing in the statute authorizes DHS or DoD to impose this or any other additional substantive requirement. If Congress had intended to mandate such additional requirements for naturalization, it could have done so. In fact, Congress did the opposite, by enacting a statute that eases the naturalization requirements and processing time for soldiers serving honorably during periods of armed conflict.

75. In enacting Section 1440, Congress intended to reward MAVNI soldiers for voluntarily answering our Nation's call to service, not to punish and disadvantage them, or to place their lawful immigration status in jeopardy post-enlistment. Defendant officials have admitted as much by acknowledging that "Section 1440(a) relaxes the preconditions for naturalization established in Section 1427." Yet, through their unlawful actions, Defendants have imposed on Plaintiffs one of the most onerous requirements for naturalization that one could imagine — a rigorous investigation for top-level security clearance. Accordingly, DoD's improper instruction, and DHS's unlawful compliance with that instruction, are contrary to the plain language and clear purpose of the statute. And, even if DHS pretends that it established this new condition on its own, without any outside influence, it would remain unlawful.

76. Furthermore, Section 1440 specifically and expressly removed and eliminated the length-of-residency requirement normally required for naturalization for this class of individuals — *i.e.*, those willing to volunteer to serve during periods of armed conflict. However, Defendants have attempted to justify the imposition of the "enhanced DoD background checks" on MAVNI soldiers on the grounds that these soldiers purportedly have not resided in the United States as long as legal permanent resident soldiers. As one DoD official asserted, Tier 5 investigations include "certain valuable checks for foreign born recruits, such as developed reference interviews, which are necessary in the case of personnel whose lack of extended presence in the U.S. will cause their investigation to be short of scope."

77. However, Congress already has made the policy determination on this point for this class of individuals — *i.e.* those willing to volunteer to serve during periods of armed conflict — and determined that these individuals should not be disadvantaged in relation to naturalization based on length of residency. Specifically, Section 1440(b)(2) commands that, for

naturalization of such individuals, ***"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). Thus, in defiance of the law, Defendants' "hold" effectively reinstates the very residency requirement that the statute expressly eliminated.

78. Defendant officials also have attempted to justify the hold on the grounds that "the background checks may result in the recruit receiving an other-than-honorable discharge from the military." But Congress has already made the policy determination on this point as well. Section 1440(c) expressly provides that an individual's citizenship may be "revoked . . . if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." Thus, the statute directly addresses this issue and provides 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 unfavorable subsequent discharge. ***In no event is naturalization for MAVNI Selected Reservists conditioned on their completing basic training or post-enlistment military suitability determinations***. Once the soldier serves honorably, he/she is eligible to naturalize. If the military later determines that the soldier no longer is suitable for military service, that assessment has no bearing on whether the soldier already met the lawful criteria for naturalization.

79. In addition, Defendants' July 7 Policy is arbitrary, capricious, and irrational for numerous independent reasons. First, most of the Plaintiffs, consistent with the broader MAVNI population, have resided in the U.S. for longer than the period required for naturalization of legal

permanent residents (typically three or five years, but in some cases shorter periods of residency or no residency at all). In fact, some of the Plaintiffs have resided in the United States since childhood. Thus, it is arbitrary and irrational to apply the DoD Enhanced Background Investigation requirement to them based on Defendants' length-of-residency rationale, while at the same time imposing no such requirement on legal permanent residents with little or no history in the U.S. The "hold" directive is thus untethered to the issue that the agency claims to be addressing (length of residency). Instead, the "hold" punishes MAVNIs simply for being MAVNIs regardless of how long they have resided in the United States.

80. Second, USCIS's "enhanced DoD security check" hold was plainly arbitrary, capricious, and irrational as promulgated. Specifically, the July 7 Policy orders USCIS field offices as follows:

> USCIS has determined that the completion of DOD background checks is relevant to a MAVNI recruit's eligibility for naturalization. As such, all pending and future MAVNI cases may not proceed to interview, approval, or oath until confirmation that all enhanced DoD security checks are completed.

However, ***at the time USCIS issued the July 7 Policy, the DHS Defendants were fully aware that DoD planned to discharge the soldiers in question without conducting any of these "enhanced DoD security checks."***

81. In particular, on or about May 19, 2017, DoD officials issued an action memo ("**DoD Action Memo**") detailing DoD's plans regarding Selected Reserve MAVNIs. The DoD Action Memo made clear: (i) that DoD had no intention of conducting the "enhanced DoD security checks" on which USCIS later claimed it was waiting; (ii) that DoD did not have the resources to conduct such security checks; and (iii) that DoD instead intended to discharge these MAVNI Selected Reserve soldiers without performing such security checks.

> **Group 3**: [Selected Reserve MAVNIs] . . .
>
> - Approx. 500 Group 3 MAVNIs have received command endorsement [*i.e.*, N-426 "honorable service" certifications] and applied for naturalization based on having "performed creditable service" in the form of two weekend drills. These citizenship applications are under review by [USCIS].
>
> - **Action:** The heightened risk associated with Groups 1/2, and the application of resources needed to mitigate that risk, render it infeasible to continue to process [Group 3] MAVNIs. **Except for individual cases deemed vital to the national interest, Group 3 will be separated by Secretarial plenary authority.**

82. The DoD Action Memo specified that the plans set forth therein would be executed in the absence of a countermanding directive by the Secretary of Defense. USCIS was fully aware of the DoD Action Memo no later than June 28, 2017 (and likely far earlier). Thus, USCIS issued its July 7 Policy directive to "hold" MAVNI applications pending completion of "enhanced DoD security checks" with express knowledge that DoD had no intention of performing those security checks. One can scarcely conceive of a more arbitrary, capricious, and irrational agency action. While DoD subsequently claimed that the Secretary of Defense "verbally … modif[ied] the proposed course of action" with respect to Selected Reserve MAVNIs, Defendants failed to produce any written record of these supposed orders, notwithstanding a July 19, 2017 Court order that it produce any such information. No written record of this purported modification has been identified or provided to the Court or Plaintiffs. And no record of this purported oral modification is included or referenced in the Certified Administrative Record Defendants' recently produced for the July 7 Policy. In all events, any purported subsequent verbal modification of the May 19, 2017 DoD Action Memo would in no way alter the sham nature of the July 7 Policy.

83. Defendants' "hold" is arbitrary, capricious, and contrary to law for the further reason that it treats similarly-situated individuals differently in two separate respects. Prior to instituting the present "hold," USCIS naturalized thousands of MAVNI soldiers without "enhanced DoD security checks." USCIS will apply the "enhanced DoD security check" procedure only to a portion of the MAVNI population. Moreover, many (if not most) MAVNIs – including several of the named Plaintiffs – have resided in the United States at least as long as the period required for naturalization of permanent residents. Yet, despite their similarly-situated residence status, USCIS is applying enhanced background checks only to MAVNI applications for naturalization.

84. Finally, in issuing the July 7 Policy, USCIS failed to properly consider and/or completely ignored crucial aspects of the problem including the adverse impacts that would result from that policy. Among other things, USCIS failed to consider that it did not have the capability to implement and apply the July 7 Policy as promulgated. Specifically, since its inception, USCIS has had no means to reliably identify the pool of naturalization applicants to which the July 7 Policy was intended to apply. This is because USCIS is unable to identify actual MAVNI applicants. Rather, USCIS has represented to the Court in this action that it only can identify individuals who "appear to be MAVNI recruits" by relying on "inferences" from "other information." Consequently, the July 7 Policy at all times has been both over-inclusive and under-inclusive. The USCIS Chief of the Office of Performance and Quality recently admitted as much in a sworn statement:

> I understand that since USCIS issued the July 7, 2017 guidance at issue in this litigation, the Field Operations Directorate ("FOD") has manually tracked which military naturalization applicants appear to be MAVNI recruits. ***However, because the process is manual and because it relies on inferences based on other***

> ***information reported on Form N-400***, such as whether the applicant identified himself or herself as a lawful permanent resident, ***it is possible that certain information may be under- and/or over-inclusive***. [Emphasis added.]

85. In its rush to enact the policy for litigation purposes in this case – indeed the Certified Administrative Record specifically cites this litigation in a memorandum issued just days before enactment – USCIS likewise ignored the severe adverse consequences that would flow from the July 7 Policy. *Only after enactment of the July 7 Policy* have Defendants acknowledged the massive delays that have resulted from implementation of the USCIS policy in proceedings before the Court:

> THE COURT: I do want to have an accurate reporting system. I don't need to have as many attachments as I got. But it certainly would be helpful to know how we're doing because there is a claim here. It is not just discovery but whether we're going to get these people through or whether they're going to hit a wall or whether they're going to have to wait an indeterminable amount of time.
>
> [DEFENDANTS]: I think the answer is that people are going to have to wait. It is simply a math problem. If you have to do 2100 and you could do, for example, 50 a month which would be, I don't think they could do that many but if they could do 50 in a month, that is still well over a year.

86. In fact, at the rate of 50 per month — which Defendants themselves argue is unlikely — ***the "wait" amounts to 3.5 years***. USCIS, however, gave no prior consideration to this simple "math problem" and the grave consequences that it reflects. And the questions asked by the Court — "whether we're going to get these people through or whether they're going to hit a wall or whether they're going to have to wait an indeterminable amount of time" — are the type of questions that USCIS was reasonably required to consider, but utterly failed to consider, before it imposed the July 7 Policy on the MAVNI population. Indeed, the USCIS official who issued the July 7 Policy did not even have an understanding of what a Tier 5 or Tier 3

background check covers or entails, or how that check differs from the DCII query already called for in the USCIS published guidance.

87. USCIS also failed to properly consider or ignored the express statutory policy favoring prompt adjudication of naturalization applications in general and the specific statutory policy favoring expedited and eased naturalization processing for non-citizen service members.

DHS Defendants Are Failing to Comply With Their Own Policy By Refusing to Adjudicate Naturalization Applications Even After the "Enhanced DoD Security Checks" Are Complete

88. DHS Defendants are not complying with their own (albeit unlawful) July 7 Policy by systematically failing or refusing to adjudicate the naturalization applications of even those soldiers who satisfactorily have completed the DoD Enhanced Background Investigations, including soldiers who have had their enhanced DoD security checks completed for many months. In short, these individuals are among the most stringently-vetted applicants for naturalization in U.S. history. These individuals have fully satisfied even the lengthy, burdensome and extra-statutory requirements imposed on them under the July 7 Policy. Yet, DHS Defendants continue to refuse to adjudicate their naturalization applications.

89. In so doing, DHS Defendants have interposed a wide array of unlawful additional criteria as the grounds for its refusals, including: requiring the completion of BCT, AIT, and/or other active-duty service; submission by the applicant of a Form DD-214 (Certificate of Release or Discharge from Active Duty); satisfaction of the criteria set forth in the New DoD N-426 Policy; and/or other requirements over and above the DoD Enhanced Background Investigations.

90. DHS Defendants' unlawful conduct has been widespread and systematic and includes the USCIS Military Helpline, the USCIS Military Info-line as well as at least the following USCIS Field Offices: Boston, Massachusetts; Charleston, South Carolina; Charlotte,

North Carolina; Detroit, Michigan; Houston, Texas; Los Angeles, California; Louisville, Kentucky; Milwaukee, Wisconsin; Minneapolis, Minnesota; Santa Ana, California; San Antonio, Texas; San Bernardino, California; and Raleigh, North Carolina.

91. For example, in recent weeks and months, USCIS representatives have stated the following to MAVNI soldiers, *all of whom have successfully completed their DoD Enhanced Background Investigations,* when these soldiers inquired about the adjudication of their applications:

- Military Helpline: Informing MAVNI soldier (whose background checks were already complete for three months) that ***soldier would be interviewed and oathed after returning home from basic training and AIT***.

- Field Office: Asking MAVNI soldier why soldier bothered coming in for naturalization information if he had not yet "completed basic training."

- Military Helpline: Informing MAVNI soldier that "there was almost no possibility that [his] naturalization interview would be scheduled before [he] shipped to basic training, but that [he] would be able to naturalize as soon as possible after [he] graduated from AIT."

- Field Office: ***USCIS personnel "laughed at" MAVNI soldier and informed him that: he would not be scheduled for an oath ceremony "because he was a MAVNI;" that DoD "stopped" all military applications on October 13, 2017; that active-duty service was a prerequisite for naturalization***; that he needed a Form DD-214 to naturalize; and that his Form N-426 issued in June 2017 was no longer valid.

- Military Helpline: Informing MAVNI soldier that, because DoD failed to timely report the successful completion of his background checks, the soldier "will be able to naturalize only after completing his military training."

- Field Office: Informing MAVNI soldier that as a "MAVNI case" his application is subject to "further review."

- Military Helpline: Instructing MAVNI soldier to call USCIS closer to his March 12, 2018 ship date so that "USCIS could put his application on hold until he finished basic training."

- Field Office: ***Informing MAVNI soldier that service members must complete basic training/AIT in order to naturalize***; that the soldier would need a Form DD-214; that the soldier's application "will be on hold" until he completes basic training, AIT and 180 days of service; and that the soldier should wait until he shipped to basic training and completed AIT to reapply with a new N-400 and a new N-426.

- USCIS Military Info-line: ***Informing MAVNI soldier that "part of the MAVNI/Military natz process is that you have to attend basic training to complete the process***."

- Military Helpline: Informing MAVNI soldier that he will only be able to naturalize after basic and AIT.

- Field Office: Informing MAVNI soldier that he needed a DD-214 in order to complete the naturalization process, that the soldier would have 30 days to submit the DD-214; and ***that the soldier would "never be a citizen without going to basic training."***

- Field Office: Informing MAVNI soldier that he could not get naturalized before BCT.

- Field Office: Informing MAVNI soldier that he needed a "New N-426 signed by an 06 or above & a DD214," which the soldier would receive at the end of basic training.

- Military Helpline: Informing MAVNI soldier that he would have to wait until basic training to get naturalized.

- USCIS Military Info-line: Informing MAVNI soldier that "after you return home from basic and AIT you will be interviewed and oathed at that time. Again, congratulations on getting your date to go to basic. You are now one step closer to naturalization and have something to look forward to after basic and AIT."

- Field Office: ***Informing MAVNI soldier that, in order to become eligible for naturalization, he needed to complete basic training and serve an additional one year in the Army Reserve***.

- Field Office: Informing MAVNI soldier that the ***soldier's application is still "pending based on the DOD Memorandum of October 13, 2017."***

- Military Helpline: Informing MAVNI soldier not to expect to be able to get citizenship before going to basic training.

- Field Office/Military Helpline: Informing MAVNI soldier that his application was "administratively closed" because of a failure to provide a DD-214.

- USCIS Military Info-line: ***Informing MAVNI soldier that "[m]ost MAVNI cases will actually go to Basic before getting their naturalization cases adjudicated, and will be naturalized when they return home from basic training and their AIT."***

- Military Helpline: Informing MAVNI soldier that: "part of the military naturalization process is to graduate both BCT and AIT;" "your application is good to go. ***You just have to graduate both BCT and AIT to be naturalized***;" and "once you graduate your BCT and get closer to graduating your AIT, give us a call with your AIT graduation date, then we will send your packet to Minneapolis USCIS and notify them to naturalize you."

- Field Office: Informing MAVNI soldier that all MAVNI cases are on hold until DoD provides specific direction to proceed.

- Field Office: Responding to a Congressional inquiry and reporting that the field office has "not yet received additional guidance with respect to adjudicating MAVNI cases," and as such, the constituent's case "is still on hold."

92. ***At least one MAVNI soldier — whose enhanced DoD security checks had been complete for at least five weeks at the time — was overtly threatened by a USCIS naturalization officer simply for inquiring into the status of her interview and oath ceremony***:

> Your N-400 must be approved before you can be schedule for Oath. If you are unable to complete the process before you leave for basic training, you may finish it when you return from Basic and AIT. Keep in mind USCIS is aware of your unique situation and that of the other MAVNI applicants. ***This process requires patience, and we will hate to report your behavior or lack of***

> ***patience to your commander***. You are serving in the Military and thus held to higher standards.

This soldier's "behavior" consisted of the following innocuous e-mail to the USCIS military info-line: "Just wanted to let you know that my uscis status got updated since yesterday and said i was in interview line. Can you kindly place me in interview and oath ceremony on the same day in this month."

93. In some cases, DHS Defendants have delayed the naturalization interview date until after the soldier has shipped to BCT, knowing full well that the soldier already shipped to BCT, that the soldier could not communicate with USCIS because of the restrictions placed on soldiers at BCT, and that the soldier could not possibly attend the scheduled interview.

94. In all cases, Defendants unreasonably and unnecessarily are delaying the "official" reporting of the completion of "enhanced DoD security checks" for MAVNI soldiers. This delay in "official" reporting is shocking, particularly given the simplicity of the task, and strongly suggests that the delay is deliberate. For example, Defendant representatives have admitted that DoD waits at least three to four weeks after it informs recruiters that a soldier's background checks are complete before "officially" or "formally" notifying USCIS of this same fact. Yet, Defendants' admitted delay — albeit shockingly long in its own right — vastly understates the actual amount of delay that is occurring.

95. In fact, ***numerous soldiers who had their "enhanced DoD security checks" completed in October or November of 2017 still had not had their completed status "officially" reported to USCIS as of January or February of 2018***, resulting in delays of as much as 12 weeks or more. Many more MAVNI soldiers who had their "enhanced DoD security checks"

completed in January 2018, according to USCIS, still had not had their completed status "officially" reported to USCIS more than 6 weeks later.

96. Moreover, ***although the July 7 Policy has now been in place for over eight months, representatives for the DHS Defendants have admitted that the agency has not put any process in place to obtain background check status or information from DoD***. Even when an individual MAVNI soldier provides proof to DHS Defendants that his or her "enhanced DoD security checks" have been successfully completed, DHS Defendants refuse to take any action to verify or independently obtain the background check status or information. Instead, representatives for DHS Defendants describe the current process as follow: "DOD provides notice when they provide it."

97. Worse still, USCIS officers continue to actively deny that the DoD Enhanced Background Investigations have been "officially" or "formally" reported as complete even for large numbers of MAVNI soldiers who have been reported as complete to this Court. Pursuant to their Court-ordered reporting obligations in this case, on February 28, 2018, Defendants reported that at least 191 *Nio* class members have both completed their "enhanced DoD security checks" and received favorable NSD and MSSD adjudications by DoD. Many of the soldiers included on the list of these 191 individuals have since contacted USCIS. ***USCIS officers continue to tell these soldiers that USCIS has no "official" or "formal" confirmation that their DoD background checks are complete, notwithstanding the agency's report to the Court showing that the background checks for these soldiers were completed weeks and months ago***.

98. Even absent Defendants' reports to the Court, USCIS's denials often are not credible on their face. Just by way of example, one USCIS naturalization officer wrote the following in response to an inquiry by one MAVNI:

> USCIS has not received official notification that your background checks have been completed. Once we have received the notification we will route your N-400 application to Newark, NJ. Please notify our office when you return from Basic/AIT and we will provide you with an update on your application. Safe travels to Missouri.

The problem here is that the soldier never informed the USCIS officer that the Army was sending her to Missouri for BCT. The USCIS officer could know that fact only if he had access to the soldier's orders shipping her to BCT at Fort Leonard Wood, Missouri. And access to such orders would confirm that the soldier's "enhanced DoD security checks" were complete.

99. The unconscionable delays do not cease even after USCIS finally acknowledges that it has received "official" or "formal" confirmation that an individual soldier's DoD Enhanced Background Investigations have been successfully completed. Rather, DHS has informed MAVNI soldiers that it will take up to three months (after the "official" reporting of successfully-completed background checks) just to issue a naturalization interview notice to the soldier. And this three-month delay relates to the interview notice, not to the interview itself, which will occur at some later point in time. Accordingly, representatives for DHS Defendants have informed MAVNI soldiers that it takes "another 4 to 5 months" after the enhanced DoD security checks are "officially" reported as complete for the soldier to actually receive an interview and be naturalized. This additional four to five month period, by itself, exceeds the average processing time that pertained to military naturalization applications prior to the July 7 Policy change. Of course, this additional four to five month period is on top of the two to three months (at least) that it takes to "officially" report completion of background checks between DoD and USCIS as well as the two-plus years that the soldiers must wait to complete the "enhanced DoD security checks" themselves.

100. DHS Defendants' conduct also is directly contrary to the representations that Defendants made to the Court to try to justify the July 7 Policy. Specifically, Defendants assured the Court that USCIS would perform and complete all USCIS requirements in parallel with the DoD Enhanced Background Investigations so that interviews would be "scheduled promptly" upon their completion:

> [DEFENDANTS]: The answer is that there are certain steps that can be completed prior to the interview. For example, FBI checks and other background checks we can do. Where we have an application that's already finished those then it is paused until the interview, but we are working applications up until that interview point.
>
> ***THE COURT: And will you continue to do these applications whatever you have to do that doesn't require DoD's vetting?***
>
> ***[DEFENDANTS]: Yes, that's right.***
>
> ***THE COURT: So you will proceed with these? This is a representation of the government which we will hold you to.***
>
> ***[DEFENDANTS]: Yes, up until the interview point, yes.***
>
> * * *
>
> THE COURT: You will proceed with everything you can do short of an interview?
>
> [DEFENDANTS]: Yes.
>
> THE COURT: Before you hear from DoD?
>
> [DEFENDANTS]: Yes, that's right.
>
> THE COURT: Then you're going to hear from DoD and you don't, can't tell when interview will be?
>
> [DEFENDANTS]: It would be scheduled promptly. I can say that.

101. However, as shown above, DHS Defendants are not scheduling interviews promptly after completion of the DoD Enhanced Background Investigation. And DHS

Defendants are not performing the USCIS requirements for naturalization in parallel with the DoD Enhanced Background Investigations. In fact, MAVNI soldiers who have had naturalization applications pending for many months — including some with applications pending for more than a year — have been informed that the USCIS requirements are not yet complete even though they have successfully cleared the DoD Enhanced Background Investigations.

102. USCIS naturalization officers also have admitted that DHS Defendants do not even perform "pre-processing" for MAVNI naturalization applications until the DoD Enhanced Background Investigations are reported complete. As one such officer informed a soldier: "Right now you are still pending background checks because we have not received formal notification from the DOD about your checks being completed. Once we receive those then we will finish pre-processing your file and forward it to the field office near your home."

DHS Defendants Are Failing to Comply With July 7 Policy By Refusing to Request or Consider Any of the Information Gathered in the "Enhanced DoD Security Check" Process

103. DHS Defendants are not complying with their own policy because they are failing to request or consider any of the information gathered in the DoD Enhanced Background Investigation process. Notably, DHS Defendants have attempted to justify their July 7 Policy on the grounds that the DoD Enhanced Background Investigations — which previously had been reserved only for high-level security clearances — might reveal information pertinent to USCIS's "good moral character" determination. As a result, DHS Defendants denied that they were imposing on MAVNI soldiers any new legal standard or new legal requirement for naturalization. In particular, Defendants represented to the Court:

> USCIS has not redefined "good moral character" for MAVNI naturalization applicants. It has only required that adjudicators collect and consider evidence obtained from DoD to the same degree that they collect and consider evidence obtained from other federal entities such as the FBI. Additionally, USCIS does not require MAVNI naturalization applicants to "pass" the background checks conducted by DoD. Rather, it requires that DoD background checks be completed prior to the adjudication of a naturalization application. Plaintiffs point to no evidence suggesting that, if the background checks reveal adverse information, USCIS would not evaluate it in accordance with the same regulatory definition of "good moral character" that applies to every other naturalization applicant.

104. However, on information and belief, to date DHS Defendants have not actually requested — let alone considered — a shred of information gathered in connection with the DoD Enhanced Background Investigations since the July 7 Policy was issued, even though these background checks have been completed for hundreds of MAVNI soldiers for many months. Instead, DHS Defendants have outsourced the process to DoD to make NSD and MSSD determinations in place of "good moral character" determinations. But NSDs and MSSDs are military-specific adjudications conducted for national security purposes that: (i) are performed by agencies that have no lawful role in the naturalization process and (ii) involve legal standards that are fundamentally different than the "good moral character" requirement under the INA. As the Supreme Court has made clear:

> A [security] clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion or circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct . . . such as having close relatives residing in a country hostile to the United States. To be denied clearance on unspecified grounds in no way implies disloyalty or any other repugnant characteristic.

Moreover, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." By contrast, citizenship for soldiers should be liberally granted.

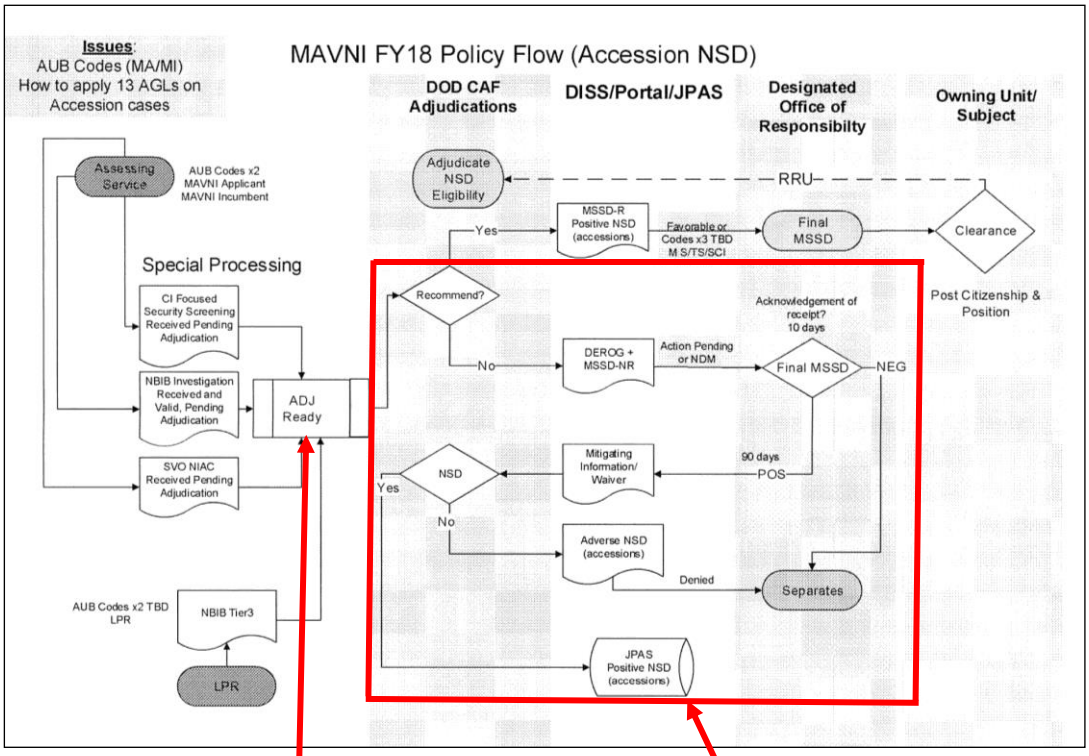
105. DHS Defendants' failure to request and act on the information gathered in connection with the DoD Enhanced Background Investigations has had serious adverse consequences for MAVNI soldiers by unnecessarily delaying their "good moral character" determinations. This is because for many MAVNI soldiers, the DoD Enhanced Background Investigations have been complete for many months.

106. As one example, DoD completed the last step in the background check process, the CI Interview, for Plaintiff Almeida in September 2017. Yet, DHS Defendants still have not acted on his naturalization application. Rather than request and review the information gathered, and make a "good moral character" determination based thereon (as they represented to the Court), ***DHS Defendants have let the information sit for six months while DoD performs its separate, and wholly irrelevant, NSD and MSSD adjudications***.

107. Worse still, ***DoD Defendants suspended NSD and MSSD adjudications for MAVNI soldiers altogether for a full three month period from October 2107 through January 2018***. Although Defendants failed to apprise the Court of this development in their periodic Court-ordered reporting, Defendants' representatives have since admitted that "there were no DoD CAF recommendations between October 17th and January 13th." Notwithstanding this lengthy suspension, DHS Defendants sat idly by without either reviewing – or it appears even requesting to review – the fully-compiled background check information that had been gathered and therefore was available.

108. DHS Defendants' failure to comply with its own July 7 Policy has injured Class members by unnecessarily and unreasonably delaying the adjudication of their naturalization

applications. These injuries are particularly acute for Class members who do not "pass" their initial DoD NSD and MSSD adjudications. As depicted in Defendants' own flow chart below, these soldiers are subjected to a convoluted, multi-tiered re-adjudication process that might more aptly be described as a hamster wheel in terms of its endless loops with no prospect for progress:



109. As the chart shows, for these soldiers, the DoD Enhanced Background Investigations are complete before they are subjected to the DoD "re-adjudication" loop. Yet, DHS has not acted on their naturalization applications. Indeed, ***as late as January 2018, more than six months after DHS Defendants adopted the July 7 Policy, DHS Defendants admitted***

to the Court that they still had no policy in place with DoD for the exchange of the information gathered in connection with the DoD Enhanced Background Investigations.

110. In all events, DHS Defendants' new requirement that MAVNI soldiers complete NSD and MSSD adjudications as a prerequisite to adjudication of their naturalization applications likewise is, in and of itself, unlawful. In fact, Defendants' representatives have admitted that the NSD/MSSD adjudication process reflects nothing more than "an internal personnel decision" by DoD as to the soldier in question. Therefore, there is no valid basis for DHS Defendants to further withhold adjudication of naturalization applications pending completion of these post-investigation events.

DHS Defendants Are Improperly and Irrationally Subjecting MAVNI Soldiers to Redundant and Superfluous FBI Checks as a Prerequisite to Naturalization Adjudication

111. DHS Defendants also are requiring soldiers who have successfully completed the DoD Enhanced Background Investigations to undergo a second FBI check (the **"FBI Check Policy"**) — identical to the FBI check conducted as part of their just-completed enhanced DoD security checks — solely on the grounds that USCIS was not the requesting agency for the initial FBI check. Accordingly, representatives for Defendants have stated that, even for those MAVNIs who have successfully completed the DoD Enhanced Background Investigations (which includes FBI name checks), the soldiers "cannot be interviewed or naturalized" until separately-initiated USCIS "FBI name checks are complete." ***Further, Defendants' representatives have admitted that the two sets of FBI checks are, in fact, "the same checks."***

112. This totally duplicative and redundant check — in addition to further delaying the adjudication of the naturalization applications for these soldiers by many months — is a gratuitous waste of Government resources. Indeed, the Section Chief of the National Name

Check Program Section of the FBI recently testified about significant delays in that program due to the "exponential" growth in the number of FBI name check requests, "with more and more customers seeking background information from FBI files on individuals before bestowing a privilege, such as Government employment or appointment, a security clearance, attendance at a White House function, a 'green card,' naturalization, or a visa." As a result, the FBI actively is working to "address[] delays on three fronts: leveraging technology, augmenting resources and refining processes." As part of that initiative, the FBI "is working with federal agency customers to identify high priority requests or *requests no longer needed* to prioritize/reduce backlog."

113. In light of these circumstances, DHS Defendants' conduct in requiring duplicative and superfluous FBI checks is so utterly irrational that it must be specifically calculated either to harm Plaintiffs and the Class or to re-impose, through practical means of delay, a minimum active-duty service requirement.

* * *

114. Defendants' ongoing array of unlawful policies and improper actions have created an unconscionable situation. As noted above, Defendants' February 28, 2018 reporting to the Court indicates that, by Defendants' own reckoning, at least 191 members of the class have both (i) completed their "enhanced DoD security checks" and (ii) received favorable NSD and MSSD adjudications by DoD. Defendants' reporting further indicates that the vast majority of these soldiers satisfied these requirements more than a month prior to the date of the report, with a substantial percentage satisfying the requirements more than five months prior to the date of the report. Nevertheless, at the same time, ***Defendants admit that only 23 MAVNI soldiers have been naturalized since Defendants adopted the July 7 Policy***. And many of these

naturalizations occurred only because of action, or the immediate threat of potential action, by this or other courts.

DoD's Unlawful N-426 Policies

115. In mid-2017, DoD adopted a policy precluding the certification of honorable service for members serving in the Selected Reserve until such service members serve in an active duty status. Pursuant to that policy, according to Defendant officials, "DoD is not certifying any new MAVNI N-426s" and it is reserving the right, in furtherance of the policy, to rescind the honorable service certifications that Selected Reserve MAVNIs, including Plaintiffs, who have received them without active duty service. Defendant officials stated that N-426s issued to "individuals without creditable active duty service could be considered signed in error and may be decertified upon completion of a review of the existing standards . . . ."

116. On September 6, 2017, the Court in this case issued a decision denying without prejudice Plaintiffs' Motion for Preliminary Injunction. Dkt. 44. In that decision, the Court indicated that it was "puzzled" by Defendants' legal position that Section 1440 required active duty service. Dkt. 44 at 16. The Court did not decide the question, however, because the active duty policy had not been applied to any of the Plaintiffs.

117. On September 1, 2017, certain MAVNI Selected Reservists filed a related action against DoD. *See Kirwa v. Dept. of Defense, et al.*, Case. No. 1:17-cv-01793-ESH (D.D.C.) ("***Kirwa***"). In the *Kirwa* action, plaintiffs alleged that the unlawful active duty policy was being applied to them, and they moved for a preliminary injunction to obtain relief from that unlawful policy, which the court converted to a summary judgment motion.

118. On October 13, 2017, on the eve of a hearing and decision in that case, in an attempt to avoid an adverse ruling, and without rescinding its prior policy, DoD issued a new

policy, referred to herein as the "**New DoD N-426 Policy**." On its face, the New DoD N-426 Policy imposes an active duty service requirement and other unlawful conditions on the issuance of N-426s to new enlistees who want to apply for naturalization. DoD implemented this policy with the express understanding and intent that, without an N-426, DHS will not accept and begin to process the service member's application for naturalization.

119. The New DoD N-426 Policy specifies that for soldiers who previously obtained N-426s but who had not yet naturalized by October 13, 2017 (*i.e.*, including Plaintiffs), DoD would be recalling, revoking, or decertifying the N-426s. The Policy further states that soldiers in this circumstance may receive a new N-426 certification only after DoD determines that the service member has completed certain DoD "background investigation and suitability vetting."

120. These N-426 policies are intended to disrupt and interfere with the naturalization processing of MAVNIs, including Plaintiffs, since DHS cannot or does not process or adjudicate Section 1440 naturalization applications without a duly executed N-426. For its part, DHS is facilitating and is complicit in this DoD conduct by continuing to "hold" the final adjudication of naturalization applications pending DoD's implementation of these policies.

121. DoD's policies and DHS's hold are contrary to the plain language of the statute and implementing regulations. For example, in unambiguous fashion, Section 1440 provides that a service member with honorable service "as a member of the Selected Reserve of the Ready Reserve ***or*** in an active-duty status" is eligible for naturalization as a U.S. citizen. 8 U.S.C. § 1440(a) (emphasis added). Indeed, whereas the prior version of the statute limited naturalization to those serving in an active duty status, the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1693 (2003), amended the statute to add those serving as members of the Selected Reserve. Therefore, contrary to the position expressed in the

DoD policy, Congress made clear that naturalization is available based on either service as a member of the Selected Reserve or service in active duty status.

122. The regulations implementing 8 U.S.C. § 1440 are to the same effect. 8 C.F.R. § 329.2 provides that a service member is eligible for naturalization under 8 U.S.C. § 1440 upon establishing that he or she has "served honorably in the Armed Forces of the United States as a member of the Selected Reserve of the Ready Reserve ***or*** in an active duty status in the Armed Forces of the United States . . . ." 8 C.F.R. § 329.2 (emphasis added). Like the statute, the disjunctive language of the regulations makes clear that active duty service is not required for naturalization if the soldier has served in the Selected Reserve. Thus, in promulgating its final rule on this provision, DHS explained:

> In conformance with the expansion of eligibility made by the NDAA [National Defense Authorization Act for Fiscal Year 2004] (see section 329(a) of the INA, 8 U.S.C. 1440(a)), this final rule extends eligibility for naturalization to include those individuals who have served honorably in the U.S. Armed Forces ***either*** in an active duty status ***or*** as a member of the Selected Reserve of the Ready Reserve. See revised 8 CFR 329.2(a). In addition, this rule amends the title 8 CFR part 329 to include service in the Selected Reserve of the Ready Reserve. Currently, the title only lists active duty service as a basis for naturalization where service occurred during specified periods of hostilities.

75 Fed. Reg. 2785, [FR 3-10] (Jan. 19, 2010) (emphasis added).

123. The USCIS Policy Manual provides and confirms that service in the Selected Reserve qualifies an individual for naturalization under Section 1440 and that "[o]ne day of qualifying service is sufficient in establishing eligibility." In fact, prior to formulating their "active duty" service requirement, and consistent with the law, regulation, and Policy Manual, Defendant officials admitted in their court filings that:

> As members of the U.S. Armed Forces during a period of hostilities, MAVNI recruits are eligible to apply for naturalization under Section 1440 once they join the military, they begin serving as a member of the SRRR [Selected Reserve of the Ready Reserve] or in an active-duty status.

124. Moreover, under Section 1440, USCIS has naturalized members of the Selected Reserve who had not previously served in any active duty status, and, on information and belief, continues to do so for those Selected Reservists who are medical professionals. In short, DoD's N-426 policies appear to be little more than hastily assembled litigation positions aimed at further manipulating the naturalization process.

125. The active duty service requirement, and other extra-statutory preconditions to naturalization set forth in the DoD N-426 policies are contrary to law as applied to Selected Reservists. Moreover, separate and apart from these unlawful conditions – which permeate the New DoD N-426 Policy and should render it unlawful in its entirety, the portion of the New DoD N-426 Policy that purports to apply the policy retroactively to revoke, recall, or decertify previously issued N-426s to Plaintiffs and the Class separately is unlawful. Nothing in the statute authorizes such revocation, recall, or decertification, and nothing in the statute authorizes DoD to withhold new certifications from otherwise statutorily eligible Selected Reservist naturalization applicants. To the contrary, pursuant to the law, DoD "shall determine whether" Plaintiffs have served honorably in the Selected Reserve. DoD's policies, as applied to Plaintiffs and the Class, are contrary to the plain and unambiguous terms of the governing statute and regulations.

126. Since the New DoD N-426 Policy's issuance, the Court has preliminarily enjoined its implementation in both this case and in the related *Kirwa* action. Among other things, the Court noted that, "despite its assertions to the contrary, DoD does not control the naturalization

process" so its "unfounded attempt to control criteria for naturalization" did not provide a reasonable basis for its new policies.

Plaintiffs' Honorable Service and Applications for Naturalization

127. Plaintiff Dr. Kusuma Nio enlisted in the Selected Reserve through the MAVNI program in August 2015. Dr. Nio is a surgeon by occupation. Dr. Nio took his service oath on August 12, 2015. Dr. Nio began serving with the 1st Forward Surgical Team in Fort Hamilton, New York, as a Specialist (E-4) in August 2016, and has since participated in multiple Selected Reserve drill periods with his unit. Dr. Nio submitted his N-400 Application for Naturalization in September 2016, and USCIS received his application on September 19, 2016. Dr. Nio's Company Commander signed Form N-426 certifying Dr. Nio's honorable service in the Selected Reserve.

128. After an unexplained, lengthy delay, Dr. Nio was given a naturalization interview on April 10, 2017. Upon completion of that interview, he was recommended for approval, was provided documentation to that effect, and was scheduled for a citizenship oath ceremony on May 5, 2017. However, on April 13, 2017, Dr. Nio received a "de-scheduling notice" informing him that his oath ceremony had been canceled. Dr. Nio met with immigration officers at the St. Louis Service Center, including a Field Officer Supervisor, to inquire about the reason for the cancellation of his oath ceremony and was informed that the DoD had instructed USCIS that naturalization applications for MAVNI service members such as Dr. Nio were put on hold. Following these communications, on May 7, 2017, Dr. Nio contacted his United States Senators and Representative. A staff member from United States Senator Tammy Duckworth's office inquired into the status of Dr. Nio's application and USCIS confirmed that, "Dr. Nio's case is currently pending due to military background checks required by the Department of Defense.

USCIS is unable to render a decision on Dr. Nio's application at this time. Once the background checks have been completed, his case will continue through the immigration process."

129. After Plaintiffs filed the original Complaint in this matter, Dr. Nio was naturalized as a United States citizen. A CI interview was not completed for Dr. Nio prior to his naturalization. Dr. Nio had not served in an active duty status with the Army at any time prior to his naturalization.

130. Plaintiff Wanjing Li enlisted in the Selected Reserve through the MAVNI program in February 2016. Ms. Li took her service oath on February 5, 2016. Ms. Li began serving with the 325th Combat Support Hospital as a Specialist (E-4) on March 19, 2016 and has since participated in multiple Selected Reserve drill periods with her unit. Ms. Li submitted her N-400 Application for Naturalization on August 17, 2016, and USCIS received her application on August 19, 2016. An authorized supervisor signed Ms. Li's Form N-426 certifying Ms. Li's honorable service in the Selected Reserve.

131. After a lengthy delay, Ms. Li was scheduled for a naturalization interview on March 13, 2017. Upon completing the interview, Ms. Li was informed by the USCIS officer conducting the interview that her application was recommended for approval. USCIS officials have admitted that Ms. Li's application for naturalization was approved on May 3, 2017. However, Ms. Li subsequently was told by USCIS that her naturalization application has been put on hold.

132. USCIS officials have admitted that all USCIS requirements for processing Ms. Li's naturalization application are complete but that "further processing" of the application "awaits the completion of her DoD enhanced background investigation." Ms. Li's naturalization application has been pending since August 17, 2016. DoD officials have stated that Ms. Li's Tier

5/SSBI investigation is complete and was completed in 530 days. Ms. Li's CI Focused Review and CI Interview were completed on September 22, 2017, yet Defendants still report to the Court that "CAF awaits the Counterintelligence Focused Screening Report."

133. Plaintiff Jae Seong Park enlisted in the Selected Reserve through the MAVNI program in October 2015. Mr. Park was sent to BCT at Fort Jackson, South Carolina, in May 2016. Mr. Park successfully completed BCT on December 15, 2016. Mr. Park was retained on active-duty status at Fort Jackson awaiting assignment to further training, which was substantially delayed due to pending military background checks. Mr. Park's command at Fort Jackson executed Form N-426 certifying Mr. Park's honorable service as a member of the Selected Reserve.

134. Mr. Park completed most of his naturalization requirements in May 2016, including his naturalization interview at the local USCIS office at Fort Jackson. Despite his one-year long service on active duty, Mr. Park's naturalization application was placed on hold. Mr. Park has checked on the status of his naturalization application and was told by USCIS, through the military hotline, on February 22, 2017, that he would need to speak with local office representatives to ascertain his status. The local USCIS office at Fort Jackson informed him on May 4, 2017 that his application has been put on hold pending the completion of a military background check. After Plaintiffs filed the original Complaint in this matter, Mr. Park was naturalized as a United States citizen.

135. Plaintiff Haendel Crist Calisto Alves de Almeida enlisted in the Selected Reserve through the MAVNI program in May 2016. Mr. Almeida took his service oath on May 26, 2016. Mr. Almeida began serving with the 405th Combat Support Hospital located in West Hartford, Connecticut as a Private (E-2) in August 2016 and since has participated in multiple Selected

Reserve drill periods with his unit. Mr. Almeida submitted his N-400 Application for Naturalization in February 2017 and USCIS received his application that same month. Mr. Almeida's Company Commander signed his Form N-426 certifying Mr. Almeida's honorable service in the Selected Reserve.

136. Mr. Almeida has checked on the status of his naturalization application and was informed by USCIS that his and other MAVNI applications have been put on hold pending additional background investigations by the DoD.

137. Mr. Almeida's naturalization application has been pending since February 6, 2017. DoD officials have stated that Mr. Almeida's Tier 5/SSBI investigation is complete and was completed in 373 days – on September 6, 2017. Mr. Almeida's CI Focused Review and CI Interview were completed on September 12, 2017. USCIS officials have admitted that all USCIS background checks required for processing Mr. Almeida's naturalization application were completed by June 2017. Defendants have reported to the Court that Mr. Almeida's CAF adjudication is complete, but that "further review [is] required by Army."

138. Plaintiff Prashanth Batchu enlisted in the Selected Reserve through the MAVNI program in June 2016. Mr. Batchu took his service oath on June 7, 2016. Mr. Batchu began serving with the 419th Transportation Company as a Specialist (E-4) in September 2016 and has participated in multiple Selected Reserve drill periods with his unit. Mr. Batchu submitted his N-400 Application for Naturalization in March 2017 and USCIS received his application shortly thereafter. Mr. Batchu's Commander signed Form N-426 certifying Mr. Batchu's honorable service in the Selected Reserve.

139. Mr. Batchu has checked on the status of his naturalization application and was told by USCIS that his application has been put on hold pending additional security screening by the DoD and that all other similar MAVNI applications are subject to the same hold.

140. USCIS officials have stated that Mr. Batchu's application awaits the completion of his DoD enhanced background investigation. Mr. Batchu's naturalization application has been pending since March 23, 2017. DoD officials have stated that Mr. Batchu's Tier 5/SSBI is complete and was completed in 475 days. Mr. Batchu's CI Focused Security Interview was completed on January 23, 2018, yet Defendants still report to the Court that his CAF review is "in progress."

141. Plaintiff Lucas Calixto enlisted in the Selected Reserve through the MAVNI program in February 2016. Mr. Calixto took his service oath on March 16, 2016. Mr. Calixto began serving with the 743rd Transportation Company in Roslindale, Massachusetts as a Private (E-1) in April 2016 and has since participated in multiple Selected Reserve drill periods with his unit. Mr. Calixto submitted his N-400 Application for Naturalization in March 2017, and USCIS received his application on March 7, 2017. An authorized command official signed Form N-426 certifying Mr. Calixto's honorable service in the Selected Reserve. On April 14, 2017 USCIS requested that Mr. Calixto arrange for his command to issue another N-426, which he subsequently obtained and sent to USCIS on April 15, 2017. USCIS confirmed receipt and informed Mr. Calixto that they did not need anything else from him at that time to process his application.

142. Mr. Calixto has inquired about the status of his naturalization application and was informed by a USCIS officer that his case was put on hold pursuant to an instruction from DoD to not process applications for MAVNI service members who have not attended BCT.

143. USCIS officials have stated that Mr. Calixto's application awaits the completion of his DoD enhanced background investigation. Mr. Calixto's naturalization application has been pending since March 7, 2017. DoD officials have stated that Mr. Calixto's Tier 5/SSBI investigation is complete and was completed in 405 days. Mr. Calixto's CI Focused Review and CI Interview were complete on September 26, 2017, yet Defendants still report to the Court that the CAF status is "in progress."

144. Plaintiff Shu Cheng enlisted in the Selected Reserve through the MAVNI program in February 2016. Ms. Cheng took her service oath on February 23, 2016. Ms. Cheng began serving with the 349th Combat Support Hospital as a Specialist (E-4) in May 2016 and has since participated in multiple Selected Reserve drills periods with her unit. Ms. Cheng submitted her N-400 Application for Naturalization on February 27, 2017, and USCIS received her application on March 2, 2017. Ms. Cheng's Company Commander signed Form N-426 certifying Ms. Cheng's honorable service in the Selected Reserve.

145. Ms. Cheng has inquired about the status of her naturalization application, including by calling the Military Helpline. On May 3, 2017, the Military Helpline confirmed that Ms. Cheng's naturalization application was still "pending" because her military background check had not been completed.

146. USCIS officials admitted that all USCIS background checks required for processing Ms. Cheng's naturalization application were completed by May 2017. Ms. Cheng's naturalization application has been pending since February 27, 2017. DoD officials have stated that Ms. Cheng's Tier 5/SSBI investigation is complete and was completed in 517 days. Ms. Cheng's CI Focused Security Interview was completed on September 12, 2017. The adjudication of Ms. Cheng's NSD and MSSD was completed on January 22, 2018, but as of the date of this

filing (March 14, 2018), Ms. Cheng has not even been scheduled for a naturalization interview, even though she is scheduled to ship to basic training on March 26, 2018.

147. Plaintiff Seung Joo "Josh" Hong enlisted in the Selected Reserve through the MAVNI program in May 2016. Mr. Hong took his service oath on May 13, 2016. Mr. Hong began serving with the 392nd Signal Battalion at Fort Meade as a Private First Class (E-3) in August 2016 and has participated in multiple Selected Reserve drill periods with his unit. Mr. Hong submitted his N-400 Application for Naturalization in February 2017, and USCIS received his application on February 28, 2017. Mr. Hong's command signed Form N-426 certifying Mr. Hong's honorable service in the Selected Reserve.

148. Mr. Hong has checked on the status of his naturalization application and was told by USCIS that his application and all other MAVNI applications have been put on hold pending additional background investigations by the DoD.

149. USCIS officials have stated that Mr. Hong's application awaits the completion of his DoD enhanced background investigation. Mr. Hong's naturalization application has been pending since February 28, 2017. DoD officials have stated that Mr. Hong's Tier 5/SSBI investigation is complete and was completed in 513 days. Mr. Hong's CI Focused Interview was completed on October 24, 2017, yet Defendants still report to the Court that the CAF adjudication is "in progress."

150. Plaintiff Ye Liu enlisted in the Selected Reserve through the MAVNI program in March 2016. Mr. Liu took his service oath on March 16, 2016. Mr. Liu began serving with the 1001st Quartermaster Company in Columbus, Ohio, as a Specialist (E-4) in April 2016 and has since participated in multiple Selected Reserve drill periods with his unit. Mr. Liu submitted his N-400 Application for Naturalization in September 2016, and USCIS received his application on

September 30, 2016. An authorized command official signed Form N-426 certifying Mr. Liu's honorable service in the Selected Reserve.

151. Mr. Liu has checked on the status of his naturalization application and has been informed by USCIS that his application was put on hold until he reports to BCT, and he will not be permitted to report to BCT until completion of the newly-ordered DoD background investigations.

152. USCIS officials have admitted that all USCIS background checks required for processing Mr. Liu's naturalization application were completed by March 2017, but that "further processing" of the application "awaits the completion of his DoD enhanced background investigation." Mr. Liu's naturalization application has been pending since September 30, 2016. DoD officials have stated that Mr. Liu's Tier 5/SSBI investigation is complete and was completed in 651 days. Mr. Liu's CI Focused Security Interview was completed on September 27, 2017, yet, Defendants still report to the Court that the CAF adjudication is "in progress."

153. Plaintiff Emeka Udeigwe enlisted in the Selected Reserve through the MAVNI program in March 2016. Mr. Udeigwe took his service oath on March 17, 2016. Mr. Udeigwe began serving with the 463rd Engineer Battalion located in Wheeling, West Virginia, as a Specialist (E-4) in January 2017 and has since participated in multiple Selected Reserve drill periods with his unit. Mr. Udeigwe submitted his N-400 Application for Naturalization in January 2017, and USCIS received his application that same month. Mr. Udeigwe's command signed Form N-426 certifying Mr. Udeigwe's honorable service in the Selected Reserve.

154. Mr. Udeigwe has inquired about the status of his naturalization application and has been told by USCIS that his application and all other MAVNI applications have been put on hold pending additional DoD background investigations.

155. USCIS officials have admitted that all USCIS background checks required for processing Mr. Udeigwe's naturalization application were completed by June 2017 but that "further processing" of the application "awaits the completion of his DoD enhanced background investigation." Mr. Udeigwe's naturalization application has been pending since January 13, 2017. DoD officials have stated that Mr. Udeigwe's Tier 5/SSBI investigation is complete and was completed in 162 days. Mr. Udeigwe's CI Focused Security Interview was completed on September 28, 2017, yet Defendants still report to the Court that "CAF awaits the Counterintelligence Focused Screening Report."

156. Each Plaintiff has a completed NIAC.

157. USCIS officials have admitted that all regular USCIS background checks, including the USCIS-ordered FBI checks, are complete.

158. Despite representing to this Court that USCIS "has only required that adjudicators collect and consider evidence obtained from DoD to the same degree that they collect and consider evidence obtained from other federal government entities such as the FBI," there is no indication that USCIS has obtained, collected, and begun/or is considering any of the Tier 5/SSBI, NIAC, and/or CI results that are complete for the Plaintiffs.

Defendants' Unlawful Conduct Has Caused, and Will Continue to Cause, Substantial and Irreparable Harm to Plaintiffs

159. Plaintiffs and the members of the Class are suffering and will continue to suffer irreparable harm if the requested relief is not immediately granted. The right to acquire United States citizenship is a precious one. The benefits of U.S. citizenship are priceless, and the consequences of a lost or unlawfully delayed opportunity to acquire citizenship are dire. Depriving U.S. service members of their lawful right to apply to become naturalized citizens, an

entitlement earned through their honorable military service and guaranteed by statute, is an ongoing and mounting harm for which there is no recompense.

160. Defendants' conduct is unlawfully depriving Plaintiffs and the members of the Class of the opportunity to realize fundamental rights and benefits that come along with citizenship including the right to vote, protection from deportation, work or school authorization, the right to travel outside of this country and return to the United States, the ability to meet personal, family and professional obligations, and peace of mind regarding their legal status to remain in the United States. This deprivation of citizenship opportunities continues with each passing day. And every day of lost citizenship rights and benefits is a day that these Plaintiffs can never recover or be recompensed for losing.

161. Defendants' conduct is unlawfully depriving Plaintiffs and the members of the Class of the right to timely adjudication of their naturalization applications as well as to adjudication of their applications under the criteria established by law. And if Plaintiffs' N-426 certifications are revoked by DoD pursuant to the New DoD N-426 Policy, adjudication of Plaintiffs' pending naturalization applications will be halted altogether, since DHS requires that form in order to process Plaintiffs' applications. Defendants' conduct has placed Plaintiffs and the members of the Class in a state of limbo and left them to languish indefinitely in that state.

162. Furthermore, the imposition of new and impermissible naturalization requirements has led to financial distress and hardship for many Plaintiffs and members of the Class. The legal immigration status of many Plaintiffs and members of the Class has been jeopardized by their enlistment in the U.S. military combined with the unlawful delay in naturalization. DHS officials have stated that, in the agency's view, those Plaintiffs and members of the Class who entered the United States on F or M nonimmigrant visas are subject to

removal because of their enlistment in the U.S. Army. According to DHS, these U.S. Army soldiers remain "lawfully presen[t]" in the United States only "at the discretion of the agency" and only "for so long as DHS continues to forbear" removal proceeding against them. Furthermore, current DHS guidance relating to F and M nonimmigrant visas provides that if a MAVNI Selected Reserve soldier receives "compensation during Reserve duty, this marks the beginning of employment and the [Designated School Officials] must terminate the student SEVIS record." While DHS officials state that, at least for now, the agency "will not enforce the requirement that designated school officials terminate the Student and Exchange Visitor Information System (SEVIS) record of a student solely because he or she accepts compensation for participating in Reserve duty," the "requirement" still exists and this representation affords no comfort whatsoever to MAVNI soldiers whose enrollment already has been terminated or will yet be terminated by school officials in compliance with this DHS requirement.

163. Members of the Class have, in fact, been denied continued enrollment as F-1 students by several institutions or have been informed that their enrollments will be terminated, specifically because of their service as soldiers in the Selected Reserve, and as a direct result of DHS Defendants' published guidance to that effect. Moreover, upon revocation of their existing N-426 certifications pursuant to the New DoD N-426 Policy, Plaintiffs and the members of the Class would lose the modicum of protection and assurance against removal and deportation afforded to them by virtue of having a pending naturalization application.

164. Indeed, Defendants' irrational policies have placed Plaintiffs and the members of the Class in an impossible situation. On the one hand, Defendants maintain that, by volunteering to serve as MAVNI soldiers and applying for citizenship (which is expressly required of MAVNI soldiers), Plaintiffs and the members of the Class have demonstrated "immigrant intent" and thus

cannot maintain or renew their legal non-immigrant status. On the other hand, Plaintiffs and the members of the Class are being faulted, as MAVNIs, for not maintaining their legal non-immigrant status.

165. Without the ability to obtain a job, a driver's license, a passport (which has prevented certain Plaintiffs and members of the Class from visiting loved ones, including ill and dying family members), additional educational opportunities, and the myriad of other privileges that naturalization would afford, many of these soldiers and their families are suffering. Further, the new uncertainty associated with their military careers, and concomitantly their legal status, is causing anguish and is particularly unconscionable given that each Plaintiff and member of the Class is serving during a period of armed conflict and has sworn an oath to protect and defend the United States.

166. Finally, any loss of the opportunity to become U.S. citizens on the part of Plaintiffs or the members of the Class, after already having volunteered to serve in the United States military, could subject these individuals to extreme peril. These individuals would be subject to deportation to countries of origin such as, for example, China, where they could face prosecution and imprisonment because of their decision to enlist in the U.S. Army and to swear their allegiance to the United States and the Constitution.

167. All of these injuries flow directly from Defendants' unlawful policies. And these injuries have only multiplied and magnified as a result of DHS Defendants' subsequent failure to comply with the July 7 Policy — by refusing to adjudicate the naturalization applications for even those soldiers that have completed the "enhanced DoD security checks" — which has further prevented and delayed the adjudication of naturalization applications of MAVNI soldiers.

168. DHS Defendants have engaged in other conduct that exacerbates the harm suffered by these soldiers. On January 30, 2018, just as DoD was beginning in earnest to issue orders to MAVNI soldiers shipping them to basic training based on successfully-completed DoD Enhanced Background Investigations, DHS Defendants "coincidentally" terminated their long-standing "Naturalization at Basic Training Initiative." Defendants' representatives have further stated that USCIS personnel would no longer travel to military bases "to conduct naturalization interviews, oath ceremonies, and the like."

169. For many years, DHS Defendants touted this program in literature and on its website. However, according to USCIS, the agency "decided to end the Naturalization at Basic Training Initiative . . . [b]ecause of changes in DOD requirements for certifying honorable service for U.S. service members applying for naturalization." Yet, those are the very same N-426 policy changes that the Court found unlawful and preliminarily enjoined in both this case and the related *Kirwa* Action. Thus, this agency action, too, is facially irrational. It was expressly taken based on an unlawful and enjoined DoD policy. And the only effect of the action was to remove naturalization support from military bases right at the moment that soldiers needing such services were beginning to be shipped en masse to those military bases. As such, Defendants' conduct can only be seen as either a specific effort to harm MAVNI soldiers or another unlawful attempt to impose a minimum active-duty service requirement on MAVNI Selected Reserve soldiers.

170. Because of DHS Defendants' failure to comply with its own policies, MAVNI soldiers are unable to naturalize prior to BCT and AIT even though their DoD Enhanced Background Investigations have been completed for many months. And because DHS Defendants have now removed all naturalization support from Army bases, MAVNI soldiers will

have no opportunity to interview or naturalize until completion of BCT and AIT. ***The end result is an additional 20 to 27 week delay in the adjudication of most MAVNI naturalization applications.*** This further five to seven month delay is over and above the two-plus year delay in completion of their "enhanced DoD security checks." And, again, this delay, in and of itself, exceeds the average processing time for military naturalization applications that existed prior to implementation of Defendants' unlawful policies.

171. This separate and additional 20 to 27 week delay likewise multiplies and magnifies the injuries being suffered by Plaintiffs and members of the Class. Members of the Class will, in fact, lose their existing legal status during their time at BCT and AIT. Members of the Class will, in fact, lose employment and career opportunities as a result of the delay. Members of the Class will, in fact, be delayed in realizing the immediate benefits of citizenship, such as, for example, the right to sponsor spousal applications for legal permanent resident status. Members of the Class will, in fact, suffer further personal and family hardships.

172. In addition, while at BCT (and even AIT), MAVNI soldiers will have restricted off-base communications. As a result, these soldiers face the very real risk that USCIS will send Requests for Evidence to which the soldiers cannot respond, or schedule naturalization interviews that the soldiers cannot change or attend, resulting in the denial or administrative closure of their naturalization applications and requiring these soldiers to start the process over again from the back of the line, or worse.

173. Furthermore, the additional delay will negatively impact the ability of certain MAVNI soldiers to perform their military functions. For example, some MAVNI soldiers are assigned to military occupations that require the operation of motor vehicles. These soldiers must possess valid driver's licenses to complete their training and perform their duties. Several

of these soldier will, in fact, lose their valid driver's licenses during this additional extended delay. These soldiers will not be able to train for or perform the military duties to which they are assigned. These soldiers face quite the dilemma of Defendants' making – they will not be able to complete their AIT training allowing them to return home to naturalize. But, not being able to naturalize, these soldiers cannot take the steps necessary to complete their AIT training.

174. Like DHS Defendants, DoD Defendants have engaged in other improper conduct that compounds the risks and harms being suffered by the members of the Class. For example, as part of the DoD Enhanced Background Investigations process, DoD officials are instructing MAVNI soldiers — who have not yet been made U.S. citizens — to surrender their current foreign passports for destruction and to provide "[d]ocumentation showing renouncement of prior citizenship to include a copy of letter sent and receipt of mailing." Like the other improper conduct described throughout this Complaint, these are not isolated instances. The direction to provide documentation proving "renouncement" of foreign citizenship is included in the official "Counterintelligence Screening Instructions to MAVNI Personnel Prior to Arrival" given to MAVNI soldiers as part of the CI Interview process. The direction to destroy foreign passports is memorialized in a letter from an Army Inspector General's (AIG) office, which attaches a form letter used for certifying the destruction of such passports. The AIG letter also indicates that CAF adjudications for soldiers will not even be "requested" until proof of passport destruction and renouncement of foreign citizenship is provided. These actions will leave MAVNI soldiers stateless.

175. Finally, ***on February 14, 2018, DoD Defendants issued yet another policy ("the DoD Discharge Policy") that will result in the discharge of a large number of MAVNI soldiers prior to their naturalization***. Under the DoD Discharge Policy, "[s]ervice members who have

been non-deployable for more than 12 consecutive months, for any reason, will be processed for administrative separation in accordance with Department of Defense Instruction (DoDI) 1332.14 . . . ." With respect to Selected Reserve MAVNIs, DoD takes the position that such soldiers are non-deployable at least until such time that they complete BCT. And under DoD's policies, Selected Reserve MAVNI soldiers cannot commence BCT until their DoD Enhanced Background Investigations are complete, which takes several years. The DoD Discharge Policy provides an exception only for pregnant and post-partum service members. ***Pursuant to this new policy directive, any Selected Reserve MAVNI soldiers who have not yet completed BCT are subject to immediate discharge, and all Selected Reserve MAVNI soldiers who do not complete BCT by October 1, 2018 must be processed for discharge.***

CLASS ACTION ALLEGATIONS

176. The named Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other persons similarly situated. The Class is defined as follows:

177. Class: All persons who have: (i) enlisted in the Selected Reserve through the MAVNI program prior to October 13, 2017; (ii) served honorably with a Selected Reserve unit through participation in at least one qualifying drill period or in an active-duty status; (iii) submitted N-400 Applications for Naturalization; (iv) been issued Form N-426s certifying honorable service as a member of the Selected Reserve or in active-duty status; and (v) had the processing or final adjudication of their naturalization applications (including naturalization itself) withheld or delayed because of (a) a final USCIS processing hold for MAVNIs, (b) a DoD N-426 policy review, (c) a DoD N-426 recall/decertification policy, (d) enhanced DoD security

screenings, (e) a DoD Consolidated Adjudications Facility ("CAF") adjudication, (f) a national security determination, and/or (g) a military service suitability vetting or determination.

178. Defendants have acknowledged that the class as defined above includes "all Selected Reserve MAVNIs with certified Forms N-426 and N-400 applications for naturalization pending before USCIS, including: 1) Selected Reserve MAVNIs who have accessed to basic training or Advanced Individual Training and beyond pending their DoD enhanced background checks; 2) DTP medical and language Selected Reserve MAVNI soldiers and; 3) Selected Reserve MAVNI soldiers who have been discharged from the Selected Reserve (including those who received "uncharacterized" or "entry-level" discharges)." In addition, Defendants have acknowledged that the class includes "Selected Reserve MAVNI soldiers, whether or not USCIS has received from the FBI the results of their FBI background checks, and whether or not USCIS has received from DoD the results of their DoD enhanced background checks."

179. The action warrants class action treatment under Rule 23(a) of the Federal Rules of Civil Procedure. One DoD official has stated that as many as 10,000 individuals have been recruited through the MAVNI program. While the exact number of class members has changed over the course of this litigation, and continues to change as eligible soldiers obtain N-426 certifications and submit their N-400 naturalization applications to USCIS, Defendants have acknowledged that the class consists of at least several hundred members. Moreover, the May 19, 2017 DoD Action Memo indicates that, as of the date that information was compiled, there were at least 500 current members of the proposed class.

180. The proposed class meets the numerosity requirement of Rule 23(a)(1) because the members of the class are so numerous that joinder of all members is impractical.

181. The proposed class meets the commonality requirement of Rule 23(a)(2) because there are questions of law and fact common to the class. The questions of law and fact common to the class include, for example: whether the DHS Defendants are acting contrary to the pertinent statute and regulations by suspending processing of MAVNI applications for naturalization pending completion of DoD Enhanced Background Investigations, NSD and MSSD adjudications, and other policies and practices – as described above – that impose unlawful preconditions to naturalization or otherwise unreasonably or irrationally delay naturalization adjudications; whether the DHS Defendants' actions are arbitrary, capricious, and/or irrational; and whether DoD's N-426 policies are contrary to law.

182. The proposed class meets the typicality requirement of Rule 23(a)(3) because the claims of the named Plaintiffs are typical of the claims of each of the class members. Class members similarly are affected by Defendants' wrongful conduct in violation of federal law, including 8 U.S.C. § 1440, that is described herein.

183. The named Plaintiffs will fairly and adequately protect the interests of the class as required by Rule 23(a)(4) because their interests are identical to those of the other members of the classes. Fair and adequate protection of the interests of the class will be further ensured because the named Plaintiffs are represented by competent legal counsel who are experienced in federal litigation, are undertaking representation on a pro bono basis, and have adequate resources and commitment to represent the class as a whole.

184. Furthermore, as contemplated by Rule 23(b)(1), if the individual members of the class were to bring separate suits to address Defendants' policies, practices, and actions and inactions, Defendants may address the cases of the named Plaintiffs but ignore the naturalization applications and concerns of the remaining class members, thereby exacerbating Defendants'

violations of the law. Resolving this matter as a class action also would serve the Court's interest in judicial economy, by avoiding overburdening the Court with individual lawsuits brought by each of the many enlistees recruited through the MAVNI program whose naturalization applications are, or will be, subject to DoD's and DHS's unlawful policies.

185. Alternatively, this case qualifies for class action treatment under Rule 23(b)(2) because Plaintiffs seek final injunctive and declaratory relief. This relief is appropriate for the whole class as Defendants' actions and/or refusals to act apply generally to the class as a whole.

186. On October 27, 2017, following assessment of the class allegations presented by Plaintiffs as of that date, the Court issued an order certifying the class as specified above, under Rules 23(a), 23(b)(1)(A), and 23(b)(2), appointing Plaintiffs as class representatives, and appointing class counsel. Dkt. 72 at 1-2.

CLAIMS FOR RELIEF

Count I: Declaratory Judgment

187. Plaintiffs re-allege paragraphs one through one hundred eighty-six as if fully set forth herein.

188. 28 U.S.C. § 2201 authorizes a court, "[i]n a case of actual controversy within its jurisdiction . . . upon the filing of an appropriate pleading" to "declare the rights and other legal relations of any interested party seeking such declaration."

189. 8 U.S.C. § 1440 establishes a clear, limited, and purely ministerial role for DoD in the naturalization process. DoD's role simply is to verify, by way of Form N-426, whether a service member has served or is serving honorably.

190. DoD's limited role in the naturalization process does not include performing military-specific background checks, including an SSBI/Tier 5 background investigation, CI

review or interview, NIAC, and "issue-oriented interview and/or issue-oriented polygraph" checks as a pre-requisite to naturalization. Notwithstanding this limited role, Defendants have halted the processing of Plaintiffs' naturalization applications on the erroneous basis that naturalization pursuant to 8 U.S.C. § 1440 is dependent on the completion and results of a military-specific DoD background check and/or post-enlistment military suitability vetting, DHS Defendants have implemented a policy to stop the processing of MAVNI naturalization applications pending completion of DoD Enhanced Background Investigations and suitability vetting, and DHS Defendants have applied that policy to halt the processing and/or final adjudication of Plaintiffs' naturalization applications.

191. 8 U.S.C. § 1440 and the implementing regulations promulgated thereunder further provide that service members with honorable service ***either*** as a member of the Selected Reserve of the Ready Reserve ***or*** in an active-duty status are eligible for naturalization under Section 1440. Service in an active duty status is not required. In contradiction to the plain and clear language of the statute and regulations, DoD has adopted policies precluding the certification of honorable service for members serving in the Selected Reserve until such service members serve in an active duty status. Moreover, the New DoD N-426 Policy, issued on October 13, 2017, purports to revoke, recall, or decertify the existing N-426 certifications of honorable service already issued to Plaintiffs and the Class and to withhold issuance of new certifications pending a determination that these soldiers successfully completed a "background investigation and suitability vetting." DoD has no such revocation, recall, or decertification authority under the law, nor may it impose these additional requirements as a condition to keeping or obtaining an N-426.

192. Accordingly, Plaintiffs seek declaratory judgment that:

(i) DoD's role pursuant to 8 U.S.C. § 1440 is limited to executing Form N-426 confirming whether a service member has served or is serving honorably;

(ii) Congress has not imposed post-enlistment DoD background checks or adjudications, including the SSBI/Tier 5, CI review or interview, NIAC, "issue-oriented interview and/or issue-oriented polygraph" checks, and/or the MSSD or NSD, as naturalization conditions for persons applying for naturalization under 8 U.S.C. § 1440;

(iii) DHS and USCIS may not, on the basis of DoD instruction or otherwise, stop, suspend, delay, or hold the processing or final adjudication of the naturalization applications of MAVNIs with honorable service (as may be confirmed by a MAVNI's commander on Form N-426) pending completion of any SSBI/Tier 5, CI, NIAC, "issue-oriented interview and/or issue-oriented polygraph" checks, MSSD or NSD adjudications, or other military- or DoD-specific background investigations or adjudications (other than the DCII);

(iv) DHS and USCIS may not, on the basis of DoD instruction or otherwise, stop, suspend, delay, or hold the processing or final adjudication of the naturalization applications of MAVNIs with honorable service (as may be confirmed by a MAVNI's commander on Form N-426) pending so-called "official" notification from DoD of completion of any DoD background investigations or adjudications, completion of a redundant FBI background check, and/or service in active duty (including at BCT or AIT); and

(iv) DoD may not (a) refuse to issue or withhold Form N-426s, (b) refuse to certify honorable service, and/or (c) revoke, rescind, or invalidate previously issued N-426 certifications, for members of the Selected Reserve on the basis that such service members have not served in an active duty status or pending post-enlistment background investigations or suitability vetting.

Count II: Temporary, Preliminary, and Permanent Injunctive Relief

193. Plaintiffs re-allege paragraphs one through one hundred ninety-two as if fully set forth herein.

194. DoD Defendants unlawfully and improperly have instructed DHS Defendants to suspend the processing or final adjudication of Plaintiffs' N-400 Applications for Naturalization, and have otherwise unlawfully interfered with the processing of such applications, contrary to applicable law.

195. DHS Defendants unlawfully and improperly have complied with DoD's instruction and have failed to process Plaintiffs' N-400 Applications for Naturalization in accordance with their obligations under law and affirmatively have implemented the July 7 Policy to prevent the final adjudication of MAVNI naturalization applications pending completion of DoD Enhanced Background Investigations. DHS Defendants have applied that policy to halt the processing of Plaintiffs' naturalization applications in this case pending completion of the DoD Enhanced Background Investigations, and then have ignored elements of that July 7 Policy to further delay processing of naturalization applications for Class members who have completed the DoD Enhanced Background Investigations.

196. DHS Defendants have adopted additional policies further delaying adjudication of applications including the requirement of a second, redundant FBI check for soldiers who already

have completed such check and the requirement of separate and irrelevant NSD and MSSD adjudications.

197. Plaintiffs have been, and will continue to be, substantially and irreparably harmed by Defendants' unlawful and improper actions, for which there is no adequate remedy at law. Under the facts and circumstances of this case, the balance of the equities clearly favors Plaintiffs, and injunctive relief is in the public interest.

198. Accordingly, Plaintiffs seek temporary and/or preliminary injunctive relief against the DHS Defendants:

(i) to place and maintain the parties in the pre-dispute status quo;

(ii) to preliminarily set aside the DHS Defendants' "hold" on the processing and final adjudication of Plaintiffs' N-400 Applications for Naturalization;

(iii) to preliminarily compel the DHS Defendants to immediately resume adjudicating to decision (and citizenship oath if warranted) the N-400 Applications for Naturalization filed by Plaintiffs and the Class without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, (c) any revocation, recall, or decertification of Plaintiffs' existing N-426 honorable service certifications, (d) BCT, AIT, or any other active-duty service by the soldier, (e) any NSD, MSSD, or other military-related suitability or vetting determination or adjudication pertaining to the soldier, or (f) any second, redundant FBI check pertaining to the soldier;

(iv) to temporarily and preliminarily compel the DHS Defendants to immediately adjudicate to decision (and citizenship oath if warranted) the N-400

Applications for Naturalization filed by Plaintiffs and the Class who have completed their DoD Enhanced Background Investigations; and

(v) to compel the DHS Defendants to provide regular reports to the Court and Plaintiffs of the status of the adjudication of Plaintiffs' and the Class' N-400 Applications for Naturalization.

199. Plaintiffs seek permanent injunctive relief against the DHS Defendants:

(i) to set aside the DHS Defendants' "hold" on the processing and final adjudication of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class;

(ii) to compel the DHS Defendants to adjudicate to decision (including oath if warranted) the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, (c) any revocation, recall, or decertification of Plaintiffs' existing N-426 honorable service certifications, (d) BCT, AIT, or any other active-duty service by the soldier, or (e) any NSD, MSSD, or other military-related suitability or vetting determination or adjudication pertaining to the soldier;

(iii) to compel the DHS Defendants to immediately adjudicate to decision (and citizenship oath if warranted) the N-400 Applications for Naturalization filed by Plaintiffs and the Class who have completed their DoD Enhanced Background Investigations;

(iv) to compel the DHS Defendants to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 and to process without further delay and

without imposing any additional requirements for naturalization the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and

(v) to compel the DHS Defendants to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date.

200. Plaintiffs seek temporary and/or preliminary injunctive relief against the DoD Defendants:

(i) to place and maintain the parties in the pre-dispute status quo;

(ii) to temporarily and preliminarily set aside the application to Plaintiffs and the Class of any policy of DoD Defendants that requires service in an active duty status for certification of honorable service under 8 U.S.C. § 1440(a);

(iii) to temporarily and preliminarily restrain the DoD Defendants from decertifying, rescinding, recalling, revoking, or otherwise invalidating Plaintiffs' existing and duly issued Form N-426s pursuant to the New DoD N-426 Policy or otherwise, except as related to the conduct of an individual Plaintiff and based on sufficient grounds generally applicable to members of the military for re-characterization of service;

(iv) to temporarily and preliminarily compel the DoD Defendants to notify DHS Defendants and the respective member of the Class of completion of the DoD Enhanced Background Investigations for each Class member

immediately upon, and no later than five business days after, completion of the DoD Enhanced Background Investigations for such Class member; and

(v) to temporarily and preliminarily restrain the DoD Defendants from discharging Plaintiffs pending adjudication of their N-400 Applications for Naturalization, except as related to the conduct of an individual Plaintiff and based on sufficient grounds generally applicable to members of the military for discharge from service.

201. Plaintiffs seek permanent injunctive relief against the DoD Defendants:

(i) to enjoin the DoD Defendants from interfering with the processing and adjudication of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class;

(ii) to set aside the application to Plaintiffs and the Class of any policy of DoD Defendants that requires service in an active duty status for certification of honorable service under 8 U.S.C. § 1440(a);

(iii) to restrain the DoD Defendants from decertifying, rescinding, revoking, or otherwise invalidating the existing and duly issued Form N-426s of Plaintiffs and the Class pursuant to the New DoD N-426 Policy or otherwise, except as related to the conduct of an individual Plaintiff or member of the Class and based on sufficient grounds generally applicable to members of the military for re-characterization of service;

(iv) to compel the DoD Defendants to notify the DHS Defendants and the respective member of the Class of completion of the DoD Enhanced Background Investigations for each Class member immediately upon, and

no later than five business days after, completion of the DoD Enhanced Background Investigations for such Class member; and

(v) to restrain the DoD Defendants from discharging Plaintiffs or members of the Class pending final adjudication of their N-400 Applications for Naturalization, except as related to the conduct of an individual Plaintiff or member of the Class and based on sufficient grounds generally applicable to members of the military for discharge from service.

202. Plaintiffs further seek temporary, preliminary, and permanent injunctive relief, as necessary, against the Defendants enjoining them from taking any retaliatory actions against the Plaintiffs and the Class.

Count III: Relief Pursuant to the Administrative Procedure Act

203. Plaintiffs re-allege paragraphs one through two hundred two as if fully set forth herein.

Relief Pursuant to 5 U.S.C. § 706(1)

204. 5 U.S.C. § 706(1) authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed." Reviewable agency action includes an agency's failure to act. DHS Defendants unlawfully have withheld and/or unreasonably delayed the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class contrary to the requirements of applicable law including 8 U.S.C. § 1440.

205. Plaintiffs have a clear right to apply for naturalization pursuant to 8 U.S.C. § 1440, which provides an expedited pathway to citizenship. Defendants have interfered with that right and the only adequate remedy is to order DHS Defendants to resume processing

Plaintiffs' applications solely in accordance with existing naturalization criteria, law, and regulations.

206. Specifically, Plaintiffs and members of the Class have a clear right under the law to adjudication of their naturalization applications without the additional requirement being imposed by DHS Defendants of "enhanced DoD security checks." Notwithstanding this clear right to immediate adjudication on the present record, DHS Defendants have refused to adjudicate the N-400 Applications for Naturalization duly filed by Plaintiffs and members of the Class pending completion of an additional requirement that is contrary to law. DHS Defendants have unlawfully withheld action required by law — *i.e.*, adjudication of the N-400 Applications of Plaintiffs and the members of the Class on the present record — entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(1).

207. DHS Defendants have further unlawfully withheld and/or unreasonably delayed the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class by, among other things: (i) failing to comply with the July 7 Policy; (ii) unlawfully imposing a minimum active-duty service requirement in the form of BCT, AIT, or other active-duty service as a prerequisite to adjudication, and/or unreasonably delaying adjudications until completion of such active-duty service; (iii) unreasonably mandating superfluous and duplicative FBI background checks for individuals who have already completed such checks as part of the "enhanced DoD security checks;" (iv) systematically refusing to request, to attempt to obtain, or to receive the information gathered in connection with DoD Enhanced Background Investigations of MAVNI soldiers, and failing to put in place any system for the exchange of such information, for purposes of rendering "good moral character" determinations; (v) interposing a requirement of successful completion of any military-related NSD, MSSD, or other

suitability or vetting determination or adjudication; and/or (vi) otherwise systematically failing or refusing to adjudicate the applications of even those soldiers who have completed their DoD Enhanced Background Investigations.

208. Plaintiffs and the members of the Class have the further right to reasonably timely adjudication of their N-400 Applications for Naturalization.

209. Plaintiffs' applications for naturalization already have been pending well in excess of DHS's average processing time for military applications.

210. Moreover, pursuant to 8 U.S.C. § 1571(b), Congress has made clear that processing of naturalization applications – in the normal course (not taking into account the "expedited" processing contemplated by 8 U.S.C. § 1440 or for military applications generally), should take no longer than 180 days from the date of the filing of the naturalization application. Defendant officials further admit that they cannot even estimate the additional time it would take to complete the DoD Enhanced Background Investigations that DHS has (unlawfully) imposed on these applications. This already unreasonable delay was compounded by DoD's improper N-426 policy review, and DHS's action to further "hold" the processing of MAVNI applications pending that N-426 policy review. DHS Defendants have placed Plaintiffs and the members of the Class in a state of limbo and left them to languish there indefinitely. DHS Defendants unreasonably have delayed, and continue to unreasonably delay, the adjudication of the N-400 Applications for Naturalization duly filed by Plaintiffs and the members of the Class, further entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(1).

211. Accordingly, Plaintiffs seek an order from the Court pursuant to 5 U.S.C. § 706(1) compelling DHS Defendants: (i) to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 and otherwise to immediately act upon, process and adjudicate without further delay the

N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (ii) to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm.

Relief Pursuant to 5 U.S.C. § 706(2)

212. 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 law, in excess of statutory jurisdiction or authority, or without observance of procedure required by law.

(i) The July 7, 2017 Policy

213. DHS Defendants have imposed a new requirement on MAVNI applicants for naturalization that mandates completion of "enhanced DoD security checks" that have never before been applied to any type of applicant for naturalization and which previously has been used only in connection with granting high-level security clearances. DHS Defendants have implemented a policy to stop the processing of MAVNI naturalization applications pending completion of such "enhanced DoD security checks." DHS Defendants have applied that policy to halt the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the members of the Class while DoD Enhanced Background Investigations for such individuals were pending.

214. DHS Defendants have imposed a new substantive requirement for naturalization that is not in accordance with law. 8 U.S.C. § 1440 does not impose security clearance screenings as part of the naturalization process and nothing in the statute authorizes Defendants to impose this additional substantive requirement. On the contrary, in enacting Section 1440, ***Congress intended to reward Plaintiffs and the Class for answering the call to service during***

periods of armed conflict by "relax[ing] the preconditions for naturalization established in Section 1427." And the statute otherwise makes clear that no additional requirements for naturalization should be placed on this class of individuals that are not generally required for naturalization by providing that "[a] person filing an application under . . . this section shall comply in all other respects with the requirements of this subchapter [relating to naturalization generally]." ***Yet, DHS Defendants have punished and disadvantaged these soldiers, and only these soldiers, by imposing one of the most onerous requirements for naturalization that one could imagine — successful completion of the same rigorous investigation required to obtain a top-level security clearance***.

215. Furthermore, Section 1440 was enacted specifically to eliminate the length-of-residency requirement normally required for naturalization for this class of individuals — *i.e.*, those willing to volunteer to serve during periods of armed conflict. However, through DHS's new requirement and its justification, DHS Defendants effectively have reinstated the length-of-residency requirement that Congress expressly eliminated.

216. DHS Defendants' action is arbitrary, capricious, and irrational. On July 7, 2017, USCIS issued its "hold" directive to field offices as follows:

> USCIS has determined that the completion of DOD background checks is relevant to a MAVNI recruit's eligibility for naturalization. As such, all pending and future MAVNI cases may not proceed to interview, approval, or oath until confirmation that all enhanced DoD security checks are completed.

However, at the time USCIS issued the July 7 Policy, it understood that: (i) DoD had no intention of conducting the "enhanced DoD security checks"; (ii) DoD did not have the resources to conduct such security checks; and (iii) that DoD instead intended to discharge these MAVNI Selected Reserve soldiers without performing such security checks.

217. Moreover, DoD Defendants recently issued their new DoD Discharge Policy which subjects the vast majority of MAVNIs to immediate discharge and mandatory discharge by October 1, 2018, based on their so-called "non-deployability." The DoD Discharge Policy will ensnare MAVNI soldiers, including Class members, who have not had their DoD Enhanced Background Investigations completed by the mandatory discharge date, as evidenced by the extremely slow pace at which those investigations are being conducted and completed and the deliberately minimal amount of human resources DoD has assigned to this task. For instance, in a recent report to the Court, DoD admitted that it had assigned only two outside contractors – both of whom have other duties as well – to assembling and preparing case files for the CAF Adjudication component of the DoD Enhanced Background Investigations.

218. Yet, even assuming that DoD added resources to conducting the DoD Enhanced Background Investigations, the DHS Defendants' action nonetheless is arbitrary, capricious, and irrational because it is divorced from DHS's stated rationale for the action. Most of the Plaintiffs, including likely most MAVNIs generally, have resided in the U.S. for longer than the period required for naturalization of legal permanent residents (typically three to five years, or less). ***Some of the Plaintiffs and many of the Class members have resided in the United States since childhood***. There is no valid basis to apply the "enhanced DoD security check" requirement to them under the agency's stated rationale for the requirement, which relates to otherwise allegedly inadequate investigatory "scope" resulting from lack of sufficient U.S. residency duration. The agency's action is particularly unreasonable in light of the agency decision makers' lack of understanding of what Tier 3 and Tier 5 investigations entail at the time the directive was implemented.

219. Importantly, if DHS Defendants merely wanted to await the results of the DoD Enhanced Background Investigations in order to use those background materials to make their own independent assessment of good moral character or attachment to the Constitution, DHS Defendants would have insisted that the product of those investigations be sent to them for review, without awaiting for DoD's assessment of whether the applicant met the criteria necessary to receive a Top Secret security clearance (*i.e.*, a favorable NSD adjudication) or other military-specific adjudications, such as an MSSD. Yet, even though the background investigations have been completed for several of the Plaintiffs and many other members of the Class, DHS has not requested, made any effort to obtain, or received the background information they say they will use to inform their naturalization decision. ***Indeed, although the July 7 Policy has been in place for over eight months, DHS has failed to establish any procedure with DoD to receive the DoD background information DHS's policy says it is waiting for.***

220. DHS Defendants' "hold" is arbitrary and capricious for the further reason that it treats similarly-situated individuals differently both in relation to the thousands of MAVNI soldiers who have naturalized without "enhanced DoD security checks" and in relation to the thousands of other individuals who have naturalized with equal or less residency time in the United States than most of the Plaintiffs and other members of the Class.

221. In all events, DHS Defendants' July 7 Policy is arbitrary and capricious because the agency failed to properly consider and/or totally ignored important aspects of the problem including, without limitation, the agency's ability to reasonably and properly implement the policy, the adverse impact and burdensome consequences that the policy would have on the regulated population, and the statutory policy favoring prompt adjudication of naturalization

applications in general and the specific statutory policy favoring expedited and eased naturalization processing for military service members.

222. DHS Defendants' action also has been undertaken and applied to Plaintiffs and the Class without observance of procedure required by law. DHS Defendants have imposed a new substantive legal requirement on MAVNI applications for naturalization that requires completion of "enhanced DoD security checks" as a pre-condition for adjudication. This new requirement is not a mere interpretation of the "good moral character" requirement set forth in the statute and regulations (or any other term, for that matter). The existing regulations already extensively define what constitutes "good moral character" and what does not.

223. Further, the existing regulations provide that the scope of the good moral character investigation for these applicants need cover only one-year prior to the date of application, *see* 8 C.F.R § 329.2(d), whereas the agency's justification for the DoD Enhanced Background Investigation requirement is that such investigations cover many prior years. DHS Defendants' action is thus a new substantive legal requirement that is subject to the notice and comment requirements of 5 U.S.C. § 553 prior to implementation. DHS Defendants failed to comply with such requirements before issuing their "hold" directive and applying that directive to Plaintiffs' applications.

224. Alternatively, DHS Defendants failed to comply with the publication requirements of 5 U.S.C. § 552, which requires publication in the Federal Register of all "rules of procedure" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." DHS Defendants have made clear that their "hold" directive applies to "all currently pending and future MAVNI naturalization applicants applying

for naturalization under section 329(a), 8 U.S.C. § 1440(a)." Thus, the directive is one of general applicability subject to the publication requirements of 5 U.S.C. § 552.

225. Section 552 further provides that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Plaintiffs and the members of the Class had no actual notice of DHS Defendants' "hold" directive and were adversely affected by the agency's failure to timely publish that directive. Among other things, had Plaintiffs known prior to enlistment that these lengthy background checks would be a pre-requisite to naturalization, that they would risk losing their then-existing legal immigration status because of the extensive delays, that they would face the risk of discharge prior to naturalization because of such delays, and that they would face the risk of deportation back to their countries of origin (such as, for example, China) after having volunteered to serve in the US armed forces and sworn allegiance to the United States, then Plaintiffs and the members of the Class would have followed a different path and arranged their affairs differently. DHS Defendants' failure to timely publish their "hold" directive precludes DHS Defendants from retroactively applying the directive to the naturalization applications filed by Plaintiffs and the members of the Class. DHS Defendants have issued and applied the policy in an unlawful retroactive manner.

226. Finally, DHS Defendants' conduct must be held unlawful under 5 U.S.C. § 706(2) for the further reason that DHS Defendants have failed to comply with their own policy. Specifically, DHS Defendants have failed or refused to adjudicate the naturalization applications of even those soldiers who have satisfactorily completed the "enhanced DoD security checks."

227. DHS Defendants' action is arbitrary, capricious, irrational, otherwise not in accordance with law, and without observance of procedure required by law, entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(2).

(ii) The NSD/MSSD Policy

228. DHS Defendants have adopted an unlawful policy that puts on hold the processing of naturalization applications filed by MAVNI soldiers until DoD Defendants complete separate – and for naturalization purposes irrelevant – NSD and MSSD adjudications for such soldiers. NSDs and MSSDs are military-specific adjudications – not background checks or investigations – conducted for national security purposes that: (i) are performed by agencies that have no lawful role in the naturalization process and (ii) involve legal standards that are fundamentally different than the "good moral character" requirement under the INA. There is no lawful basis for DHS Defendants to impose such NSD and MSSD adjudications as a precondition for adjudicating MAVNI naturalization applications. This NSD/MSSD policy constitutes a final agency action that is being applied by DHS Defendants to put on hold the adjudication of the naturalization applications duly filed by Plaintiffs and other members of the Class.

229. DHS Defendants' action is arbitrary, capricious, and irrational in that there is no reasonable basis or justification for it. DHS Defendants' policy is arbitrary and capricious because the agency failed to properly consider and/or totally ignored important aspects of the issue including, without limitation, the adverse impact and burdensome consequences that the policy would have on the regulated population as well as the statutory policy favoring prompt adjudication of naturalization applications in general and the specific statutory policy favoring expedited and eased naturalization processing for military service members.

230. DHS Defendants' policy was implemented without observance of procedure required by law because it was issued without complying with the notice and comment requirements of 5 U.S.C. § 553 or the publications requirements of 5 U.S.C. § 552. DHS Defendants also have issued and applied the policy in an unlawful retroactive manner.

(iii) The FBI Check Policy

231. DHS Defendants have adopted an unlawful policy requiring duplicative and redundant FBI checks for individuals who already have completed such checks Nothing in 8 U.S.C. § 1440 permits or contemplates that soldiers seeking to naturalize under that provision may be subjected to duplicative, superfluous FBI checks performed in series. On the contrary, the statute makes clear that no additional requirements (such as double FBI checks) may be imposed on this class of individuals that are not required for naturalization generally. This policy constitutes a final agency action that is being applied by DHS Defendants to put on hold the adjudication of the naturalization applications duly filed by members of the Class.

232. DHS Defendants' action is arbitrary, capricious, and irrational in that there is no reasonable basis or justification for the action. DHS Defendants' policy is arbitrary and capricious because the agency failed to properly consider and/or totally ignored important aspects of the issue including, without limitation, the adverse impact and burdensome consequences that the policy would have on the regulated population as well as the statutory policy favoring prompt adjudication of naturalization applications in general and the specific statutory policy favoring expedited and eased naturalization procedures for military service members.

233. DHS Defendants' policy was implemented without observance of procedure required by law because it was issued without complying with the notice and comment

requirements of 5 U.S.C. § 553 or the publications requirements of 5 U.S.C. § 552. DHS Defendants also have issued and applied the policy in an unlawful retroactive manner.

(iv) Other Unlawful Naturalization Policies and Actions

234. DHS Defendants, on their own or complicit with the DoD Defendants, systematically have imposed a wide array of additional unlawful naturalization criteria on members of the Class as set forth more fully above, including, without limitation, the requirement of active-duty service in the form of BCT and/or AIT and/or other active service, the requirement of submission of a Form DD-214, and/or the requirements set forth in DoD's October 13, 2017 Policy memorandum.

235. Nothing in 8 U.S.C. § 1440 permits or contemplates that soldiers seeking to naturalize under that provision must perform any form of active-duty service or meet any of the other unlawful criteria identified above. On the contrary, the statute makes clear that active-duty service is not required and that no additional requirements may be imposed on this class of individuals that are not required for naturalization generally. These actions and policies constitute final agency action that is being applied by DHS Defendants to put on hold the adjudication of the naturalization applications duly filed by members of the Class.

236. DHS Defendants' policies and actions are arbitrary, capricious, and irrational in that there are no reasonable bases or justifications for the actions. DHS Defendants' policies and actions are arbitrary and capricious because the agency failed to properly consider and/or totally ignored important aspects of the issues including, without limitation, the adverse impact and burdensome consequences that the policies and actions would have on the regulated population as well as the statutory policy favoring prompt adjudication of naturalization applications in

general and the specific statutory policy favoring expedited and eased naturalization procedures for military service members.

237. DHS Defendants' policies and actions were implemented without observance of procedure required by law because they were issued without complying with the notice and comment requirements of 5 U.S.C. § 553 or the publications requirements of 5 U.S.C. § 552. DHS Defendants also have issued and applied the policies and actions in an unlawful retroactive manner.

* * *

238. Accordingly, Plaintiffs seek an order: (i) holding unlawful and setting aside DHS Defendants' July 7, 2017 Policy, NSD/MSSD Policy, FBI Check Policy, and Other Unlawful Naturalization Policies and Actions; (ii) declaring such policies and actions arbitrary, capricious, otherwise not in accordance with law and without observance of procedure required by law; (iii) enjoining DHS Defendants from applying such policies or taking such actions in relation to the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (iv) compelling DHS Defendants to immediately adjudicate the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class.

(v) DoD's Unlawful N-426 Policies

239. In mid-2017, DoD Defendants implemented a policy precluding the certification of honorable service under Section 1440 for members serving in the Selected Reserve until such service members serve in an active duty status. DoD Defendants' policy is contrary to the plain language of the statute and implementing regulations, which unambiguously provide that service members with honorable service ***either*** as a member of the Selected Reserve of the Ready Reserve ***or*** in an active-duty status are eligible for naturalization. DoD Defendants' policy also is

directly contrary to the decision by Congress to amend Section 1440 to broaden the statute's scope specifically to include service by members of the Selected Reserve. Finally, DoD "active-duty" service requirement is facially incompatible with the statute because, according to DoD officials, it applies only to language MAVNI Selected Reservists and not to medical MAVNI Selected Reservists, while the statute makes no reference whatsoever to skill or occupation. DoD Defendants' policy is not in accordance with law entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(2).

240. On October 13, 2017, without rescinding the prior N-426 policy which requires active duty service, DoD issued the New DoD N-426 Policy. Like the mid-2017 policy, the New DoD N-426 Policy expressly maintains the unlawful active duty service requirement at least for any post-October 13, 2017 enlistments or accessions. The New DoD N-426 Policy specifies that the N-426 Forms previously issued to Plaintiffs and the Class will be recalled and decertified. Thereafter, according to the policy, Plaintiffs and the Class will not be eligible to receive a new N-426 Form until, at a minimum, following a DoD "background investigation and suitability vetting." The purported N-426 recall and new N-426 eligibility conditions are contrary to law, arbitrary, capricious, irrational, an abuse of discretion, and the result of DoD acting outside of its authority, entitling Plaintiffs and the Class to relief under 5 U.S.C. § 706(2).

241. Accordingly, Plaintiffs seek an order: (i) holding unlawful and setting aside DoD Defendants' N-426 policy precluding the certification of honorable service for members of the Selected Reserve who have not served in an active duty status; (ii) declaring such policy not in accordance with law; (iii) enjoining DoD Defendants from revoking or withholding issuance of N-426s or certifications of honorable service on the basis of the mid-2017 policy or New DoD N-

426 Policy; and (iv) enjoining DoD Defendants from applying these policies to Plaintiffs and the Class.

Count IV: Mandamus

242. Plaintiffs re-allege paragraphs one through two hundred forty-one as if fully set forth herein.

243. DHS Defendants unlawfully and improperly have failed to process the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class in accordance with their obligations under law.

244. 28 U.S.C. § 1361 authorizes a court to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff" if the plaintiff can demonstrate that: (1) the plaintiff seeking mandamus has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available.

245. Plaintiffs have a clear right to apply for naturalization pursuant to 8 U.S.C. § 1440, which provides an expedited pathway to citizenship, and to have their N-400 Applications for Naturalization immediately adjudicated on the present record. Defendants have interfered with that right and the only adequate remedy is to order DHS Defendants to resume processing and adjudication of Plaintiffs' applications solely in accordance with existing naturalization criteria, law, and regulations.

246. Accordingly, Plaintiffs seek issuance of a writ of mandamus compelling DHS Defendants: (i) to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 to immediately act upon, process and adjudicate without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (ii) to grant priority to, and expedite, the

processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date.

Count V: Constitutional Violations

247. Plaintiffs re-allege paragraphs one through two hundred forty-six as if fully set forth herein.

248. Under the Constitution, namely, the "Uniform Rule of Naturalization" clause, Congress has the sole power to establish criteria for naturalization.

249. By enacting 8 U.S.C. § 1440, Congress has specified the naturalization eligibility conditions for Selected Reservists such as Plaintiffs and the Class.

250. 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 or any of the other requirements being imposed by Defendants in this case, such as service in an active-duty capacity or duplicative, sequential FBI background checks. The unlawful policies and practices here therefore constitute additional, non-statutory, substantive pre-conditions 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.

251. Plaintiffs and the Class are eligible and entitled by law – namely, 8 U.S.C. § 1440 – to apply for naturalization as Selected Reservists serving honorably in the U.S. military during wartime. If Plaintiffs and the Class are eligible to become naturalized under this statute (as they

so allege), DHS must grant their applications; DHS has no discretion to deny naturalization to a person who satisfies the criteria established by Congress for naturalization. Defendants' imposition of unauthorized, unlawful, and arbitrary conditions on Plaintiffs' ability to apply for and have timely adjudicated their applications for naturalization violates Plaintiffs' right to due process under the Fifth Amendment to the U.S. Constitution because these soldiers cannot lawfully be denied immigration benefits – namely naturalization – for which they are eligible and are seeking.

252. Plaintiffs request that the Court grant appropriate equitable relief on the forgoing basis.

Count VI: Equitable Estoppel

253. Plaintiffs re-allege paragraphs one through two hundred fifty-two as if fully set forth herein.

254. Defendants represented that naturalization for MAVNIs would be expedited and that naturalization would be available at basic training.

255. Plaintiffs and Class members reasonably relied on that representation from federal agencies and to their detriment by postponing the submission of their naturalization applications.

256. On January 30, 2018, just as DoD was beginning in earnest to issue orders to MAVNI soldiers shipping them to basic training based on successfully-completed DoD Enhanced Background Investigations, DHS Defendants "coincidentally" terminated their long-standing "Naturalization at Basic Training Initiative." Defendants' representatives have further stated that USCIS personnel would no longer travel to military bases "to conduct naturalization interviews, oath ceremonies, and the like."

257. Plaintiffs request that the Court grant appropriate equitable relief and estop Defendants from refusing to provide the promised naturalization assistance.

PRAYER FOR RELIEF

Wherefore, Plaintiffs, on behalf of themselves and the Class, respectfully request that this Court:

1. Assume jurisdiction over this action;
2. Issue the declaratory judgment requested in Count I of this Complaint;
3. Grant the temporary, preliminary and permanent injunctive relief requested in Count II of this Complaint;
4. Grant the relief requested pursuant to the APA (Count III of this Complaint);
5. Issue the mandamus requested in Count IV of this Complaint;
6. Grant the relief requested pursuant to Count V of this Complaint;
7. Grant the relief requested in Count VI of this Complaint;
8. Award Plaintiffs and the Class reasonable costs and attorneys' fees, including under the Equal Access to Justice Act;
9. Award such further relief as the Court deems just or appropriate.

Respectfully submitted this 14th day of March 2018.

/s/ Joseph J. Lobue
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER GRANTING PLAINTIFFS LEAVE TO FILE THIRD AMENDED COMPLAINT

THIS MATTER, having come before the Court on a motion for leave to file amended complaint under Rule 15 of the Federal Rules of Civil Procedure; the Court having reviewed the arguments to the motion; and good cause appearing,

IT IS HEREBY ORDERED that the Plaintiffs' motion for leave to file amended complaint is **GRANTED**; and

IT IS FURTHER ORDERED that the Third Amended Complaint is deemed **FILED**.

Dated: _____

_____
U.S.D.J. Ellen Segal Huvelle

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys and parties entitled to be notified of the proposed order's entry:

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