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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

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Plaintiffs respectfully submit this Reply Memorandum in further support of their Motion to File a Third Amended Complaint ("Motion") (Dkt. 115). For the reasons set forth in the Motion, and as further described below, Plaintiffs request that the Court grant the Motion.

I. INTRODUCTION

Plaintiffs filed their Motion on the evening of March 14, 2018. Attached to their Motion was Plaintiffs' proposed Third Amended Complaint, which comprises 97 pages in total and makes new and detailed factual allegations and states new causes of action arising therefrom. Dkt. 115-1. Less than 20 hours later, Defendants filed a seven-page opposition memorandum. Dkt. 117. Yet, in their haste to respond, Defendants cobbled together an opposition that displays scant evidence that they actually read the Third Amended Complaint ("TAC"). Nor do Defendants acknowledge – let alone satisfy – their heavy legal burden in demonstrating why the amendment should not be allowed.

Instead, in their opposition, Defendants advance four arguments: (1) Plaintiffs somehow delayed in seeking amendment and do so now in an attempt to avoid summary judgment; (2) amendment is improper because the "new claims are not new"; (3) Defendants will be prejudiced by an amendment because it will extend their court-ordered reporting; and (4) Count VI – which Defendants admit is a new cause of action – would be futile. Dkt. 117. None of these arguments has merit.

First, there has been no delay at all by Plaintiffs, let alone undue delay. As alleged in their Motion, Plaintiffs are bringing these new claims within days and weeks of investigating and confirming Defendants' new policies and misconduct and within two days of meeting and conferring with Defendants regarding these events. Defendants do not and cannot plausibly contend that Plaintiffs could have raised these new allegations and claims any sooner than they

did, or that Rule 15(d) does not allow for amendment in these circumstances. Nor is there any merit to Defendants' contention – unsupported by any case law – that Plaintiffs somehow waived their right to amend the complaint at the January 23, 2018 hearing. Dkt. 117 at 5. Plaintiffs did no such thing. At the time of that hearing, Plaintiffs had brought various issues to the Court's attention concerning naturalization adjudication delays. In response, Defendants repeatedly assured the Court that (a) the issues were isolated and individualized, and (b) no Court action was necessary because Defendants were willing and able to correct the problems and arrange for naturalization interviews (and oaths) within 24-48 hours of appropriately-detailed notice from Plaintiffs. However, Plaintiffs did not know, at that time, that the delays were caused by new agency policies – as now alleged in the TAC – that were affecting (or soon would be affecting) hundreds of class members. Defendants hid their new policies and other misconduct. Plaintiffs waived nothing by not seeking amendment at that time.

Moreover, Defendants' notion that Plaintiffs are seeking to avoid summary judgment is nonsensical. Plaintiffs aggressively have been prosecuting this case from the outset and moving it forward at every juncture, filing repeated motions for relief, and reacting to Defendants' ever-shifting defenses and policies. Only within the last *three weeks* did Defendants reveal that they have been misleading this Court about the bases for the July 7 Policy for months by repeatedly arguing and insinuating to the Court that the USCIS decision to "hold" MAVNI naturalizations pending DoD enhanced background investigations was due to classified information known to the agency. Although Defendants were, by local rule, obligated to produce the Certified Administrative Record Index for that policy *seven months ago* – in September 2017 – Defendants

delayed doing so until March 1, 2018.[1] *Only then did Plaintiffs (and the Court) discover that the classified documents Defendants have been using to justify their decision are not and never were part of the Administrative Record*. Defendants' lack of candor in this regard is troubling in and of itself, but for present purposes it completely undermines their claim that summary judgment in their favor is somehow imminent and that Plaintiffs' amendment is a delay tactic.

Second, Defendants argue that amendment is not warranted because the claims in the TAC are not new. This argument is curious in two respects. For starters, if Defendants are right and the amendment only adds detail to existing claims, then they cannot show the prejudice necessary to preclude amendment. In other words, Defendants' argument in this regard defeats their opposition and the Court need not consider any of the other factors. Next, notwithstanding Defendants' assertion in their opposition (which, notably, differs from the assertion they made during the parties' meet and confer days earlier), the reality is that the TAC is replete with new and recent factual allegations and new and independent causes of action arising from them. Defendants simply (and improperly) ignore the detailed allegations in the TAC to advance their current argument.

Third, Defendants' assertion that they would be prejudiced by continued reporting is flawed and unsupported, and incorrectly premised on the notion that Defendants are entitled to judgment now. Moreover, Defendants' reporting in this case has been critical to revealing the lack of progress Defendants have made in adjudicating the naturalization applications of Plaintiffs and class members. Indeed, as of the last report, only 23 soldiers had been naturalized since July 7,

[1] See Local Rule 7(n)(1) ("In cases involving the judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first."); Jan. 23, 2018 Tr. 87:18 (COURT: "Mr. Kisor, you are late, under N-1.").

2017 – less than 1% of the eligible soldiers in the *Nio* and *Kirwa* classes. Defendants cannot use their reporting obligation to prevent an amendment replete with allegations that warrant more extensive and more frequent reporting.

Finally, after mistakenly mischaracterizing the TAC as simply adding one new cause of action, Count VI (Equitable Estoppel), Defendants argue that this amendment should not be allowed because, in their view, Defendants somehow are seeking "naturalization by judicial declaration" as relief. Dkt. 117 at 6. Yet, as already mentioned, and as clearly alleged in the TAC and Plaintiffs' Motion, *the TAC states new causes of action for all five existing counts*, so it simply is not true that Count VI is the only new claim. Moreover, the equitable estoppel claim is properly pled in the TAC, and Plaintiffs do not and have not sought naturalization by judicial declaration as relief. To the contrary, they have been consistent since the outset of this case that they are seeking agency *adjudication* of their naturalization applications. It is well beyond the time for Defendants to stop attempting to twist Plaintiffs' claims into something they are not.

II. ARGUMENT

A. Defendants Never Address Any Of The Amended Complaint Allegations

Plaintiffs' Motion makes clear that the TAC (a) *continues* to challenge both the July 7, 2017 Policy and the October 13, 2017 New DoD N-426 Policy as alleged in the Second Amended Complaint, and (b) sets forth *new* causes of action based on Defendants' more recent conduct and policies, including the new FBI name check policy, the MSSD/NSD policy, and other activity that gives rise to new claims for relief. Dkt. 115. Defendants never acknowledge any of these new allegations. Instead, in conclusory fashion, they simply proclaim that an amendment is not "necessary" because all of the allegations "are already subsumed" within the Second Amended

Complaint. Dkt. 117 at 3.[2] But saying so does not make it so. The TAC allegations speak for themselves. They include the following:

- Allegations that Defendants are not complying with their July 7 Policy, TAC at ¶¶ 88-102, which give rise to independent violations of the APA, *id.* at ¶ 226. For instance, the TAC alleges that contrary to the Policy and representations they made to the Court in this case, Defendants are continuing to unreasonably delay and withhold naturalization adjudications even after successful completion of the DoD enhanced background investigation. *Id.* at ¶¶ 103-110. As such, even if the July 7 Policy were lawful (which it is not), Plaintiffs are entitled to relief based on Defendants' failure to follow their own policy.
- Allegations that Defendants have implemented a new policy which delays naturalization adjudications until after DoD completes separate, irrelevant, and military-specific National Security Determination ("NSD") and Military Service Suitability Determination ("MSSD") adjudications. *Id.* at ¶¶ 103-110, 228. These allegations give rise to new and distinct causes of action. *E.g., id.* at ¶¶ 228-30.
- Allegations that Defendants have implemented a new policy that unlawfully imposes 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. TAC at ¶¶ 111-113, 231. Defendants ignore

[2] It is worth noting that, even if Defendants were correct in their declaration, Defendants' "amendment-is-not-necessary" standard is not one of the grounds for denying a Rule 15 motion.

these allegations in the amended complaint. These allegations give rise to new and distinct causes of action. *E.g., id.* at ¶¶ 231-33.

- Allegations that Defendants systematically are 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. These allegations give rise to new and distinct causes of action. *E.g., id.* at ¶¶ 234-41.

In their Opposition, Defendants completely ignore all of these allegations and more and defiantly posit that the TAC contains nothing new.

B. Defendants Have Not Met Their Burden In Opposing Amendment

Defendants do not dispute any of the multitude of cases – including decisions from this Court[3] – cited by Plaintiffs establishing that Rule 15 amendments should be freely granted, including under Rule 15(d) where the amendment is based on new events and claims arising after the filing of the last complaint (Dkt. 115 at 7-8). Nor do Defendants dispute that denial of leave to amend is an abuse of discretion unless there is a sufficient reason for denial such as futility, undue delay, bad faith, dilatory motive, undue prejudice or repeated failure to cure deficiencies in

[3] *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).

previous amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962). And Defendants never dispute that the law imposes on Defendants the burden of proving the factors that might warrant discretionary denial of Plaintiffs' Motion here (Dkt. 115 at 9).

1. Defendants Have Not Demonstrated "Undue Delay" or "Dilatory Motive"

Defendants have not provided any grounds to find that the proposed amendment here is the product of undue delay or any improper motive. To the contrary, as noted above, Plaintiffs acted in extraordinarily swift fashion to raise these new allegations in response to Plaintiffs' discovery of Defendants additional unlawful policies. The reality is that Plaintiffs are raising these new claims and causes of action within weeks of their discovery. Defendants never explain how Plaintiffs possibly could have raised these claims earlier.

Beyond that, delay alone is not enough to deny leave to amend. The question in that circumstance would be whether the delay was undue. *Adair v. Johnson*, 216 F.R.D. 183, 186 (D.D.C. 2003) ("With regard to undue delay, the text of Rule 15 does not prescribe a time limit," and "[a]ccordingly, a court should not deny leave to amend based solely on time elapsed between the filing of the complaint and the request for leave to amend.") (citation omitted); *see also Sec. & Exch. Comm'n v. Nat'l Student Mktg. Corp.*, 73 F.R.D. 444, 447 (D.D.C. 1977) ("[A]bsent bad faith or prejudice, delay alone is an insufficient reason to deny leave to amend."); *Barkley v. U.S. Marshals Serv. ex rel. Hylton*, 766 F.3d 25, 39 (D.C. Cir. 2014) ("the grant of leave to amend a complaint might often occasion some degree of delay and additional expense, but leave still should be 'freely given' unless prejudice or delay is 'undue'") (citation omitted).

a. The Case Is Not "On the Verge of Resolution"

Defendants argue that the proposed amendment should not be allowed because, according to them, the "case is now on the verge of resolution." Dkt. 117 at 3-4. But, this Court should not

be distracted by Defendants' unsupported speculation that the amendment is an effort to fend off summary judgment. Indeed, that self-serving contention is wrong on multiple fronts.

Defendants presume, without basis, that the Court will grant summary judgment in their favor on both the July 7 Policy and the October 13 Policy. But the Court preliminarily enjoined the October 13 Policy, and the lawfulness of the July 7 Policy is far from being ripe for resolution. Indeed, the Administrative Record for the July 7 Policy is comprised of only 232 pages (many of which are duplicates), *see* Dkt. 119-1,[4] and Defendants have yet to provide an unredacted version of even that thin record to Plaintiffs or the Court.[5] Perhaps more importantly, (1) the Administrative Record omits multiple critical documents, including Defendants' prior MAVNI "hold" policies and the May 17, 2017 "DoD Action Memo" with which this Court is familiar, and (2) *the Record reveals that USCIS did not – as Defendants led this Court to believe – consider or rely on any classified documents for the July 7 Policy*.

With respect to the first point, given the slim record identified by USCIS for the July 7 Policy, Plaintiffs and the Court will need to spend additional time and effort in ensuring that the complete record is identified. Thus, Defendants' motion for summary judgment cannot be addressed until, at a minimum, the Administrative Record is finalized. Under these circumstances, the amendment is not interfering with summary judgment.

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[4] For instance, Dkt. 119-1 at AR 51-79 are the exact same documents as Dkt. 119-1 at AR 181-209.

[5] There also is a substantial question about the content of the Administrative Record that was produced to Plaintiffs on March 5. For example, contrary to this Court's admonition, the first two documents in the Record are ones that post-date the July 7 Policy. Dkt. 119-1 at AR 1-4. In fact, one document – the Renaud Declaration – even post-dates the March 1, 2018 Administrative Record Index, Dkt. 111, given that Mr. Renaud did not execute that declaration until *four days later* on March 5, 2018. Dkt. 119-1 at AR 3.

With respect to the second point, this defense admission is critical. While Defendants now tout that the Court's initial denial of the preliminary injunction motion concerning the July 7 Policy was a forecast for how the Court will rule on summary judgment, the Court was under the impression at the time of that initial ruling that the classified documents Defendants submitted to the Court were part of the Administrative Record. We now know that those documents are not part of the Administrative Record for the July 7 Policy.

Moreover, we know that Defendants not only misled the Court at the time of the initial preliminary injunction briefing, but also failed to inform the Court or Plaintiffs of that key exclusion from the Administrative Record when they should have. Under Local Civil Rule 7(n)(1), Defendants were obligated to provide the Administrative Record Index at the time of their initial motion to dismiss, which was filed on September 15, 2017. Dkt. 49. Yet Defendants did not file it then. Instead, they delayed and delayed, and we now understand why. It was not until March 1, 2018, after this Court ordered them to do so, that they filed the Index, which shows that the Administrative Record does not contain any classified documents. As such, a key premise for the Court's initial ruling is no longer valid. Thus, any suggestion that a final resolution in favor of Defendants is imminent is simply unsupported speculation.

b. The Amendment Was Not Yet Ripe As Of January 23

Defendants seem to suggest that Plaintiffs strategically delayed seeking leave to file the TAC by declining to do so at the January 23, 2018 conference. Dkt. 117 at 5. This insinuation is wrong. Plaintiffs did not know, by the time of the January 23 conference, that the problems they were raising were the result of new Defendant policies such as the FBI name check policy.[6] Indeed, Defendants never revealed these policies to Plaintiffs or the Court.

[6] Even if Plaintiffs had been aware of the policies at the time, they did not need to immediately seek leave to amend. *Driscoll v. George Washington Univ.*, 42 F. Supp. 3d 52, 56

In fact, Defendants represented to the Court at and in advance of the January 23 hearing that the instances of particular MAVNI problems identified by Plaintiffs were isolated and could be dealt with on a 24-48 hour turn-around without Court intervention. Jan. 23, 2018 Tr. 32:15-23. In the weeks following the January 23 hearing, as class members began reporting identical problems on a wider scale, Plaintiffs investigated further and discovered that the problems were the result, in part, of the new policies now alleged in the TAC.

Moreover, contrary to what Defendants represented to the Court in connection with the January 23 hearing, Defendants have not addressed the problems on a 24-48 hour turn around. Indeed, since January 23, Plaintiffs have brought more than 100 additional class member situations to Defendants' attention (with the specific details requested by Defendants), and Defendants have not addressed *any* of them in the way they presented to the Court on January 23.[7] Defendants failed to respond in any way with respect to the majority of the referrals, and with respect to the referrals for which Defendants did provide some type of response, the response typically was that – even though the class members had completed DoD enhanced background checks and favorable MSSDs and were scheduled to ship to basic training – Defendants would not be addressing the referrals because they were "premature." In fact, it was through this process that Plaintiffs learned

(D.D.C. 2012) (Huvelle, J.) ("[I]t is immaterial that . . . at the time he filed his first amended complaint he had knowledge of the additional factual allegations in his proposed second amended complaint. [D]elay alone is [typically] not a sufficient reason for denying leave . . . . 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).

[7] On March 8, Defendants acknowledged "that USCIS was notified of 307 completed background checks" on March 5, 2018. Plaintiffs thereafter stopped making referrals as the class-wide nature of this problem was evident and Defendants were not responding to the vast majority of Plaintiffs' 100-plus individual referrals in any event. However, Plaintiffs' counsel learns of additional class members facing unreasonable post-DoD background check delays on a daily basis, which further demonstrates that these are not individualized "mistakes" by Defendants but rather the result of Defendants' wide-spread policies and practices.

of Defendants' redundant FBI check policy – *more than two weeks after the January 23 hearing*. *See* Dkt. 119-12 (February 8, 2018 email from Defendants' counsel to Plaintiffs' counsel); Dkt. 119-15 (February 9, 2018 email from Defendants' counsel to Plaintiffs' counsel); Dkt. 119-17 (February 9, 2018 email exchange between Defendants' counsel and Plaintiffs' counsel).

Plaintiffs also did not learn of the wide-spread noncompliance with the July 7 Policy on or before the January 23 hearing because Defendants did not reveal accurate MSSD completion dates until their February 28 reporting. It was not until that report at the end of February that Defendants revealed that many class members had completed their DoD background checks and NSD/MSSD adjudications weeks and months earlier. Dkt. 109-1. Plaintiffs and the Court could have learned of this earlier had Defendants correctly reported to the Court in the first instance or not maintained their prior incorrect reporting for another month. In particular, in advance of the January 23 hearing, Defendants submitted a report to the Court that indicated that every MSSD completed as of the date of that reporting was completed on January 19, 2018 (the same day that the Defendants' declarant stated that she ran the report). Dkt. 93-4. When Plaintiffs questioned Defendants about the repetitive data that appeared anomalous, Defendants responded (and then repeated that response to the Court), that "[m]any Army MSSD decisions were made in late January 2018."[8] It was not until the Defendants' February 28 report (Dkt. 109-1) that Plaintiffs learned that it was not the case that many MSSD decisions were made on January 19 or in "late January 2018," but rather, there were a host of MSSDs completed in September and October 2017 and before January 19,

[8] *See* Dkt. 105 at 4-5 (Plaintiffs' noting that "[t]he number of days (processing time) in the Army Suitability Determination column reflects the difference in days from the date of the DoD CAF Suitability Recommendation to January 19, 2018, for every single day, but Defendants have not explained why or how this is the case" and Defendants' noting that "[t]the 'Army Suitability Determination (Processing Times in Days)' is the time it took for the Army to make an MSSD after receiving a recommendation from the DODCAF. Many Army MSSD decisions were made in late January 2018. . . .").

2018 (but yet USCIS had not moved forward with processing and adjudicating those soldiers' naturalization applications).[9] Thus, because of Defendants' inaccurate reporting, Plaintiffs did not have the information necessary to bring these claims earlier.[10]

Likewise, Plaintiffs were not aware at the January 23 hearing of Defendants' plan to terminate the Naturalization at Basic Training initiative, another allegation raised in the TAC. *See, e.g.*, Dkt. 115-1 ¶ 256. Defendants first confirmed that in a February 8, 2018 email. Dkt. 119-12.

Consequently, on this record, Defendants have not met their burden of demonstrating undue delay justifying denial of Plaintiffs' leave to amend. *See Associated Mortgage Bankers Inc. v. Carson*, No. CV 17-0075 (ESH), 2017 WL 6001733, at *5 (D.D.C. Dec. 1, 2017) ("Courts that have found an undue delay in filing have generally confronted cases in which the movants failed to promptly allege a claim for which they already possessed evidence. Plaintiff alleges that its notice-and-comment claim arises from the HUD OIG Report issued on July 14, 2017. Plaintiff filed its motion for leave to amend exactly two months and one day later, before the Court had ruled on any dispositive motions, and most significantly, defendants fail to explain how such a short delay prejudices them.") (citations omitted). *Paxton v. Washington Hosp. Ctr. Corp.*, 299 F.R.D. 335, 336-37 (D.D.C. 2014) (finding that much of the delay in filing the amended complaint "may be attributed to [defendant's] own omissions" during the deposition, and allowing plaintiff "to clarify and strengthen her claims" through amendment).

[9] In fact, in the February 28 report, there are only eight entries for MSSDs completed on January 19, 2018. Dkt. 109-1.

[10] This also shows why regular and detailed reporting by Defendants is necessary.

2. Defendants Have Not Demonstrated "Undue Prejudice"

a. Defendants Contend That The Allegations Are Not New

A premise of Defendants' opposition turns on their claim that there is nothing "new" in the TAC and that all of the allegations are "subsumed" in the Second Amended Complaint.[11] But, if Defendants are correct, and there is nothing new in the TAC, then they cannot be surprised by the allegations nor can they show any prejudice from having to defend against them. *See Aftergood v. CIA*, 225 F. Supp. 2d 27, 31 (D.D.C. 2002) (granting the plaintiff's motion to supplement his complaint in part because the request is "substantially identical" and would, therefore, "not surprise or prejudice the defendant").

Further, Defendants fail to address how, if the claims are so related to the claims already identified in the Second Amended Complaint, it would serve the parties or the Court to have Plaintiffs initiate another litigation to address these issues. *See Fund for Animals v. Hall*, 246 F.R.D. 53, 55 (D.D.C. 2007) ("The defendants have not demonstrated that they would be prejudiced by the plaintiffs' supplemental complaint. In fact, the defendants concede that the claims are closely related to the claims already before the court . . . and they sidestep addressing the judicial interest in hearing all similarly situated claims together. 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.") (internal citations omitted). As such, Defendants' opposition must

[11] As shown above, this assertion is flatly contradicted by the allegations in the TAC, which describes and adds new and independent causes of action based on new facts and circumstances. *Notably, Defendants' position in their Opposition is precisely the opposite of what they said during the meet and confer*. At that time, when Plaintiffs raised each of the new claims, Defendants told Plaintiffs that (a) these allegations are not in the Second Amended Complaint, (b) Defendants would not engage substantively on allegations that are not part of the case, and (c) Plaintiffs would have to either amend or file a new complaint to raise the allegations.

be rejected because Defendants cannot – even on their own theory – meet their burden of demonstrating prejudice.

b. Defendants' Continued Reporting Does Not Constitute Prejudice

In one paragraph of their opposition, Defendants' assert that they "will be prejudiced by prolonging this litigation." Dkt. 117 at 4. According to Defendants, the so-called prejudice results from having to comply with the Court's order to report on the naturalization adjudication status of class members. This weak assertion is not enough to demonstrate prejudice. In fact, the requirement is that Defendants demonstrate *undue* prejudice. As the court in *Adair* explained, undue prejudice can be demonstrated in the following types of circumstances:

> For example, prejudice may exist when allowing an amendment would necessitate reopening discovery at a relatively late stage in the proceedings. . . In addition, an amendment may cause prejudice if it bears only a tangential relationship to the complaint or changes the character of the litigation. . . Finally, prejudice may exist 'when the effect of the amendment is to impair the opposing party's ability to present evidence.'

Adair, 216 F.R.D. at 186 (citations omitted). No such showing has been made here by Defendants. As this Court has also noted, "[u]ndue prejudice is not mere harm to the non-movant but a denial 'of the opportunity to present facts or evidence which [ ] would have [been] offered had the amendment[ ] been timely.'" *Associated Mortgage Bankers Inc.*, 2017 WL 6001733, at *4 (citation omitted). Defendants do not even contend that any such prejudice would result from Plaintiffs' amended complaint.[12]

The "prejudice" alleged by Defendants is that they currently are engaged in a "burdensome" obligation to compile periodic reports for submission to the Court, that it

[12] To the contrary, as noted above, Defendants acknowledge that the additional claims in the Third Amended Complaint are closely related to the existing claims, and thus concede that there is no surprise or undue prejudice caused by the amended complaint.

"unquestionably diverts personnel and resources from operational tasks, including the processing of MAVNI background investigations,"[13] and that prolongation of litigation would "further . . . consume even more resources" of the Court and Defendants. Dkt. 117 at 4. But Defendants do not cite a single case where prolongation of litigation was found prejudicial due simply to the additional resources it would consume. In fact, as this Court has noted, amendment is not prejudicial just because it causes the opposing party to expend additional resources. *Associated Mortgage Bankers Inc.*, 2017 WL 6001733, at *6 ("an amendment is not automatically deemed prejudicial [just because] it causes the non-movant to expend additional resources.") (citation omitted).[14]

The district court in *Hisler* considered and rejected similar arguments of "prejudice" by defendants in that case and noted:

> [T]he defendant asserts that by allowing the plaintiff to amend her complaint, the defendant will be forced to 'incur further unanticipated expense' resulting from 'additional written discovery,' a 'lengthy investigation,' and the need to prepare responsive pleadings. These purported results, however, would likely stem from an amendment asserting additional causes of action

[13] In any event, even these claims are not credible. In a recent response to Defendants' submission to the Magistrate Judge on this topic, Plaintiffs detailed the flawed assumptions and unsupported claims that Defendants rely on to inflate their alleged reporting burden. Dkt. 112.

[14] *See also United States v. Honeywell Int'l, Inc.*, 318 F.R.D. 202, 206 (D.D.C. 2016) ("[A]n amendment is not automatically deemed prejudicial if it causes the non-movant to expend additional resources. Any amendment will require some expenditure of resources on the part of the non-moving party. 'Inconvenience or additional cost to a defendant is not necessarily undue prejudice.'") (citation omitted); *Hisler v. Gallaudet Univ.*, 206 F.R.D. 11, 14 (D.D.C. 2002) (finding that the extension of additional resources "would likely stem from an amendment asserting additional causes of action in almost *any* case," and that denying a motion for leave to amend because the amendment may result in additional expenses or resources would contradict "the legal standard of granting leave 'freely ... when justice so requires.'") (emphasis in original); *Nat'l Student Mktg. Corp.*, 73 F.R.D. at 448 ("Nor does a delay in trial resulting from a grant of leave to amend and the need for additional discovery necessarily constitute sufficient prejudice to deny an otherwise meritorious motion.").

> in almost *any* case. As such, if this court were to employ a policy of denying plaintiffs leave to amend in every situation where an amended complaint may result in additional discovery or expense, then this court would fail to abide by the legal standard of granting leave 'freely ... when justice so requires.' . . . Indeed, for this court to find otherwise would run afoul of the federal rules and the policy undergirding the authority in this area of law.

Hisler, 206 F.R.D. at 14 (internal citations omitted).

Similarly in *Fund for Animals*, the court rejected similar prejudice arguments. 246 F.R.D. at 55 (where defendants argued that adding three claims would delay litigation and that amendment would result in "another protracted period of litigation"). The court noted that "delay without the requisite prejudice is ordinarily insufficient to justify denial of leave to amend," and found that defendants failed to demonstrate that they would be prejudiced by the delay. *Id.* at 55 ("[T]he defendants state in broad, nondescript terms that the delay 'will significantly impede [defendants'] administration of the [refuge] System.' Such an abstract bureaucratic burden falls short of the actual prejudice the court seeks to prevent.") (citation omitted).

In fact, Defendants have their analysis backwards. As Plaintiffs explained in their Motion, Plaintiffs' amendment of the complaint *conserves* resources and serves the interests of justice and judicial economy *by avoiding a separate lawsuit and allowing the Court to resolve the entire controversy between the parties*. Dkt. 115 at 10-11.[15] *Defendants have not disputed this argument*.

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[15] "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 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 v. IRS*, 263 F. Supp. 3d 5, 7 (D.D.C. 2017)

Nowhere in their short opposition do Defendants address Plaintiffs' right to initiate a separate lawsuit on the basis of the new factual allegations and causes of action in the Third Amended Complaint. Defendants also fail to address the extension and waste of resources that would result from Plaintiffs' initiation of a separate lawsuit.

This case does not come even close to circumstances in which courts have denied motions for leave to amend a complaint on the basis of undue prejudice. In fact, the only case that Defendants cite for support of their assertion of "prejudice," *Hoffmann v. United States*, demonstrates this point. *See* Dkt. 117 at 4. In *Hoffmann*, the court's denial of the motion to amend was not based on any similar assertions of prejudice as Defendants make here, but rather the court's decision was based on the following factors: the ligation was ongoing "for nearly twenty years[,] [t]he case has made its way through two different district courts, three appellate proceedings, two appellate rehearings, two unsuccessful certiorari petitions, and is now on remand from the Federal Circuit," and "plaintiffs concede that they had at their disposal all the facts necessary to raise the claims raised for the first time" in the proposed amendment at least five years earlier. 266 F. Supp. 2d 27, 33 (D.D.C. 2003). "Under these circumstances," the court noted that "there has been undue delay, militating in favor of a denial of plaintiffs' motion." *Id*. Accordingly, *Hoffmann* does not advance Defendants' cause in the slightest.

3. Defendants Have Not Demonstrated "Futility"

Defendants' final argument against amendment is built on a house of cards and is wrong in any event. Defendants erroneously contend that the only "new" item in the TAC is the addition of Count VI, which asserts a claim for equitable estoppel. Dkt. 117 at 6-7. And according to

(finding that equity favored supplementing the complaint and noting that "dealing with the controversy as one is far preferable to requiring [plaintiff] to open yet another case.").

Defendants, that one new claim is "futile" because this Court has no power to make someone a citizen. *Id.*

But the argument is fundamentally flawed. Count VI is *not* the only new cause of action. As discussed above, the TAC asserts multiple new APA and other causes of action based on the failure to follow the July 7 Policy as well as the implementation of new unlawful policies. As such, even without the equitable estoppel claim, the TAC would not be futile as it states multiple new causes of action, none of which Defendants challenge.

Next, Defendants are wrong to continue with their mantra of falsely contending that Plaintiffs are seeking naturalization as relief in this case. They are not. Nothing in the TAC alleges otherwise. As this Court has recognized, Plaintiffs are seeking agency adjudication of their naturalization applications under 8 U.S.C. § 1440 and are seeking to prevent Defendants from imposing unlawful conditions on their right to seek naturalization. *See* Dkt. 44; *see also* Dkt. 17 at 3.

Defendants' futility argument thus misses the point, as does their reference to a Supreme Court case that has nothing to do with what Plaintiffs are alleging or the relief Plaintiffs are seeking. Dkt. 117 at 6-7. As such, Defendants have failed in their burden of establishing that the TAC is barred by futility.

III. CONCLUSION

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

Respectfully submitted,

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