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.	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In many respects, Plaintiffs' Preliminary Injunction Motion (Dkt. 119) and Defendants' Opposition (Dkt. 128) are like two ships passing in the night. Plaintiffs made clear that they are seeking preliminary injunctive relief on multiple independent grounds arising under 5 U.S.C. §§ 706(1) ***and*** 706(2): (1) evidence – based on the recently produced administrative record – that the July 7 Policy is unlawful, (2) DHS's failure to follow the July 7 Policy (even if lawful), (3) DHS' imposition of a redundant FBI check policy, and (4) DHS's imposition of a new NSD/MSSD policy. In addition, Plaintiffs seek relief based on DHS's unlawful retroactive application of these policies and because the policies violate 5 U.S.C. §§ 552 and 553. Plaintiffs supported their claim with numerous exhibits along with sworn declarations from 28 Class members detailing the policies and the irreparable harm they are suffering due to these policies. For their part, Defendants barely acknowledge the claims and evidence in Plaintiffs' Motion. Instead, they mischaracterize Plaintiffs' claims, trying to pigeon-hole them into a narrative more to Defendants' liking. For instance, Defendants attack Plaintiffs' motive and timing in bringing the Motion and they trot out, again, their "national security" refrain as if it has some bearing on this Motion – it does not. Crucially, Defendants never engage at all on most of the claims and they never respond to or even dispute the massive evidence of unlawfulness and harm compiled and presented by Plaintiffs.

Moreover, the arguments they do make are either inapposite or wrong. They spend pages seeking to justify the cessation of the Naturalization at Basic Training Initiative without regard to the fact that Plaintiffs are not seeking a preliminary injunction with respect to that policy. And they spend the bulk of the remainder of their brief seeking to explain how their new redundant FBI check policy – which adds weeks and months to already-delayed naturalization adjudications – somehow was mandated by Congress. This Court should not be distracted by Defendants' reformulation of the issues on this Motion. Given the anemic rate at which naturalization

adjudications are taking place – a mere 46 in the last nine months (less than 2% of the estimated 2,500 eligible MAVNI soldier population) per Defendants' most recent report – the need for preliminary injunctive relief is more pressing now than ever.

ARGUMENT

I. THERE IS NO BAR TO THE GRANT OF PRELIMINARY RELIEF

Defendants begin their argument with two threshold assertions, Dkt. 128 at 10-12, each of which should be summarily rejected.

First, Defendants' pending summary judgment motion is no obstacle to the relief Plaintiffs seek here as that motion is limited to the specific issue of the lawfulness of the July 7 Policy. While Plaintiffs' Motion makes claims related to the July 7 Policy, it also discusses claims arising from policies and events *after* July 7, 2017. Defendants' summary judgment motion does not involve, and is entirely irrelevant to, these claims. Moreover, Defendants cite no authority for the proposition that a pending summary judgment motion precludes preliminary injunctive relief.[1]

Next, Defendants incorrectly contend that Plaintiffs are not entitled to preliminary injunctive relief because the relief would be equivalent to final relief. As Plaintiffs demonstrated when Defendants previously raised this same argument, the law provides otherwise. Dkt. 21 at 5-6 nn.1-2. With respect to the current preliminary injunction motion, Plaintiffs are entitled to relief under the applicable legal standards, and none of the cases cited by Defendants, Dkt. 128 at 11-12, suggest otherwise.

[1] This Court should look at whether, applying the four preliminary injunction factors, Plaintiffs have demonstrated entitlement to relief. This is especially true where, as here, the summary judgment decision will be delayed by finalization of the record followed by further briefing and argument, and, in the meantime, Plaintiffs and Class members continue to suffer irreparable harm both from the July 7 Policy and Defendants' additional, *post*-July 7 actions and policies.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Defendants' July 7 Policy Violates 5 U.S.C. §§ 706(2) and 706(1)

1. *Section 706(2)*

The Agency Record (as designated by Defendants, "AR") clearly establishes that the July 7 Policy is arbitrary and capricious in violation of § 706(2). Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Plaintiffs' Motion demonstrated that DHS failed to consider numerous crucial aspects of the problem at the time it issued the July 7 Policy. ***In their Opposition, Defendants never dispute that the agency failed to consider these factors when it issued the July 7 Policy, nor do they dispute that these factors are relevant and important to the problem at hand.*** For this reason, alone, the July 7 Policy is arbitrary and capricious and must be set aside under § 706(2). *See id.*; *Am. Trading Transp. Co. v. United States,* 791 F.2d 942, 948-51 (D.C. Cir. 1986).

For example, we now know that the agency did not give any consideration to the impact that the July 7 Policy would have on the processing of MAVNI naturalization applications. In fact, USCIS did not understand (and never bothered to ask) what a Tier 5 or Tier 3 background check covers or entails, how those checks differ from the checks required by USCIS's pre-July 7 Policy, or what delays would result. *See* Dkt. 25-1 (2nd Renaud Decl.) at 5 ¶ 1. Notably, prior to implementing the July 7 Policy, the average USCIS processing time for military naturalization applications (including those filed by MAVNIs) ranged between three to four months. Yet, a simple "math problem" reveals that, even at an overly optimistic completion rate of fifty per month, it will take over four years – from now – to clear the naturalization backlog created by the

July 7 Policy. *See* Dkt. 119-22 (Jan. 23, 2018 Tr.) at 20:18-23.[2] In fact, USCIS is proceeding at a much slower pace, as Defendants reported that only twenty-two Class members were naturalized in the five-week period between February 28 and April 3, 2018. Dkt. 130 at 2 n.3. At this pace, it will take ***more than ten years*** to clear the naturalization backlog created by the July 7 Policy.

USCIS also failed to consider that it was "infeasible" (per DoD) to perform the "enhanced DoD security checks" on this extensive population. *See* Dkt. 17-8. Further, the agency failed to consider whether it had the capability to reasonably implement the July 7 Policy. In fact, USCIS never had this capability because it cannot reliably identify MAVNIs. As a result, and by the agency's own admission, the policy is both over- and under-inclusive. *See* Dkt. 108-3 ¶ 10.

The agency further ignored the fact that the DoD memorandum on which it based the July 7 Policy does not in fact apply to the regulated population. *See* AR at 5, 7; Dkt. 119-25 (Oct. 27, 2017 Tr.) at 43:23-24. Moreover, the September 30, 2016 DoD memorandum *eased* the background check requirements for MAVNI soldiers. Dkt. 17-10. The agency appears to have believed erroneously that this 2016 Memo enhanced – rather than lessened – security requirements. AR at 5 ("On September 30, 2016, [DoD] issued a policy memorandum to require enhanced security checks for MAVNI recruits.").[3] Finally, the agency failed to consider the express statutory

[2] Prior DoD estimates placed the total number of potential *Nio* Class members at over 2,500. *See* Dkt. 105 at 1 (describing party agreement that the *Nio* Class of Selected Reservists includes (1) MAVNIs at BCT, AIT, or beyond, (2) DTP MAVNIs, and (3) discharged MAVNIs); Dkt. 17-8 (adding together non-naturalized Group 2 MAVNIs and Group 3 MAVNIs); Dkt. 26 (identifying the largest category of Class members – DTP members – as totaling 2,513).

[3] Notably, DoD continues to advance this flatly false assumption. *See* Dkt. 127-1 at 4 ¶ 25 ("In 2016, in light of serious national security concerns, DoD added new requirements, including a National Intelligence Agency Check ('NIAC') and an issue-oriented interview and/or polygraph."). DoD is wrong now, and USCIS was wrong then – the September 2016 DoD Memo does not add new requirements and does not suggest heightened national security concerns. And USCIS's own Agency Record shows as much. *See* AR at 214-215 (December 2014 DoD MAVNI Memo identifies the NIAC and issue-oriented interview and/or issue-oriented polygraph in addition to the SSBI or CI-focused security review).

policy favoring prompt adjudication of naturalization applications in general and the specific statutory policy favoring expedited and eased naturalization processing for military service members. *See* Dkt. at 19–20.

Yet, putting aside what the agency *failed* to consider, the Agency Record contains no reasonable explanation or justification for the July 7 Policy, independently rendering the policy arbitrary and capricious under § 706(2). Indeed, the vast majority of the Agency Record – 199 of 232 pages – relates to information obtained ***through DHS investigations***, not through any so-called "enhanced DoD security checks." *See* AR at 33-232; AR at 80 ("An investigation conducted by the Department of Homeland Security, and subsequently forwarded to [the Army], established that …"); AR at 164 (same). As a result, these materials cannot justify or explain the July 7 Policy.

The Agency Record further reveals that the agency decision-maker ***never considered the classified reports that Defendants previously relied on as the primary justification for the July 7 Policy.*** Dkt. 111; AR 1-3. Worse still, the record shows that the agency did not evaluate or maintain any "national security" concerns relating to naturalization. Instead, the agency decision-maker merely understood ***that DoD*** had so-called "national security concerns." AR at 3. DoD's national security concerns are different from and broader than the factors that are relevant to naturalization and do not provide a reasonable explanation or justification for the July 7 Policy.

In fact, the agency based its July 7 Policy on a handful of emails that the agency decision-maker did not even personally review and an "oral briefing" about "two" cases of so-called "particular importance." AR at 1-2. However, the record shows that the agency gave no consideration whatsoever to the size of the MAVNI population (from which these few cases of "particular concern" arose) or whether this number was disproportionately large in relation to the size of that population. Furthermore, the agency did not find that the so-called "derogatory

information" discovered about these individuals was material for naturalization purposes — *i.e.*, that it actually would have prevented their naturalization. AR at 2 (stating only that the agency would have "considered" the information if it had been available). Again, in their Opposition, Defendants do not dispute any of these facts.

The threadbare nature of the Agency Record is highlighted by the Statement of Material Facts ("SOF") submitted by Defendants in support of their motion for summary judgment. Dkt. 127-1. To be clear, the July 7 Policy could not be sustained even if one considered Defendants' SOF in its entirety. For example, the SOF does not even use the term "national security" to justify the July 7 Policy. Moreover, the SOF itself is not supported by the Agency Record.[4] The vast majority of the citations contained in the SOF are to materials ***outside the Agency Record***. *See* Dkt. 127-1 ¶¶ 1-22 (including n.3). And one-third of the paragraphs in the SOF for the July 7 Policy have no references to the Agency Record at all. *See* Dkt. 127-1 ¶¶ 1, 2, 4, 11, 12, 13, 15.

For these reasons and those set forth in Plaintiffs' Motion, the Agency Record does not provide a reasonable explanation or justification for the July 7 Policy under any circumstances. However, the record is particularly insufficient here because the July 7 Policy reflects a major policy change from the agency's prior policy. As the Supreme Court has explained:

> [T]he agency need not always provide a more detailed justification [for a policy change] than what would suffice for a new policy created on a blank slate. Sometimes it must — when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or ***when its prior policy has engendered serious reliance interests that must be taken into account***. It would be arbitrary or capricious to ignore such matters.

FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009) (emphasis added) (internal citations omitted). In this case, the soldiers' "part of the bargain was to give . . . the DoD eight years of

[4] Local Rule 7(h)(2) requires that, where judicial review is based on the administrative record, summary judgment motions must include "a statement of facts with reference to the record."

military service" and in exchange for this commitment "they would have a right to apply for expedited citizenship." Dkt. 119-25 (Oct. 27, 2017 Tr.) at 25:4-9; Dkt. 44 at 17-19; *Kirwa*, Dkt. 29 at 31-34 ("delaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm"). That the agency would make a major policy change – causing thousands of individuals who relied on the prior policy substantial irreparable harm, Dkt. 44 at 17-19 – based on such an inconsequential record does not survive scrutiny under § 706(2).

2. *Section 706(1)*

Defendants also have imposed unreasonable delays on the adjudication process in violation of § 706(1). Defendants' Opposition makes no mention of this independent ground for relief.

Seven months have passed since the Court considered Plaintiffs' first request for a preliminary injunction and the delays have since compounded with no end in sight. As noted above, at the present rate of adjudications, it will take ***more than ten years*** to clear the backlog created by the July 7 Policy. "At some point, promises are no longer enough, and we must end the game of 'administrative keep-away.'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 859 (D.C. Cir. 2008) (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004)); *see also AHA v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016) ("[t]aking the above factors into account, the district court – more than a year after its first denial and with the problem only worsening – might find it appropriate to issue a writ of mandamus").

B. <u>Defendants' Failure to Comply with the July 7 Policy Violates 5 U.S.C. §§ 706(2) and 706(1)</u>

1. *Section 706(2)*

The operative facts, laid out in detail in Plaintiffs' Motion, show that while the July 7 Policy has been in effect for nine months, the agency is not following it, resulting in further delays and

mounting harm. USCIS still has not put any process in place to request or monitor background check status or information from DoD. Even when a MAVNI soldier provides proof to USCIS that his or her "enhanced DoD security checks" have been successfully completed, USCIS refuses to take any action to verify or obtain the background check status or information. Dkt. 119-7 (02/28/18 Email) ("If you just received a ship date, it is a 3 or 4 week delay before DOD notifies us…. There IS NOT a process for us to ask or request DOD expedite notification to us, DOD provides notice when they provide it."). In some cases, USCIS officers have denied that the "enhanced DoD security checks" have been "officially" or "formally" reported as complete even for MAVNI soldiers who have been reported as complete to this Court. *See* Dkt. 119 at 6.[5]

In their Opposition, Defendants do not dispute any of these facts. Indeed, the agency decision-maker who issued the July 7 Policy acknowledges that there is no process for USCIS to request information relating to the completion of enhanced DoD background checks or to

[5] Further, it appears that DoD is attempting to avoid this Court's scrutiny by re-defining when MSSDs are "done." Note that in its January 22 reporting, DoD reflected that all of the completed MSSDs were complete on January 19, Dkt. 93-4, and told Plaintiffs and the magistrate judge that "[m]any Army MSSD decisions were made in late January 2018." Dkt. 105 at 4-5. Through DoD's February 28 reporting, Dkt. 109-1, DoD first revealed that, in fact, many MSSD decisions were completed much earlier than "late January 2018," including in September and October 2017 (and yet USCIS was not processing those class members' naturalization applications). Now, in "revised" reporting submitted to the Court, DoD has altered the MSSD dates so that nearly all are not "complete" until March 2018, in an effort to mask the actual gap between MSSD completions and DoD notification of the same to USCIS. However, DoD's ploy is obvious and can be exposed with just a few examples. One example is Plaintiff Shu Cheng and the changed date from January 22 to March 1. Another noteworthy example is named *Kirwa* plaintiff Mahlon Kirwa, for whom the February 28 report reflected a September 13, 2017 MSSD completion, but DoD now claims a March 1 MSSD completion. Notably, by March 1, Mr. Kirwa already had completed six weeks of basic training. A third example is one of the Class member declarants (with initials D.C.), who finally was naturalized in late February; but, according to DoD's new "revised" reporting, that soldier's MSSD was not complete until March 1, after USCIS naturalized the soldier and even though the February 28 DoD report had a September 22, 2017 MSSD date.

otherwise monitor that process.[6] *See* Dkt. 128-1 ¶ 4 ("DoD notifies USCIS by uploading information onto a shared online portal when it has reached a final MSSD regarding a MAVNI recruit."). The type of DoD information shared and the timing of the reporting to USCIS is dictated entirely by DoD. While USCIS is the agency responsible for adjudicating naturalization applications, USCIS has fully ceded to DoD the power to control whether, and when, naturalization applications for MAVNI soldiers are adjudicated.[7]

Even after USCIS finally acknowledges that it has received "official" or "formal" confirmation that an individual soldier's "enhanced DoD security checks" have been completed (and are "favorable"), USCIS does not adjudicate the soldier's naturalization application for *"another 4 to 5 months." See* Dkt. 119-11. Again, this fact is not disputed. According to Mr. Renaud, "several months may pass between the date DoD notifies USCIS that DoD's background

[6] Separately, Defendants claim "[i]f the MSSD is adverse, USCIS requests further information from DoD." Dkt. 128 at 15. Yet, how can that be? According to DoD's latest reporting, "Soldiers who have received an unfavorable military suitability determination are no longer considered by the Army to have 'completed the DoD enhanced background check process.'" Dkt. 130 at 2 n.2. Beyond the questions of (1) why USCIS is blindly accepting DoD's re-definition of the "enhanced background check process" nine months after the July 7 Policy and (2) how DoD can make that claim for soldiers who already have been discharged or soldiers who have received notice that "derogatory information requires separation," there is the question of which agency is being candid. Has USCIS considered naturalization applicants with "adverse" MSSDs or not? If not, what is the real reason for the continued hold up?

[7] We also know that DoD waits weeks or months after it informs recruiters that a soldier's background checks are complete before "officially" or "formally" notifying USCIS of this same fact, if DoD reports the fact at all. *See* Dkt. 119 at 5-7. Soldiers who had their "enhanced DoD security checks" and MSSDs completed in September and October of 2017 still had not had their completed status "officially" reported to USCIS as of January or February of 2018. *Id*. Many more MAVNI soldiers who had their "enhanced DoD security checks" and MSSDs completed in January 2018 still had not had their completed status "officially" reported to USCIS, more than six to eight weeks later. *Id*. Because USCIS has set up no process to request or monitor DoD reporting, it has created a system that enables DoD to control the naturalization of MAVNIs – just as DoD sought to do with its October 13, 2017 N-426 Policy. This is affecting numerous Class members as well as named Plaintiff Prashanth Batchu, who has been cleared to ship to BCT but is being told that DoD has not informed USCIS of his completed MSSD.

checks are complete and the applicant's date of naturalization." Dkt. 128-1 ¶ 10. This additional multi-month period, by itself, exceeds the total average processing time that pertained to military naturalization applications prior to the July 7 Policy.

Importantly, the principal justification that Defendants offered for the July 7 Policy (albeit now debunked by the Agency Record) – *i.e.*, "national security" concerns – has no relevance to this issue. All of the MAVNI soldiers adversely affected by DHS Defendants' non-compliance with the July 7 Policy – by definition – already have been subjected to the investigation necessary for a top secret security clearance. As a result, DHS Defendants have no reasonable justification for failing to immediately adjudicate the naturalization applications for such soldiers.

Moreover, the ***new*** reason that the agency ***now*** offers for not adjudicating these applications is disingenuous and directly contrary to the assurances that Defendants previously made to the Court. Specifically, Mr. Renaud now states that, after receiving notification from DoD that the "enhanced DoD security checks" are complete, USCIS must take various steps, including potentially issuing requests for evidence from the applicant. Dkt. 128-1 ¶¶ 7-8. This is directly contrary to what Defendants represented to the Court when Plaintiffs brought their initial preliminary injunction motion. At that time, Defendants assured the Court – even in the face of the Court noting that the Government would be held to that representation – that the agency would complete all of the requirements up to the point of interview while the "enhanced DoD security checks" were ongoing. Dkt. 119-13 (Oct. 27, 2017 Tr.) at 77:4-78:8, 80:12-80:20. Indeed, Defendants now admit that they previously "advised the Court that USCIS would 'proceed with everything ... short of an interview,' while DoD background checks remained outstanding." Dkt. 128 at 25-26. Defendants' new justification – *i.e.*, that there is so much more that USCIS still

needs to do with each of these applications (even the ones where DoD's adjudications were favorable) – deserves no weight.

In sum, Defendants' failure to comply with the July 7 Policy by failing to adjudicate the naturalization applications of even those individuals who have completed the "enhanced DoD security checks" is arbitrary, capricious, and otherwise not in accordance with law. *See Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (agency must follow its own policies); *Simpkins v. Shalala*, 999 F. Supp. 106, 116 (D.D.C. 1998).

2. *Section 706(1)*

Defendants' failure to comply with the July 7 Policy also independently violates § 706(1). As has been established, USCIS has a mandatory, nondiscretionary duty to adjudicate naturalization applications. USCIS does not have "unfettered discretion to relegate aliens to a state of limbo, leaving them to languish there indefinitely." *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 51 (D.D.C. 2008) (internal quotations and citations omitted). Plaintiffs have demonstrated through analysis of the *TRAC* factors that the agency's delay in adjudicating the naturalization applications for those individuals who already have completed their "enhanced DoD security checks" is unreasonable in violation of § 706(1). *See* Dkt. 119 at 26-29; *see also Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984)). Defendants' opposition fails to challenge or oppose any of these arguments.[8]

[8] Defendants' assertions that examples of their failures to comply with their own policy are isolated, individualized incidents that have been "corrected" (Dkt. 128 at 16, 18) are false. In the last few weeks alone, the same noncompliances have occurred on multiple occasions, including with "repeat offenders" at USCIS. For example, on March 20, the Detroit Field Office again told a Congressional representative that "MAVNI cases remain on hold." See Dkt. 91-1 at 2-3. And, USCIS field offices still are telling MAVNIs that they cannot be naturalized without having attended basic training and/or that they need 180 days of service for naturalization per DoD's October 13, 2017 Memo. Recent USCIS messages include the following language: "The background check information you have received is a favorable check to attend BCT and AIT.

C. The Redundant FBI Check Policy Violates 5 U.S.C. §§ 706(2) and 706(1)

In February 2018, DHS announced a new policy – that the results of an FBI check "don't count" for naturalization purposes if DoD (and not USCIS) submitted the request to the FBI.[9] Hence, the new policy mandates, as a prerequisite to naturalization, that USCIS receive a redundant FBI check for soldiers on whom, as USCIS knows, the same FBI check already was completed as part of the "enhanced DoD security checks." To be clear, the undisputed evidence shows the two FBI checks in question are, in fact, the ***very same*** check. Dkt. 119-15 (02/09/18 Email). Defendants do not dispute or challenge this point.

1. *Section 706(2)*

Defendants' justification for the Redundant FBI Check Policy boils down to this: (1) USCIS must conduct a background investigation, (2) such investigation must include a full FBI criminal background check, and (3) 8 U.S.C. § 1440 does not relax the background check requirements. Dkt. 128 at 21-22. Defendants' explanation misses the point and offers no cover for their bizarre new policy. Because the FBI check performed as part of the "enhanced DoD background checks" includes the very same FBI check that is otherwise used for naturalization, all of the requirements identified by Defendants are satisfied without the Redundant FBI Check Policy.

This background check is NOT the required background check for USCIS" and USCIS "cannot provide interview until basic is complete."

[9] Plaintiffs are not challenging any long-standing USCIS policy of waiting for the results of an FBI background check. Given this, Defendants' statute of limitations argument, Dkt. 128 at 23 n.8, is meritless. Further, a new interpretation of a statute or regulation is a new rule for APA review purposes. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011).

Defendants' justification fails to address the actual claim that Plaintiffs are making – *i.e.*, that DHS's new policy imposes on the MAVNI population, and only the MAVNI population, the requirement for a second, identical FBI background check. That requirement is contrary to law because the statute and regulations make clear that no additional requirements may be imposed on soldiers seeking naturalization under § 1440 that are not imposed for naturalization generally. *See* 8 U.S.C. § 1440(b); 8 C.F.R. § 335.3(a). And nothing in § 1440 – a provision specifically intended to ease and expedite the naturalization process for soldiers serving in time of armed conflict – permits or contemplates a redundant, delay-inducing FBI check, particularly when non-military applicants are not subjected to such a requirement.

The Redundant FBI Check Policy violates § 706(2) for the further reason that the policy is arbitrary and capricious. There is no reasonable explanation or justification for a policy that requires that the exact same check be performed twice for naturalization applicants. The only rationale Defendants have offered in support of their policy is the claim that the statute mandates DHS to require such redundant FBI checks. This is utter nonsense, and none of the statutory or regulatory provisions cited by Defendants support this argument. For example, Defendants cite an appropriations statute which merely provides that "none of the funds appropriated or otherwise made available to [USCIS] shall be used" unless USCIS "has ***received*** confirmation from the [FBI] that a full criminal background check has been completed." Pub. L. 105-119 (emphasis added). The regulation at 8 C.F.R. § 335.2(b), also relied on by Defendants, uses this very same "received" language. Of course, once USCIS receives the results of the "enhanced DoD security checks," it necessarily has "received" confirmation from the FBI that "a full criminal background check has been completed" because that very FBI check is part of the "enhanced DoD security checks."

Defendants' next argument is that the statute requires that USCIS receive confirmation from the FBI ***directly***. But neither the statute nor the regulation requires that. *See Baltimore & Ohio R.R. Co. v. ICC*, 826 F.2d 1125, 1129 (D.C. Cir. 1987) (explaining that an agency cannot "assert a nonexistent congressional prohibition as a means to avoid responsibility for its own policy choice"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 728 (D.C. Cir. 1994) (internal citations omitted) ("[T]he agency purported to find in the statute a legal constraint on that balancing process that is simply not there. … On that basis of incorrect statutory interpretation alone, we would be obliged to reject the Commission's reasoning.").

Nevertheless, even if the agency could find such a limitation in the statute, it would not save the agency's policy under § 706(2). An agency cannot ignore obvious alternatives when implementing a rule or policy. Failure to consider alternatives is arbitrary and capricious. *See Am. Ass'n of Cosmetology Sch. v. Devos*, 258 F. Supp. 3d 50, 75 (D.D.C. 2017) ("The arbitrary-and-capricious standard described above also applies to an agency's consideration of regulatory alternatives." (citing *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C. Cir. 1973) (finding "artificial narrowing of options to be arbitrary and capricious"))). If DHS in fact "interprets" the statute and regulation to require USCIS to receive confirmation directly from the FBI, then USCIS officials simply could contact the FBI and get that confirmation directly. Plaintiffs' evidence shows that the FBI would prefer that alternative. *See* Dkt. 119-16 ¶ 24 (FBI Decl.) (noting that the FBI is trying to reduce investigatory burdens and delays by "working with federal agency customers to identify … requests no longer needed to prioritize/reduce backlog").

Moreover, Defendants' irrational interpretation cannot be squared with the purpose of the appropriations statute on which Defendants rely. The purpose of Pub. L. 105-119 was to ensure that an FBI check was ***completed*** prior to naturalization, which had not previously always been

the case.[10] Indeed, DHS's interpretation is particularly unreasonable, given that all of the individuals in question have been put through a plethora of other background checks that are typically reserved for top level security clearances. *ACA Int'l v. FCC*, No. 15-1211, 2018 U.S. App. LEXIS 6535, at *24 (D.C. Cir. Mar. 16, 2018) (finding agency's "utterly unreasonable" interpretation of a statute violated § 706(2)).

Finally, Defendants appear to contend that their action is reasonable because "USCIS has no control over the types of FBI background checks that DoD may require as part of its own screening process." Dkt. 128 at 23. In fact, USCIS has no control over the manner in which the FBI conducts background checks requested by USCIS as part of the naturalization process. In any event, this *post hoc* rationalization for the Redundant FBI Check Policy is a red herring. Any concern about what DoD ***might*** do in the future is speculative and irrelevant. Defendants have admitted that the FBI check being conducted as part of the "enhanced DoD security checks" is identical to the second FBI check being ordered by USCIS for Class members. Dkt. 119-15 (02/09/18 Email). As such, the policy being applied now – the one challenged here – unlawfully is resulting in the withholding of Class members' naturalization applications.[11]

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[10] *See* H.R. Rep. No. 105-207, at 30 (1997) ("The result of this management failure to correct the naturalization process, was not only the granting of citizenship to ineligible applicants, including criminals, but a degradation of this benefit for the many applicants who were deserving of citizenship. … Bill language is included that requires INS [now USCIS] to wait for the FBI to complete a full criminal history check before completing the adjudication of an application. This will ensure that flawed practices, namely waiting 60 days for a response by the FBI on a criminal record check and then proceeding with completion of an application for citizenship even if the FBI check had not been completed, will by law no longer be allowed to occur.").

[11] The Redundant FBI Check Policy is arbitrary and capricious for the further reason that the agency failed to consider important aspects of the issue. DHS failed to consider the adverse impact and burdensome consequences that the policy has placed 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.

2. *Section 706(1)*

The Redundant FBI Check Policy also unreasonably delays the adjudication of Class members' naturalization applications in violation of § 706(1). Defendants wrongly contend that Plaintiffs' Motion "does not contain any facts to support their claim." Dkt. 128 at 24. But Plaintiffs presented substantial undisputed facts, analyzed in light of the *TRAC* factors, demonstrating the unreasonableness of the delay resulting from the Redundant FBI Check Policy, including the manner in which it undermines the "expedited" processing to be applied to military naturalizations, its effect on agency resources (at FBI and USCIS), and the serious interests being prejudiced. *See* Dkt. 119 at 32-33.

Indeed, it is Defendants' briefing on this issue that is inadequate and thin. Defendants' only response – concerning the "rule of reason" factor – is mispremised on the contention that Plaintiffs are challenging USCIS's practice of waiting for completed FBI background checks for naturalization purposes. But Plaintiffs are making no such challenge. Plaintiffs challenge the substantial unreasonable delay resulting from USCIS's requirement that soldiers undergo a second FBI check identical to the FBI check that already was performed as part of their "enhanced DoD security checks."

3. *Final Agency Action*

Two conditions must be satisfied for agency action to be "final." First, the action must mark the "consummation of the agency's decisionmaking process" – that is, it "must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (internal citation omitted).

Here, the Redundant FBI Check Policy marks the consummation of the agency's decision-making and is not merely tentative or interlocutory. Indeed, as noted above, Defendants claim that DHS is compelled by statute to adopt this policy. Moreover, DHS actually is applying the policy to withhold the adjudication of naturalization applications filed by Class members.

Furthermore, the agency's action is one by which "rights or obligations have been determined" or from which "legal consequences will flow." The members of the Class have a right to expedited adjudication of their naturalization applications without the completion of a second, redundant FBI check. Dkt. 119-25 (Oct. 27, 2017 Tr.) at 25:1-9 (in exchange for committing to eight years of military service, these soldiers "would have a right to apply for expedited citizenship"); Dkt. 44 at 17-19. DHS has denied these soldiers that right through this unlawful policy. Numerous other legal consequences flow directly from DHS's actions, including that the policy deprives these soldiers of the opportunity to vote, to work, to continue their education, to travel outside the United States, and to obtain or renew a driver's license. *See Kirwa*, Dkt. 29 at 31-34 ("delaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm").[12]

[12] Relying on *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), Defendants contend that Plaintiffs are asserting an impermissible "programmatic" challenge to USCIS's action. Dkt. 128 at 20-21. This is incorrect. In *Lujan*, the plaintiff generally challenged "the entirety" of the Department of the Interior's "land withdrawal review program." *Id.* at 890. Here, by contrast, Plaintiffs do not assert a general challenge to the entire MAVNI naturalization program; rather, Plaintiffs challenge particular actions, namely the application of the Redundant FBI Check Policy to Class members to prevent and withhold adjudication of the naturalization applications filed by such soldiers. This is precisely the type of action that is reviewable under the APA. As the *Lujan* Court explained, to satisfy the requirement, a party "must direct its attack against some particular 'agency action' that causes it harm" such as "some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 891. That is exactly what Plaintiffs do here.

D. Defendants' NSD/MSSD Policy Violates 5 U.S.C. §§ 706(2) and 706(1)

DHS has adopted an unlawful policy that puts on hold the processing of naturalization applications filed by MAVNI soldiers until DoD completes NSD and MSSD adjudications for such soldiers. While Defendants' seek to merge the issues, Plaintiffs clearly have shown that the July 7 Policy is distinct from the NSD/MSSD Policy. Dkt. 119 at 10-11. While the July 7 Policy requires USCIS to await the completion of "enhanced DoD security checks" so that USCIS may consider information discovered in connection with such background checks in its "good moral character" determination, AR at 5, the NSD and MSSD determinations are not investigations or background checks in any way, shape, or form. Rather, NSDs and MSSDs are military-specific adjudications conducted by the DoD Consolidated Adjudication Facility ("DoD CAF") and the Army for purposes of permitting access to classified information and assessing continued suitability for military service. ***In other words, neither the NSD nor the MSSD is an "enhanced DoD security check."***

Notably, Defendants cannot keep their story straight on this issue. In their various submissions to the Court, including the Opposition itself, Defendants acknowledge that the "enhanced DoD security checks" and NSD/MSSD adjudications are separate and distinct. *See, e.g.*, Dkt. 129 ¶ 6 ("It appears that approximately 900 members of the *Nio* class are still undergoing DoD's enhanced background check process ***or*** awaiting a final suitability determination." (emphasis added)); *id*. ¶ 1 (referring to "DoD Individuals with Complete Background Checks ***and*** MSSDs." (emphasis added)); Dkt. 128 at 26 ("USCIS policy requires notification that DoD has completed all background and security checks ***and*** reached a final MSSD before beginning to adjudicate naturalization application of MAVNIs." (emphasis added)).

Moreover, neither the July 7 Policy nor the Agency Record for that policy makes any mention of NSD/MSSD adjudications. Instead, in a declaration prepared in March 2018, eight months *after* the Policy decision, the agency decision-maker claimed: "Of particular importance to my decision were two cases…. In both cases, an applicant naturalized before his or her DoD background checks revealed derogatory information ***that USCIS would have considered***, had it known about the information, in determining whether the individual was eligible to naturalize." AR at 2 (emphasis added). In other words, the purported reason for the rule was to wait to see if any derogatory information was revealed by the DoD background checks that ***USCIS*** would consider in determining whether the individual was eligible to naturalize.

Finally, to the extent there is any doubt about whether the July 7 Policy included an NSD/MSSD requirement, it was laid to rest by the representations that Defendants made to the Court in connection with Plaintiffs' initial motion for preliminary injunction. At that time, Defendants assured the Court that the July 7 Policy merely allowed the agency to "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" and "evaluate [the application] in accordance with the same regulatory definition of 'good moral character' that applies to every other naturalization applicant." Dkt. 31 at 34. Accordingly, the NSD/MSSD Policy is a new policy (or a new change in policy) by USCIS.[13]

1. *Section 706(2)*

Defendants' NSD/MSSD Policy is not in accordance with law and should be found unlawful and set aside under 5 U.S.C. § 706(2). As Plaintiffs demonstrated in their Motion, and

[13] Notably, Defendants still have not responded regarding compounding delays due to DoD CAF internal "expiration" and other policies or USCIS's "expiration" policies, and the resulting seemingly never-ending cycle further holding up Class member naturalizations.

as Defendants have admitted, the NSD/MSSD adjudication process reflects nothing more than "an internal personnel decision" by DoD. Dkt. 119-28 (Jan. 23, 2018 Tr.) at 9:15-22. These military-specific adjudications are performed by agencies that have no lawful role in the naturalization process and involve legal standards that are fundamentally different than the "good moral character" requirement under the INA. As the Supreme Court has explained:

> 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. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic."

Dep't of Navy v. Egan, 484 U.S. 518, 528-29 (1988) (quoting *Molerio v. FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984)). Nothing in 8 U.S.C. § 1440 permits or contemplates that soldiers seeking to naturalize under that provision may be subjected to separate NSD/MSSD adjudications as a prerequisite for naturalization. On the contrary, § 1440 eases and expedites the naturalization process for soldiers. Indeed, § 1440 clearly states that the sole military assessment for naturalization purposes is a retrospective certification of the soldier's "honorable service." Here, of course, the Army already made that "honorable service" determination for each Class member.

Once again, Defendants do not dispute any of these points. In fact, Defendants' submissions confirm many of them. In particular, through Mr. Arendt, Defendants describe the MSSD as follows:

> Each Service establishes its own standards for enlistment under the authority of Title 10 of the United States Code. These standards (aptitude, education, physical fitness, moral character, age, and citizenship) are based upon the needs of the Services and are designed to ensure those individuals accepted are qualified for military duties.… The Service Secretary, or his/her designee, has visibility on all aspects of enlistment qualification requirements, to include the skills each prospective member brings to the force, and is in the best position to weigh any

> known risk factors against the need for that individual's skill set in [the] military department concerned.

Dkt. 128-2 ¶ 2.

Considerations such as the soldier's physical fitness, education, aptitude, and age have nothing to do with eligibility for naturalization. Further, "weighing" factors against "the needs of the Service" and "any known risks" has nothing to do with eligibility for naturalization. In any event, this same exercise already was completed once for every member of the Class. Plaintiffs and the Class all were approved for enlistment and in fact enlisted years ago.[14] They all have military ranks and military ID cards and have been assigned to, and serve in, specific operational military units. They all are subject to the Uniform Code of Military Justice and the orders of their military superiors. And the Army already has issued N-426s certifying their honorable service. That the Army may want to make ***another*** "internal personnel decision" by re-weighing the factors set forth above to decide whether to ***continue*** the service of these soldiers has no bearing on naturalization. There is no lawful basis for DHS to impose NSD and MSSD adjudications as a precondition for adjudicating MAVNI naturalization applications.[15]

The NSD/MSSD Policy also should be set aside under § 706(2) because there is no reasonable justification for a rule that prevents and withholds adjudication of naturalization

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[14] And they were highly vetted prior to enlistment. *Tiwari et al. v. Mattis et al.*, No. 2:17-cv-00242-TSZ, Dkt. 115-29 (Decl. Stock) ¶¶ 2-5 (W.D. Wash. Mar. 27, 2018).

[15] Nor can DHS Defendants properly withhold adjudication based on the speculation that some unidentified individual might be discharged at some unspecified time in the future. The plain language of Section 1440(a) makes clear that a discharge is to be considered only if the discharge has already occurred. *See* 8 U.S.C. 1440(a). Moreover, for separation purposes, the service of a member of the Selected Reserve is characterized as "under honorable conditions" as a matter of law unless a specific finding has been made by a court-martial or other designated board of officers that the service member's service is other than honorable. *See* 10 U.S.C. § 12685. There is no reasonable basis for DHS Defendants to withhold adjudication of thousands of MAVNI naturalization applications based on mere conjecture that some unidentified soldier might be subject to a future court-martial or other similar disciplinary board.

applications based on "internal personnel decisions." Again, the conclusory justification of "national security" has no relevance here. All of the Class members subjected to the NSD/MSSD Policy have completed their enhanced DoD security checks and the same information available to DoD for the NSD/MSSD adjudications is equally available to USCIS for their naturalization adjudications. USCIS thus is able to make the required "good moral character" determinations for each individual without waiting for further "internal personnel decisions" by DoD.

Indeed, the only justification offered by USCIS for requiring completed NSD/MSSD adjudications is that "USCIS understands" that such adjudications are "the culmination of DoD's enhanced background check process." Dkt. 128-1 ¶¶ 2, 4. Even if this were true, the short answer is, so what? DoD could consider that its enhanced background check "process" for a soldier culminates when Jupiter next aligns with Saturn (or that the process is never-ending). But that does not mean that USCIS can withhold adjudication of a soldier's naturalization application until that event occurs. Here, DHS has provided no reasonable explanation and cannot do so because, as noted above, the information needed for USCIS to make its "good moral character" determination already has been collected.[16]

2. *Section 706(1)*

The NSD/MSSD Policy also runs afoul of 5 U.S.C. § 706(1). As Plaintiffs demonstrated in their Motion, the NSD/MSSD Policy has caused unreasonable delay in the naturalization adjudication process for MAVNI soldiers. *See* Dkt. 119 at 36-38. In their Opposition, Defendants

[16] The NSD/MSSD Policy is arbitrary and capricious for the further reason that the agency failed to consider important aspects of the issue. Defendants have failed to consider the adverse impact and burdensome consequences that the policy has placed 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.

do not address Plaintiffs' argument. The unlawful withholding of DHS's mandatory, nondiscretionary duty to adjudicate naturalization applications pending DoD's completion of irrelevant NSD/MSSD adjudications violates § 706(1).

E. The Policies Are Unlawfully Retroactive and Violate 5 U.S.C. §§ 552 and 553

Plaintiffs' Motion shows that each of the July 7 Policy, the Redundant FBI Check Policy, and the NSD/MSSD Policy: (1) changed the legal landscape and are being applied in an impermissibly retroactive manner; (2) are legislative rules effecting a major shift in agency policies that were adopted without complying with the notice and comment requirements of 5 U.S.C. § 553; and (3) were issued and applied without satisfying the publication requirements of 5 U.S.C. § 552 in a manner that has adversely affected the members of the Class, all of whom lacked actual notice of the policies. Dkt. 119 at 38-40. Defendants' Opposition does not address any of these claims.

III. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE INJURY

Defendants' Opposition includes a section that purports to address irreparable harm, Dkt. 128 at 26-30, but most of their argument focuses on inapposite factors. For instance, while ignoring this Court's prior irreparable harm findings in this and the related *Kirwa* litigation,[17] Defendants instead cite this Court's prior comments about balancing interests, repeat their argument that they are complying with their own July 7 Policy, and then expend substantial effort discussing their unworkable proposal for dispute resolution. What Defendants do not do is contest the substantial evidence of irreparable injury that Plaintiffs have adduced in support of their Motion. Indeed, Defendants never even address the evidence that Class members are – as this Court has characterized it – in "legal limbo" with "their ability to travel and pursue professional

[17] Dkt. 44 at 17-19 ("Plaintiffs have met their burden on irreparable harm."); *see also Kirwa* Dkt. 29 at 31 ("[D]elaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm.").

and personal opportunities" curtailed. Dkt. 44 at 17. Nor do Defendants dispute that the harm has increased with the passage of time and Defendants' additional unlawful policies/practices.[18] Most notably, Defendants never once address any of the harm described in the over two dozen Class member declarations submitted with Plaintiffs' motion. *See* Dkts. 119-37 through 119-64.

Finally, Defendants' callous comments about Plaintiffs' ability or responsibility to "maintain proper immigration status" and being put on "notice" of the risks, Dkt. 128 at 29-30, are not new, and already were rejected by the Court.[19] In fact, this Court previously said, "These plaintiffs enlisted in the MAVNI program over a year ago with the clear understanding, based on the explicit representations of the government, that they would become naturalized citizens, not illegal immigrants. Thus, plaintiffs have established irreparable harm." Dkt. 44 at 18-19 (footnote omitted). Nothing in Defendants' Opposition should change that finding by the Court.

IV. THE PUBLIC INTEREST AND BALANCE OF HARMS FAVOR PLAINTIFFS

In their Motion, Plaintiffs make clear that national security concerns can have no bearing on their claims based on Defendants' failure to follow the July 7 Policy, the Redundant FBI Check Policy, and the NSD/MSSD Policy because all of those policies come into play *after* DoD has completed its enhanced security checks. Dkt. 119 at 45. For instance, by the time soldiers are subjected to the delays and injuries of the NSD/MSSD Policy, all of their background information already has been collected – with SSBIs, NIACs, and CI reviews completed. And by the time

[18] Defendants acknowledged in May 2017 that "[a]pproximately 1,000 Group 3/4 MAVNIs are no longer in a valid immigration status." Dkt. 17-8. If Defendants had any evidence indicating that the number of MAVNIs without a valid immigration status had decreased since May 2017, they had every opportunity to make that representation. Thus, any attempt by Defendants to suggest that these soldiers currently are suffering less harm now than they were when this Court found irreparable injury seven months ago is nonsensical and unsupported.

[19] Without realizing it, Defendants' insinuation that two of the named Plaintiffs lack "lawful presence," Dkt. 128 at 29, only serves to reinforce Plaintiffs' injury point.

DHS is waiting on the second, identical FBI check, DoD has completed the enhanced background checks and even made the NSD/MSSD determination. Thus, any so-called "derogatory" information already has been identified, making any "national security" interest satisfied by that point.[20] Defendants simply ignore these arguments – never disputing any of them – and repeat the same "national security" mantra that they raised previously. Dkt. 128 at 30-31.[21] Consequently, Defendants' analysis does not even match, let alone refute, the "public interest" and "balancing of the harms" arguments presented in Plaintiffs' motion.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion.

[20] From a practical perspective, at present, the same is true with respect to the July 7 Policy itself. For the overwhelming majority of the Class, OPM already has made SSBI findings, NIACs have been run, and CI reviews and interviews are complete. Again, any relevant "derogatory" information already would have been flagged.

[21] Defendants' indiscriminate invocation of the term "national security" gets them nowhere as a matter of law. *See Wagafe v. Trump*, No. 2:17-CV-00094, 2017 WL 5989162, at *1 (W.D. Wash. Nov. 28, 2017) ("The Government may not merely say those magic words—'national security threat'—and automatically have its requests granted in this forum."); *see also Kirwa*, Dkt. 60 at 8 ("[W]hile courts should exercise caution when adjudicating claims involving matters of military affairs and national security, that caution does not give DOD carte blanche authority to act in contravention of the Constitution or applicable statutes.").

Respectfully submitted,

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