UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. KUSUMA NIO, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Civil Action No. 1:17-00998-ESH

DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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I. FACTUAL DEVELOPMENTS

On October 13, 2017, DoD signed a new policy regarding certification and decertification of Form N-426, Request for Certification of Military or Naval Service (DoD N-426 policy). *See* ECF No. 58. Only Section III of the DoD N-426 policy is relevant to this case, as it applies to the named Plaintiffs and the certified class. *See* ECF No. 58-1 at 4. This section permits the military to recall and de-certify any Form N-426, which had been previously certified before the service member completed all application screening and suitability requirements. *Id*. On October 20, 2017, Plaintiffs filed a Second Amended Complaint ("SAC") (ECF No. 61), along with their Motion for a Temporary Restraining Order and Renewed Motion for Preliminary Injunction (ECF No. 63), seeking to enjoin DoD "from decertifying, rescinding, recalling, or otherwise invalidating Plaintiffs' existing Form N-426 pursuant to the new DoD policy." *Id.* ¶ 150(iii). The SAC alleges, *inter alia*, that DoD's N-426 policy is "arbitrary, capricious, irrational, an abuse of discretion, and the result of DoD acting outside of its authority, entitling Plaintiffs and the Class to relief." *Id.* ¶ 172.

Relying on reasoning from the preliminary injunction order in *Kirwa v. U.S. Dep't of Def.*, No. 17-1793 (ESH), 2017 WL 4862763 (D.D.C. Oct. 25, 2017), on October 27, 2017, the Court entered a nationwide preliminary injunction order enjoining DoD from implementing Section III of DoD's N-426 policy. ECF No. 74. Thus, the Court preliminarily enjoined DoD from decertifying, rescinding, recalling, revoking, or otherwise invalidating Plaintiffs' or the class's existing and duly issued Form N-426s, except as related to the conduct of a class member and based on sufficient grounds generally applicable to members of the military for re-characterization of service. *Id.* Additionally, the Court certified the following class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1)(A), and 23(b)(2):

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

ECF Nos. 72, 73.

However, as previously articulated in Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, and pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss Plaintiffs' SAC in its entirety as it fails to state a cause of action for which this Court could grant relief under the Administrative Procedure Act, the Mandamus Act, and Article 1, Section 8 of the United States Constitution.[1]

II. STANDARD OF REVIEW

A. Standard For Dismissal For Failure To State A Claim

Dismissal under Rule 12(b)(6) is appropriate if a plaintiff fails to state a claim upon which the court can grant the requested relief. Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Although a complaint need not contain "detailed factual allegations" to survive, a plaintiff must furnish "more than labels and conclusions" – "a formulaic recitation of the

[1] Insofar as Plaintiffs' SAC challenges USCIS's requirement for enhanced background checks for MAVNI applicants, Defendants incorporate by reference the arguments articulated in Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 49), and Reply in Support of Defendants' Motion to Dismiss (ECF No. 57); *see also* ECF No. 75, TRO/Preliminary Injunction Tr. 69:4-69:14.

elements of a cause of action will not do." *Id.* at 555. There must be something more than "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). Rather, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56. While a court must assume all allegations in the complaint are true, this tenet does not apply to legal conclusions. *Iqbal*, 556 U.S. at 678.

III. ARGUMENT

A. Plaintiffs Fail To State A Claim Under 5 U.S.C. § 706(2) Because The October 13, 2017 Policy Is Lawful.[2]

1. Plaintiffs fail to state a claim under the APA because the decision whether to de-certify an N-426 is committed to agency discretion by law.

The only question at issue with regards to the DoD N-426 policy in this case is whether DoD can lawfully set standards for what constitutes honorable service and decertify those Forms N-426 previously certified prematurely. Plaintiffs assert that the DoD N-426 policy is unlawful and contrary to the plain and unambiguous terms of the governing statute and regulations because "nothing in the statute authorizes [the revocation, recall, or decertification of Forms N-426]." SAC ¶ 88. However, as the Government has previously set forth, the decision whether and when to de-certify a Form N-426 is committed to agency discretion by law. *See Kirwa*, 17-cv-01793, Opp'n to Pls.' Mot. for Prelim. Inj. ("Opp'n") at 20, ECF No. 20. The Court disagreed with this argument at the preliminary injunction stage in *Kirwa*, concluding that "the

[2] As discussed in Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Renewed Motion for a Preliminary Injunction (ECF No. 67), any challenge to the alleged "minimum period of service, service-capacity, physical presence, residency, and geographic-service" requirements, or to the background checks required by DoD to certify new N-426s going forward, are already before this Court in the *Kirwa* action. *See e.g.*, *Kirwa v. DoD*, Case 1:17-cv-01793-ESH, ECF No. 20; *see also id.* at ECF Nos. 22, 26. Accordingly, the Government incorporates by reference all filings in *Kirwa*, to rebut these claims.

nature of the administrative action involved, as well as 8 U.S.C. § 1440's statutory and regulatory regime, provide a meaningful standard for judging DOD's N-426 certification decisions." *See Kirwa v. U.S. Dep't of Def.*, No. 17-1793 (ESH), 2017 WL 4862763, *10 (D.D.C. Oct. 25, 2017). However, the Court remains free to modify its analysis in light of the more developed arguments set forth herein, should the Court deem such a modification appropriate. *See, e.g., Precision Links Inc. v. USA Prods. Grp., Inc.*, No. 3:08cv576, 2009 WL 4325221, at *1 (W.D.N.C. Nov. 24, 2009) (merits analysis at the preliminary injunction stage was "merely preliminary"); *Abbott Labs. v. Sandoz, Inc.*, 529 F. Supp. 2d 893, 902 (N.D. Ill. Dec. 4, 2007) (same); *see also Benisek v. Lamone*, No. JKB-13-3233, 2017 WL 3642928, at *3 (D. Md. Aug. 24, 2017) (explaining that "findings and conclusions" at the preliminary injunction stage "will not bind the Court in any future proceedings"), *appeal docketed*, No. 17-333 (Sept. 1, 2017). And Defendants respectfully adhere to their position and submit that a careful reading of § 1440(a) and relevant authorities shows that the N-426 certification decision is committed to agency discretion and is therefore not reviewable under the APA.[3]

Here, the plain meaning of § 1440 does not provide *any* standard, timeline, or deadline of how or when honorable service determinations are to be made, which inherently includes de-certifying honorable service certifications that were issued in error or prematurely. *See Bagheri*

[3] In determining whether action is committed by law to agency discretion, courts consider "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). "Agency action is committed to agency discretion by law when 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Therefore, review under the APA is unavailable when "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Heckler*, 470 U.S. at 830 (citation omitted). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

v. INS., No. 98-55177, 13322000 WL 335712, at *1 (9th Cir. 2000) (unpublished) (upholding the denial of naturalization application because the Navy retracted by letter the certification the plaintiff was earlier and erroneously given and stating that "[w]e do not decide whether the Navy's decision not to certify Bagheri is judicially reviewable") (citing *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998) ("The discretionary exception to judicial review applies if 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.")).[4]

The statutory text and context of § 1440's references to honorable service strongly indicate that Congress left it to DoD's discretion to construe the phrase. Nowhere in § 1440(a) or elsewhere in the Immigration and Nationality Act ("INA") did Congress set forth what it means to have "served honorably" in the Selected Reserve or on active duty. Nor does the legislative history offer any clues as to the meaning of the phrase. Section 1440 states that "the executive department under which such person [seeking naturalization] served shall *determine* whether persons have served honorably and whether separation from such service was under honorable conditions." (Emphasis added). Thus, pursuant to Section 1440's language, the underlying determination of whether a soldier had served honorably—and, by extension, the decision to de-certify honorable service certifications that were issued prematurely—is delegated to the Executive department under which the applicant served. *See Roberts v. Napolitano*, 792 F. Supp. 2d 67, 73–74 (D.D.C. 2011) (statute authorizing Global Entry program included general mandates but was "silent as to the criteria the Secretary of Homeland Security should apply in approving applications for entry into the . . . program," and such statutory silence "indicates that Congress committed to the [agency] the sole discretion to determine eligibility guidelines and

[4] *But see Cody v. Caterisano*, No. 09-cv-00687, at *1–4, 9–13 (D. Md. May 12, 2009) (unpublished).

evaluate applicants"); *cf. Wash. Hosp. Ctr. v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986) ("If a statute is silent or ambiguous, a court may assume that Congress implicitly delegated the interpretive function to the agency . . . ." (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984))).

The statute even permits DoD to make an honorable service determination at the time of the soldier's separation from the military. *See* 8 U.S.C. § 1440 (instructing DoD to determine whether a person has served honorably, "and whether separation from such service was under honorable conditions"). Thus, because Congress left the construction of the term to the agency charged with making honorable service determinations – and because Congress did not impose time restrictions for DoD to abide by in certifying or de-certifying honorable service, Section 1440 leaves the certification and de-certification process within the discretion of DoD.

Additionally, because characterization of military service is a highly fact-dependent determination, DoD inherently has discretion to establish the criteria it deems necessary for such honorable service. Section 1440 imposes on DoD the responsibility to make *meaningful assessments* to determine honorable service, and the statute does not preclude DoD from de-certifying a Form N-426 that was issued in prematurely, before DoD had sufficient information to make that assessment.

The conclusion that DoD's honorable service certifications are committed to agency discretion is further compelled by the legislative history of the statute. The Nationality Act of 1940, which authorized naturalization for persons serving in the Armed Forces, required proof of honorable service "by duly authenticated copies of records of the executive departments having custody of the records of such service." Pub. L. No. 76-853, § 324(e), 54 Stat. 1137, 1150. Yet the INA, enacted in 1952, changed the rules: now, noncitizen soldiers were required to submit a

certified statement from the executive department under which the soldiers served, affirming that their service was honorable (essentially the same rules that apply today). Pub. L. No. 82-414, §§ 328(b)(3), 329(b)(4), 66 Stat. 163, 249–50. This shift in the law reflects Congress's intent to give the Military Departments an active role in determining honorable service, and undercuts any notion that the role is ministerial. If Congress had viewed the honorable service determination as pro forma, as Plaintiffs have characterized it in this litigation, Congress could have simply retained the straightforward proof-of-service requirement from the 1940 Act. In short, Plaintiffs have read the term "honorably" out of the statute: DoD can of course certify whether a soldier has or has not enlisted, but that certification is meaningless if DoD lacks adequate information to affirm whether the soldier's service has been honorable.

Moreover, the judicial branch has recognized that "the merits of a service secretary's decision regarding military affairs are unquestionably beyond the competence of the judiciary to review." *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"). The justiciability of military personnel decisions "is limited by the fundamental and highly salutary principle that: '[J]udges are not given the task of running the Army.'" *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (quoting *Orloff*, 345 U.S. at 93-94). Thus, "courts will not normally review purely discretionary decisions by military officials which are within their valid jurisdiction."

Jones v. New York State Div. of Military & Naval Affairs, 166 F.3d 45, 52 (2d Cir. 1999) (quoting *Kurlan v. Callaway*, 510 F.2d 274, 280 (2d Cir. 1974)).[5]

The relief Plaintiffs seek – an injunction directing DoD not to de-certify their Forms N-426 – is precisely the sort of relief that is unavailable under the APA. The honorable service certifications at issue in this case concern the military's judgment about how best to oversee its personnel and evaluate a soldier's fitness, and they are "exactly the sort of military personnel decisions which are beyond the competence of the judiciary to review." *Orloff*, 345 U.S. at 94; *see also Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988) (security clearance adjudications committed to agency discretion by law); *Oryszak v. Sullivan*, 576 F. 3d 522 (D.C. Cir. 2009) (stating that the grant of a security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the executive branch.) Such decisions are especially sensitive in light of the results of DoD's internal reviews of the MAVNI program, which revealed the existence of counter-intelligence, security, and insider-threat concerns within the program, including recruits engaging in criminal activity before being accessed to active-duty status as well as other counter-intelligence and security concerns. *See* ECF No. 19-7, First Miller Decl, ¶¶ 15-17. Given the military's expertise in this

[5] Other military decisions courts have determined to be non-reviewable include the transfer of registry of maritime vessels, *see District No. 1, Pac. Coast Dist., Maritime Engineers' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) ("Were we to decide whether the [defendant's decision to transfer] is reasonable, we would necessarily be 'second guessing' not only the Executive's determinations regarding the military value of the eight vessels but also its judgments on questions of foreign policy and national interest." (citation omitted)); and the reassignment, downgrading, and termination of civil servants in reductions in force, *see Am. Fed'n of Gov't Empls., Local 1872 v. Stetson*, No. 77-2146, 1979 WL 1919, at *5 (D.D.C. July 24, 1979) (holding that such a decisions are "managerial, and committed to agency discretion"); *see also Dibble v. Fenimore*, 339 F.3d 120, 127-28 (2d Cir. 2003) (dismissing claim for equitable relief based on military personnel decisions as nonjusticiable).

area, DoD is uniquely situated to make the qualitative determination about which MAVNI recruits have served honorably and when such certifications should be made.

The Court's preliminary injunction order in *Kirwa* relied on *Cody v. Caterisano*, No. 09-MJG-00687 (D. Md. May 12, 2009), an unpublished district court opinion from Maryland that addressed the narrow question "whether, in the particular circumstances of [that] case," a particular Naval Academy student "can be, and should be, naturalized as a United States citizen." Slip op. at 8; *see also id.* ("The instant case presents a unique, unlikely to be repeated, set of circumstances."). But the circumstances in *Cody* are distinguishable. There, a Naval Academy official had certified the student's Form N-426, but USCIS took no further action on the student's naturalization petition. After litigation ensued, the Naval Academy issued a revised Form N-426 at the summary judgment stage, stating that the student had never accessed into the Navy or served on active duty and that the prior certification was a clerical error. The Navy thus purported to "rescind[] and nullif[y]" the prior form. *Id.* at 11. The district court was skeptical of this purported nullification, which it viewed as an attempt by the Navy to salvage its litigating position. The court concluded that it could either enforce the prior certification or find that the student had served honorably on active-duty status in light of awards and letters he had received as well as "certifications, other letters of support, and a legal opinion documenting his active-duty status." *Id.* at 13. Most relevant here, *Cody* does not address whether honorable service determinations are committed to agency discretion by law. In short, that case offers little guidance on the questions pending before the Court in this case.[6]

[6] The Fourth Circuit's review of the district court's subsequent order denying the student's request for attorneys' fees is even less illuminating, as the court included no discussion as to the meaning of honorable service other than to note in passing that by "all accounts, Petitioner was a model midshipman who served honorably and received many awards," *Cody v. Caterisano*, 631 F.3d 136, 138-39 (4th Cir. 2011).

Finally, the statement in Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, does not constitute an admission that DoD's characterization of a soldier's service is solely a "ministerial" task devoid of any need for judgment. *See* ECF No. 19 at 36. at 32-37 ("[T]he fact that DoD serves a ministerial role in determining if an individual is serving honorably does not prevent USCIS from using its own judgement to determine that it needs specific, additional information."). The Court suggested that "DOD is arguably judicially estopped from changing its position based on a change in litigation interests." *Kirwa*, 2017 WL 4862763, at *12 n.18. However, judicial estoppel should not apply here because undersigned counsel's passing reference to a "ministerial role" was not an essential feature of the Defendants' arguments, nor did the Court even address this point in denying Plaintiffs' motion for a preliminary injunction, *see Nio v. U.S. Dep't of Homeland Sec.*, No. 17-998 (ESH), 2017 WL 3917006 (D.D.C. Sept. 6, 2017); *see also New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) ("[C]ourts regularly inquire whether the party [to be estopped] has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.' Absent success in a prior proceeding, a party's later inconsistent position introduces 'no risk of inconsistent court determinations,' and thus poses little threat to judicial integrity." (citations omitted)); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) (characterizing judicial estoppel as an "extraordinary" remedy); *cf. United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, No. 95-1231 (RCL), 2007 WL 851871, at *1 (D.D.C. Mar. 14, 2007) ("[T]he doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles . . . he makes no judicial admission and sets up no estoppel which

would prevent the court from applying . . . the proper legal principles . . . .” (quoting *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963))). This statement came in the context of discussing DHS’s decision to wait until the completion of background checks before adjudicating a naturalization application; it should not be read to undermine DoD’s exclusive role in determining honorable service or the importance of this vital function. On the contrary, Defendants made clear that “USCIS should *defer* to DoD to determine when an individual is serving honorably in the armed services, and the N-426 serves just that purpose.” ECF No. 19 at 36, No. 17-998 (ESH) (D.D.C.) (emphasis added). Undersigned counsel’s point simply was that USCIS has an independent responsibility to exercise its “own judgment to determine that it needs . . . specific, additional information from DoD in certain circumstances.” *Id.* That argument, and the argument DoD presents here (*i.e.*, that DoD’s honorable service determinations are committed to the agency’s discretion by law) are not in tension with one another. Thus, the Court should not be read the statement to constitute any sort of admission with regards to the discretionary nature of an honorable service determination. DoD retains the discretion to determine the criteria for making honorable service certifications and control over the timing of the process, but that once such a determination has been made, DoD has an obligation to share its determination with DHS by completing the relevant section of a N-426 form.

Finally, citing to an Army publication, titled “The Soldier’s Guide to Citizenship Application,” which states that as a “general rule, a Soldier is considered to be serving honorably unless a decision has been made . . . to discharge him/her under less than honorable conditions, ” the Court’s preliminary injunction decision in *Kirwa* that Army’s past practice had been to sign off on Forms N-426 after a MAVNI recruit attended at least one drill does not preclude a finding that § 1440 is discretionary. *Kirwa*, 2017 WL 4862763, at *11. Indeed, even that Army

publication shows that N-426 certification has never been strictly ministerial. The publication acknowledges "rare cases" in which the character of a soldier's service is questionable and provides that the "sole criterion for the decision" is whether, if discharged today, the soldier would be discharged under other than honorable conditions. That decision inherently requires an exercise of judgment on the part of the certifying official. Moreover, the Army's regulations recognize that a discharge under other than honorable conditions may be appropriate not only for "misconduct" but also for "fraudulent entry" or "security reasons." AR 635-200, § 3-7(c) (2016). DoD's N-426 policy was designed in part to ensure uniform execution of honorable service determinations across each of the Military Departments. The Army's past practice does not deprive DoD of its discretion going forward. The N-426 policy sets forth reasonable procedures for making that discretionary determination and permits DoD to rescind such certification upon determining that the N-426 had been issued in error or prematurely. Those procedures are not subject to judicial review under the APA. Accordingly, the Court should dismiss the SAC for failure to state a claim.

2. The N-426 policy is not contrary to law or in excess of DoD's statutory authority.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). DoD's policy of requiring MAVNI soldiers who enlisted prior to October 13, 2017, to have completed background investigations and security screening in order to be eligible for honorable service certification is a more-than-reasonable construction of the agency's authority under § 1440. Section 1440 imposes no obligation to certify a non-citizen's service as honorable within a specific time period, and neither the statute nor the legislative history contain any criteria about what it means to serve "honorably." The

statute makes two references to DoD's role in the naturalization process; in both places, Congress explicitly referred only to certifications for active-duty status. *See* 8 U.S.C. § 1440(a) ("The executive department under which such person served shall determine whether persons have served honorably in an active-duty status . . . ."); § 1440(b)(3) ("[S]ervice in the military, air or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status . . . ."). "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion," *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), and here, Congress left both the timing of and criteria used for honorable service certifications within the absolute discretion of DoD, electing not to provide DoD either criteria by which service should be judged as "honorable" or a deadline for making certifications. DoD's requirement that MAVNI soldiers have completed background checks and security screening in order to receive honorable service certification is accordingly consistent with the express language of § 1440.

Plaintiffs note that DHS issued a regulation and other policy documents mirroring the "Selected Reserve of the Ready Reserve or in an active duty status" language from the first sentence of § 1440(a), *see* SAC ¶¶ 43-47, but these materials do not render DoD's policy contrary to statutory law. DHS's regulation implementing § 1440(a), for instance, is, by its own terms, limited to the criteria for the naturalization eligibility of alien and non-citizen soldiers. *See* 8 C.F.R. § 329.2 (listing the criteria for a soldier "[t]o be eligible for naturalization under [8 U.S.C. § 1440(a)]," including that the applicant has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status). The regulation does not purport to define for DoD what constitutes "honorable" service, nor does it state that a soldier

must receive honorable service certification by a certain point in time. Rather, the regulation merely states that, for purposes of DHS's adjudication of naturalization applications, certification of honorable service in either the Selected Reserve or in active-duty status is sufficient. DoD still retains the discretion to determine what constitutes "honorable" service and when such a determination should be made.

In any event, even if there were a direct conflict between DHS's regulation or other policy documents and DoD's current policy, that conflict would not be dispositive of Plaintiffs' § 706(2) claim here. *See Am. Bar Ass'n v. FTC*, 671 F. Supp. 2d 64, 81 (D.D.C. 2009) ("[I]n the end, as instructive as it might be, one agency's interpretation of a congressional statute is not controlling on another agency's interpretation of that same statute." (citation omitted)), *vacated and remanded on other grounds*, 636 F.3d 641 (D.C. Cir. 2011); *see also Old Colony R. Co. v. Comm'r*, 284 U.S. 552, 562 (1932) (holding that the rules of accounting enforced by the now-defunct Interstate Commerce Commission are not binding upon the IRS). Plaintiffs' reliance on any purported discord between DoD's policy and that of DHS as a basis for their § 706(2) claim is accordingly misplaced. It is DoD that the statute charges with determining whether a soldier has served honorably.

3. Section III of the N-426 policy is not arbitrary and capricious.

A decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This is a "narrow" standard of review as courts defer to the agency's expertise. *Id*

The reviewing court "is not to substitute its judgment for that of the agency," *id.*, and "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974). A decision that is not fully explained may be upheld "if the agency's path may reasonably be discerned." *Id.* at 286; s*ee also Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (a court must "defer to the wisdom of the agency, provided its decision is reasoned and rational"); *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 387, 400 (D.D.C. 2015). Reversal, therefore, is appropriate only where "a reasonable factfinder would have to" reach a contrary conclusion. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

In *Kirwa* the Court found that "DoD offered no reasoned explanation" for the N-426 policy change. *See Kirwa*, 2017 WL 4862763, at *12. However, as discussed *supra*, DoD has articulated that reviews of the MAVNI program revealed weaknesses in the military accessions vetting process, and the existence of counter-intelligence, security, and insider-threat concerns within the program, including recruits engaging in criminal activity before entering onto active-duty status as well as other counter-intelligence and security concerns. *See* ECF No. 19-7, First Miller Decl, ¶¶ 15-17. In Ms. Miller's first declaration, DoD specifically stated:

> On or around April of 2017, senior leaders from DoD's USD (P&R) informed USCIS that it was concerned about the naturalization of individuals whose Office of Personnel Management (OPM) background investigation and DoD counterintelligence security reviews has not yet been completed. DoD and USCIS jointly determined that it was in the best interest of the United States to ensure the naturalization decision of USCIS was informed by the outcome of the completed OPM background and the DoD counterintelligence security review. Know that this review relied upon OPM and specific counterintelligence expertise within DoD, and that failure to these background checks could lead to discharge from the military and make an individual unable to meet the honorable service requirement that the N-426 certifies, a strategic pause was prudent with respect to the MAVNI pilot program. . . . For a variety of reasons, some which remain

> classified, DoD is undertaking a review of the entire MAVNI pilot program, its procedures, and the standards for certifying approximately 400 existing N-426s.

Id. at ¶¶ 18, 20. Further, Ms. Miller's declaration notes that while DoD was considering how to proceed with regard N-426s, it did not want to continue issuing N-426s erroneously due to the national security concerns. *See id.* ¶¶ 18-19. Additionally, the N-426 policy states that DoD's goal was to make an "informed determination as to whether the member served honorably, as set forth below." ECF No. 58-1 at 2. Thus, DoD "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). In articulating the reason for its action, the agency "provided a rational connection between the facts found and the choice made." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 90 (D.C. Cir. 2010). And DoD has intended that an honorable service determination be based upon a military suitability determination. *See* U.S. Army Reserve, Enlisted Military Accessions Vital to the National Interest (MAVNI) Information Paper 3–4 (2014) (ECF No. 20–4) ("DO NOT MAIL YOUR CITIZENSHIP PACKET BEFORE YOU SHIP TO BCT. . . .). Thus, the N-426 policy is not arbitrary and capricious. *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983) (noting that the 706(2) standard of review is highly deferential to the agency; "a court need not find that the agency's decision is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings") (internal citation and quotations omitted).

4. The N-426 policy is not impermissibly retroactive.

Although Plaintiffs do not bring a retroactivity challenge to DoD's N-426 policy in the SAC, in granting Plaintiffs' preliminary injunction request, the Court relied on its decision in

Kirwa to conclude that DoD's N-426 policy is impermissibly retroactive. *See* No. ECF No. 74 (citing *Kirwa*, 2017 WL 4862763, at *13-14). In its holding, the Court "admittedly" relied on the "principles" applicable in the "jurisprudence relevant to retroactivity in the context of administrative law [which] involves either rulemaking by notice and comment or adjudications." *Id.* at *14. To determine whether a rule is impermissibly retroactive, courts "first see whether it effects a substantive change from the agency's prior regulation or practice." *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C. Cir. 2011). If it does, the court "then examines its impact, if any, on the legal consequences of prior conduct" to determine whether it operates retroactively. *Id.*; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("[i]n the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.")

Plaintiffs fail to explain how the N-426 policy takes away or impairs "vested rights" acquired under existing law. *Maxcell Telecom Plus, Inc. v. F.C.C.*, 815 F.2d 1551, 1554–55 (D.C. Cir. 1987) (noting that plaintiffs had "not suffered any significant injury from the retroactive effect of the [new] lottery procedure" because they had neither suffered the deprivation of a right nor the imposition of new and unexpected liabilities or obligations"). As the Supreme Court explained in *Landgraf v. USI Film Products*, a rule is not retroactive simply because it "upsets expectations based on prior law":

> Even uncontroversially prospective [rules] may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards.

511 U.S. 244, 269–70 n. 24 (1994); *Regents of the University of California v. Burwell*, 155 F. Supp. 3d 31, 36, 45 (D.D.C. 2016), (denying an impermissibly retroactive challenge to HHS's application of a 2005 rule and noting that "plaintiffs did not have any vested right to receive reimbursement for costs under rule," and the new rule only "upset plaintiffs' expectations").

Here, Plaintiffs did not have any vested, clear right to receive a Form N-426 "based on a simple service record check and begin the naturalization process." ECF No. 63 at 13. Although DoD changed the practice of when it will issue a Form N-426 and what information is required to reach a determination as to whether a service member is serving "honorably," it did not change Plaintiffs' ultimate right to apply for United States citizenship under § 1440. Thus, DoD's N-426 policy does not attach "new legal consequences" as Plaintiffs posit. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Plaintiffs remain eligible to receive Forms N-426 once they complete DoD's security and suitability requirements. Additionally, Plaintiffs present no evidence whatsoever that the DoD had a *settled* policy – therefore creating a vested right – to issue Forms N-426 "based on a simple records check," as there were previously no set standards by which military departments certified Forms N-426. *Ne. Hosp. Corp.*, 657 F.3d at 14 ("nothing in the law promised the permanent ossification of wage-index-calculation methods or bound the Secretary to continue to utilize a certain methodology for evaluating historical data when calculating future wage indices."). The fact that some components and officials within DoD applied a different, non-formal process to N-426 certifications at certain points in time does not bind the entire military to that same process in the future. *See, e.g.*, *Chan v. Reno*, 113 F.3d 1068, 1073 (9th Cir. 1997) (holding that informal adjudications such as unpublished decisions without the force of precedent do not have a binding effect on subsequent agency actions); *see also Kirwa*, 2017 WL 4862763, at *14 ("Admittedly, the jurisprudence relevant to retroactivity

in the context of administrative law involves either rulemaking by notice and comment or adjudications . . . ."); *cf. Nat'l Petrochemical*, 630 F.3d at 158 (articulating standard for "whether a *statute* or *regulation* has retroactive effect"). Thus, the DoD N-426 policy does not infringe on Plaintiffs' right to apply for naturalization.

Moreover, retroactive enforcement of a rule is improper only if "the ill effect of the retroactive application" of the rule outweighs the "mischief" of frustrating the interests the rule promotes. *Maxcell Telecom Plus, Inc.*, 815 F.2d at 1554–55 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Here, Plaintiffs cannot plausibly claim that they did not have fair notice that DoD could alter the terms of their existing contracts, including when it would issue Form N-426s. Plaintiffs have always been on notice that their status in the military and any attendant benefits are dependent upon the governing law at the time decisions concerning those aspects of their service are made. In fact, Plaintiffs' enlistment contracts clearly state:

> Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document.

See ECF No. 23-2 at 3, Partial Statement of Existing United States Law. In *Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002), the D.C. Circuit held that the Department of Interior could modify its lease contracts with petroleum producers because the contracts "recognize Interior's authority to modify them." The court cited the following language from the contracts to support its position: "Rights granted are subject . . . to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provisions of this lease." *Id; see also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (denying a retroactivity challenge to a new Federal Communications Commission (FCC) rule and noting that the "Commission always retained the

power to alter the term of existing licenses by rulemaking.").

Plaintiffs (and the Court in its prior decision) seem to suggest that the N-426 policy is invalid because it breaks a promise made to Plaintiffs at the time of their enlistment. *See Kirwa*, 2017 WL 4862763, at *13 (basing retroactivity analysis on observation that "[w]hen they enlisted, the government told them that they would receive N-426s either after just one day of qualifying service . . . or within around 180 days when they shipped to basic training"); *id*. at *14 ("The Court is . . . convinced that DOD's application of the October 13th Guidance could result in serious inequities that are not counterbalanced by any significant statutory interests."). But that concern is dependent upon an estoppel-based rationale, which applies to the Government narrowly, if at all. *See, e.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419, 422 (1990) ("From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants" and further noting that the Court has "reversed every finding of estoppel that [it] ha[s] reviewed"); *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (requiring, among other things, "a definite representation to the party claiming estoppel" and "affirmative misconduct" by the Government). Although Plaintiffs received N-426 certifications, the revocation of these certifications that were issued prematurely, at most "upsets expectations" premised on the prior practice of some DoD components. *See Nat'l Petrochemical*, 630 F.3d at 159 (citation omitted). As such, the N-426 policy constitutes a legally permissible effort by DoD to set criteria for honorable service certifications in the future and does not violate retroactivity principles.

B. Defendants Have Committed No Constitutional Violation.

Plaintiffs' allegation of a constitutional violation under the naturalization clause also fails to state a claim and the Court should dismiss it under Rule 12(b)(6). Plaintiffs argue that because

Congress did not specify that persons seeking naturalization under 8 U.S.C. § 1440 must complete enhanced background checks, the Defendants have committed a constitutional violation under the "Uniform Rule of Naturalization" clause.[7] SAC, ¶¶ 180-184. Plaintiffs lack standing to assert a violation of this clause. Moreover, the argument is illogical and incorrect.

Article I, Section 8 of the Constitution establishes that "Congress shall have power . . . To establish a uniform Rule of Naturalization." This Constitutional mandate empowers Congress to define "the processes through which citizenship is acquired or lost," to determine "the criteria by which citizenship is judged," and to fix "the consequences citizenship or noncitizenship entail." *Davis v. District Director, INS*, 481 F. Supp. 1178, 1183–84 n. 8 (D.D.C. 1979) (citation omitted). Alexander Hamilton explained that the word "uniform" in the Naturalization Clause confers upon Congress the "exclusive jurisdiction" to regulate within that area, "because if each State had power to prescribe a distinct rule, there could not be a uniform rule." The Federalist No. 32, at 199 (Hamilton) (Clinton Rossiter ed., 1961).

Acting upon this exclusive power sooner rather than later, Congress passed the first "uniform Rule of Naturalization" in March 1790. *See* Naturalization Act of 1790, 1 Stat. 103, Mar. 26, 1790. In 1795, Congress claimed exclusive authority over naturalization by establishing new conditions—"and not otherwise"—for aliens "to become a citizen of the United States, or any of them." *See* Naturalization Act of 1795, 1 Stat. 414, Jan. 29, 1795. This claim

[7] The Second Amended Complaint has a single passing reference to the Due Process Clause. SAC ¶ 183. To the extent that Plaintiffs intend to bring a Due Process challenge as a separate claim from their Uniform Rule of Naturalization clause claim, it is necessarily subsumed in their APA § 706(2) claim. SAC ¶¶ 172-173. Moreover, while Plaintiffs allege that they "cannot be lawfully denied immigration benefits – namely naturalization – for which they are eligible and seeking," SAC ¶ 183, Plaintiffs cannot claim a protected property or liberty interest now or the mere possibility that they will be naturalized. Subsection (b) of that statute provides that noncitizen soldiers who qualify for expedited naturalization under subsection (a) must still comply "in all other respects" with most requirements enumerated in subchapter III of the INA.

was confirmed by the Supreme Court in *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817), where Chief Justice Marshall explained that "the power of naturalization is exclusively in congress," notwithstanding any state laws to the contrary. *See also Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers[.]" (internal citation omitted)); *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("The power, granted to Congress by the Constitution, to establish an uniform rule of naturalization, was long ago adjudged by this court to be vested exclusively in Congress." (internal quotation marks omitted)).

Because Article I, Section 8, Clause 4 is an affirmative grant of authority to Congress, and does not confer any rights on private individuals, there is no private right of action under it. *Flores v. City of Baldwin Park*, No. 14-cv-9290, 2015 WL 756877, *3 (C.D. Cal. Feb. 23, 2015); *see Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). "The uniformity requirement was a response to tensions that arose from the intersection of the Articles of Confederations Comity Clause and the states' divergent naturalization laws, which allowed an alien ineligible for citizenship in one state to move to another state, obtain citizenship, and return to the original state as a citizen entitled to all of its privileges and immunities." *Korab v. Fink*, 797 F.3d 572, 580-81 (9th Cir. 2015) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 (1824)). Therefore, Plaintiffs lack standing to raise a claim under Article I, Section 8, Clause 4.

Even assuming there is such a right, no violation has occurred. Congress has enacted a statutory framework that carefully delineates when and how an alien may naturalize as a member of the military:

> Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States . . . during any . . . period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force . . . may be naturalized as provided in this section.

8 U.S.C. § 1440(a). Congress has expressly delegated to the Secretary of Homeland Security the broad authority to administer all provisions of the INA with the force of law, and establish regulations of this purpose. 8 U.S.C. § 1103; *see also U.S. ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). This delegation includes in the Secretary's discretion, requiring MAVNI recruits who are applying for naturalization under Section 1440 to complete DoD background checks because USCIS has determined that these background checks are pertinent to its investigation of the applicant's eligibility for naturalization. As argued in Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, USCIS has determined that DOD background checks may be a valuable source of information that directly relates to eligibility for naturalization, and has discretion to require the results of such checks before MAVNI recruits may be naturalize. (ECF No. 49, at 16-18); *see also* Memorandum Opinion, ECF No. 44 at 20-21 (citing *Entergy Corp. v. Riverkeeper, Inc*., 556 U.S. 208, 218 (2009) (noting that agency action is permissible if it represents a "reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts"); and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513, 517–18 (1994) (upholding application of a broad regulation because it did not conflict with the

regulation's plain language)). Thus, in requiring these background checks, USCIS is complying with the uniform rule of naturalization that Congress has set out. *See* 8 U.S.C. § 1446(a); *De Canas v. Bica*, 424 U.S. 351, 354–55 (1976) (the "power to regulate immigration is unquestionably exclusively a federal power."); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (Substantial precedent has established that Congress has plenary power to govern immigration issues). Therefore, in waiting for the results of these enhanced background checks, USCIS has not committed any constitutional violation.

Plaintiffs' request that this Court grant appropriate equitable relief on their constitutional theory, therefore, must fail. As the Supreme Court held in *I.N.S. v. Pangilinan*, 486 U.S. 875, 882 (1988), Article I of the Constitution grants Congress the power "[t]o establish an uniform Rule of Naturalization," and Congress used that authority to prescribe conditions under which an individual could become naturalized. The INA states that "[a] person may be naturalized . . . in the manner and under the conditions prescribed in [the INA], and not otherwise." *Id*. at 883–84 (quoting 8 U.S.C. § 1421(d)). Until a MAVNI applicant has completed the enhanced background investigation, the applicant's good moral character cannot be assessed, which is a statutory requirement to naturalize. Courts do not have equitable authority to ignore those requirements, and Congress has not otherwise given the courts equitable power to confer citizenship even if the statutory requirements are not met. *Id*. Because Plaintiffs fail to state a claim under the Naturalization Clause of the United States Constitution the Court should dismiss this claim.

IV. CONCLUSION

Based on the arguments herein and those submitted in Defendants' prior motion to dismiss and reply in support of Defendants' motion to dismiss, the Court should dismiss

Plaintiffs' Complaint in its entirety under Federal Rule 12(b)(6) for failure to state a claim upon which this Court can grant relief.

Dated: November 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE
Civil Action No. 1:17-00998-ESH

I HEREBY CERTIFY that on this **17th day of November, 2017**, a true copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing via e-mail to the following:

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