UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO
21 Franklin St., Apt. 15
Somerville, MA 02145,

TOUNDE DJOHI
3717 Cordell Avenue
Woodbridge, VA 22193,

WANJING LI
5855 Washington Blvd. #2C
St. Louis, MO 63112,

ZEYUAN LI
60 Ashcrest
Irvine, CA 92620,

FANG LU
2010 Aquamarine Terrace
Silver Spring, MD 20904,

HEMBASHIMA SAMBE
9707 Braeburn Glen Blvd., #65
Houston, TX 77074,

JINGQUAN QU
7141 Loubet
Forest Hills, NY 11375,

EMEKA UDEIGWE
13855 Superior Road, Apt. 2410
Cleveland, OH 44118,

on behalf of themselves and those similarly situated,

PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF THE ARMY and **MARK ESPER,** in his official capacity as Secretary, U.S. Department of the Army,

DEFENDANTS.

Civil Case No. 1:18-cv-01551-ESH

AMENDED COMPLAINT AND PRAYER FOR DECLARATORY, PRELIMINARY AND PERMANENT INJUNCTIVE, ADMINISTRATIVE PROCEDURE ACT, AND CONSTITUTIONAL RELIEF

AMENDED COMPLAINT

1. The United States Army has continued to mistreat non-U.S. citizen soldiers who enlisted and served in the U.S. Army through the Military Accessions Vital to the National Interest ("MAVNI") program. These soldiers enlisted in the Army only after satisfying the strict enlistment criteria for MAVNIs, including establishing that they possessed the requisite health care or language skills deemed essential to U.S. military readiness and scoring higher on the Armed Services Vocational Aptitude Battery exam than the requirement for U.S. citizen military enlistees, in addition to passing the background and suitability requirements that all military enlistees must undergo. And, in order to qualify as a MAVNI, each soldier had to be lawfully present in the United States and already passed the immigration-related screening necessary to attain such lawful status.

2. Beginning in late 2016, the Department of Defense ("DoD") closed the MAVNI program to new enlistees and began subjecting already enlisted and serving MAVNIs to additional, enhanced background investigations (the equivalent of Top Secret security clearance checks plus Counter Intelligence reviews) and subsequent so-called military service suitability determinations ("MSSDs"). And, in coordination with the Department of Homeland Security ("DHS"), MAVNI naturalizations were delayed pending the completion of those background investigations and MSSDs. These actions are the subject of two related class action lawsuits pending in the United States District Court for the District of Columbia: *Nio v. DHS* and *Kirwa v. DoD.*

3. This complaint arises from the additional unlawful conduct toward MAVNIs. In particular, Plaintiffs, and a similarly-situated group of MAVNI soldiers, are the victims of summary discharge decisions rendered by the Army. These discharges were accomplished in

blatant violation of military regulations specifically designed to afford soldiers due process with respect to discharge decisions and in violation of the soldiers' constitutional due process and equal protection rights. Based on available information, Plaintiffs believe that many of the discharge decisions are related to the enhanced military background investigations and MSSDs. Indeed, some discharge orders reference "MAVNI – Personnel Security." In other words, Plaintiffs suspect that the discharge decisions are being made not because of any misconduct by Plaintiffs, but rather because the Army either did not want to expend the resources necessary to complete the background investigations or they could not do so.

4. But regardless of any such "Personnel Security" references on some discharge orders, there are two common themes to these final discharge decisions: (a) in summarily discharging these soldiers, the Army did not comply with any of notice and process pre-conditions to discharge that are mandated by military regulations and the law; and (2) the Army did not characterize the discharges as "honorable" or "general – under honorable conditions," but rather is specifying the discharge "type" as "uncharacterized" or "entry level." These actions have a profound and negative impact on Plaintiffs in terms of, among other things, their reputations, future military service and benefits, and their naturalization.

5. Prior to the discharges, Plaintiffs received no notice of any intent to discharge them, let alone the grounds for the discharge or any opportunity to respond or challenge such grounds before the discharge decision was made. Even after Plaintiffs learned of the final discharge decisions, the Army still has not explained the discharge grounds. These summary discharges therefore failed in virtually every respect to follow the mandatory notice and process procedures established by military regulations, not to mention the disregard for fundamental fairness to these soldiers whose lives and military careers are upended by virtue of the Army's

conduct. It is somewhat ironic, therefore, that some of the discharge orders cite to an Army Regulation as "authority" for the discharges, while the Army ignored the provisions of that very regulation that prohibit the discharge actions that are complained of herein.

6. To make matters worse, the circumstances surrounding these summary discharges reflect Army chaos, disarray, and disorder. Not only did the Army fail to properly advise Plaintiffs of the proposed discharges, but whoever made these decisions failed in many instances to alert the military units where these soldiers are assigned, other DoD entities, and even their court representatives in litigation involving some of these same Plaintiffs. For instance:

- Although the Army issued discharge orders for two of the named plaintiffs in this amended complaint on July 5, 2018, with effective dates on July 5 and August 1, 2018, the Army has represented to the Court in the related *Nio* action (where these soldiers also are named plaintiffs), as recently as August 1, 2018, that these soldiers have not been separated from the Army;
- Some soldiers have received discharge orders purporting to have an effective date prior to the order itself;
- In some cases, military units to which soldiers are attached were not informed of the discharge decision until months *after* the purported discharge occurred;
- In some instances, military officials have informed soldiers that the discharges were mistaken, or did not happen at all;
- The Army ordered several soldiers to attend military background investigation interviews *after* their purported discharges;

- The Army ordered soldiers to continue drilling with their units *after* their supposed discharge;
- The military has demanded that soldiers refund money to the Army for the service pay they received after the purported discharge, even though the soldiers earned the pay through service and neither the soldiers nor their units were aware of the discharges.

7. The orderly and mandatory discharge process called for by military regulations, if followed, likely would have prevented or, at a minimum, reduced these situations.

8. These final discharge decisions have continued even following the commencement of this action wherein Plaintiff Lucas Calixto demonstrated that Defendants violated the law by summarily discharging him. PV2 Calixto, who received discharge orders even though he received multiple honorable service certifications and even though he recently had been promoted, received no explanation for his discharge. Not even his Army unit had any explanation. Only following suit, and more than two weeks after PV2 Calixto's filing of a preliminary injunction motion to have his discharge order revoked, did Defendants capitulate, issue an order revoking the discharge, and represent that he would be reinstated in the Army.

9. Even though Defendants were fully aware through this lawsuit and their own actions that many other MAVNI soldiers had been discharged in a similar fashion in violation of the law, the Army has failed to revoke such discharges, proceeded with pending discharges, and initiated new unlawful discharges.

10. The additional named Plaintiffs herein allege that they, too, are victims of Defendants' unlawful discharge conduct. None of these Plaintiffs has been the subject of any disciplinary action or proceeding by the military. Yet, without any notice or opportunity to

respond, each of these Plaintiffs purportedly has been discharged from the Army. And each Plaintiff has suffered and will continue to suffer substantial harm – including to his/her military career, civilian career, naturalization and immigration status, and/or reputation – unless and until the discharge is revoked and they are reinstated.

11. Apart from the offensive and disrespectful nature of Defendants' actions – by which they treat this class of U.S. Army soldiers as nuisances rather than the patriotic military servicemen and women that they are – Defendants' conduct violates Army regulations, DoD regulations, and the fundamental requirements of due process and equal protection afforded by the Constitution. Indeed, no one should be surprised that in an organization such as the Army, where regulations play a vital role in administration and in protecting soldiers from abusive action, detailed procedures and regulations dictate (a) the conditions and findings that might justify initiation of discharge or separation and (b) the process that must be afforded to soldiers before any such action is taken. What is both surprising and disappointing is that Defendants would ignore those regulations with respect to MAVNIs and, even when the violations are exposed, continue to do so.

12. Accordingly, Plaintiffs bring this civil action on behalf of themselves and on behalf of a class of all similarly-situated individuals to obtain the relief sought herein, including a declaratory judgment that Defendants' actions are unlawful, an order directing Defendants to set aside and revoke the purported discharges/separations, and an injunction to bar Defendants from continuing or reinitiating discharge actions against these soldiers except in accordance with applicable regulations and the law.

JURISDICTION

13. This action arises under the laws of the United States and the U.S. Constitution. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*.

VENUE

14. Venue is proper in the Court under 28 U.S.C. § 1391(e) because the individual Defendant is an officer of the United States acting in his official capacity in this district, and venue is proper because the United States Department of the Army is present in this district.

PARTIES

15. Plaintiff Lucas Calixto resides in Somerville, Massachusetts. PV2 Calixto currently is serving in the U.S. Army with the U.S. Army Reserve's 743rd Transportation Company in Roslindale, Massachusetts.

16. Plaintiff Tounde Djohi resides in Woodbridge, Virginia. SPC Djohi was serving in the U.S. Army with the U.S. Army Reserve's 130th Chemical Company in Fort A.P. Hill, Virginia.

17. Plaintiff Zeyuan Li's residence is in Irvine, California. PFC Li was serving in the U.S. Army with the U.S. Army Reserve's 327th Quartermaster Battalion in Williamsport, Pennsylvania.

18. Plaintiff Wanjing Li resides in St. Louis, Missouri. SPC Li was serving in the U.S. Army with the U.S. Army Reserve's 325th Combat Support Hospital in St. Charles, Missouri.

19. Plaintiff Fang Lu resides in Silver Spring, Maryland. SPC Lu was serving in the U.S. Army with the U.S. Army Reserve's 398th Combat Sustainment Support Battalion in Rockville, Maryland.

20. Plaintiff Jingquan Qu resides in Forest Hills, New York. SPC Qu was serving in the U.S. Army with the U.S. Army Reserve's 716th Quartermaster Company in Jersey City, New Jersey.

21. Plaintiff Emeka Udeigwe resides in Cleveland, Ohio. SPC Udeigwe was serving in the U.S. Army with the U.S. Army Reserve's 463rd Engineering Battalion in Wheeling, West Virginia.

22. Plaintiff Hembashima Sambe resides in Houston, Texas. SPC Sambe was serving in the U.S. Army with the U.S. Army Reserve's 17th Psychological Operations Battalion in Austin, Texas (and also was drilling with a unit in the Houston area).

23. Defendant United States Department of the Army (the "Army") is responsible for the overall administration of policy for the U.S. Army and Army Reserve.

24. Defendant Mark Esper is Secretary of the Army. Mr. Esper is responsible for the overall administration of Department of the Army and Army Reserve. Plaintiffs sue Mr. Esper solely in his official capacity.

25. Defendants Army and Esper collectively are referred to as "Defendants."

MAVNI Program Changes

26. The MAVNI program is a DoD recruiting program, under which certain non-U.S. citizens with critical language and/or medical skills that DoD has identified as "vital to the national interest" can enlist and serve in the United States Armed Forces. The DoD encouraged

soldiers to enlist in the MAVNI program by touting the opportunity as providing an "expedited" path to citizenship.

27. Since the program's inception in 2008, more than 10,400 soldiers have enlisted in the armed services through the MAVNI program.

28. On September 30, 2016, DoD began to insist on additional so-called security checks for the MAVNI program, requiring that MAVNI soldiers undergo extensive background checks – including completion of a Tier 5 (or "Top Secret") background investigation and completion of a Counter Intelligence review (including interview) – and a second supposed "military service suitability determination," which entails what has proven to be lengthy adjudications by the DoD organization that makes Top Secret clearance determinations and the Army intelligence group called "G-1."

29. However, DoD did not insist on these additional checks and adjudications for any future MAVNI enlistees, as the MAVNI program was suspended at the same time and there have been no new enlistees since mid-2016. Rather, DoD insisted on those checks for already-enlisted and serving MAVNI soldiers.

30. No later than May 2017, DoD and the Army realized that they did not have the resources to complete the mandated checks. So, instead of completing the checks on the enlisted and serving MAVNI soldiers, DoD and the Army made plans to discharge or separate nearly all of them, and particularly those who had not yet been naturalized. But, when that plan was publicly revealed, DoD and the Army were forced to take a different tack.

31. However, DoD and the Army still lacked the necessary resources to complete the background checks and adjudications. And, facing litigation in the related *Nio v. DHS* action, DoD committed that each class member in that case would have his/her so-called MSSD

completed in advance of his/her three-year enlistment anniversary, a date that now has passed for some of the MAVNI soldiers and that is fast-approaching for many others.

32. Now, MAVNI soldiers are being told that they have been or will be separated or discharged from the military because they are not "suitable" for service, have "refused to enlist," are "personnel security" failures, and the like. Not only are those statements vague and without the provision of due process called for by Army regulations, DoD regulations, and the Constitution, they are not true. These soldiers *already* have enlisted and the Army *already* found them suitable for service, ***two years or more ago***. And, although the Army and DoD have not provided soldiers with the requisite processes – either during the background checks and adjudications or during the discharge decision-making – some MAVNI soldiers have received, through FOIA and similar requests, the purported reasons why they supposedly are security "failures." And, in large part, those reasons reflect Army ineptitude, rather than any derogatory finding with respect to the soldier. In some instances, DoD and Army simply chose to "complete" the adjudications without having all of the background check information in front of them. Thus, an "Incomplete Data/Records Check" is not a MAVNI soldier shortcoming, but rather an Army failure to dedicate the resources necessary to gather the information.

33. Further, the fact that the Army and DoD are not providing MAVNI soldiers with the ability to challenge the "security clearance" decision, much less the discharge decision, is a double denial of due process. Even when purportedly discharged/separated MAVNI soldiers have volunteered to be subject to a polygraph examination, which is a recognized, available step in the now-mandated background check and adjudication process, the Army and DoD refuse the request, never providing these soldiers the ability to explain any recruiter or investigator mistakes or clear their names.

Plaintiffs' Final Discharge Decisions

Lucas Calixto

34. PV2 Calixto enlisted in the U.S. military in February 2016 and signed an enlistment contract obligating him to serve eight years in the Army Reserve, six years of which must be served in the Selected Reserve of the Ready Reserve. The Selected Reserve "consists of those units and individuals in the Ready Reserve designated . . . as so essential to initial wartime missions that they have priority over all other Reserves."

35. PV2 Calixto is a non-U.S. citizen who was recruited by and enlisted in the U.S. Army Reserve through the MAVNI program.

36. Upon enlistment, the Army found PV2 Calixto suitable for military service and assigned him to the 743rd Transportation Company ("743rd TC") in Roslindale, Massachusetts. He took his service oath on March 16, 2016, and began serving with the 743rd Transportation Company as a Private (E-1) over two years ago.

37. In March 2017, PV2 Calixto submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service ("USCIS"), which included an N-426 Form signed by his commander certifying PV2 Calixto's honorable service in the U.S. military.

38. On May 10, 2018, in another N-426 Form, the Army again confirmed PV2 Calixto's honorable service. PV2 Calixto's N-400 Application for Naturalization is pending final adjudication with USCIS.

39. On June 13, 2018, Headquarters, U.S. Army Reserve Command issued order number 18-164-00004 purporting to discharge PV2 Calixto from the U.S. Army Reserve effective July 1, 2018. The discharge order set forth no reason for the discharge but listed the

type of discharge as "Uncharacterized." Under the heading "Additional Instructions," the order included the notation "MAVNI – Military Personnel Security."

40. PV2 Calixto received no prior notice of the Army's discharge decision. The Army failed to provide PV2 Calixto any opportunity to respond to or otherwise be heard regarding his discharge. To this day, the Army has not furnished PV2 Calixto any explanation for that discharge decision.

41. On June 18, 2018, PV2 Calixto submitted a request through his chain of command for the Army to rescind and revoke his discharge order because of the Army's failure to comply with regulations. The Army never responded to his request.

42. Three weeks after the commencement of this litigation, and after PV2 Calixto filed a motion for preliminary injunction, Defendants informed the Court that Defendants intended to revoke PV2 Calixto's discharge order and that the "Army will comply with applicable law and regulations governing administrative separation of soldiers . . . in determining whether Plaintiff should be separated." Dkt. 15.

43. On July 17, 2018, the Army revoked PV2 Calixto's discharge order. *See* Dkt. 17-1. The revocation papers filed with the Court state that "Soldier will be provided a reasonable period of time (not less than 30 calendar days) to respond by endorsement to the notification memorandum." *Id*. at 3. To date, no such "notification memorandum" has been provided to PV2 Calixto.

44. Although PV2 Calixto has been informed that he has been "reinstated," to date, the Army has not restored his access to various electronic and online portals such as Army Knowledge Online ("AKO"), U.S. Army Human Resources Command ("HRC") record portal, and his military email account.

Tounde Djohi

45. Tounde Djohi enlisted in the U.S. Army Reserve as a MAVNI in December 2015 and signed an enlistment contract.

46. SPC Djohi is a non-U.S. citizen. At the time of his enlistment, he was lawfully present in the United States.

47. At the time of enlistment, the Army performed routine background checks and determined that SPC Djohi was suitable for military service.

48. In March 2016, SPC Djohi submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service ("USCIS"), which included an N-426 Form signed by his commander certifying SPC Djohi's honorable service in the U.S. military.

49. On February 1, 2018, the Army again confirmed SPC Djohi's honorable service via a second N-426 Form. In that same form attesting to his honorable service, the Army stated that unspecified "derogatory information" had been found in his background investigations that supposedly would "require separation."

50. In the six months following the second N-426, SPC Djohi received no further word regarding any derogatory information or separation and he continued to drill with his unit. In mid-June 2018, however, an Army recruiter informed him that his MSSD results were unfavorable and that he was being processed for separation from the Army.

51. Thereafter, on June 20, 2018, SPC Djohi received from his recruiter a discharge order issued by his Army Recruiting Battalion. The order is dated June 11, 2018 and has an effective discharge date of July 1, 2018. The discharge order cites AR 135-178, paragraph 15-8 as "Authority." The order further specifies the "Type of Discharge" as "Entry Level Separation (Conduct Disqualification)."

52. SPC Djohi contacted Army Headquarters to inquire about the discharge. The Army informed him that it could not provide any information regarding his discharge and that his background check results could not be provided to him until the year 2042. In addition, the Army told SPC Djohi – without explanation or specification – that "you do not meet the Army's Personnel Security requirement for continued service."

53. SPC Djohi received no prior notice of the Army's discharge decision. The Army failed to provide SPC Djohi any opportunity to respond to or otherwise be heard regarding his discharge. To this day, the Army has not furnished SPC Djohi any explanation for the discharge decision. Thus, at the time of the discharge decision, the Army did not take into account any statement or evidence from SPC Djohi.

54. Had he been given an opportunity to respond, SPC Djohi would have provided the Army with, among other things, letters of recommendation and commendation that he has received from his Army unit, in order to mitigate any so-called derogatory information, to the extent any such derogatory information actually exists, since none has been identified by the Army to date.

55. Army personnel also informed SPC Djohi that (a) because of the type of discharge he received, he was not eligible for reenlistment in the military and (b) because he had received an "unfavorable" MSSD, he would not be eligible for naturalization.

Wanjing Li

56. Wanjing Li enlisted in the U.S. Army Reserve as a MAVNI in February 2016 and signed an enlistment contract.

57. SPC Li is a non-U.S. citizen. At the time of her enlistment, she was lawfully present in the United States.

58. At the time of enlistment, the Army performed routine background checks and determined that SPC Li was suitable for military service.

59. SPC Li began drilling with her Army unit in March 2016.

60. SPC Li submitted her N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service in August 2016. The application included a duly executed Form N-426 by which the Army certified that SPC Li's honorable service in the military.

61. USCIS interviewed SPC Li, determined that she met all of the requirements for naturalization, approved her naturalization application, and scheduled her to take her naturalization oath on June 23, 2017.

62. Prior to administering the naturalization oath, USCIS de-scheduled SPC Li's oath ceremony citing "unforeseen circumstances," which have never been explained. SPC Li still has not been naturalized to this date.

63. In June 2018, the Army, on its own, provided SPC Li with an additional N-426, which again confirmed SPC Li's honorable service. This second N-426 also indicated that unspecified "derogatory information" that supposedly would "require separation" had been found in SPC Li's newly-mandated military background investigation.

64. On July 6, 2018, an Army recruiter informed SPC Li via text message that she had been discharged from the Army. SPC Li later obtained a copy of the discharge order. That order was dated July 5, 2018, with an effective date of July 5, 2018. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "uncharacterized."

65. The Army gave SPC Li no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for SPC Li to respond to any purported discharge grounds.

66. Moreover, in an August 1, 2018 report to the Court in a related litigation (*Nio v. DHS*), and notwithstanding SPC Li's written orders with the effective discharge date of July 5, DoD represented that SPC Li was ***not*** "separated" from the military.

Zeyuan Li

67. PFC Zeyuan Li enlisted in the U.S. Army Reserve as a MAVNI in April 2016 and signed an enlistment contract.

68. PFC Li is a non-U.S. citizen. At the time of his enlistment, he was lawfully present in the United States.

69. At the time of enlistment, the Army performed routine background checks and determined that PFC Li was suitable for military service.

70. PFC Li served and drilled with his Army unit from April 2016 through October 2017.

71. In July 2017, PFC Li submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service, which included an N-426 Form signed by his military unit administrator certifying PFC Li's honorable service in the U.S. military and further stating: "Request favorable action on PFC Li being granted U.S. citizenship."

72. On October 31, 2017, unit personnel notified PFC Li by email that he had been discharged. PFC has never seen any discharge orders, if they exist. The Army provided PFC Li no advance notice of the discharge and has provided no explanation at any time for the purported discharge, let alone any meaningful opportunity for PFC Li to respond to such grounds.

73. Additionally, based on DoD reporting to the Court in the related *Nio* action, the Army has stated that PFC Li's MSSD is not complete and the results from his Counter Intelligence screening were not sent to DoD CAF for adjudication. In those same reports to the Court, DHS states that the location of PFC Li's naturalization application is "unknown."

Fang Lu

74. Fang Lu enlisted in the U.S. Army Reserve as a MAVNI in March 2016 and signed an enlistment contract.

75. SPC Lu is a non-U.S. citizen. At the time of her enlistment, she was lawfully present in the United States.

76. At the time of enlistment, the Army performed routine background checks and determined that SPC Lu was suitable for military service.

77. SPC Lu began drilling with her Army unit in April 2016.

78. SPC Lu submitted her N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service in or about March 2017. The application included a duly executed Form N-426 by which the Army certified SPC Lu's honorable service in the military. Also in or about March 2017, SPC Lu's commanding officer wrote a letter of recommendation, stating in part that SPC Lu "has been performing outstanding service under my command" and attesting that she "will make a positive impact to readiness of our unit and have a promising career in the U.S. military as I can personally verify her positive character and amazing moral disposition."

79. In early July 2018, an Army recruiter informed SPC Lu by telephone that she was being discharged from the Army. SPC Lu first obtained a copy of her discharge order from her recruiter on July 16, 2018. That order was dated July 6, 2018, with an effective date of August 1,

2018. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "Entry Level Separation (Unfavorable MAVNI Investigation Results)."

80. The Army gave SPC Lu no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for her to respond to any purported discharge grounds.

81. SPC Lu has reason to believe that the discharge order is based on mistaken information, in part because, at the time of the discharge order, her military background investigations were not complete and DoD CAF had not even begun to adjudicate the investigation results. Among other things, on July 30, 2018 – three weeks after the discharge orders – an investigator contacted SPC Lu stating that he was continuing to work on her military background investigation and had additional questions for her. In addition, DoD reporting in the related *Nio* case, as of July 20, 2018, indicates that SPC Lu's MSSD is pending.

Jingquan Qu

82. Jingquan Qu enlisted in the U.S. Army Reserve as a MAVNI in February 2016 and signed an enlistment contract.

83. SPC Qu is a non-U.S. citizen. At the time of his enlistment, he was lawfully present in the United States.

84. At the time of enlistment, the Army performed routine background checks and determined that SPC Qu was suitable for military service.

85. SPC Qu began drilling with his Army unit in May 2016.

86. SPC Qu submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service in February 2017. The application included a duly executed

Form N-426 by which the Army certified SPC Qu's honorable service in the military.

87. In November 2017, the Army executed a second N-426 in which Col. Brian Thomas again confirmed SPC Qu's honorable military service.

88. On July 27, 2018, in response to SPC Qu's emails a week earlier inquiring about his BCT ship date, an Army HR official told SPC Qu that he would not be receiving a BCT ship date because he had been discharged effective December 1, 2016 (almost 19 months earlier). Thereafter, SPC Qu first obtained a copy of the discharge order. It is dated November 23, 2016. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "Uncharacterized."

89. No one from the Army, including his unit, ever informed SPC Qu prior to July 27, 2018 that he had been discharged and, in fact, he continued to drill with his unit from December 2016 through July 2018 and the Army paid him for those drills. Moreover, SPC Qu paid for insurance related to his military service during that period, and those payments were accepted.

90. The Army gave SPC Qu no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for him to respond to any purported discharge grounds.

Hembashima Sambe

91. Hembashima Sambe enlisted in the U.S. Army Reserve as a MAVNI in February 2016 and signed an enlistment contract.

92. SPC Sambe is a non-U.S. citizen. At the time of his enlistment, he was lawfully present in the United States.

93. At the time of enlistment, the Army performed routine background checks and determined that SPC Sambe was suitable for military service.

94. SPC Sambe began drilling with his Army unit (as a PFC) in October 2016.

95. SPC Sambe submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service in February 2017. The application included a duly executed Form N-426 by which the Army certified SPC Sambe's honorable service in the military.

96. In May 2018, SPC Sambe's unit informed him by email that he had been discharged. The unit representative told SPC Sambe that he did not know the basis for the discharge.

97. Thereafter, SPC Sambe first obtained a copy of the discharge order. It is dated September 15, 2017 with an effective date of October 1, 2017. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "Uncharacterized."

98. On November 29, 2017, almost two months *after* the discharge orders, the Army ordered SPC Sambe to a Counter Intelligence interview as part of his military background investigation. Moreover, between the date of the supposed discharge and May 2018, SPC Sambe continued to attend drills with his unit.

99. In July 2018, SPC Sambe had an email exchange with John Sheehy, from the United States Army Recruiting Command ("USAREC"). Mr. Sheehy, on behalf of the Army, then informed SPC Sambe that the discharge order was mistaken. Mr. Sheehy told SPC Sambe that "you have not been discharged" and that the Army was still awaiting his MSSD results.

100. Thereafter, on July 26, 2018, SPC Sambe received a demand letter from another DoD component, the Defense Finance and Accounting Service ("DFAS"). The DFAS letter claimed that SPC Sambe was a former service member and that he owed the Army more than $1,100 for pay he received after he had been discharged.

101. No one from the Army, including his unit, ever informed SPC Sambe prior to May 2018 that he had been discharged. The Army gave SPC Sambe no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for him to respond to any purported discharge grounds.

Emeka Udeigwe

102. Emeka Udeigwe enlisted in the U.S. Army Reserve as a MAVNI in March 2016 and signed an enlistment contract.

103. SPC Udeigwe is a non-U.S. citizen. At the time of his enlistment, he was lawfully present in the United States.

104. At the time of enlistment, the Army performed routine background checks and determined that SPC Udeigwe was suitable for military service.

105. SPC Udeigwe began drilling with his Army unit in January 2017.

106. SPC Udeigwe submitted his N-400 Application for Naturalization to the U.S. Citizenship and Immigration Service in January 2017. The application included a duly executed Form N-426 by which the Army certified SPC Udeigwe's honorable service in the military.

107. On July 6, 2018, an Army recruiter called SPC Udeigwe and informed him that he was being discharged. The recruiter provided no explanation for the discharge.

108. On July 9, 2018, SPC Udeigwe first obtained a copy of the discharge order. It is dated July 5, 2018 with an effective date of August 1, 2018. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "Uncharacterized."

109. No one from the Army, including his unit, ever informed SPC Udeigwe prior to July 2018 that he had been discharged. The Army gave SPC Udeigwe no advance notice of the

discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for him to respond to any purported discharge grounds.

110. Moreover, in an August 1, 2018 report to the Court in a related litigation (*Nio v. DHS*), and notwithstanding SPC Udeigwe's written orders with the effective discharge date of August 1, DoD represented that SPC Udeigwe was ***not*** "separated" from the military.

Other Examples of Unlawfully Discharged Class Members

111. The specific circumstances described above with respect to the individually-named Plaintiffs are consistent with known discharge actions taken against other MAVNI enlistees.

112. For example, on June 28, 2018, the Army issued a discharge order, without any advanced notice or opportunity to respond, to a Regular Army ("RA") MAVNI who enlisted in September 2016. The discharge order is dated June 28, 2018, but the effective date of the discharge is June 21, 2018 (seven days earlier). The discharge order cites AR 135-178 as "authority." The order does not describe the type of discharge but cites "Refused to Enlist" as an "additional instruction." This instruction reference, however, is inaccurate and not the true cause for the discharge decision. A contemporaneous document reflects that the actual reason for the discharge is an unfavorable MAVNI MSSD result. The soldier received no explanation of the unfavorable results nor any opportunity to contest the findings before the discharge became final.

113. As another example, on June 13, 2018, the Army issued a discharge order for a soldier who had been serving in the Army Reserve for more than two years, reflecting a discharge date of July 1, 2018. The soldier received no prior notice of the Army's discharge decision. In fact, the soldier only received notification of the fact of his discharge more than one week *after* the July 1 effective date of his discharge order. The discharge order set forth no

reason for the discharge, but listed the type of discharge as "Uncharacterized." And, under the heading "Additional Instructions," the order included the notation "MAVNI – Military Personnel Security." The Army failed to provide the soldier any opportunity to respond to or otherwise be heard regarding the soldier's discharge, and to this day, the Army has not furnished any explanation for the discharge decision. Thus, at the time of the discharge decision, the Army did not take into account any statement or evidence from the soldier.

114. Another MAVNI soldier learned that he had been discharged only after he contacted Tricare, the health insurance program for military members, which informed him that he could not use and was not entitled to Tricare coverage at that time because he was not eligible for such benefits and suggested that he contact the Defense Enrollment Eligibility Reporting System ("DEERS"). Upon contacting DEERS, the soldier was told he had been discharged, and that he should confirm this with his unit. When the soldier contacted his unit to inquire about a potential discharge, his unit initially said it was not aware that he had been discharged; however, upon pulling up and examining the soldier's record, the unit informed the soldier that his record contained an uncharacterized discharge (which already was effective). The soldier's discharge order had been issued on June 13, 2018, with an effective date of July 1, 2018, yet he did not receive a copy of any discharge order or related papers until after July 18. The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "Uncharacterized." Under the heading "Additional Instructions," the order included the notation "MAVNI – Military Personnel Security." The Army gave this soldier no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity to respond to any purported discharge grounds.

115. As another example, the Army issued a discharge order dated April 25, 2018, which reflected an effective date of March 27, 2018 (nearly one month before the date the order was issued). The discharge order does not explain the grounds for the discharge but cites AR 135-178 as "authority" and indicates that the discharge type is "uncharacterized." Under the heading "Additional Instructions," the order included the notation "MAVNI – Military Personnel Security." However, the soldier learned of his discharge on or around July 18, 2018 (almost four months after his purported discharge orders were effective). No one from the Army, including his unit, ever informed this soldier prior to July 2018 that he had been discharged. The Army gave him no advance notice of the discharge, no explanation at any time for the purported discharge, and no meaningful opportunity for him to respond to any purported discharge grounds.

The Army's Violation of Regulations and the Constitution

116. Defendants' summary discharges violated Army regulations, DoD regulations, and the fundamental requirements of due process and equal protection.

Applicable Army Regulations

117. Discharge orders obtained by Plaintiffs (where available) cite AR 135-178 as "authority" for the discharges.

118. Army Regulation 135-178 specifies that its "purpose" is to ensure "the ***orderly*** administrative separation of . . . enlisted soldiers." AR 135-178 at ¶ 1-1 (emphasis added).

119. Army Regulation 135-178 Chapter 3, titled "Guidelines for Separation" sets forth the process that must occur in advance of the discharge. In particular, the regulation specifies that:

> ***[T]he commander will notify the Soldier, in writing***, of the matter set forth in this section . . .

> (1) ***The basis of the proposed separation***, including the circumstances upon which the action is based, and a reference to the applicable provisions of this regulation.
>
> (2) ***Whether the proposed separation*** could result in a discharge from the Army . . . or release from custody or control of the Army.
>
> (3) The least favorable characterization or description of service authorized ***for the proposed separation***.
>
> (4) The right to obtain copies of documents that will be sent to the separation authority supporting the basis of the ***proposed separation***. . . .
>
> (5) The Soldier's right to submit statements.
>
> (6) The Soldier's right to consult with military legal counsel. . . .
>
> (8) The right to waive the rights in paragraphs 3-5*a*(4) through (7), in writing . . . after being afforded a reasonable opportunity to counsel with counsel, and that failure to respond within 30 calendar days from the date of receipt of the notice will constitute a waiver of the right.

AR 135-178 at ¶ 3-5*a* (emphases added).

120. Army Regulation 135-178 Chapter 2 provides guidelines on separation and characterization, and notes that "[t]here is a substantial investment in the training" of enlisted Army soldiers. *Id.* at ¶ 2-2*a*. It further provides that "[a]s a general matter, reasonable efforts at rehabilitation should be made ***prior to initiation*** of separation proceedings." *Id*. (emphasis added).

121. Army Regulation 135-178 provides "further guidance" for "specific reasons for separation." *Id.* at ¶ 2-1. For example, when a soldier is to be discharged under the personnel security category (or for "security reasons"), the soldier shall be processed in accordance with Army Regulation 380-67. *See* AR 135-178 at ¶ 14-1*h*.

122. Army Regulation 380-67 in turn provides that:

> ***[N]o unfavorable administrative action shall be taken under the authority of this regulation unless the person concerned has been given***:

> *a*. ***A written statement of the reasons why the unfavorable administrative action is being taken***. The statement shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 USC 552a) and national security permit. . . .
>
> *b*. ***An opportunity to reply*** in writing to such authority as the head of the component concerned may designate. . . .
>
> *c*. ***A written response to any submission under paragraph b***, stating the final reasons therefore, which shall be as specific as privacy and national security considerations permit.

AR 380-67 at ¶ 8-6 (emphases added).

123. Army regulations define "unfavorable administrative action" to include any "[a]dverse action taken as the result of personnel security determinations ***and unfavorable personnel security determinations***," which are further defined to include any "nonacceptance for or discharge from the Armed Forces when any of the foregoing actions are based on derogatory information of personnel security significance." AR 380-67, Glossary Section II (Terms) (emphasis added).

124. Soldiers separated for "entry level performance and conduct" are not only specifically entitled to advanced notice as set forth in Army Regulation 135-178 at 3-5 (*see* AR 135-178 at ¶ 8-4*a*), but "***[s]eparation processing may not be initiated . . . until the Soldier has been formally counseled under the requirements prescribed by paragraph 2-4***." AR 135-178 at ¶ 8-2 (emphasis added).

125. Army Regulation 135-178 further provides that:

> *a.* *General*. ***Commanders must make reasonable efforts to identify Soldiers who are likely candidates for early separation and to improve their chances for retention through counseling, retraining, and rehabilitation before starting separation action***. . . .

> *b.* *Counseling*. When a Soldier's conduct or performance approaches the point where a continuation of such conduct or performance would warrant initiating a separation action for one of the reasons in paragraph 2–4a, the Soldier will be counseled by a responsible person about their deficiencies. . . . The Soldier's counseling or personnel records must establish that the Soldier was afforded a reasonable opportunity to overcome these deficiencies. . . .

AR 135-178 at ¶ 2-4 (emphasis added).

126. Additional due process rights and procedures for soldiers facing potential discharge are set forth in Army Regulation 635-200.

127. Defendants violated Army regulations by making final discharge decisions with respect to Plaintiffs without affording them the formal notice, response, and other applicable rights set forth in Army Regulations.

Applicable DoD Regulations

128. Defendants' summary discharges also violated DoD regulations, which are mandatory and binding on the Army.

129. Pursuant to Department of Defense Instruction ("DoDI") 5200.02, all members of the military are deemed to hold "national security positions." DoDI 5200.02, Glossary Part II (Definitions); *see also* DoD Manual 5200.02 at ¶ 7.6(b) ("All military positions are national security positions regardless whether or not the Service member requires access to classified information, as established in DoDI 5200.02."). Plaintiffs – all of whom enlisted in the Army Reserve in or prior to 2016, served honorably as certified by their commanders, and have military ranks – previously had been found eligible for service in a "national security position." The Army's purported discharges on personnel security grounds (including "MAVNI Military Personnel Security" or "Unfavorable MAVNI Investigation Results") thus constitute denials or revocations of Plaintiffs' eligibility to hold national security positions.

130. With regard to such denials or revocations of eligibility, DoDI 5200.02 provides:

> APPEAL PROCEDURES – DENIAL OR REVOCATION OF ELIGIBILITY. Individuals may elect to appeal unfavorable personnel security determinations in accordance with the procedures set forth in . . . [DoD Manual 5200.02], as applicable, or as otherwise authorized by law.

DoDI 5200.02, Enclosure 3, Section 4.

131. DoD Manual 5200.02 in turn provides that "***[m]ilitary members*** who are denied or revoked a favorable national security eligibility determination ***will be afforded due process***." DoD Manual 5200.02 at ¶ 7.6(b)(2)(a) (emphasis added). DoD Manual 5200.02 defines "national security eligibility" as "[t]he status that results from a formal determination by an adjudication facility that a person meets the personnel security requirements for access to classified information ***or to occupy a national security position*** or one requiring the performance of national security duties." DoD Manual 5200.02, Glossary Section G.2 (Definitions) (emphasis added). Because "[a]ll military positions are national security positions," *see* DoD Manual 5200.02 at ¶ 7.6(b), any decision to separate a soldier from the military on personnel security grounds is, by definition, a "national security eligibility" determination.

132. That manual further provides:

> ***MINIMUM DUE PROCESS REQUIREMENTS APPLICABLE TO ALL. No unfavorable national security eligibility determination will be made without first***:
>
> a. ***Providing the individual with a comprehensive and detailed written explanation*** of the basis for the unfavorable determination as the national security interests of the United States and other applicable law permit. The [Letter of Denial] or [Letter of Revocation] must include each security concern, the applicable adjudicative guideline(s) related to each concern, and provide an explanation of the kinds and types of information they could provide to support their appeal.

b. Informing the individual of their right to:

(1) Be represented by counsel or other representative at their own expense.

(2) Request the documents, records, and reports upon which the unfavorable national security determination was made. Be granted an extension to set the timeline by the Component [Personnel Security Appeal Board] if requested documents, records, and reports are not provided promptly.

c. ***Providing a reasonable opportunity to reply*** in writing and to request review of the unfavorable determination.

d. Providing the individual written notice of reasons for the determination, the determination of each adjudicative guideline that was provided to the individual in the statement of reasons (SOR) that accompanied the notification of intent (NOI) to deny or revoke the identity of the determination authority, and written notice of the right to appeal unfavorable determinations to a high-level panel. . . .

f. Providing the individual an opportunity to appear in person and present relevant witnesses, documents, materials, and information.

g. ***Providing the individual with a written decision on appeal***.

DoD Manual 5200.02 at ¶ 10.2 (emphasis added).

133. Still further due process rights and procedures for military members are set forth in ¶ 10.4 of DoD Manual 5200.02.

134. Additional due process rights and procedures for military members facing potential discharge are set forth throughout DoD Instruction 1332.14.

135. Defendants violated applicable law by purporting to discharge Plaintiffs without affording them the rights and procedures mandated by DoD Regulations.

Constitutional Rights

136. In addition to the regulatory violations stated herein, Defendants violated the fundamental requirements of due process under the Fifth Amendment of the U.S. Constitution by

purporting to discharge Plaintiffs from the U.S. Army, prior to the expiration of their enlistment contracts, without providing them with an adequate explanation for the discharge and without providing them with any meaningful opportunity to be heard and respond to the grounds, if any, for the discharge action. Defendants' conduct also failed to follow applicable DoD and Army guidance and regulations. Additionally, the property and/or liberty interests of Plaintiffs and the Class have been implicated by Defendants' actions. For example, the discharge characterizations and notations on their discharge orders have stigmatized and have impugned the reputations of Plaintiffs and the Class (and will continue to do so), thereby implicating their liberty interest in due process.

137. Moreover, Defendants' actions unconstitutionally discriminate against Plaintiffs based on their national origin in violation of Plaintiffs' equal protection rights as guaranteed by the Fifth Amendment of the U.S. Constitution. For instance, the "MAVNI – Military Personnel Security" notation on some discharge paperwork indicates that Defendants are directing their summary discharge practices at MAVNIs in particular, and that such discharge due process denials are not being applied to non-MAVNI soldiers.

CLASS ACTION ALLEGATIONS

138. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other persons similarly situated, as defined herein.

139. Class definition: All individuals:

a. who have enlisted in the U.S. Army (including the Army Reserve) through the MAVNI program;

b. who are the subject of a final discharge or separation decision since September 30, 2016 (whether or not the soldier received a formal

discharge order and regardless of whether the "effective date" of the discharge or separation has passed);

c. whose discharge or separation has not been characterized by the Army (including "uncharacterized" and "entry level" discharges or separations); and

d. whose final discharge or separation decision was made without the soldier first being afforded the process due under applicable Army and DoD regulations and the law, including adequate notice of the discharge grounds, an opportunity to respond, due consideration of the soldier's response by the Army, or other requirements of law.

140. Class action designation is warranted under Rule 23(a) of the Federal Rules of Civil Procedure ("Rule 23(a)").

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

142. Although the exact number of class members is unknown to Plaintiffs at this time as such information resides exclusively within the province of Defendants and must await Defendants' disclosure/discovery, Plaintiffs have grounds to believe that the proposed class currently exceeds 40 individuals and that, unless the Court provides the requested preliminary injunctive relief, the number of class members is likely to grow substantially larger.

143. Media reports from a few weeks ago indicated that, at that point in time, approximately 40 MAVNIs already had been discharged in a manner similar to PV2 Calixto.

144. Further, in one of the related actions (*Nio v. DHS*), DoD stated that, as of June 29, 2018, there were 111 identified class members in that class who either already had attended basic

training or are "no longer serving." Upon information and belief, the vast majority of that list of 111 are MAVNI soldiers who fall in the "no longer serving" category because they have been discharged or separated improperly and without the process due.

145. In addition, in another related action (*Kirwa v. DoD*), DoD recently identified 86 class members who did not receive the Court-ordered notice because those "86 soldiers have been separated from the military." Upon information and belief, the majority of those 86 MAVNI soldiers have been discharged or separated improperly and without the process due.

146. Finally, a Pentagon spokesperson recently stated that the Army expects to discharge approximately one-third of the MAVNI soldiers still waiting for MSSDs, and earlier DoD estimates suggested that DoD expected closer to half of the MAVNI soldiers to receive "unfavorable" adjudications. Based on DoD reporting from the related litigation and otherwise on information and belief, there are thousands of MAVNI soldiers still waiting to be informed of their MSSDs. As a result, absent this Court's grant of preliminary injunctive relief, based on current estimates, this class could easily grow to include many hundreds of members.

147. The proposed class satisfies the commonality requirement of Rule 23(a)(2) because there are questions of law and fact common to the class. Among the questions of law and fact common to the class are whether Defendants are acting contrary to the pertinent regulations by discharging/separating Plaintiffs and class members – all MAVNI enlistees in the U.S. Army – without affording them the formal notice, response, appeal, and any other applicable due process and equal protection rights required under the applicable law for a discharge without a characterization.

148. The proposed class satisfies the typicality requirement of Rule 23(a)(3) because the named Plaintiffs' claims are typical of the claims of each of the class members. Class

members similarly are affected by Defendants' wrongful conduct in violation of the Administrative Procedure Act, applicable Army regulations, DoD regulations, and the U.S. Constitution.

149. The named Plaintiffs will fairly and adequately protect the interests of the class because their interests are identical to those of the other members of the classes. Fair and adequate protection of the interests of the class will be ensured further because the named Plaintiffs are represented by competent legal counsel who are experienced in federal court litigation, including class action litigation, and have adequate resources and commitment to represent the class as a whole.

150. Furthermore, if the named Plaintiffs (and members of the class) were to bring separate suits to address Defendants' practices, actions, and inactions, Defendants may address the discharges of the named Plaintiffs but ignore the discharges and concerns of the remaining class members, thereby exacerbating Defendants' violations of the law and applicable regulations.

151. Indeed, the Army revoked Plaintiff Calixto's Discharge Order only after and because he commenced this action. Following that revocation, Defendants were placed on notice that numerous similarly situated soldiers were the subjects of comparably deficient and unlawful final discharge decisions. Defendants were provided ample opportunity to represent and commit that such discharge orders would be revoked and that applicable regulations and law would be followed, but Defendants did not respond to that offer and no such representation or commitment was made.

152. Resolving this matter as a class action would promote judicial economy by avoiding overburdening the Court with individual lawsuits brought by each of the dozens or

hundreds of Army soldiers who are or are expected to become the subject of final discharge decisions rendered in violation of applicable law.

153. In addition to qualification for class treatment under Rule 23(b)(1)(a), this case qualifies for class action treatment under Rule 23(b)(2) because Plaintiffs seek final injunctive and declaratory relief. The relief is appropriate for the whole class as Defendants' conduct applies generally to the class as a whole.

CLAIMS FOR RELIEF

Count I: Declaratory Judgment

154. Plaintiffs re-allege paragraphs one through 153 as if fully set forth herein.

155. 28 U.S.C. § 2201 authorizes a court, "[i]n a case of actual controversy within its jurisdiction . . . upon the filing of an appropriate pleading" to "declare the rights and other legal relations of any interested party seeking such declaration."

156. Army and DoD regulations set forth specific procedures that must be followed before a final discharge decision is made. Defendants failed to follow those procedures with respect to Plaintiffs, in contravention of the regulations and in violation of Plaintiffs' due process rights. Accordingly, Plaintiffs seek a declaratory judgment that the final discharge decisions made with respect to Plaintiffs and the Class are unlawful and must revoked.

Count II: Preliminary and Permanent Injunctive Relief

157. Plaintiffs re-allege paragraphs one through 156 as if fully set forth herein.

158. Defendants unlawfully and improperly made the final discharge decisions with respect to Plaintiffs and the Class without complying with applicable law including, without limitation, Army Regulation 135-178, Army Regulation 380-67, DoDI 5200.02, DoD Manual 5200.02 (incorporated in DoDI 5200.02 by reference), and the U.S. Constitution.

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

160. Plaintiffs and the Class seek a preliminary injunction as follows:

a) The Army shall issue orders revoking the final discharge decisions for Plaintiffs and the Class;

b) Defendants shall take all actions necessary to fully reinstate in the Army Plaintiffs and the Class;

c) To the extent that Defendants notified other military departments, DOD, or other federal agencies or components, including DHS, of the final discharge decisions, Defendants shall promptly notify such entities that the discharges are revoked and void for all purposes;

d) Defendants shall not renew or commence new discharge actions against Plaintiffs or the Class except in accordance with applicable law and regulations governing such discharges;

e) Within two weeks of the preliminary injunction, Defendants shall provide the Court and Plaintiffs with a complete list of all Class members and a copy of each soldier's discharge revocation order;

f) Within four weeks of the preliminary injunction, Defendants shall provide the Class with a notice, in a form approved by the Court, informing each soldier of this litigation, the preliminary injunction,

and the revocation/reinstatement, and offering each soldier the ability to waive his/her right to revocation/reinstatement;

g) Beginning four weeks after the preliminary injunction (and to occur every four weeks thereafter for the duration of the litigation), Defendants shall file a report with the Court identifying any non-characterized MAVNI soldier discharges or separations and providing (i) a copy of the discharge order, (ii) a description of the process provided to the MAVNI soldier prior to the final discharge, and (iii) contact information for the MAVNI soldier that will allow class counsel, a monitor, or other appropriate persons to confirm the process provided.

161. Plaintiffs and the class seek a permanent injunction as follows:

a) The Army shall issue orders revoking the final discharge decisions for Plaintiffs and the Class;

b) Defendants shall take all actions necessary to fully reinstate in the Army Plaintiffs and the Class;

c) To the extent that Defendants notified other military departments, DOD, or other federal agencies or components, including DHS, of the final discharge decisions, Defendants shall promptly notify such entities that the discharges are revoked and void for all purposes;

d) Defendants shall not renew or commence new discharge actions against Plaintiffs or the Class except in accordance with applicable law and regulations governing such discharges;

e) Within two weeks of the injunction, Defendants shall provide the Court and Plaintiffs with a complete list of all class members and a copy of each soldier's discharge revocation order;

f) Within four weeks of the injunction, Defendants shall provide each member of the Class with a notice, in a form approved by the Court, informing each soldier of this litigation, the injunction, and the revocation/reinstatement, and offering each soldier the ability to waive his/her right to revocation/reinstatement;

g) Until further order of the Court, Defendants shall, on a monthly basis, file a report with the Court identifying any non-characterized MAVNI soldier discharges or separations and (i) a copy of the discharge order, (ii) a description of the process provided to the MAVNI soldier prior to the final discharge, and (iii) current contact information, including personal email address and phone number, for the MAVNI soldier that will allow class counsel, a monitor, or other appropriate persons to confirm the process provided.

Count III: Administrative Procedure Act

162. Plaintiffs re-allege paragraphs one through 161 as if fully set forth herein.

163. 5 U.S.C. § 706(2) authorizes a court to hold unlawful and set aside final agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or without observance of procedure required by law.

164. Defendants made the final discharge decisions without complying with applicable law including, without limitation, the requirements of Army Regulation 135-178, Army Regulation 380-67, DoDI 5200.02, and DoD Manual 5200.02 (incorporated in DoDI 5200.02 by reference). Defendants' actions therefore are not in accordance with law and were undertaken without observance of procedure required by law. Furthermore, Defendants' actions were arbitrary and capricious because Defendants failed to comply with their own regulations.

165. Accordingly, Plaintiffs seeks an order holding unlawful and setting aside the final discharge decisions pursuant to 5 U.S.C. § 706(2).

Count IV: Constitutional Violation – Procedural and Substantive Due Process

166. Plaintiffs re-allege paragraphs one through 165 as if fully set forth herein.

167. The final discharge decisions deprived Plaintiffs of their constitutionally-protected liberty and/or property interest, including with respect to their reputations, ability to pursue their chosen careers, and/or their timely and appropriate adjudication of their right to naturalization. Defendants made the final discharge decisions without providing Plaintiffs with the requisite notice and opportunity to be heard. In most instances, if not all, Defendants provided Plaintiffs with no process at all.

168. To the extent that the final discharge decisions are attributable to "personnel security" findings, such decisions were made without affording the soldiers advanced notice and

a meaningful opportunity to respond and be heard. Defendants' discharge decisions for "personnel security" reasons carry significant adverse consequences for soldiers and the nature of their discharges – based on the notations on their discharge orders – are stigmatizing, as they impact their ability to pursue their military careers, their ability to obtain a civilian or non-military government job, their naturalization status, and their reputations. Defendants' conduct therefore violates the due process rights of Plaintiffs and the Class under the Fifth Amendment of the U.S. Constitution.

169. Defendants' conduct with respect to the decision-making and processing of Plaintiffs' separation and discharge from the Army is arbitrary, contrary to DoD and the Army's own guidance and regulations, and shocks the conscience. As such, Defendants' conduct also violates the substantive due process rights of Plaintiffs and the Class under the Fifth Amendment of the U.S. Constitution.

170. Plaintiffs request that the Court grant appropriate equitable relief on the foregoing basis.

Count V: Constitutional Violation – Equal Protection

171. Plaintiffs re-allege paragraphs one through 170 as if fully set forth herein.

172. Plaintiffs (as MAVNIs who are receiving "uncharacterized" or "entry level separation" discharges without the required rights and process to which they are entitled) are being treated differently with respect to Defendants' processing of their separation and discharges from the Army. By treating these MAVNI soldiers differently than soldiers who did not enter through the MAVNI program, but receive the notice, opportunity to be heard, counseling, appeal, and/or other rights with respect to the separation/discharge process, Defendants are unconstitutionally discriminating against Plaintiffs (and the Class) based on their

national origin in violation of their equal protection rights as guaranteed by the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

173. Plaintiffs request that the Court grant appropriate equitable relief on the foregoing basis.

PRAYER FOR RELIEF

Wherefore, Plaintiffs, on behalf of themselves and the class, respectfully requests that this Court:

a. Assume jurisdiction over this action;

b. Issue the declaratory judgment requested in Count I of this Complaint;

c. Grant the preliminary and permanent injunctive relief requested in Count II of this Complaint;

d. Grant the relief requested pursuant to the APA (Count III of this Complaint);

e. Grant the relief requested pursuant to Count IV of this Complaint;

f. Grant the relief requested pursuant to Count V of this Complaint;

g. Award Plaintiffs reasonable costs and attorneys' fees, including under the Equal Access to Justice Act; and

h. Award such further relief as the Court deems just or appropriate.

Dated: August 3, 2018

/s/ Douglas W. Baruch

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