UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUNAY MIRIYEVA, *et al.*, *Plaintiffs*, v. U. S. CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, *Defendants*.	Civil Action No.: 19-3351 (ESH)

DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

BRIAN J. FIELD
D.C. BAR #985577
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 252-2551
E-mail: Brian.Field@usdoj.gov

December 13, 2019

Table of Contents

The Plaintiffs are four foreign-born individuals who formerly served in the United States Army. Under the Military Accessions Vital to the National Interest ("MAVNI") pilot program, Plaintiffs were able to enlist in the Army even though they were not U.S. citizens or lawful permanent residents. Their enlistment in the Army provided them with an opportunity to meet the statutory criteria for naturalization based on military service during a time of conflict, pursuant to 8 U.S.C. § 1440(a). There were, however, conditions that Plaintiffs must satisfy before U.S. Citizenship and Immigration Services ("USCIS") could approve their naturalization applications. This dispute turns on one particular condition—whether Plaintiffs demonstrated that they were "separated under honorable conditions," as Congress required in 8 U.S.C. § 1440(a). As Plaintiffs concede, they were each discharged from the Army while in an "entry-level status," which resulted in the Army designating their "character of service" or "type of discharge" in their discharge documents as "uncharacterized." Thus, no Plaintiff was "separated under honorable conditions," as required by § 1440(a). Accordingly, USCIS denied each Plaintiff's naturalization application.

In this action, Plaintiffs seek to challenge those determinations. As Defendants USCIS and Kenneth Cuccinelli, in his official capacity, (collectively, "USCIS") already explained, Congress enacted a special venue provision for Plaintiffs to make challenges to the denial of their naturalization applications—8 U.S.C. § 1421(c). *See* Defs.' Mot. to Dismiss at 5–9 (ECF No. 15) ("Defs.' MTD"). But rather than pursue their claims as Congress directed, Plaintiffs challenge USCIS's reasoning for denying their naturalization applications, calling it a "policy" and attempting to use the Administrative Procedure Act ("APA") to circumvent § 1421(c)'s requirements. Additionally, Plaintiffs attempt to repackage their APA claims as Constitutional claims, contending that USCIS violated the Naturalization Clause when it denied their applications. For the reasons set forth in USCIS's Motion to Dismiss, the Court should dismiss

Plaintiffs' claims. If it does not, the Court should enter summary judgment in USCIS's favor and deny Plaintiffs' Motion for Partial Summary Judgment for the reasons discussed below. *See* ECF Nos. 2 & 14 ("Pls.' MSJ").

The thrust of Plaintiffs' claim is that USCIS violated the APA by acting contrary to law. As discussed below, this claim is premised on a misunderstanding of the relevant statutes, regulations, and guidance. Under § 1440(a), applicants for naturalization who have separated from the military must demonstrate *both* that they "served honorably" *and* that they were "separated under honorable conditions." Plaintiffs ask the Court to disregard the second condition. Yet, USCIS cannot ignore this statutory requirement. For these determinations, USCIS defers, as it must, to the appropriate branch of the military. Here, the Army issued official discharge documents to each Plaintiff documenting that he or she received an "uncharacterized" discharge. Army regulations and guidance make clear that this category of discharge is distinct from an honorable discharge or a general (under honorable conditions) discharge. Thus, USCIS properly concluded that Plaintiffs had not demonstrated that their discharges were "under honorable conditions," and Plaintiffs' "contrary to law" APA claim thus fails. For the same reason, Plaintiffs' claim that USCIS violated the APA by acting arbitrarily and capriciously fails. In fact, the only federal district court to address this question has agreed, holding that an "Uncharacterized (Entry Level Separation) discharge is not an honorable separation from service within the meaning of [§ 1440], and therefore, a discharge of this type cannot give rise to eligibility for military naturalization." *Oyebade v. Lee*, No. 09-cv-1054, 2010 WL 2927207, at *5 (S.D. Ind. July 21, 2010). Likewise, Plaintiffs' claim that USCIS violated the APA by failing to engage in notice-and-comment rulemaking fails because requiring that applicants for naturalization under § 1440(a) meet the statutory requirement that they were "separated under honorable conditions" is not a

legislative rule. Finally, Plaintiffs' attempt to recast their APA claim as one under the Constitution's Naturalization Clause fails for the same reason—when applying § 1440, USCIS requires the same showings that Congress established.

Accordingly, for the reasons discussed below, the Court should grant summary judgment in USCIS's favor and deny Plaintiffs' Partial Motion for Summary Judgment.

BACKGROUND

A. MAVNI Program

Under the MAVNI program, certain foreign-born individuals who were in the United States on non-immigrant visas were eligible to enlist in the Army even though they were not U.S. citizens or lawful permanent residents. In turn, their enlistment in the Army provided them with an opportunity to meet the statutory criteria for naturalization based on military service during a time of conflict, pursuant to 8 U.S.C. § 1440(a). As this Court has noted previously, similar "special naturalization provisions have applied to non-citizens who serve in the United States military" "[s]ince at least the Civil War." *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 25 (D.D.C. 2017). As relevant here, non-citizen members of the United States Army Reserve who enlist under the MAVNI program may be eligible for naturalization if certain conditions are satisfied. *See id.*, 285 F. Supp. 3d at 29. During periods of military hostilities, the requirements for naturalization based on military service are found in § 329 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1440.[1]

[1] A separate section of the INA—Section 328, 8 U.S.C. § 1439—applies during peacetime. But only § 1440 is relevant here as Executive Order Number 13269 (which remains in effect today) declared a period of military hostilities that began on September 11, 2001. *See* Exec. Order No. 13269, 67 Fed. Reg. 45, 287 (July 3, 2002).

Under § 1440, "[a]ny person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States" during a period of designated military hostilities "and who, if separated from such service, was separated under honorable conditions may be naturalized" if certain additional conditions are satisfied. 8 U.S.C. § 1440(a) (requiring, for instance, that such person shall have "been in the United States" or certain other specified areas when they enlisted, or thereafter shall have been lawfully admitted to the United States for permanent residence). "The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from service was under honorable conditions." *Id*. Additionally, this "executive department" shall certify "whether the applicant served honorably … and was separated from such service under honorable conditions." *See* 8 U.S.C. § 1440(b)(3). Here, the relevant "executive department" is the Department of the Army.

Enlisted administrative separations from the Army Reserve fall into one of two categories: (1) "[s]eparation with characterization of service as honorable, general (under honorable conditions), or under other than honorable conditions;" and (2) "[s]eparation with an uncharacterized description of service[.]" Army Reg. ("AR") 135-178, ¶ 2-7(a) (attached hereto as Exhibit A);[2] *see also* AR 635-200, ¶ 3-9(a) (governing Active Duty Enlisted Administrative Separations) (attached hereto as Exhibit B). As relevant here, a separation will be "with an uncharacterized description" when the separation occurs while the person is "[i]n an entry level status." AR 135-178, ¶ 2-7(a); *see also id.* ¶ 2-11(a) ("Service will be described as uncharacterized

[2] In the exhibits to this Motion, USCIS provides excerpted copies of the various documents in an effort to not burden the Court with lengthy exhibits. Upon request, USCIS will provide the Court with full copies of each exhibit.

if separation processing is initiated while a Soldier is in an entry level status"). A soldier remains in "entry level status" during "[t]he first 180 days of continuous active military service." *Id.*, Glossary ¶ 2. There are only two exceptions to this rule: (1) "[w]hen characterization under other than honorable conditions is authorized under the reason for separation and is warranted by the circumstances of the case; or (1) the Secretary of the Army … , on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving conduct and performance of military duty." *Id.* ¶ 2-11(a). Absent one of those conditions, a soldier discharged while in an entry-level status will receive an "uncharacterized" discharge. *Id.* ¶ 2-7(a); *see also* AR 635-200, ¶ 3-9(a).

A person seeking naturalization under § 1440 must submit an application for naturalization (Form N-400) to USCIS. *See* USCIS Policy Manual, Vol. 12, Part I, Ch. 5, § A (attached hereto as Exhibit C). Additionally, the applicant must submit a Form N-426, which "confirms whether the applicant served honorably" and, where a person has been separated, a copy of DD Form 214 or an equivalent discharge order. *Id.*; Form N-426, Instructions at 2 (attached hereto as Exhibit D); *Nio v. USCIS*, No. 17-cv-0998 (ESH) (*Nio* ECF No. 171) (explaining that "USCIS has determined that it will treat … discharge orders listing an uncharacterized discharge as the functional equivalent of a DD Form 214."). DD Form 214 is the "Certification of Release or Discharge from Active Duty." *See, e.g.*, Pls.' MSJ, Ex. 5. Where an individual separates from the Army while in entry level status, the DD Form 214 states that the "Character of Service" is "Uncharacterized." *See, e.g.*, Pls.' MSJ, Ex. 5; AR 135-178, ¶ 2-7(a).

If USCIS denies a naturalization application, the individual may appeal that denial by submitting a Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings. *See* 8 U.S.C. § 1421(c) (providing that an applicant for naturalization may only come to federal court

"after a hearing before an immigration officer under section 1447(a) of this Title" (*i.e.*, INA § 336)); 8 C.F.R. § 336.9(d). Thereafter, Congress directed that applicants may challenge application denials pursuant to 8 U.S.C. § 1421(c).

B. Plaintiffs' Naturalization Applications

This action relates to naturalization applications that four individuals filed pursuant to § 1440. Plaintiff Miriyeva enlisted in the Army Selected Reserve of the Ready Reserve on March 14, 2016. *See* Pls.' MSJ, Ex. 3 at 2. She submitted her N-400 application on March 29, 2018. Pls.' MSJ, Ex. 2 at 1. She was subsequently discharged on December 21, 2018. Pls.' MSJ, Ex. 5 at 1. The Army stated that her "Character of Service" upon discharge was "uncharacterized" and that the reason for her separation was "Failed Medical/Physical/Procurement Standards." Pls.' MSJ, Ex. 5. Miriyeva's N-400 was initially approved prior to her discharge, but was later reopened and denied on July 11, 2019, based on the uncharacterized discharge. Pls.' Statement of Facts ("Pls.' SOF") ¶¶ 28, 35–36. Miriyeva appealed this determination, submitting a Form N-336 on August 16, 2019. Decl. of G. Miriyeva ¶ 24 (ECF No. 2-23). That appeal remains pending. *Id.*

In August 2019, the Army informed USCIS that Ms. Miriyeva's discharge was not properly effectuated, which would have meant that she had not been fully discharged from the Army and did not have an "uncharacterized" discharge. Pls.' SOF ¶ 39. Based on that information, USCIS issued a Motion to Reopen and approved Ms. Miriyeva's N-400 on August 13, 2019. *Id.* ¶ 38. Before Ms. Miriyeva was administered the Oath of Allegiance to complete the naturalization process, the Army notified USCIS that Ms. Miriyeva was in fact properly discharged. USCIS issued another Motion to Reopen on November 20, 2019, based on the latest information from the Army. *See* Agency Mot. to Reopen (Nov. 20, 2019) (attached hereto as Exhibit E). Ms. Miriyeva

responded to that Motion on or about December 2, 2019 and the decision on the Motion to Reopen is currently pending. *See id.*

Plaintiff Tum enlisted in the Army Selected Reserve of the Ready Reserve on May 17, 2016. Pls.' MSJ, Ex. 9 at 2. Tum submitted her N-400 application on August 2, 2018. *See* Exhibit H (attached hereto). Tum was discharged on February 19, 2019. Pls.' MSJ, Ex. 10 at 1. The Army stated that her "Character of Service" upon discharge was "uncharacterized" and that the reason for her separation was "Failed Medical/Physical/Procurement Standards." Pls.' MSJ, Ex. 10 at 1. USCIS denied Tum's naturalization application on May 28, 2019. *See* Pls.' MSJ, Ex. 12. USCIS stated that the Tum's DD Form 214 indicated that she "received an uncharacterized discharge from the U.S. Army." Pls.' MSJ, Ex. 12 at 1–2. Accordingly, USCIS stated that Tum had not met her burden of "demonstrate[ing] that [she was] discharge[d] from the U.S. Armed Forces under honorable conditions." Pls.' MSJ, Ex. 12 at 2. Tum appealed this determination, submitting a Form N-336 on June 24, 2019. *See* Decl. of A. Tum ¶ 14 (ECF No. 2-26). That appeal remains pending. *See id.*

Plaintiff Kulkarni enlisted in the Army Selected Reserve of the Ready Reserve on January 22, 2016. *See* Compl. ¶ 70. She submitted her N-400 application on December 21, 2018. Pls.' MSJ, Ex. 17 at 2. Kulkarni was discharged on December 7, 2018. Pls.' MSJ, Ex. 15 at 1. The Army stated that her "Character of Service" upon discharge was "uncharacterized" and that the reason for her separation was "Condition, Not a Disability." Pls.' MSJ, Ex. 15 at 1. USCIS denied Kulkarni's naturalization application on June 5, 2019. Pls.' MSJ, Ex. 17 at 1. USCIS stated that it denied the application because Kulkarni received an "uncharacterized" discharge and had not "demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions." Pls.' MSJ, Ex. 17. Kulkarni appealed this determination, submitting a Form N-336 on or about

July 5, 2019. *See* Decl. of S. Kulkarni ¶ 15 (ECF No. 2-25). USCIS affirmed the denial on October 17, 2019.[3] *See id*.

Plaintiff Kadel enlisted in the Army Selected Reserve of the Ready Reserve on July 24, 2015. Pls.' MSJ, Ex. 20 at 1. He submitted his N-400 on July 24, 2017. Pls.' MSJ, Ex. 22 at 2. Kadel was discharged from the Army on August 4, 2017. Decl. of B. Kadel ¶ 5 (ECF No. 2-24). The Army stated that his "Character of Service" upon discharge was "uncharacterized" and that the reason for his separation was "Maximum DEP time has been exceeded." Pls.' MSJ, Ex. 21. USCIS denied Kadel's naturalization application on July 10, 2019. *See* Pls.' MSJ, Ex. 22. USCIS stated that it denied the application because Kadel received an "uncharacterized" discharge and had not "demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions." Pls.' MSJ, Ex. 22 at 2. Kadel appealed this determination, submitting a Form N-336 on August 15, 2019. Kadel Decl. ¶ 14. Since then, the Army stated that it would offer to reinstate Kadel. *See id.* ¶ 17.

STANDARD OF REVIEW

"The Court must grant summary judgment if the moving party demonstrates that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Johnson v. Perez*, 66 F. Supp. 3d 30, 35 (D.D.C. 2014). "A fact is material if it

[3] For Kulkarni, Plaintiffs state that she "had served six months and eight days on active duty (over 180 days, meaning that she should not have received an entry-level 'uncharacterized' discharge but should have received a characterized 'honorable' discharge)." Pls.' MSJ at 12. Plaintiffs do not dispute, however, that Kulkarni received an "uncharacterized" discharge. Nor do Plaintiffs argue that any Defendant in this case had any role in calculating Kulkarni's dates of service. Accordingly, this specific fact (if true) is not relevant here. Of note, Kulkarni also has a remedy available to her if she wishes to challenge this record. The Army Discharge Review Board is charged with reviewing discharges of former soldiers and can change the characterization of service and/or the reason for discharge. *See* 10 U.S.C. § 1553; *see also* Overview, Army Discharge Review Board (available at https://arba.army.pentagon.mil/adrb-overview.html). Plaintiffs do not allege that Kulkarni has availed herself of this remedy.

'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008)).

The party moving for summary judgment has "the burden of demonstrating the absence of a genuine dispute as to any material fact." *Johnson*, 66 F. Supp. 3d at 35 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party satisfies this burden, the "non-moving party must designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing *Celotex*, 477 U.S. at 324). While the Court must view evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, the "non-moving party must show more than '[t]he mere existence of a scintilla of evidence in support of' his or her position." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). "Moreover, the non-moving party 'may not rest upon mere allegation or denials of his pleading but must present affirmative evidence showing a genuine issue for trial.'" *Id.* (quoting *Laningham v. United States Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987)).

For claims under the Administrative Procedure Act ("APA"), "the summary judgment standard of review set forth in Federal Rule of Civil Procedure 56 does not apply." *WMI Liquidating Tr. v. Fed. Deposit Ins. Corp.*, 110 F. Supp. 3d 44, 52 (D.D.C. 2015). Rather, the court must decide, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review. *See Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007) (citing *Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977)).

ARGUMENT

I. Standards For Review Of Naturalization Application Determinations

For the reasons discussed herein, Plaintiffs' claims fail, and the Court should issue summary judgment in USCIS's favor. Before addressing this legal argument, however, it is important to note the context for reviewing such claims.

The Supreme Court has held that naturalized citizenship in the United States "is a high privilege," *United States v. Manzi*, 276 U.S. 463, 467 (1928), and has called its "[a]cquisition ... a solemn affair," *Costello v. United States*, 365 U.S. 265, 269 (1961) (quoting *Chaunt v. United States*, 364 U.S. 350, 352 (1960)); *see also United States v. Minker*, 350 U.S. 179, 197 (1956) ("[w]hen we deal with citizenship we tread on sensitive ground") (Douglas, J. concurring). The burden of demonstrating eligibility for naturalization rests entirely on the alien seeking that relief:

> When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by "clear, unequivocal, and convincing evidence." But when an alien seeks to obtain the privileges or benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted, cannot be lightly taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect.

Berenyi v. Dist. Dir., INS, 385 U.S. 630, 636–37 (1967).

Any doubts regarding the Government's grant or denial of a naturalization application "should be resolved in favor of the United States and against the claimant." *Id.* at 637 (citations omitted). Moreover, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with," *United States v. Ginsberg*, 243 U.S. 472, 474–75 (1917), and "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," *Fedorenko v. United States*, 449 U.S. 490, 506 (1981); *see also I.N.S.*

v. Pangilinan, 486 U.S. 875, 883–84 (1988) ("[T]he power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers).

II. The Naturalization Application Determinations Did Not Violate The APA

Under the APA, a court may set aside final agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations. *See* 5 U.S.C. § 706(2). A court's APA review is "'deferential,' but requires that the court at least assure itself that the [agency's] reason for its decision is both rational and consistent with the authority delegated to it by Congress." *Xcel Energy Servs. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000); citing 5 U.S.C. § 706(2)(A), (C); *Motor Vehicle Mfrs. Ass'n v. State Fam Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)); *see also Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997) (stating that courts performing APA review "show considerable deference"). The Supreme Court has held that a court reviewing agency action under the APA shall not "substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971). And where Congress has authorized an agency to implement a statute, "the court accords special deference to the [agency's] interpretation[.]" *Milk Train v. Veneman*, 310 F.3d 747, 753 (D.C. Cir. 2002).

Plaintiffs claim that USCIS violated the APA when it denied their naturalization applications.[4] In the main, Plaintiffs claim that the basis for the denials was contrary to law and thus in violation of 5 U.S.C. § 706(2).[5] *See* Compl. ¶¶ 102–11, 120. Additionally, Plaintiffs claim

[4] Calling the denials a "policy," Plaintiffs claim that USCIS also violates the APA when it applies the same determination in denying other individuals' applications. *See* Compl. ¶ 7.

[5] This is the only claim for which Plaintiffs seek summary judgment. *See* ECF No. 14 at 1 n.1.

in passing that the denials also violated the APA because they were arbitrary and capricious, *see id.* ¶ 122; USCIS did not engage in the notice and comment requirements of 5 U.S.C. § 553, *see id.* ¶ 127; and USCIS did not comply with the publication requirements of 5 U.S.C. § 552, *see id.* ¶ 128. Each of these arguments fails and summary judgment should be entered in USCIS's favor and Plaintiffs' Motion should be denied.

A. USCIS's naturalization application determinations were not contrary to law

The gravamen of Plaintiffs' APA claim is that USCIS's naturalization determinations were contrary to law.[6] *See* Compl. ¶¶ 102–11, 120. Specifically, Plaintiffs claim that USCIS violated § 1440 when it determined that their "uncharacterized" discharges do not satisfy § 1440(a)'s requirement that they be discharged "under honorable conditions." *Id.* Plaintiffs' claim fails because USCIS followed Congress's requirement that any individual who has separated from military service and applies for naturalization under § 1440(a) must demonstrate both that she served honorably *and* that she was separated under honorable conditions. As discussed below, USCIS defers to the relevant military branch for both determinations. Here, the Army stated that each discharge was "uncharacterized," which, as discussed below, is distinct from an "honorable

[6] In addition to the reasons discussed herein, USCIS maintains that Plaintiffs' APA claim fails because there is another "adequate remedy in a court," and therefore, this Court lacks jurisdiction. Defs.' MTD at 4 (quoting *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006)). Indeed, Congress directed that Plaintiffs bring their challenges pursuant to 8 U.S.C. § 1421(c). Where, as here, Congress has afforded plaintiffs a private right of action, there generally is no APA remedy. *See CREW v. Dep't of Justice*, 846 F.3d 1235, 1244–45 (D.C. Cir. 2017). That is "particularly true where," as here, "Congress has provided for *de novo* review, 'given the frequent incompatibility between *de novo* review and the APA's deferential standards.'" *Greenpeace v. Dep't of Homeland Sec.*, 311 F. Supp. 3d 110, 126 (D.D.C. 2018) (quoting *CREW*, 846 F.3d at 1245). Accordingly, Defendants maintain that Plaintiffs are merely challenging the specific reasons that USCIS denied each of their naturalization applications and have improperly tried to recast those claims as challenging a "policy" to circumvent the special jurisdictional and venue provisions Congress created. As there is an "adequate remedy in a court," Plaintiffs' APA claim fails. *Fund for Animals*, 460 F.3d at 18.

conditions" discharge. Accordingly, USCIS correctly applied § 1440(a) in denying Plaintiffs' applications. As USCIS has thus not acted contrary to law, summary judgment should be entered in its favor on this claim. The Court should also deny Plaintiffs' summary judgment motion on this claim because Plaintiffs have not identified anything calling into question the lawfulness of USCIS's actions.

i. Uncharacterized discharges are not "under honorable conditions"

Section 1440's naturalization provision exists for certain aliens who are serving honorably in the Selected Reserve of the Ready Reserve or in active-duty status or who have honorably completed military service:

> Any person who, while an alien or noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in the 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, and who, if separated from such service, was separated under honorable conditions, may be naturalized as in this section if (1) at the time of enlistment, re-enlistment, extension of enlistment, or induction, such person shall have been in the United States [or certain other locations]…, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.

8 U.S.C. § 1440(a). Thus, the elements for consideration in a § 1440 naturalization application are: (1) alienage; (2) service in the Selected Reserve of the Ready Reserve or in active-duty status; (3) honorable service during a designated period of armed conflict; (4) physical presence in the United States or certain other locations at the time of enlistment, or subsequent admission for lawful permanent residence, and (5) separation "under honorable conditions."[7] *See id.* Here, the dispute turns on the final prong—separation "under honorable conditions."

[7] In addition, "[a] person filing an application under [§ 1440(a)] shall comply in all other respects with the requirements of [Title III of the INA], except" for certain exclusions related to age;

As discussed below, all relevant authority supports USCIS's determination that an "uncharacterized" discharge does not qualify as an "under honorable conditions" discharge. At the outset, though, Plaintiffs' Motion is surprising for its failure to note that another federal district court has previously considered this question and concluded that USCIS acted in accordance with § 1440(a) when it determined that an "uncharacterized" discharge was not an "under honorable conditions" discharge. *See Oyebade*, 2010 WL 2927207. In *Oyebade*, the court considered whether Oyebade's "Uncharacterized (Entry Level Separation)" satisfied § 1440's "under honorable conditions" requirement. *See id.* at *4. The *Oyebade* court held that "[t]he basic canons of statutory construction indicate that an 'Uncharacterized (Entry Level Separation)' discharge is not an honorable separation from service within the meaning of [§ 1440], and therefore, a discharge of this type cannot give rise to eligibility for military naturalization." *Id.* at *5.[8] This Court should conclude likewise.

Pursuant to § 1440(a), USCIS deferred here to the Army for the determination of discharge. The Army provides that there are only four possible characterizations of service upon discharge for administrative separations:[9] (1) honorable; (2) general (under honorable conditions); (3) other than honorable; or (4) entry-level. *See* AR 135-178, ¶ 2-7(a); AR 635-200, ¶¶ 3-4(a)(2), 3-9(a).

---

deportability; "alien enemies"; and residence and physical presence within the United States or any State or district of USCIS. 8 U.S.C. § 1440(b). The provisions of Title III of the INA that apply to military naturalization thus include the requirements for good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition to the good order and happiness of the United States set out at 8 U.S.C. § 1427(a).

[8] Of note, *Oyebade* reached this conclusion on *de novo* review, *see Oyebade*, 2017 WL 2927207, at *4, rather than under the APA's more deferential review standards that are applicable in the instant case, *CREW*, 846 F.3d at 1245.

[9] Administrative separations do not include adjudged punitive discharges, which include a Bad Conduct Discharge and a Dishonorable Discharge. *See generally* Uniform Code of Military Justice 10 U.S.C. Ch. 47.

The Army further provides that an entry-level discharge will generally be uncharacterized, but identifies narrow circumstances when an entry-level discharge may be considered as honorable: only when "[t]he Secretary of the Army ... , on a case-by-case basis," has "determine[d] that characterization of service as honorable is clearly warranted by the presence of unusual circumstances[.]"[10] *Id.*, ¶ 2-11(a)(1). If, as Plaintiffs' contend, *see* Pls.' MSJ at 1, an "uncharacterized" discharge was equivalent to an "honorable conditions" discharge, there would be no reason for the Army to include this case-by-case review provision in its regulations. Rather, this regulation indicates clearly that there is a distinction between an "uncharacterized" discharge and an "honorable conditions" discharge.

The statutory language of § 1440(a) also confirms this distinction. Indeed, under basic principles of statutory construction, it is clear that an "uncharacterized" discharge is distinct from "honorable" separation. As the *Oyebade* court correctly explained, "[c]onflating an Uncharacterized (Entry Level Separation) discharge with 'honorable' impermissibly renders the statutory term [honorable] insignificant." *Oyebade*, 2010 WL 2927207, at *5. The Supreme Court has instructed that "in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *I.N.S. v. Phinpathya*, 464 U.S. 183, 184 (1984) (quotations marks omitted). Each word of the statute must be given effect. *See generally Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 833 (1983). When construing a statute, it is a cardinal principle that no clause, sentence, or word shall be superfluous, void, or insignificant. *See C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997); *Doe v. Chao*, 540 U.S. 614, 630 (2004).

[10] Plaintiffs do not argue that they should have earned this designation. *See generally*, Pls.' MSJ.

Applying these standards, the Court must give effect to Congress's inclusion of a separate requirement for discharged soldiers. Where a service member has separated from service, Congress expressly required that she demonstrate *both* honorable service *and* separation "under honorable conditions." Of the four possible characterizations of discharge identified above, only two are "under honorable conditions": "honorable" and "general (under honorable conditions)." AR 135-178, ¶ 2-7(a); AR 635-200, ¶3-9(a). The third and fourth types of separation, "other than honorable" and "uncharacterized," clearly do not fit within the statute's requirement of separation under "honorable conditions." *See id.* Despite Plaintiffs' attempt to construe the statute in their favor, the statutory language cannot accommodate conflating neutral, uncharacterized entry-level separation with "honorable" separation, as that would impermissibly render the statutory term insignificant. *See C.F. Commc'ns*, 128 F.3d at 739. Under any reasonable construction of the statute, USCIS has appropriately deferred to the Army's characterization of discharge. Summary judgment should thus be entered in USCIS's favor on this claim because its application of § 1440(a) "is both rational and consistent with the authority delegated to it by Congress." *Xcel Energy Servs.*, 815 F.3d at 952; *see also Oyebade*, 2010 WL 2927207, at *5.

ii. Plaintiffs fail to identify anything calling into question the lawfulness of USCIS's actions

In their Motion, Plaintiffs do not identify anything calling into question the lawfulness of USCIS's actions. As noted, Plaintiffs argue that USCIS acted unlawfully when it concluded that an "uncharacterized" discharge does not satisfy § 1440(a)'s "separated under honorable conditions" requirement. *See id.* For this, Plaintiffs rely on the following argument: (i) § 1440(a) delegates to the Department of Defense ("DOD") (and in these cases, the Army) the responsibility for determining "whether separation from such service was under honorable conditions;" (ii) Congress and the DOD consider an "uncharacterized" discharge to be the same as an "under

honorable conditions" discharge; and thus (iii) USCIS unlawfully substituted its own interpretation of the discharge when it denied Plaintiffs' naturalization applications. While the Parties agree that DOD (and the Army) are responsible for determining the nature of Plaintiffs' separation, Plaintiffs' remaining contentions are meritless.

The primary flaw in Plaintiffs' argument is their attempt to collapse two of § 1440(a)'s requirements into one. Yet, Congress set forth two pertinent requirements in § 1440(a), and this distinction is key to understanding the failures of Plaintiffs' claim. For soldiers still serving, naturalization under § 1440(a) is available if, along with satisfying other naturalization criteria, they have "served honorably." 8 U.S.C. § 1440(a). This is the characterization of service reflected in Part 5 of an N-426. *See* USCIS Policy Manual, Vol. 12, Part I, Ch. 5, § A (Form N-426 "confirms whether the applicant served honorably in an active duty status"). But, Congress established an additional requirement for those who, like Plaintiffs, have "separated from such service." 8 U.S.C. § 1440(a). Congress required also that their "separation from such service was under honorable conditions." *Id*. This is the characterization of service reflected on a DD Form 214 or an equivalent discharge document. *See, e.g.*, Pls.' MSJ, Ex. 5 (DD Form 214 is the "Certification of Release or Discharge from Active Duty"), as well as in Part 6, Question 2 of an N-426. Thus, applicants like Plaintiffs must demonstrate *both* honorable service *and* separation under honorable conditions. Congress did not provide any further explanation of what will constitute a separation "under honorable conditions." 8 U.S.C. § 1440(a). Rather, it delegated that determination to the "executive department under which such person served." 8 U.S.C. § 1440(a).

Each Plaintiff has separated from service and thus they cannot rely solely on their characterization of service found on Form N-426. *See* Pls.' MSJ at 9, 12–13, 15, 19.[11] The question is not whether Plaintiffs were serving honorably before discharge. Rather, under § 1440(a), Plaintiffs must separately demonstrate that their *discharge* was under honorable conditions. *See* 8 U.S.C. § 1440(a). If a discharged soldier needed only to demonstrate that her service was honorable, it would strip all meaning from the second part of § 1440(a) addressing soldiers who have separated. But Congress made these requirements conjunctive and Plaintiffs cannot focus only on the "served honorably" requirement. *See C.F. Commc'ns Corp.*, 128 F.3d at 739 (rejecting an interpretation that "violates the familiar principle of statutory interpretation which requires construction so that no provision is rendered inoperative or superfluous, void or insignificant.") (quotation marks omitted).[12]

As discussed earlier, the Army provides its characterization of discharge on DD Form 214. *See, e.g.*, Pls.' MSJ, Ex. 5. It is beyond dispute that none of the Plaintiffs' DD Form 214s state that they were discharged with an "honorable" or "general (under honorable conditions)"

[11] In their Motion, Plaintiffs spend considerable energy arguing about the Army's honorable service statements on Plaintiffs' N-426 forms. *See* Pls.' MSJ at 9, 12–13, 15, 19. This energy, however, is entirely misplaced as Part 5 of the N-426 is not relevant to this dispute. USCIS did not dispute whether Plaintiffs had satisfied the "honorable service" requirement. *See* Pls.' MSJ, Exs. 2, 12, 17, 22. Rather, the honorable *separation* is at issue. The only part of an N-426 that is relevant to the question of whether a soldier's *separation* was under honorable conditions is Part 6, Question 2, and only one Plaintiff in this action (Plaintiff Tum) has an N-426 reflecting a separation under honorable conditions. That N-426, however, is contradicted by her DD Form 214 and thus is insufficient to meet her burden to establish by a preponderance of the evidence that she is eligible for naturalization. *See* 8 C.F.R. § 316.2(b). The remaining three Plaintiffs do *not* have post-discharge N-426s reflecting a separation under honorable conditions.

[12] Elsewhere, Plaintiffs also make reference to an Army publication titled "The Soldier's Guide to Citizenship Application." *See* Pls.' MSJ at 19–20; *see also* Pls.' Reply in Supp. of Mot. for Prelim. Inj., Ex. 7, *Kirwa v. Dep't of Defense*, No. 17-cv-1793 (ESH) (ECF No. 22-7). But this argument is similarly misplaced as the Guide examines only the characterization of service for soldiers currently serving, *not* the characterization of discharge.

characterization of service. *See* Pls.' MSJ, Exs. 5, 10, 15, 21. Rather, Plaintiffs' central contention is that Congress and DOD consider "uncharacterized" discharges to be "under honorable conditions" discharges. *See* Pls.' MSJ at 2 (stating incorrectly that "[m]ilitary statutes and instructions specify that uncharacterized discharges are and must be treated as 'under honorable conditions' discharges'"). Thus, according to Plaintiffs, USCIS must interpret an "uncharacterized" discharge to satisfy § 1440. Otherwise, Plaintiffs claim, USCIS is acting unlawfully by failing to defer to the responsible "executive branch." In support of this argument, Plaintiffs rely on inapposite statutory and regulatory language.

To support their argument that an "uncharacterized" discharge is equivalent to an "under honorable conditions" discharge, Plaintiffs chiefly rely on 10 U.S.C. § 12685, which provides that "[a] member of a reserve component who is separated for cause … is entitled to a discharge under honorable conditions unless – (1) the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned; or (2) the member consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board." 10 U.S.C. § 12685; *see also* Compl. ¶ 10; Pls.' MSJ at 3, 21, 22. According to Plaintiffs, § 12685 means that "any applicant for naturalization under § 1440 who has received an 'uncharacterized' discharge has been determined by the U.S. Army … to have been separated 'under honorable conditions.'" Compl. ¶ 12.

Plaintiffs' reliance on § 12685 is misplaced for a host of reasons. First, Plaintiffs fail to identify any authority suggesting that through this provision, Congress purported to define "honorable" service for the purposes of § 1440. This is unsurprising as Congress expressly delegated such determinations to the responsible "executive department." 8 U.S.C. § 1440(a). If

§ 12865 were read to define "honorable conditions" for the purposes of § 1440(a), Congress's delegation to the responsible "executive department" would be superfluous. 8 U.S.C. § 1440(a); *see also C.F. Commc'ns*, 128 F.3d at 739 (rejecting such statutory interpretations). As § 12685 was added to the U.S. Code in 1994, decades after § 1440, its silence on § 1440 is notable. *See* Nat'l Def. Auth. Act for FY 1995, Pub. L. No. 103-337, § 1662(i)(1), 108 Stat. 2663, 2998. Second, Plaintiffs' reliance on § 12685 suffers a more fatal defect—they overlook the fact that it applies solely where the reservist is "separated *for cause*." 10 U.S.C. § 12685 (emphasis added). None of the Plaintiffs was separated for cause and thus § 12685 is irrelevant. A separation *for cause* is one based on personal or professional conduct issues. *See* AR 135-178, Glossary § 2 (defining "cause" as "based on a decision by an appropriate member of the Soldier's chain of command, supervisory chain, or higher authority that the Soldier's personal or professional conduct, behavior, or performance of duty warrants separation or denial of reenlistment in the best interest of the Army.").[13] Congress similarly explained that "cause" is a distinct term. *See* 10 U.S.C. § 12646(d)(1) (discussing discharge or transfer "for physical disability, for cause, or because [the officer has] reached the age at which transfer … is required by law"). Plaintiffs' reliance on § 12685 is thus entirely misplaced. Rather, in § 12685, Congress merely set forth certain procedural protections for a soldier who is being separated due to "personal or professional conduct." It has no bearing on Plaintiffs' separations and thus no relevance to their APA claim. For the same reasons, Plaintiffs' reliance on DOD Instruction 1332.14, Enclosure 4, Part 3(c)(1)(d)

[13] The Navy's regulations similarly explain that separations "for cause" are restricted to conduct issues: "Separation for Cause. Officers who do not maintain required standards of performance or professional or personal conduct may be processed for separation for cause[.]" SECNAVINST 1920.6C, Policy Governing Involuntary Separation (attached as Exhibit F).

(attached hereto as Exhibit G) is equally misplaced as it is also limited to separations "for cause."[14] *See* Compl. ¶ 10; Pls.' MSJ at 3.

Plaintiffs also rely on DOD Instruction 1332.14, Enclosure 4, Part 3(c)(1)(c). *See* Compl. ¶ 12; Pls.' MSJ at 22–23. In this Instruction, DOD provides that: "[w]ith respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization." DOD Instruction 1332.14, Enclosure 4, Part 3(c)(1)(c) (see Exhibit G). Plaintiffs baldly claim that this Instruction is "directly on point," Pls.' MSJ at 23, and that "administrative matters" must mean naturalization applications under § 1440. Noticeably absent is any authority supporting Plaintiffs' speculation that the referenced "administrative matters" include naturalization applications processed by an outside agency. Rather, given the many DOD service-related benefits available exclusively to soldiers whose discharges are characterized as honorable or general (under honorable conditions),[15] the Instruction is best understood as preserving access to such benefits for soldiers who have not been removed by court-martial or a disciplinary board, rather than as a requirement that DOD must report as honorable the service of soldiers who have not received that designation. And Plaintiffs provide no basis for concluding otherwise.

Furthermore, as a matter of policy, Plaintiffs' suggested interpretation is incongruous. Plaintiffs' proposed reading would extend the high privilege of citizenship to troubled or otherwise ineligible recruits who could pass a disqualifying condition past a recruiter and remain in the military for a minimal length of time. This scenario lies well beyond the plain language of the

[14] Throughout their Motion, Plaintiffs cite this as DOD Instruction 1322.14. *See, e.g.*, Pls.' MSJ at 3, 23. But it is clear from context and Plaintiffs' Exhibit 1 that they intended to cite DOD Instruction 1332.14.

[15] For instance, payment for accrued leave, 37 U.S.C. § 501; health coverages, 10 U.S.C.§ 1145; transitional housing, 10 U.S.C. § 1147; and relocation assistance, 10 U.S.C. § 1148.

statute, and would twist the statute to create an unwarranted loophole in a benefit clearly aimed at service members who continue to serve on active duty or who have received an honorable post-separation characterization of their service. *See Phinpathya*, 464 U.S. at 184 ("in all cases involving statutory construction, … we assume that the legislative purpose is expressed by the ordinary meaning of the words used"). Plaintiffs are neither continuing in service nor have they been honorably discharged. Thus, their service, though not dishonorable, does not rise to the necessary level for naturalization eligibility.

At bottom, Plaintiffs cannot identify any support for their argument that USCIS's naturalization application determinations were unlawful. Indeed, applying the APA's "considerable deference," *Troy Corp.*, 120 F.3d at 283, USCIS's application of § 1440 is certainly "rational" and "consistent" with the authority Congress delegated to USCIS, *Xcel Energy Servs.*, 815 F.3d at 952. Contrary to Plaintiffs' arguments, it is clear that (i) the Army is responsible for determining the characterization of each Plaintiff's discharge; (ii) no Plaintiff's DD Form 214 stated that they received an honorable or general (under honorable conditions) discharge; (iii) the Army treats "uncharacterized" discharges as distinct from honorable, general (under honorable conditions), or other than honorable conditions discharges; and (iv) USCIS applied the plain text of § 1440 when it concluded that the Plaintiffs had not satisfied § 1440(a)'s "separat[ion] under honorable conditions" requirement.

Accordingly, nothing remains of Plaintiffs' claim that USCIS's naturalization application decisions are contrary to law. Summary judgment should be entered in USCIS's favor, and the Court should deny Plaintiffs' Motion.

B. USCIS's naturalization application determinations were not arbitrary and capricious

Plaintiffs also allege that the naturalization application denials violated the APA because they were arbitrary and capricious. *See* Compl. ¶ 122. Beyond a single passing statement in their Complaint, *see id.*, and a reference to the APA's "arbitrary and capricious" standard in their Motion, *see* Pls.' MSJ at 17, 24, Plaintiffs do not explain how USCIS's naturalization determinations were either arbitrary or capricious. That is likely because such a claim fails for the simple reason that USCIS acted in accord with all relevant statutes and regulations.

As the Supreme Court has explained, review under the "arbitrary and capricious standard is narrow[.]" *Bowman Transp. v. Ark.–Best Freight Sys.*, 419 U.S. 281, 285–86 (1974). Additionally, "[a]rbitrary and capricious" review is "highly deferential" and "presumes the agency's action to be valid." *Envt'l Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). On such review, the court "considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals*, 903 F. Supp. at 105 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)); *see also Citizens to Preserve Overton Park*, 401 U.S. at 416 (stating that a court's reversal of an agency's decision is appropriate only where the decision was not "based on a consideration of the relevant factors" or where there "has been a clear error of judgment").

Here, there can be no argument that following the statutory text of § 1440 and applying the Army's discharge characterization was a "clear error of judgment," *Marsh*, 490 U.S. at 378, nor that USCIS failed to offer an explanation for its decision that runs counter to the facts, *see Motor Vehicle Manufacture Association*, 463 U.S. at 43. To be sure, "[e]ven when an agency has adopted a reasonable construction of a governing statute, the Court 'still must ensure that [the agency's]

action is not otherwise arbitrary and capricious.'" *WMI Liquidating Trust*, 4110 F. Supp. 3d at 53 (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 90 (D.C. Cir. 2010)) (alteration in original). But the Court should not struggle here to conclude that USCIS did not act arbitrarily or capriciously. Rather, as explained above, USCIS acted in accordance with § 1440(a), *see supra,* Part II.A; it explained its decisions, *see* Pls.' MSJ, Exs. 2, 12, 17, 22; the determinations are based on facts in the record—namely the fact that the Army expressly differentiates "uncharacterized" discharges from honorable condition discharges, *see, e.g.*, AR 135-178, ¶ 2-7(a); and there are no "relevant factors" suggesting otherwise that USCIS has not considered. *See Fund for Animals*, 903 F. Supp. at 105. Accordingly, the Court should enter summary judgment in USCIS's favor on this claim.

C. USCIS did not fail to comply with the APA's notice and comment or publication requirements

Plaintiffs also claim that the basis for the naturalization application denials—that an "uncharacterized" discharge does not satisfy § 1440's "under honorable conditions" requirement—is "a new substantive legal requirement that is subject to the notice and comment requirements of 5 U.S.C. § 553 prior to implementation." Compl. ¶ 127. Yet, USCIS's application of § 1440 is not a "new substantive requirement" and does not violate the APA's notice-and-comment rulemaking regulations.

The APA provides that, absent a published finding of good cause, an agency may issue a "legislative rule" only after following the notice and comment procedure described in the APA. 5 U.S.C. § 553. An agency need not, however, follow those procedures to issue "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A); *see also Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995). A legislative rule is one that has the force of law and creates new rights or duties, while an interpretive

rule merely clarifies an existing rule and does not change law, policy, or practice. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). Importantly, interpretive rules and rules of agency organization, procedure, or practice do not add to the substantive law that already exists in the form of a statute or legislative rule. *See Cent. Tex. Tel. v. FCC*, 402 F.3d 205, 213 (D.C. Cir. 2005).

Plaintiffs' claim fails because USCIS has not added anything to the substantive law. *See supra*, Part II.A. Rather, Congress requires an applicant under § 1440(a) to demonstrate separation "under honorable conditions." 8 U.S.C. § 1440(a). USCIS merely requires the same thing and relies on the Army to provide the requisite characterization of discharge. *See supra* Part II.A. It is thus clear that USCIS's reasoning is not a legislative rule requiring notice and comment. In *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), the D.C. Circuit established a framework for distinguishing between legislative and interpretative rules, where a legislative rule will be found: (1) when, in the absence of the rule, there would not be an adequate legislative basis for agency action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule. *Am. Mining Congress*, 995 F.2d at 1109. Here, USCIS has not invoked its general legislative authority, and has not amended any prior legislative rule. Moreover, USCIS has an adequate legislative basis supporting its determinations—the plain language of § 1440(a). Accordingly, USCIS's reasoning was not a legislative rule requiring notice and comment. *See Cent. Tex. Tel. v. FCC*, 402 F.3d at 213.

For similar reasons, summary judgment should be entered in USCIS's favor on Plaintiffs' claim that it violated the Freedom of Information Act's ("FOIA") publication requirement. *See* Compl. ¶¶ 128–29 (citing 5 U.S.C. § 552). Under 5 U.S.C. § 552, an agency must "make available

to the public" all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a). Unless a person has "actual and timely notice" of such a "substantive rule," he or she "may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.*

To make a claim under this statute, Plaintiffs must show that they were "adversely affected" by an unpublished policy that should have been published, and that they did not have actual notice of the content of that policy. *See Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1136 (D.C. Cir. 1994); *Mass. Mfg. Extension P'ship v. Locke*, 723 F. Supp. 2d 27, 42 (D.D.C. 2010). This claim fails for at least two reasons. First, § 1440(a) put Plaintiffs on notice that they were required to demonstrate that they separated from the Army under honorable conditions and the Army Regulations put them on notice that the Army treated "uncharacterized" discharges as distinct from honorable condition discharges. *See* 8 U.S.C. § 1440(a); AR 135-178, ¶ 2-7(a); AR 635-200, ¶ 3-9(a). Second, USCIS has not changed any requirement for Plaintiffs (or others similarly situated) to receive naturalization pursuant to § 1440. Rather, as discussed above, USCIS merely applies the plain text of § 1440(a) and the separation characterization that the Army offered. *See supra* Part II.A. Therefore, Plaintiffs have failed to show that USCIS failed to publish a "*substantive* rule" or otherwise violated this portion of 5 U.S.C. § 552(a). Accordingly, the Court should enter summary judgment in USCIS's favor on this claim.

III. Plaintiffs' Constitutional Claims Fail

Plaintiffs also claim that USCIS's decisions violate the Constitution. *See* Compl. ¶¶ 132–38. Specifically, Plaintiffs allege that USCIS has violated the "Uniform Rule of Naturalization." *Id.* According to Plaintiffs, "Congress has the sole power to establish criteria for naturalization."

Id. ¶ 132. And "Congress did not specify that veterans seeking naturalization under § 1440 were subject to a different standard for naturalization than currently-serving soldiers." *Id.* ¶ 134. Thus, according to Plaintiffs, USCIS is applying "additional, non-statutory, substantive pre-conditions to naturalization" that "violate the Constitution[.]" *Id.* ¶ 135.

Plaintiffs are mistaken. In fact, this argument fails for many of the reasons already discussed—Plaintiffs incorrectly believe that Congress set no additional requirements in § 1440 for applicants no longer serving in the military. *See* Compl. ¶ 134. But as noted, Congress did precisely that—an applicant who is no longer serving in the military must satisfy a *second* requirement of demonstrating that his or her discharge was "under honorable conditions." 8 U.S.C. § 1440(a); *see also supra* Part II.A. This requirement is separate and distinct from the requirement that the applicant also demonstrate that she served honorably. *See id.* Thus, contrary to Plaintiffs' suggestion, USCIS has added no requirements to § 1440; USCIS merely applies the plain text of the statute. In requiring that separated soldiers demonstrate that they were discharged under honorable conditions, USCIS has not violated the Naturalization Clause, as this is the same requirement Congress established. *See supra*, Part II.A. For the same reasons—the lack of any arbitrary, unlawful, or unauthorized conditions set by USCIS—Plaintiffs' Fifth Amendment due process claim fails.[16]

Moreover, Plaintiffs' request that this Court grant equitable relief on their constitutional theory must fail as courts do not have equitable authority to disregard Congress's directives in this context and Congress has not otherwise given courts equitable power to confer citizenship even when the statutory requirements are not satisfied. *See Pangilinan*, 486 U.S. at 883–84.

[16] USCIS maintains also that Plaintiffs' Constitutional claim fails because they lack standing and the Court should dismiss the claim on that basis. *See* Defs.' MTD at 16–19.

Accordingly, the Court should enter summary judgment in USCIS's favor on Plaintiffs' Constitutional claim.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in USCIS's favor and deny Plaintiffs' Motion.[17]

December 13, 2019

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ Brian J. Field*
BRIAN J. FIELD
D.C. BAR #985577
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 252-2551
E-mail: Brian.Field@usdoj.gov

[17] Additionally, the Court should dismiss Plaintiffs' Declaratory Judgment Act claim for the reasons set forth in USCIS's Motion to Dismiss. *See* Defs.' MTD at 18–19. This Court lacks subject matter jurisdiction over such a claim where, as here, there is no independent source of federal jurisdiction. *C&E Servs. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). As the foregoing demonstrates, each of Plaintiffs' claims fails. Accordingly, there is no remaining independent source of federal jurisdiction and Plaintiffs' Declaratory Judgment Act claim fails.