IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	Civil Action No. 1:17-cv-998-PLF

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FEES, EXPENSES, AND COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

I. INTRODUCTION

In August 2020, this Court entered final judgment in favor of the Plaintiffs and permanently enjoined further violations of the law by the government defendants herein. The Court's orders clearly establish Plaintiffs as the "prevailing parties" and form the basis for their entitlement to a recovery of attorneys' fees and expenses from the Defendants under the Equal Access to Justice Act ("EAJA"). In support of their application, Plaintiffs set forth below the legal and factual grounds supporting their fee application, including detailed support for the thousands of hours over several years that their counsel from two law firms devoted to the successful prosecution of this heavily litigated class action. Indeed, as explained below, and as this Court itself recognized, the results of this litigation are extraordinary, with Plaintiffs having through litigation removed the unlawful roadblocks to military naturalization that Defendants had imposed, leading to more than 2,000 class members attaining U.S. citizenship.

While the litigation success is self-evident, and a fee award justifiable on that basis alone, the history of this litigation warrants more. The conduct of Defendants in this case was by no means the norm. Defendants did not just interpose typical litigation defenses and assertions of governmental rights. Far from it. Instead, the record here is consistent with that subset of EAJA cases where Defendants engaged in conduct warranting an enhanced fee recovery, in excess of the EAJA statutory rate. Indeed, it is precisely because of Defendants' intentional and repeated unlawful actions, which began before litigation and continue today, that Plaintiffs' counsel was forced to bring to bear and maintain for years enormous resources in order for Plaintiffs to prevail.

Defendants could have avoided this outcome. They had an opportunity early on to provide the Military Accessions Vital to the National Interest ("MAVNI") program plaintiff-soldiers in this case with the necessary relief, but they chose to pursue to a path that they knew—based on their own internal documents uncovered in the course of litigation—would violate the soldiers'

constitutional and statutory rights. Even after litigation commenced, Defendants could have made things right by agreeing to provide the necessary relief, but they instead caused immense harm and suffering to thousands of enlistees by placing additional roadblocks in Plaintiffs' path to citizenship, and then attempt to hide their tracks to avoid legal scrutiny and accounting. And even after the Court began unraveling Defendants' true intentions with respect to these soldiers—namely, to discharge them in a manner that would prevent their naturalization—Defendants continued to delay and prolong the soldiers' suffering. At every turn, rather than comply with the law, Defendants chose delay, obfuscation, and retaliation, and in doing so *Defendants* unnecessarily dragged out this litigation, resulting in mounting—but essential—counsel resources.

Plaintiffs do not make these assertions lightly. And Plaintiffs in no way suggest that every individual at DoD or USCIS supported Defendants' unlawful policies; certain Defendant personnel may well have been inclined toward the soldiers. Yet, at the end of the day, Defendants' actions and final decisions tell the story of agency intransigence and bad faith conduct.

Eventually, through litigation, Plaintiffs overcame this conduct. The Court's orders and grant of summary judgment ultimately enabled more than 2,000 class members who otherwise would have been discharged from the Army and subject to deportation to become naturalized U.S. citizens. But it was a slog to get that relief, and the case was exponentially expanded and prolonged by Defendants' intentional actions to thwart Plaintiffs' rights. Consequently, Plaintiffs' counsel were compelled to expend thousands of hours litigating the action and counseling class members in order to achieve this result.

As the prevailing parties, Plaintiffs are entitled to recover fees under two different provisions of the Equal Access to Justice Act (EAJA). First, Plaintiffs can be awarded fees under 28 U.S.C. § 2412(b) because the government acted in bad faith both before and during this

litigation. Second, and in the alternative, Plaintiffs are entitled to fees under 28 U.S.C. § 2412(d) because the government's conduct was not substantially justified for at least the same reasons.

Class counsel reasonably and necessarily devoted 15,577.6 hours to bring this hard-fought class action to successful resolution even in the face of the government's intransigence.[1] While the overall hours number is justified on its own via the billing records and other supporting materials here, it is also important to put it into perspective. On an individual basis, for instance, Plaintiffs' counsel devoted approximately 7.7 hours to secure the (in many instances, life-saving) rights of the 2,000 *Nio* class members naturalized to date. And that per-class member hours average drops to less than 6.0 hours per soldier when one considers the total potential class size of approximately 2,600 MAVNIs for whom Plaintiffs have secured permanent injunctive relief.

An award of market rate fees is warranted here. First, market rates fees always are appropriate where an award under § 2412(b) is based on the government's bad faith conduct. Second, market rate fees also are appropriate if the Court awards fees under § 2412(d) because Congress specifically provided for an upward departure from the EAJA statutory rate in cases involving "a special factor, such as the limited availability of qualified attorneys for the proceedings involved." As demonstrated below, and supported by witness testimony—including from Retired Army Lt. Col. Margaret Stock, who was instrumental not only in founding the MAVNI program but also in securing counsel for the MAVNIs for this litigation—this case required not only expertise in the intersection of immigration law, military matters, and class actions, it also required counsel who were both willing and able to devote millions of dollars' worth of time to this case pro bono—and to do the same for three other litigations the same counsel

[1] This Motion accounts for fees and costs through October 2020. After completion of briefing, Plaintiffs will file a supplement regarding additional recoverable fees associated with the Motion.

have initiated as a result of the government's multi-faceted efforts to deny MAVNI soldiers the ability to naturalize as U.S. citizens. As Ms. Stock attests, many attorneys simply could not bring the necessary combination of skills and litigation firepower to the case, and many more who theoretically might have been able to but were not willing to take on so large a case. This unusual combination of factors warrants an award of market rate fees under § 2412(d).

As detailed below, based on the hours worked, Plaintiffs seek a fee award of $9,757,453 and $34,147 in costs, for a total award of $9,791,600. Class counsel's true investment in the case is significantly higher—more than $13.6 million in fees at counsel's standard rates. Plaintiffs, however, have elected to calculate the requested fees based on the LSI *Laffey* Matrix (*i.e.*, a rate lower than their standard rates), which is frequently used in this Circuit as a conservative measure of prevailing market rates for complex federal litigation in Washington, D.C.[2]

II. BACKGROUND

1. Over a decade ago, the U.S. Armed Forces launched the MAVNI program, which offered an expedited path to U.S. citizenship to foreign national U.S. military enlistees who possessed language, medical, and other skills deemed critical to U.S. military readiness and national security. Between 2008 and 2016, approximately 10,000 MAVNI soldiers earned their U.S. citizenship, in expedited fashion, by enlisting and serving in the U.S. Army.

2. As MAVNI enlistees in the Selected Reserve during a designated period of hostilities, these U.S. Army soldiers were eligible to apply for naturalization pursuant to 8 U.S.C. § 1440(a). Under the plain language of the statute, naturalization is not dependent on an individual performing active-duty service.

[2] If the Court awards fees, but is not inclined to award market rate fees, Plaintiffs request in the alternative fees of $3,181,632 calculated at the cost-of-living adjusted EAJA statutory rate plus $34,147 recoverable expenses, for a total award of $3,215,779.

3. Section 1440 eases the path to U.S. citizenship for MAVNI soldiers in multiple ways. One key is that no minimum period of military service is required. *See* 8 U.S.C. § 1440; *see also* S. Rep. No. 1268-92, at 5 (2d Sess. 1968) ("the wartime serviceman has no minimum required"); *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 26-27 (D.D.C. 2017) ("*Kirwa I*") (granting preliminary injunction); ECF 74 (granting *Nio* PI for the reasons stated in *Kirwa I*).

4. Prior to the unlawful government actions that gave rise to these suits, the § 1440 naturalization process for a MAVNI soldier was straightforward and expedient. First, an applicant submitted two forms to USCIS: (1) the standard Form N-400 naturalization application, and (2) a Form N-426 "Request for Certification of Military or Naval Service." *Nio v. United States Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 55 (D.D.C. 2017) (ECF 44) ("*Nio I*"). The Form N-426 requires an applicant to fill out personal information, their enlistment date and location, and all periods of military service by branch, dates of service, and "type of service" ("Active Duty" or "Selected Reserve of the Ready Reserve"). *Kirwa I*, 285 F. Supp. 3d at 27.

5. DoD was then required to perform the ministerial duty of certifying the applicant's qualifying military service on the Form N-426, indicating, by checking either "Yes" or "No," "whether the requestor served honorably or is currently serving honorably for each period of military service the requestor served." *Id*. at 28. DoD's prior policy and practice was to conduct a "cursory record check to determine if the enlistee (1) was in the active duty or the Selected Reserves, (2) had valid dates of service, and (3) had no immediately apparent past derogatory information in his service record." *Id*. at 29.

6. Following DoD's certification of the Form N-426, USCIS followed the standard requirements for naturalization. *Nio I*, 270 F. Supp. 3d at 55. After completion of those checks, an applicant could be scheduled for examination by a USCIS officer. The majority of MAVNI

applications were adjudicated in a roughly 10-week period between the applicant's arrival at basic training to the end of training. *Id.* Overall, prior to the unlawful policy change at the heart of the litigation, the average USCIS processing time for military naturalization applications was approximately four months. *Nio v. U.S. Dep't of Homeland Sec.*, 385 F. Supp. 3d 44, 51 (D.D.C. 2019) (ECF 249) ("*Nio IV*").

7. On September 30, 2016, DoD promulgated policy guidance requiring that MAVNI enlistees complete an enhanced security screening before they could receive a suitability for service determination, qualify for active duty status, or ship to basic training. These newly-required "enhanced DoD security checks" included: (1) a Tier 3 or Tier 5 background investigation (normally reserved for "secret" and "top secret" security clearances); (2) a National Intelligence Agency Check; (3) a counter-intelligence focused security review; and (4) an "issue-oriented interview and/or issue-oriented polygraph, if needed to resolve any foreign influences or foreign preference concerns." *Nio I*, 270 F. Supp. 3d at 54.

8. After this investigation was complete, MAVNI soldiers still had to wait for a two-step "military suitability determination." *Nio IV*, 385 F. Supp. 3d at 51. First, DoD made a "military service suitability recommendation" ("MSSR") based on its review of the information gathered during the enhanced security screening. *Id.* This MSSR was provided to the service branch (*e.g.*, the Army) to render a "military service suitability determination" ("MSSD"). *Id.* at 52. This MSSD determined whether a MAVNI could attend Basic Training and proceed to active duty or whether they were discharged. *Id.* A MAVNI enlistee deemed "unsuitable" for service received an uncharacterized discharge and became ineligible to become a naturalized citizen. *Id.*

9. This new multi-stage policy extended MAVNI enlistees' waiting periods between enlistment and shipment to Basic Training. This delay increased the risk that applicants would

"time out" of the military altogether, resulting in a discharge characterization that USCIS would consider disqualifying for naturalization purposes under 8 U.S.C. § 1440. *See Nio I*, 270 F. Supp. 3d at 57 n.13 (noting the cases of two enlistees who were rendered unable to naturalize according to USCIS in light of this delay).

10. At the behest of DoD, USCIS issued a string of directives implementing a "hold" on the processing of MAVNI N-400 naturalization applications. *Nio IV*, 385 F. Supp. 3d at 53-54. On July 7, 2017, USCIS issued "Updated MAVNI N-400 Guidance" to all field offices:

> USCIS must ensure that each MAVNI naturalization applicant demonstrates good moral character and attachment to the U.S. Constitution as required by the INA and 8 CFR. In order to do so, each applicant must receive proper DoD vetting and clearance in alignment with the September 30, 2016 MAVNI extension authorization and restrictions. ***Consequently, USCIS will not proceed to interview, approve, or oath any currently pending or future MAVNI naturalization applicants applying for naturalization under INA § 329 [codified at 8 U.S.C. § 1440], regardless of their active duty or reserve service, until all enhanced DoD security checks are completed***.

Id. at 54-55 (emphasis added). Pursuant to this policy, USCIS refused to process MAVNI naturalization applications until DoD completed its enhanced security screenings, and instead held MAVNI applications pending both the enhanced security screenings and the Army MSSD. *Nio I*, 270 F. Supp. 3d at 57. USCIS also treated an unsuitable MSSD as determinative for naturalization, even though the standards for military service are more stringent than the standards for naturalization. *Nio IV*, 385 F. Supp. 3d at 65-66. As a result of this MSSD requirement, USCIS was adding a naturalization eligibility requirement that unlawfully blocked the soldier's ability to exercise their statutory right to naturalize. *Id*. at 65.

11. Also in mid-2017, DoD told the Court that it was "'undertaking a review of . . . the standards for certifying approximately 400 existing N-426s' (the *Nio* plaintiffs), and that it was 'not certifying any new MAVNI N-426s' (the *Kirwa* plaintiffs) because it 'viewed [active duty] as

a necessary precondition of an honorable service determination.'" *Kirwa I*, 285 F. Supp. 3d at 32.[3]

12. Section III of the October 13, 2017 policy applied to persons who had previously enlisted, had submitted a completed application for naturalization, and had not yet met the new security screening requirements (the *Nio* plaintiffs). It stated:

> The Military Department concerned will recall and de-certify the Form N-426 for a Service Member described below:
>
> 1. The Service Member's accession was prior to the date of this memorandum; **AND**
>
> 2. The Service Member has submitted to the USCIS a complete application for naturalization that includes both a Form N-400 and a Form N-426, certifying the member's honorable service for purposes of naturalization, signed by a representative of the Military Department concerned, and USCIS has not adjudicated such application, or, if USCIS has granted such application, the member has not yet naturalized; **AND**
>
> 3. The Service Member has ***not*** completed all applicable screening and suitability requirements as set forth in Section 1, paragraph 2 above.

Nio v. U.S. Dep't of Homeland Sec., 323 F.R.D. 28, 31 (D.D.C. 2017) (ECF 73) ("*Nio II*") (quoting Oct. 13, 2017 Guidance). The "screening and suitability requirements" referenced in this guidance are the "enhanced security screening" required under the September 30, 2016 DoD policy and relied on by the July 7, 2017 USCIS hold policy.

III. PROCEDURAL HISTORY

Plaintiffs commenced suit on May 24, 2017, alleging that DoD was unlawfully interfering with the naturalization process for MAVNI soldiers and that USCIS's acquiescence to DoD's request to hold MAVNI applications was unlawful. The complaint alleged multiple causes of

[3] Pursuant to this "review," the Army formally ordered that no N-426s were to be issued unless the MAVNI soldier had served on active duty. *Id.* The related *Kirwa* litigation spawned from this policy, alleging that the policy was unlawful and prevented MAVNI soldiers from being issued certified N-426s. Without those certified N-426s, soldiers could not apply for naturalization and were therefore subject to the threat of removal by virtue of having no pending naturalization application pursuant. *Id*. at 33-34.

action ranging from violations of the Administrative Procedure Act to constitutional violations. The Complaint detailed the unlawful actions against ten MAVNIs—who aimed to serve as class representatives—and detailed the conduct then known to Plaintiffs. *See* ECF 1.

Shortly after filing suit, Plaintiffs' counsel contacted Defendants' counsel, explained the facts and law, and sought to work with Defendants to remedy the unlawful conduct that had placed a hold on Plaintiffs' naturalization applications. Wollenberg Decl. ¶ 8 n.1. Defendants not only refused to provide any relief, but they affirmatively and repeatedly denied that any such "hold" had been put in place. *Id*.

Plaintiffs filed a preliminary injunction motion on June 28, 2017. Following briefing, the Court learned, in two separate hearings, of new developments from Defendants not covered in the briefing that required additional clarification and supplemental briefing. *Nio I*, 270 F. Supp. 3d at 60-61. Given the additional questions raised at these hearings, the Court ordered, *inter alia*: (1) Defendants to file supplemental declarations responding to the Court's specific questions; (2) Plaintiffs to file an amended complaint, and (3) the parties to file supplemental preliminary injunction briefing; and (4) Defendants to file further supplemental responses after the second hearing. *Id.* at 61. Plaintiffs filed the amended complaint on August 4, 2017.

Following DoD's issuance of an October 13, 2017 policy, the Court allowed Plaintiffs to file an amended complaint, an amended motion for class certification, and a motion for preliminary injunctive relief confined to the issue of Section III of DoD's October 13, 2017 policy, which purported to direct DoD to recall and decertify previously-issued Form N-426s. *See* ECF 60.

Plaintiffs filed a second amended complaint on October 20, 2017, challenging USCIS's July 7, 2017 "hold" policy and DoD's October 13, 2017 policy requiring active duty service to issue a Form N-426 and potential revocation of previously certified N-426s. *See* ECF 61. On

October 27, 2017, the Court granted Plaintiffs' motions for class certification and issued a preliminary injunction enjoining DoD from implementing the October 13, 2017 N-426 decertification policy. *See* ECF 72, ECF 74.

Subsequently, Defendants filed two motions to dismiss, each of which the Court denied. *See* ECF 98, ECF 159. In between these two orders, Plaintiffs sought leave to file a third amended complaint and sought a preliminary injunction against USCIS based on its failure to process naturalization applications for MAVNI soldiers who had successfully completed the challenged security screening requirements and were only awaiting their MSSD. The Court denied both motions. But, in denying the motion for leave to file a third amended complaint, the Court stated that it would "consider plaintiffs' allegations regarding USCIS's waiting for the results of the MSSD to be part of the second amended complaint." *See* ECF 135. And, while the Court denied the preliminary injunction, it also ordered Defendants to submit regular status reports detailing class members' progress through the naturalization process. *Id*.

In its June 20, 2018 Order denying Defendants' motion to dismiss, the Court ordered Plaintiffs to file a partial motion for summary judgment focused specifically on the MSSD portion of the USCIS July 7, 2017 policy. *See* ECF 159. On May 22, 2019, the Court granted Plaintiffs' motion for summary judgment in part, vacating the MSSD requirement as arbitrary and capricious, and denying Defendants' cross-motion for summary judgment. *Nio IV*, 385 F. Supp. at 69.

On August 20, 2020, the Court converted its preliminary injunction into a permanent injunction. *Nio v. U.S. Dep't of Homeland Sec.*, No. 17-0998, 2020 WL 6266304, at *1 (D.D.C. Aug. 20, 2020) (ECF 307) ("*Nio V*"). The Court permanently enjoined Defendants from "implementing Section III of the DoD's October 13, 2017 Guidance" and from "decertifying, rescinding, recalling, revoking, or otherwise invalidating plaintiffs' or the class' existing and duly

issued Form N-426s, except as related to the conduct of a class member and based on sufficient grounds generally applicable to members of the military for re-characterization of service." *Id.*

Following entry of final judgment, Defendants' noticed, but later withdrew, an appeal of the District Court's summary judgment and permanent injunction orders.

IV. AN AWARD OF FEES, COSTS AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT IS FULLY JUSTIFIED IN THIS CASE

A. The EAJA

In the EAJA, Congress provided for an award of fees and expenses to the prevailing party in at least two circumstances:

First, the prevailing party may recover fees and expenses where the U.S. government has acted in bad faith. Specifically, 28 U.S.C. § 2412(b) "makes '[t]he United States ... liable for [attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991); *see also Runyon v. McCrary*, 427 U.S. 160, 183 (1976) (recognizing "the 'inherent power' of the federal courts to assess attorneys' fees when the losing party has 'acted in bad faith'") (citations omitted); *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16, 27-28 (D.C. Cir. 2016) (following *Am. Hosp. Ass'n* and affirming award based on bad faith of government agency).

Under § 2412(b), and consistent with the common law, the government is liable to a prevailing party either "where [] bad faith (1) occurred in connection with the litigation, or (2) was an aspect of the conduct giving rise to the lawsuit." *Am. Hosp. Ass'n*, 938 F.2d at 219 (citing *Nepera Chem., Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 701 (D.C. Cir. 1986)). "Bad faith in conduct giving rise to the lawsuit may be found where 'a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the

injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.'" *Id*. at 220 (*quoting Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982)).

"No statutory ceiling on the hourly rate used to calculate fees under § 2412(b) exists; thus, an award of attorney fees for bad faith can be calculated at market rates." *Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36, 39 (D.D.C. 2004) (finding that government conduct giving rise to the litigation was in bad faith); *see also True the Vote, Inc. v. Internal Revenue Serv*., No. CV 13-734 (RBW), 2019 WL 2304659, at *11 (D.D.C. May 30, 2019) (finding bad faith and awarding fees at prevailing market rates); *Cobell v. Norton*, 407 F. Supp. 2d 140, 169 (D.D.C. 2005) (finding bad faith and awarding market rate fees under § 2412(b)).

Second, the EAJA provides for recovery of fees and expenses from the United States in non-tort cases "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(2)(B). So long as the prevailing party meets the net worth limitation, as Plaintiffs here do, the "court *shall* award to a prevailing party other than the United States fees and other expenses." *Id*. (emphasis added); *see also Info Labs, Inc. v. U.S. Citizenship and Immigration Servs.*, No. 19-684 (RC), 2020 WL 6445868, at *2 (D.D.C. Nov. 3, 2020) (where the EAJA statutory requirements are satisfied, "the court must award attorneys' fees and reasonable costs").

Once a Plaintiff establishes that he or she is a "prevailing party" and alleges the government's position was not "substantially justified," the burden shifts to the government on the substantial justification issue. *Hirschey v. F.E.R.C.*, 760 F. 2d 305, 309 (D.C. Cir. 1985). The government also bears the burden of proving that there are "special circumstances" which foreclose a fee award. *Id*.

For important public policy and access to justice reasons, the fact that class counsel

represented Plaintiffs and the Class pro bono in this case has no bearing on whether an award should be granted or the rate at which fees are to be calculated. *See, e.g., AARP v. EEOC*, 873 F.2d 402, 405 (D.C. Cir. 1989) ("[T]he mere non-existence of liability for legal fees between client and counsel does not automatically disqualify a plaintiff from recovering attorneys' fees."); *Cornella v. Schweiker*, 728 F.2d 978, 986 (8th Cir. 1984) ("[A]llowing fee awards to pro bono counsel under the EAJA serves to insure that legal services groups, and other pro bono counsel, have a strong incentive to represent indigent social security claimants.") (internal quotation marks and citation omitted); *Taucher v. Rainer*, 292 F. Supp. 2d 111, 120 (D.D.C. 2003).[4]

Fees awarded under § 2412(d)(2)(B) are based on an hourly rate of "$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). However, courts routinely adjust the statutory rate to account for cost-of-living increases. *See, e.g., Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004).

B. Plaintiffs Are Eligible For An EAJA Fee Award

Plaintiffs satisfy the fee award requirements under both §§ 2412(b) and 2412(d)(2)(B).

1. **Plaintiffs are eligible "prevailing parties"**

Plaintiffs easily satisfy the threshold requirement of having prevailed in the litigation. *See* 28 U.S.C. §§ 2412(b) and (d)(1)(A). "A prevailing party is 'one who has succeeded on any significant claim affording it some of the relief sought[.]'" *Fitzgerald v. Fed. Transit Admin.*, 815 F. App'x 548, 549 (D.C. Cir. 2020) (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch.*

[4] Morgan Lewis will donate any fees recovered for its work on the underlying litigation to charitable causes and legal services organizations. *See* Declaration of Douglas Baruch ("Baruch Decl.) ¶ 28. Fried Frank has also committed to donate a substantial portion of any fee recovery to charitable causes. *Id*. at ¶ 29.

Dist., 489 U.S. 782, 791 (1989). The D.C. Circuit applies a three-part test to "determin[e] whether a litigant is a prevailing party" within the meaning of the EAJA:

1. "there must be a court-ordered change in the legal relationship of the parties";
2. "the judgment must be in favor of the party seeking the fees"; and
3. "the judicial pronouncement must be accompanied by judicial relief."

SecurityPoint Holdings, Inc. v. Transp. Sec. Admin., 836 F.3d 32, 36 (D.C. Cir. 2016). While the fact that every named Plaintiff and more than 2,000 *Nio* class members in total—all of whom were at risk of discharge making them ineligible for naturalization and many of whom were at risk of deportation absent this litigation—have become naturalized citizens because of the removal of the unlawful impediments to naturalization that this Court set aside and enjoined, they would still be deemed "prevailing parties" even if Plaintiffs had not received complete relief. *See generally Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 202 F. Supp. 3d 20, 25 (D.D.C. 2016) ("A prevailing party need not win on its central claim, let alone every single claim it makes.") (citing *Texas State Teachers Ass'n*, 489 U.S. 782 at 790).

Here, Plaintiffs clearly prevailed.[5] This Court entered a preliminary injunction against DoD's unlawful N-426 policy in the early days of the litigation—thereby preventing Defendants from carrying out their plan to thwart processing of Plaintiffs' naturalization applications by revoking without cause the honorable service certifications that DoD already had issued. And later, after extensive litigation, this Court entered partial summary judgment on Plaintiffs Administrative Procedure Act claim, setting aside as arbitrary and capricious USCIS's MSSR/MSSD policy which Defendants had implemented in another effort to block class

[5] Plaintiffs also meet the threshold eligibility requirement that each named Plaintiff's net worth falls within the limits of § 2412(d)(2)(B). *See* Exs. 32-41; *Cobell*, 407 F. Supp. 2d 140 at 148-49 (finding that affidavits signed by the class representatives attesting to the fact that each of their individual net worth met the threshold "amply satisf[ied]" the statutory requirement).

members' naturalization. The Court later converted the preliminary injunction into a permanent injunction and entered final judgment, providing Plaintiffs complete relief.

The Supreme Court has identified two situations that meet the "court-ordered change in the legal relationship" requirement: a judgment on the merits and a court-ordered consent decree. *Buckhannon*, 532 U.S. at 603-05. While *Buckhannon* concerned a fee award under a different statute, the D.C. Circuit has applied its reasoning in the EAJA context. *See, e.g.*, *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 794 F.3d 21, 24 (D.C. Cir. 2015). Here, the final judgment was clearly a judgment on the merits "in favor of the party seeking the fees."

There can be no dispute that the final relief afforded to Plaintiffs was integral to their complaint. *See* ECF 135 (deeming plaintiffs' allegations regarding USCIS's waiting for the results of the MSSD to be part of the second amended complaint). Certainly, Judge Huvelle recognized the significance of her rulings in enabling close to 2,000 class members to become naturalized U.S. citizens and opening the door for hundreds more to do so by virtue of the permanent injunction and final judgment. *See, e.g.*, Jt. Hr'g Tr. 5 (ECF 204) (Aug. 7, 2020).

Further, the judicial pronouncements in this case was accompanied by judicial relief. The D.C. Circuit has described judicial relief as "requir[ing] 'some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or specific performance or the termination of some conduct.'" *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 494 (D.C. Cir. 2003) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). Here, the Court terminated conduct by the Defendants. The Court set aside USCIS's MSSR/MSSD policy, thus requiring it to process the class' naturalization applications without further delay and without waiting for naturalization-disqualifying discharge actions by the Army. *See Nio IV*, 385 F. Supp. 3d at 68-69. In addition, the permanent injunction bars Defendants from implementing Section III of DoD's October 13,

2017 Guidance, and prohibits them from revoking class members' N-426s except on grounds generally applicable to all soldiers. *Nio V*, 2020 WL 6266304 at *1.

Finally, as a direct result of this litigation and the Court-ordered relief, not only have 2,000 soldiers been able to exercise their statutory right to military naturalization, but they have benefitted by escaping the immigration limbo they had been suffering under. Given their non-immigrant status and their pending naturalization applications, many of the class members were not authorized to work and support themselves or their families and many lived in constant fear that they would be subject to deportation to their countries of origin where they faced the very real prospect of punishment and persecution for having enlisted in the U.S. military. The relief obtained through this litigation was literally life-saving for many class members.

2. **The government's position was not substantially justified**

In an EAJA case, the government is liable for fees and expenses to a prevailing party unless it can show that *both* the underlying agency action *and* its arguments in court in defense of that action were "substantially justified." 28 U.S.C. § 2412(d)(2)(B). Once the plaintiff has established that it is the prevailing party, as here, the burden shifts to Defendants to prove any claim that their actions, both with respect to the challenged policies and during the course of the litigation, were substantially justified. *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) ("The Government has the burden of proving that its position, including both the underlying agency action and the arguments defending that action in court, was 'substantially justified' within the meaning of the Act."). The Supreme Court has described this standard as requiring that the government's positions were "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). In other words, to be substantially justified "the government must show that 'its position is one that a reasonable person could think . . . correct.'" *Air Transp. Ass'n of Can. v. Fed. Aviation Admin.*,

156 F.3d 1329, 1332 (D.C. Cir. 1998) (quoting *Pierce*, 487 U.S. at 566 n.2 (1988)). Once the prevailing party claiming fees alleges the absence of substantial justification, the burden then shifts to the government to establish that its position was substantially justified at both the administrative and judicial stages. *See SecurityPoint*, 836 F.3d at 39; *Halverson*, 206 F.3d at 1208.

The government cannot show that its conduct was substantially justified for *at least* the reasons that its conduct was in bad faith: Defendants knowingly implemented an unlawful policy; the government repeatedly made false and misleading statements to the Court; and Defendants repeatedly violated the Court's orders. *See supra* at IV.B.2; *see also Tiwari*, 363 F. Supp. 3d at 1166. Plaintiffs will respond as appropriate to any attempt by Defendants to advance a substantial justification defense, but highlight here some comments from the Court indicating the challenge awaiting Defendants in this regard. *See, e.g., Nio IV*, 385 F. Supp. at 60 ("USCIS's explanation for [the July 7, 2017 policy] *runs counter to the evidence*.") (emphasis added); *Kirwa I*, 285 F. Supp. 3d at 43 (rejecting the government's argument justifying DoD's withholding of N-426s as "nothing short of illogical") (incorporated by reference in PI Order (ECF 74)). These issues were not close calls, and Defendants' strained arguments were little more than another effort to do what the government wanted to do all along: prevent MAVNIs from naturalizing. A reasonable person would not view the government's policies or litigation conduct as substantially justified.

3. **No "special circumstances" are present**

The second statutory exception to an award of attorneys' fees and expenses—where "special circumstances make an award unjust"—has no application here. 28 U.S.C. § 2412(d)(1)(A). The "special circumstances" exception is a "safety valve" that "helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be

made." *Air Transp.*, 156 F.3d at 1333 (citing H. R. Rep. No. 1418, 96th Cong., 2d Sess. at 11, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4990). Nothing here would make an award of attorneys' fees, costs, and expenses unjust, and, to the contrary, the equities weigh strongly in favor of a fee award. Defendants will not be able to invoke this exception here.

4. **The government acted in bad faith**

Where the government has acted in bad faith, plaintiffs may recover their attorneys' fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute which provides for such an award." *Am. Hosp. Ass'n*, 938 F.2d at 219. "In [the D.C.] Circuit, a 'bad faith' enhancement is appropriate where the Government's misconduct '(1) occurred in connection with the litigation, *or* (2) was an aspect of the conduct giving rise to the litigation.'" *Cobell*, 407 F. Supp. at 168 (quoting *Am. Hosp. Ass'n*, 938 F.2d at 219). The Court can award fees under Section 2412(b) if the government's conduct underlying the litigation was in bad faith, *or* if it was in connection with the litigation; bad faith at both stages is not required. *See, e.g.*, *True the Vote, Inc.*, 2019 WL 2304659 at *11 (awarding attorneys' fees "at prevailing market rates pursuant to the bad faith enhancement to the EAJA" where defendants' conduct "r[o]se to the level of pre-litigation bad faith"); *Gray Panthers*, 304 F. Supp. 2d at 39 (finding the government's "conduct that gave rise to this action was in bad faith" and awarding fees at market rates where plaintiffs did "not claim bad faith regarding the manner in which the instant litigation was defended"). Bad faith must be shown by clear and convincing evidence. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 187 F.3d 655, 660 (D.C. Cir. 1986).

Here, Defendants' pre-litigation conduct *and* their actions during this lawsuit were characterized by bad faith. This is the sort of "exceptional case" where Defendants' bad faith so permeated the case that the applicable test "allows a court to shift *all* of a party's fees 'in one fell swoop.'" *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187-88 (2017) (quoting

Chambers v. NASCO, Inc., 501 U.S. 32, 51 (1991)) (emphasis added). Defendants' bad-faith conduct was neither a one-off incident nor even a few discrete occurrences; it prompted this lawsuit and continued unabated in multiple forms.

As detailed below, Defendants engaged in a concerted strategy to prevent the naturalization of MAVNI soldiers that Defendants knew (and the Court ruled) was contrary to Congress's mandate. In furtherance of that unlawful effort, Defendants retaliated against MAVNI soldiers for daring to exercise legal rights, misled the Court, and concealed material information. Even after Plaintiffs secured a preliminary injunction, Defendants implemented new means to deprive MAVNI soldiers of their legal rights. Courts have found similar conduct, at such a scale, renders a case "exceptional" for purposes of bad-faith fees awards. *See, e.g.*, *CrossFit, Inc. v. Nat'l Strength and Conditioning Ass'n*, No. 14-CV-1191 JLS (KSC), 2019 WL 6527951, at *23-24 (S.D. Cal. Dec. 4, 2019) (bad faith rendered the case "exceptional" where "every step of th[e] case was poisoned by the [defendant's] decisions from inception" and throughout the discovery process, the defendant "withheld evidence, withheld documents, [and] didn't give accurate or correct answers").

Defendants' bad-faith conduct falls into three general categories. First, Defendants implemented programs and policies—before and during the litigation—that they knew were unlawful. This violation of Defendants' clear duties constitutes bad faith. *See Am. Hosp. Ass'n*, 938 F.2d at 220. Absent litigation, Defendants' unlawful practices would have continued unchecked and harming of countless MAVNIs who pledged to defend this country.

Second, Defendants concealed and misrepresented material information to Plaintiffs, class counsel, and the Court throughout the litigation. *See, e.g.*, *Cobell*, 407 F. Supp. 2d at 168-69 ("Defendants' abuse of the judicial process independently merit[ed] a fee sanction" where

"defendants made numerous illegitimate representations, failed to correct known misrepresentations, and neglected to inform the court about self-inflicted obstacles to comply with its discovery obligations"); *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980) (awarding bad-faith fees where defendants "engaged in dilatory tactics during discovery and courtroom hearings, . . . and on at least two occasions seriously misled the Court by misquoting or omitting material portions of documentary evidence"). Defendants repeatedly misled the Court regarding their policies—including modified policies that they introduced in direct response to this litigation—and their harm to MAVNIs. Defendants also misled regarding the steps they took (or failed to take) to comply with the Court's requests and orders. This required constant fact-checking and extensive briefing to expose and try to remedy the inaccurate claims made by Defendants and prevent further prejudice and harm to the Plaintiff class.

Third, Defendants repeatedly ignored or sought to circumvent the Court's orders. *See Aero Corp. v. Dep't of the Navy*, 558 F. Supp. 404, 420 (D.D.C. 1983) (finding bad faith for actions "including failure to follow Court Orders"). Defendants' refusal to timely and directly comply with the injunctions in the absence of Court intervention demonstrates that, even after protracted litigation, Defendants sought (and, it seems, *still* seek) to impair MAVNI soldiers' rights.

Had Defendants processed MAVNIs' naturalization applications under the clear terms of the applicable statute, this lawsuit would not have been necessary. And once the litigation commenced, had Defendants withdrawn their unlawful policies, rather than double-down on them and seek to delay and obfuscate while they carried out their plan, further litigation could have been avoided. But, Defendants chose another path, requiring years of heated litigation before Plaintiffs could fully vindicate their rights. During the litigation, Defendants engaged in tactics that go well beyond stubborn defense of a challenged policy. As exemplified below and supported by witness

testimony, including from the MAVNI program founder, Ms. Stock, there is clear and convincing evidence of Defendants' bad faith conduct both preceding and continuing throughout this case.

a. Defendants' Callous Disregard for Servicemembers

Under the MAVNI program, DoD encouraged qualified individuals to enlist, in large part by touting the opportunity of an "expedited" path to citizenship. *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 263 (D.D.C. 2018) ("*Kirwa II*"). For instance, the MAVNI Information Paper, signed by MAVNI enlistees at the time of enlistment, provided that "[t]he Army, along with [USCIS] has implemented expedited citizenship processing." *Kirwa I*, 285 F. Supp. 3d at 40 n.29. The process to receive a certified N-426, enabling the MAVNI soldier to apply for naturalization, was designed to take approximately 180 days. *Id*. at 31. The policies at issue served to extend that "expedited" path to citizenship by at least two or three years. *Id*. at 43.

The Court determined that these policies—delaying naturalization applications after promising an expedited path to citizenship and thereby depriving U.S. service members of their right to apply for naturalization—irreparably harmed Plaintiffs. *Nio I*, 270 F. Supp. 3d at 62-63. Defendants deprived Plaintiffs of their "lawful presence" for purposes of ICE enforcement, subjecting them to the risk of removal. *Id*. at 63. Furthermore, these policies jeopardized the legal immigration status of many plaintiffs. *Kirwa I*, 285 F. Supp. 3d at 43.

Defendants' irrational policies placed Plaintiffs in an impossible situation. On the one hand, Defendants maintained that, by volunteering to serve as MAVNI soldiers and applying for citizenship (an express requirement for MAVNI soldiers), Plaintiffs had demonstrated "immigrant intent" and thus could not maintain or renew their legal non-immigrant status. On the other hand, Plaintiffs were being faulted, as MAVNIs, for not maintaining their legal non-immigrant status.

Many Plaintiffs and their families suffered due to their inability to obtain a job, driver's

license, passport (which prevented visits to ill family members), education opportunities, and other privileges afforded by naturalization. Combined with the uncertainty surrounding their military careers and their legal status, Plaintiffs suffered significant anguish. These irrational and unlawful policies also created a risk of extreme peril for many Plaintiffs who faced the specter of deportation to countries of origin where they would face persecution and imprisonment based on their decision to enlist in the U.S. Army and swear their allegiance to the United States and the Constitution.

Defendants knew the plight that MAVNIs were facing, but did nothing to help them. Instead, Defendants acted against their interests. The following are just some examples of this behavior:

- They refused to provide MAVNIs with the protections of Deferred Action.
- They purposefully cut off MAVNI sources of information about the status of their naturalization applications and the Army's actions and policies regarding MAVNIs.
- They attempted to discharge MAVNI soldiers—without due process—on multiple occasions and in such a way that, under current USCIS policy, they would be unable to naturalize on the basis of their military service.
- They encouraged Army recruiters to find ways to drop MAVNIs from the service by providing "loss forgiveness" that only applied to MAVNIs.
- They stopped naturalizing soldiers at basic training locations just as MAVNIs—after 18 months of delay by Defendants—again could have benefitted from that initiative.
- They sought to convince MAVNIs to "waive" the very rights that they were pursuing.
- They falsely characterized MAVNI soldiers as bad actors, when in fact their only "misbehavior" was weekend phone calls to their parents in a foreign country.
- And they retaliated against MAVNIs for suing Defendants.

See Wollenberg Decl. ¶¶ 10(a)-(h); Declaration of Margaret Stock ("Stock Decl.") ¶¶ 38-53; Declaration of Beverly W. Cutler ("Cutler Decl.") ¶¶ 8-9. In other words, Defendants repeatedly acted in bad faith with respect to their treatment of MAVNI soldiers.

a. Defendants Knowingly Implemented Unlawful Policies

The Court found two of Defendants' policies to be unlawful. But those policies were not in place when *Nio* was filed. The policies in place when the *Nio* litigation began were so obviously unlawful that Defendants changed both before they could be subjected to judicial scrutiny.

When Plaintiffs brought this lawsuit in 2017, DoD and USCIS were acting in concert to prevent MAVNI soldiers from naturalizing. An internal DoD memo that Defendants tried to keep secret and often complained was "leaked" to the press revealed their motivation for preventing MAVNI naturalizations: DoD believed that by preventing MAVNIs from obtaining naturalization, it would prevent them from obtaining legal rights and Constitutional protections. *See* ECF 17-8. In that "Action Memo," DoD recognized "significant legal constraints to subjecting [the *naturalized* MAVNI] population to enhanced screening without an individualized assessment of cause." *Id.* at 2. Looking at this same secret memo, another federal district court ruled that "[t]his evidence shows that the DoD was aware of the equal protection violations that would arise if naturalized MAVNI soldiers were treated differently from other citizens, *but it nevertheless persisted in the discrimination*." *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1166 (W.D. Wash. 2019) (emphasis added).[6] This memo demonstrated that Defendants actively sought ways to impair MAVNIs' rights and determined that blocking the path to naturalization served this purpose.

At DoD's behest, USCIS placed a knowingly unlawful "hold" on all MAVNI naturalization applications, stopping all naturalization interviews and oath ceremonies for MAVNI soldiers. Defendants knew this "hold" policy was unlawful and did not want any court looking at it. During

[6] In *Tiwari*, Stephanie Miller, the DoD official who authored the memo and who submitted declarations in this case as well, attempted to explain away her own statement acknowledging the unlawfulness of the planned program as merely a nod to "litigation risk." The *Tiwari* court rejected her testimony as "less than forthcoming." 363 F. Supp. 3d at 1166 n.21.

the June 30, 2017 telephone conference regarding Plaintiffs' pending preliminary injunction motion, Defendants informed the Court that USCIS was developing a new policy and that *this new policy* would be lawful. Wollenberg Decl. ¶ 8 n.1. In other words, Defendants implicitly admitted that USCIS's earlier policy—put in place in concert with DoD—was *not* lawful.

During the June 30, 2017 conference, Defendants also represented to the Court—contrary to the facts—that the prior policy was not a "blanket hold" of MAVNI applications. Defendants made similar misrepresentations to Plaintiffs' counsel throughout June 2017. Defendants told Plaintiffs' counsel that there was not a MAVNI-wide hold or "blanket" hold—under any definition—on MAVNI naturalization applications. ECF 17-4 ¶ 6. They represented that each MAVNI's naturalization application was delayed because of individualized circumstances specific to that person. But these statements were demonstrably false and misleading. *See Nio I*, 270 F. Supp. 3d at 56-57 (describing Defendants' efforts to "disavow" the characterization of their policy as a "hold" despite the use of the term "hold" in earlier internal USCIS communications, and finding that even if USCIS's July 7, 2017 action "is not labeled a 'hold,' it appears to have the same effect"); *see, e.g.*, ECF 17-41 at ¶¶ 10-11 (describing Defendants' misrepresentations concerning named Plaintiff's situation, which was not a specific, individualized issue with her naturalization application, but rather the result of Defendants' unlawful "hold" on MAVNI naturalization applications).

Defendants tried to hide their prior "hold" policy from the Court and Plaintiffs. For example, in an effort to justify their new policy, they submitted a declaration that selectively (i.e., misleadingly) described the actions taken by USCIS in concert with DoD in early 2017. *See* ECF 19-6. That declaration included no written documentation of those actions, which led the Court to *sua sponte* chastise Defendants and order production of the documentation. *See* ECF 22; ECF 34

(July 19, 2017 Hearing Tr.) at 75:22-76:6 (THE COURT: "I don't want anybody to have an affidavit that refers to documents, and they don't give the Court the document. Is the Government here listening? . . . [I]t's totally unacceptable to have an affidavit that relies on documents and you don't give me the documents."); *Nio I,* 270 F. Supp. 3d at 60. When Defendants begrudgingly produced the back-up documentation, the documents were riddled with evidence of a hold, including multiple uses of that exact term. The record was clear that Defendants had an unlawful blanket hold on MAVNI naturalization applications for months prior to litigation and only changed the policy after litigation had been initiated. *See* ECF 23-1 at 6-13, 26.

As evidenced by the outcome of this lawsuit, even Defendants' modified policies were unlawful. They facially looked a little different, but at their core were the same unlawful policies. *See Nio I*, 270 F. Supp. 3d at 57 ("[E]ven if the USCIS's July 7, 2017 action is not labeled a 'hold,' it appears to have the same effect. . ."). For example, Defendants claimed that, under the terms of the July 7, 2017 policy, USCIS personnel were not waiting for DoD to make discharge decisions, but instead were waiting for background check information that could inform the naturalization decision. The so-called "leaked" DoD memo, however, admitted that DoD did not have the resources to conduct the background checks and did not intend to conduct them, planning instead to mass discharge all non-naturalized MAVNIs. *See* ECF 17-8 at 3 (admitting it was "infeasible to continue to process DTP MAVNIs"). Thus, the July 7, 2017 policy was a farce from its origin. And even though Defendants had to suspend its mass discharge action at that point, DoD began to surreptitiously take discharge actions against MAVNIs.[7] It became clear to the Court that USCIS was not waiting for or reviewing background check information as it claimed, but instead was

[7] Before the Court's summary judgment decision setting aside USCIS's policy, DoD attempted to summarily discharge hundreds of MAVNIs, and USCIS was denying naturalization on the basis of those discharges. This necessitated the related *Calixto* action (Case No. 1:18-cv-01551-ESH).

waiting for the Army to discharge a MAVNI and in such a way that would be the basis for USCIS to deny the naturalization application. *Nio IV*, 385 F. Supp. 3d at 63.

DoD implemented its own unlawful policies and practices to prevent MAVNI soldiers from naturalizing. In mid-2017, class counsel learned that DoD was refusing to certify N-426 forms and wanted to revoke or otherwise invalidate already-issued forms held by *Nio* class members. *See Nio I*, 270 F. Supp. 3d at 59-60; ECF 19-6 (July 7, 2017 Renaud Decl.) ¶ 24; ECF 19-7 (July 7, 2017 Miller Decl.) ¶ 19. This practice would have resulted in USCIS denying MAVNIs' pending naturalization applications. *See Nio I*, 270 F. Supp. 3d at 60. Here, again, the government's policy was unlawful. ECF 74 (Oct. 27, 2017 Order Granting Preliminary Injunction). It was clear to the Court, which questioned Defendants how they could reconcile this policy with the fact that in Section 1440, Congress neither limits military naturalization to those who performed active duty service nor imposes a minimum period of service requirement. *See Nio I*, 270 F. Supp. 3d at 60 (noting that DoD's "current view" regarding the N-426 Review was "in clear conflict with the statutory language in 8 U.S.C. § 1440"). It was also clear to Defendants. That is why, three business days before a hearing and without notice, DoD released a *new* N-426 policy. *See* ECF 58 at 2 (October 13, 2017 Status Report); *id.*, Ex. 1 (Oct. 13, 2017 Memorandum).

Once again, Defendants' new policy—which necessitated additional briefing and judicial scrutiny—ultimately was determined to be unlawful. *See* ECF 74 (Oct. 27, 2017 Order Granting Preliminary Injunction); *Nio V*, 2020 WL 6266304 (converting preliminary injunction into permanent injunction).[8] Defendants must have known all along that the new policy was no better:

> COURT: it "didn't take Einstein to know that people who sign up and say I'll give you eight years of my life to be in the military in exchange for an expedited path of

[8] Even *after* the Court ruled this policy was unlawful, the Army continued to apply it to MAVNIs who did not meet the definition of the *Nio* and *Kirwa* classes and to green card holders, which necessitated yet *another* lawsuit. *See* Case No. 1:20-cv-01104-PLF, ECF 1 (*Samma* Complaint).

> citizenship that's what was held out to the people who signed these enlistment contracts. . . . And now we're talking two, three year process. I think that to say **you can't be surprised that you find yourself with a lawsuit**. **The rules of the game have changed** whether you have decided there's good reason for some of the rules and I've decided there's not good reason for some of the other rules. **You have to tell me that the legal landscape has changed."**

Prelim. Inj. Hrg. Tr. at 17:22-18:11 (Oct. 27, 2017) (emphasis added). Then, in reference to Defendants' policy changes after the litigation was initiated, Court further explained:

> COURT: You keep saying that to the good reasons for the, pulling the N426s. I don't get it. I'm continually baffled. I've expressed my opinion on this, so I don't think there's a whole lot of reasons to go backwards. . . . And then I'm a little perplexed. I've not been in a case in which I think I got this yesterday after I issued my opinion. It's unusual to issue an opinion and then have somebody change the rules of the game again.

Id. at 19:6-19.

b. Defendants Repeatedly Misled the Court

Throughout this lawsuit, the government repeatedly misled Plaintiffs, class counsel, and the Court by misrepresenting or omitting material facts in an effort to propagate and protect their unlawful policies. As discussed above, were it not for the fact that an internal government memo got "leaked" to the press (*see* ECF 34 at 46:24-25), Defendants' plan to mass discharge non-citizen MAVNIs (and the true reason behind the Defendants' obstructing MAVNI naturalizations) may not have been revealed because Defendants were not candid with the Court. Also as discussed above, Defendants repeatedly tried to hide the hold on MAVNI naturalization applications from class counsel and the Court, including by omitting information in self-serving Court submissions.

When USCIS presented its new July 7, 2017 policy to the Court, USCIS and DoD conveniently did not disclose to the Court that DoD *already had determined* that it did not have the resources to conduct those background checks and had planned to simply discharge all of the non-citizen MAVNI soldiers without expending any further effort on the background checks. *See* ECF 17-8 at 3. DoD and USCIS similarly omitted from their disclosures to the Court that even

without a mass Secretarial plenary authority discharge, many (if not all) MAVNIs were going to be discharged under a "time-out" rule before DoD would ever finish the background checks and adjudications that they sought to require. *See* ECF 24 (July 19, 2017 Order) at 2 (directing Defendants to answer the question: "Is there a time limit on how long MAVNI enlistees can remain in the 'Delayed Training Program" before being discharged?"); ECF 25-2 (July 28, 2017 Miller Decl.) at 9-10. In fact, the government concealed that some MAVNI soldiers already were discharged under that "time-out" rule by July 2017. Only after Plaintiffs raised this to the Court did DoD adjust that time-out rule for MAVNIs. *See* ECF 26 (July 27, 2017 DoD Memo.). Thereafter, the military began surreptitiously taking discharge actions against MAVNI soldiers. *See* Ex. 50. Once again, Defendants were not candid with the Court: they never informed Judge Huvelle that these discharges were happening and that USCIS would never look at the background check information that USCIS claimed justified the July 7, 2017 policy.

As another example, Defendants claimed that Plaintiffs' allegations were non-justiciable because their naturalization applications were within normal processing times. They supported this claim with Daniel Renaud's sworn declaration. *See* ECF 19-6 ¶¶ 6-8. But *after* Plaintiffs provided contrary evidence, the Court ordered Defendants to explain the discrepancy. *See* ECF 24 at 1. Defendants were forced to produce the separately tracked *military* naturalization application processing times. *See* ECF 25-1 at 3-5. This showed what Defendants knew, but had sought to conceal, that the *Nio* plaintiffs' applications were *not* within normal processing times.

In an effort to avoid a preliminary injunction, Defendants told the Court that there was no plan in place to invalidate the N-426s of *Nio* plaintiffs. The Court explained this was the basis in finding no irreparable harm to plaintiffs by DoD: "Currently, plaintiffs each have a valid N-426, and DOD has not represented that it intends to imminently revoke any of plaintiffs' N-426s." *Nio*

I, 270 F. Supp. 3d at 61-62 (citing the July 28, 2017 Miller Decl.). Five weeks later, DoD issued its October 2017 policy revoking *every* class member's N-426. Stephanie Miller, the declarant referenced above, acted as the military's key witness in this case and repeatedly misrepresented facts to the Court. *See* Stock Decl. ¶¶ 41-44. Notably, in a lawsuit involving discriminatory military policies for naturalized MAVNI soldiers, the court questioned whether Ms. Miller had been forthcoming in her testimony. *See Tiwari*, 363 F. Supp. at 1166 n.21.

In this case and the related case *Calixto v. U.S. Dept. of the Army*, No. 1:18-cv-01551-PLF, Defendants regularly misreported that MAVNI soldiers had been discharged from military service. This misreporting resulted in currently-serving soldiers being denied naturalization on the basis of a discharge that never was effectuated. Inexplicably, the Army's declarant, Lin St. Clair, stated on multiple occasions in sworn declarations that *Nio* class members had been issued a discharge-effectuating Reserve Command order when, in fact, no such orders had ever been issued and the declarant never could have witnessed such an order in these soldiers' files. *See, e.g.*, *Calixto*, Case 1:18-cv-01551-ESH, ECF 22-1 ¶ 8 (Aug. 13, 2018 St. Clair Declaration representing that Mr. Li was "currently discharged" and had "received discharge orders" issued by USAREC, and USARC "issued discharged orders" effective Nov. 17, 2017). Defendants only admitted this falsity months *after* class counsel notified Defendants of the problem. *Calixto*, ECF 113 ¶¶ 1-3, 8 (reporting that a "recent review" of MAVNI "discharges," which the Army conducted only after a June 24, 2019 hearing and June 25, 2019 Court Order, "revealed" to the Army that it had not "processed or issued" USARC discharge orders for Mr. Li and a number of other MAVNI soldiers the Army previously had presented to the Court and USCIS as discharged). Yet, even though Defendants finally admitted this, they took no corrective action to address the mess left behind.

In one especially glaring example of bad faith, the government's actions resulted in not

only the denial of one *Nio* class member's naturalization (ECF 270 at 2-3 [stating on Sept. 4, 2019 that upon reviewing the file for certain identified individuals, "the denial decision was based solely on a purported uncharacterized discharge"]), but *her arrest and indictment* for allegedly fraudulently seeking an immigration benefit. *See* ECF 302. Neither the DoD nor USCIS made any effort to assist her with dismissal of the criminal charges, seeking instead to diminish their behavior toward this class member when Plaintiffs brought her situation to the Court's attention. *See id.; see also* Sept. 23, 2019 Tr. at 44:19-45:16 (Defendants trying to disavow any responsibility for this soldier, claiming she did not fit the class definition because of her discharge, *even though she never actually was discharged*). Thereafter, USCIS misrepresented to the Court *for over a year* that her naturalization application was being addressed, but this class member finally was naturalized only after counsel raised her case again with the Court in mid-2020. ECF 302, 305.

These examples demonstrate that Defendants litigated these matters in bad faith. And these are only a few of the many times that Defendants submitted false or misleading information to the Court. *See* Stock Decl. ¶¶ 43-47; Cutler Decl. ¶¶ 8, 10. Defendants' recurring misrepresentations and material omissions required both class counsel and the Court to devote tremendous resources to investigating and, on multiple occasions, *disproving* Defendants' assertions.

c. Defendants Failed to Comply with the Court's Injunctions

After the Court's October 2017 preliminary injunction restricted Defendants from invalidating existing N-426 certifications, Defendants repeatedly refused to recognize the existing honorable service certifications. They often behaved as if the Court's injunction was meaningless, telling class members that they could not naturalize until after performing active duty service, they could not naturalize until after completing BCT (and sometimes also AIT), their N-426s had been revoked by DoD, they needed a new N-426 from DoD, and that DoD's October 2017 policy

invalidated their N-426s. Plaintiffs were forced to raise this issue with the Court in January 2018, filing class member declarations that detailed Defendants' bad faith behavior. *See* ECF 94. But Defendants' bad faith behavior continued for years. *See, e.g.*, Wollenberg Decl. ¶¶ 8-11; Ex. 1.

After the Court's May 2019 summary judgment decision setting aside USCIS's July 2017 MSSR/MSSD policy, Defendants exhibited the same disregard for the Court's order. Defendants refused to process class members' applications until after DoD completed its "background checks" (which Defendants had admitted to the Court were done and that only the adjudications – MSSRs/MSSDs – were not complete) or after the class members had been found favorable by DoD's adjudications. *See, e.g.*, Wollenberg Decl, ¶ 8(bb); Ex. 2.

These non-compliances were not isolated incidents that could be attributed to a rogue employee or a simple "mistake," as Defendants *repeatedly* suggested. *See* Stock Decl. ¶¶ 46-52. In 2018, Defendants even were forced to assign a special email address to respond to class counsel's "inquiries." ***Plaintiffs estimate that approximately 1,000 emails were exchanged between class counsel and the "inquiries" mailbox in two years***. *See* Wollenberg Decl, ¶ 9(b). Even after issues were repeatedly raised to Defendants and Defendants assured the Court that Defendants' relevant personnel had been informed of the Court's orders, the same so-called "mistake" would be made again, including in some instances, by the very same field office and the very same field office employee. In fact, class counsel notified Defendants of one field office employee making similar so-called "mistakes" on four separate occasions with four different class members, including that the field office employee referred to the *Nio* lawsuit as "frivolous" *after* the Court had granted relief to the class. *See* Wollenberg Decl, ¶ 9(i); Ex. 3. Beyond that, USCIS personnel (including a field office director) have denied any knowledge of the Court's orders. *See* Stock Decl. ¶¶ 52-53.

These problems still continue. *See* Cutler Decl ¶¶ 8-9. For example, in March 2021, three and a half years after the Court first enjoined Defendants' N-426 revocation policy and nearly two years after the Court's summary judgment decision concerning USCIS's MSSR/MSSD policy, a *Nio* class member was told that his application may be denied unless he submits a new N-426 that includes the results of his DoD background checks. When this was raised to Defendants, they once again refused to explain how it happened or if anything will be done to prevent similar problems in the future. *See, e.g.,* Wollenberg Decl, ¶ 11; Ex. 4.

Defendants' bad faith conduct, exemplified above, both necessitated and immeasurably expanded the scope of this lawsuit. This required class counsel to devote more than *fifteen thousand* hours exposing Defendants' willful misconduct, pressuring Defendants to disclose the true nature of their unlawful policies, and protecting class members' rights. Defendants' bad-faith conduct warrants Plaintiffs' full recovery of market-rate fees and costs under Section 2412(b).

V. PLAINTIFFS' REQUESTED AWARD OF FEES AND COSTS

A. Class Counsel

Over three-and-a-half years of litigation, Plaintiffs and the class have been represented by a team of litigators, several of whom have dedicated thousands of hours to the case. *See* Baruch Decl ¶¶ 2, 23; Ex. 5. This team has been led by Jennifer M. Wollenberg, Douglas W. Baruch, and in the early phase, Joseph L. LoBue. Baruch Decl ¶ 2. From the inception of the *Nio* case in 2017 through mid-2019, Plaintiffs' attorneys were with Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"). *Id*. In late July 2019, Ms. Wollenberg and Mr. Baruch joined Morgan, Lewis & Bockius LLP ("Morgan Lewis"), and responsibility for the case transitioned with them to Morgan Lewis at that time. Certain other Fried Frank case team members later joined Morgan Lewis. *Id.*

The MAVNI case team has extensive experience in complex federal civil litigation, class actions, immigration, military matters, and public interest litigation, all of which was important to

the successful prosecution of the case. *See* Baruch Decl. ¶¶ 5-18. In addition, both Morgan Lewis and Fried Frank are large law firms with the deep benches that could, and did, commit the resources required to successfully prosecute this case. *Id*. ¶¶ 2-4, 19-27; Declaration of Jennifer M. Wollenberg ("Wollenberg Decl.") ¶¶ 13-29. Morgan Lewis continues to work with *Nio* and *Kirwa* class members to enforce the Court's permanent injunctions, in addition to continuing to litigate the related cases *Calixto* and *Miriyeva v. U.S. Citizenship and Immigration Servs.*, No. 20-5032 (D.C. Cir.). Wollenberg Decl. ¶ 13. To date, class counsel have devoted more than 24,000 hours to the four related MAVNI cases. *Id*. ¶ 14.

B. Attorneys' Fees

1. Counsel necessarily devoted more than 15,000 hours to this highly complex, hard-fought class action litigation.

Through October 2020, class counsel devoted thousands of hours to bringing this case to a successful resolution on behalf of the Plaintiff class. Through this Motion, Plaintiffs seek fees for 15,577.6 hours of counsel's time. The calculation of time spent on this case is based on statements attached to the Wollenberg Declaration, which were compiled from class counsel's contemporaneously created time records and verified by Ms. Wollenberg. Wollenberg Decl. ¶¶ 19-20, 24-25 & Exs. 6 and 7; *see also* Ex. 11 (summary). Ms. Wollenberg's Declaration also summarizes the work that was performed by these attorneys, *id*. ¶¶ 6-9, and the time records attached to the Declaration provide more detail about the work performed in successfully prosecuting this case on behalf of the Plaintiff class.

This is a conservative statement of the reimbursable time counsel devoted to this case and was arrived at after the exercise of billing judgment. The itemized statements attached as Exhibits 6 and 7 and the requested fee award do not include approximately 1,200 hours actually worked by class counsel but which Plaintiffs have eliminated from this fee motion in the exercise of billing

judgment. *See* Wollenberg Decl. at ¶¶ 21, 25. Plaintiffs do not, for example, seek any fees at all for the time of more than two dozen attorneys who worked on the case. *Id*.

The amount of time class counsel devoted to this long, highly complex litigation was both significant and necessary. This case was vigorously litigated by both sides, and given hands on management by Judge Huvelle. As the docket shows, the case included three different complaints addressing Defendants' shifting policies and the rapidly developing facts, and a fourth complaint Judge Huvelle deemed unnecessary to address the full scope of Defendants' disputed conduct; two different preliminary injunction motions (again, addressing the quickly changing policies and evidence); three government motions to dismiss, which counsel successfully opposed; a disputed motion for class certification; privilege and protective order disputes that went to the heart of the key issues in the case; supplementation of the administrative record; counsel's analysis of approximately 70 different Court-ordered reports regarding the key factual issues in the case, every one of which required detailed review and fact checking, which very often revealed that the reports were wrong or at best incomplete; and cross motions for summary judgment, that ultimately resulted in judgment for Plaintiffs. ***To reach that resolution, judges of this Court held no fewer than thirty different hearings in this case—21 before Judge Huvelle and five before Magistrate Judge Meriweather, plus four settlement conferences conducted by Magistrate Judge Harvey***.

All of that work was possible only because of counsel's extensive efforts outside the courtroom. The sheer size of the class was a key driver of counsel's work. Every one of the roughly 2,600 MAVNI Selected Reserve soldiers eligible to be in the class needed more than just a paper order to vindicate their rights. Class members and their individual immigration counsel needed information about how to navigate the numerous barriers the government erected between them and naturalization, advice about changing policies, help overcoming the government's

intransigence—including violations of the Court's orders and conduct by field personnel contrary to Defendants' representations to the Court—and answers to their many, many questions. Wollenberg Decl. ¶ 9(a), (g).

The team conducted the necessary communications via email, through a dedicated website, and through numerous calls, video conferences, and in person meetings. *Id*. ¶ 9(a). ***The dedicated email inbox set up for the use of the Nio class includes over 26,000 communications.*** *Id*. Ms. Wollenberg's personal Fried Frank email folder for the related MAVNI cases goes through June 2019 and contains more than 42,000 items. *Id.*

These communications were more than just counsel's duties to their clients. Through the MAVNIs themselves, counsel was able to gather facts about the changing situation on the ground, Defendants' conduct, and their continued obstruction of nationalization applications. *Id*. ¶ 9(a), (g). This allowed counsel and the Court to address the real-world problems faced by the class.

Class counsel also communicated regularly with defense counsel by telephone and email on a host of issues, including hearings, information requests, motions, scheduling, compliance with reporting obligations, and compliance with the Court's injunctions and other orders. *Id*. at ¶ 9(b).

Finally, the amount of time devoted to the case is also reasonable in light of the important interests at stake. The government broke faith with soldiers who were recruited for their important skills, and to whom it made a commitment to expedite their path to U.S. citizenship. And, paradoxically, it did so because they were born outside the United States. *Cf. Tiwari*, 363 F. Supp. 3d at 1161 (policies of "continuous monitoring" and limiting security clearances imposed on MAVNI citizen-soldiers, but not other soldiers, "discriminate on the basis of national origin" in violation of the Constitution). U.S. citizenship is itself deeply precious, and no less so because it is acquired in adulthood rather than at birth. Ensuring that thousands of eligible soldiers have been

able to seek nationalization on the terms required by law is itself more than enough to justify the years of work counsel devoted to this case. But even beyond that, Defendants' refusal to promptly and properly process MAVNI naturalization applications left many class members without lawful immigration status and at risk of deportation and not only separation from their homes, families and communities, but in many cases at serious risk of persecution in their native countries for having joined the U.S. military. In many cases, the entire trajectory of MAVNI soldiers' lives turned on the outcome of this case. Counsel's dedication of more than 15,000 hours to the case was necessary to archive the successful result, and it was more than reasonable.

2. **Hourly Rate**

An award of market rate fees is appropriate in this case whether the Court bases its award on § 2412(b) or § 2412(d)(2)(A). An award of market rate fees is always appropriate when fees are awarded under § 2412(b) in light of the government's bad faith, and the circumstances here also warrant a "special factor" enhancement market rate fees under § 2412(d)(2)(A).

As explained below, the evidence shows that class counsel's standard hourly rates are consistent with Washington, D.C.-area market rates, as well as those of similar law firms nationwide, and thus an appropriate measure of reasonable attorney's fees in this case. Although Plaintiffs believe that counsel's standard hourly rates would be an appropriate basis for a fee award, Plaintiffs conservatively base their fee award request on the applicable LSI *Laffey* Matrix rates, which the D.C. Circuit and judges of this Court repeatedly have found to be an appropriate measure of attorney rates in the Washington, D.C. market.

If the court awards fees under § 2412(d)(2)(A) but is not inclined to grant a special factor enhancement, Plaintiffs seek in the alternative an adjustment of the EAJA statutory rate in light of cost of living increases. *See generally Role Models*, 353 F.3d at 969 ("courts routinely approve cost-of-living adjustments") (internal quotation omitted).

a. **An award of market rate fees is warranted.**

(1) **Fees under § 2412(b) are calculated at market rates**

It is well established that a fee award under § 2412(b) is not subject to any cap and thus a bad faith fee award is appropriately calculated using market rates. *See, e.g.*, *Gray Panthers*, 304 F. Supp. 2d at 39 ("No statutory ceiling on the hourly rate used to calculate fees under § 2412(b) exists; thus, an award of attorney fees for bad faith can be calculated at market rates."); *see also Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 190–91 (2d Cir. 2000).

(2) **A "special factor enhancement" to market rates is appropriate**

Even setting aside Defendants' bad faith, the facts here justify an award of market rate fees. If the Court awards fees under § 2412(d) rather than §2412(b), any fee award should be subject to a "special factor enhancement" and calculated using market rates. Under a March 1996 amendment to the EAJA, fees may be awarded in excess of the $125 per hour statutory rate where "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Here, a combination of several "special factor[s]" warrant an upward adjustment of the standard EAJA hourly rate.

In *Pierce*, 487 U.S. at 572, the Supreme Court interpreted the phrase "limited availability of qualified attorneys for the proceedings involved" with emphasis on the qualifications of the attorneys involved. It understood the statutory language to refer to "attorneys qualified for the proceedings in some specialized sense, rather than just in their general legal competence ... [and] to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Id.* Examples of the requisite "distinctive knowledge or specialized skill"

include "an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the [statutory EAJA] cap, reimbursement above that limit is allowed." *Id*. at 572.

The D.C. Circuit has also emphasized attorney qualifications, holding that fee enhancement is available in cases involving lawyers who have acquired some specialized training or expertise beyond that which can and should be acquired by an ordinary lawyer through study and experience. *See, e.g., F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996). A special factor enhancement is warranted here because class counsel have a unique combination of necessary skills and—importantly—no similarly qualified counsel were available to litigate the case.

First, Class Counsel have highly relevant expertise in multiple fields. As Judge Huvelle observed in appointing class counsel, "Plaintiffs' counsel consists of a team of attorneys with experience in immigration law, military law, complex civil litigation, federal court litigation, and class-actions—representing both plaintiffs and defendants." *Nio II*, 323 F.R.D. at 33; *see also* Baruch Decl. ¶¶ 5-18 (detailing counsel's qualifications); Exs. 8 and 9. The case team included attorneys with experience in immigration law—including Fried Frank's Public Service Counsel, a nationally recognized expert in immigration law, whose time has not been included in the motion but who nevertheless provided significant assistance and expertise to Plaintiffs. Baruch Decl. ¶¶ 10-13. The team also included multiple attorneys with military experience, and was led by attorneys with decades of experience in class actions and government litigation. *Id*. ¶¶ 6-9, 14.

Courts in this and other Circuits have recognized expertise in immigration law as a "special factor" that may justify an enhanced award. *See, e.g., Walker v. Lowe*, No. 4:15-CV-0887, 2016 WL 6082289, at *4-5 (M.D. Pa. Oct. 17, 2016); *Catholic Soc. Servs. v. Napolitano*, 837 F. Supp. 2d 1059, 1073-75 (E.D. Cal. 2011); *Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992);

Nadler v. INS, 737 F. Supp. 658, 662 (D.D.C. 1989). While Class Counsel's experience in complex civil litigation and class actions might not, standing alone, justify a special factor enhancement, in combination with the other necessary areas of expertise, those skills weigh in favor of a special factor enhancement.

Second, this combination of skills was necessary to the representation. Wollenberg Decl. ¶ 12; Stock Decl. ¶¶ 20-29. The case centered on the legal issues around a unique part of immigration law and its overlap with military matters. It also involved all of the usual complexities of a class action—including Rule 23 issues, the need to communicate with the class, many of whom are not known to counsel, and the need to ensure appropriate class-wide relief—as well as the unusual situation of a class of individuals who needed extensive assistance to obtain the benefits of the Court's orders. Wollenberg Decl. ¶¶ 9(a), (g). The military context presented a number of particular challenges, including the need to address a variety of alleged national security issues, as well as the practical considerations around litigation between a servicemember and their command. *Id*. ¶ 12; Baruch Decl. ¶ 14.

Third, the text of § 2412(d)(2)(A) addresses both the qualifications of counsel and the availability of counsel to litigate the case. Here, the case team stepped up to take this large, resource intensive case when others who might have had immigration or military expertise, or even both, could not or would not litigate the case.

The MAVNI program was initially spearheaded by Margaret Stock, a now-retired Lieutenant Colonel in the U.S. Army Reserve, former West Point professor, recipient of the MacArthur Fellowship ("genius grant"), and a nationally recognized expert in immigration law. *See* Stock Decl. ¶¶ 2-5; Ex. 10. Ms. Stock remains closely connected to the MAVNI program and represents numerous soldiers in her immigration law practice. In late 2016, Ms. Stock began

getting reports from MAVNI soldiers in the U.S. Army that their applications for naturalization were not being processed timely by USCIS. It soon became clear to Ms. Stock that DoD and USCIS were working together to stop MAVNI soldiers from obtaining citizenship. Stock Decl. ¶¶ 16-19. Ms. Stock recognized that litigation likely would be necessary to protect and advance the rights of these MAVNI soldiers and others facing the same circumstances.

Aware that she and her small Alaska-based firm could not handle the case, Ms. Stock worked for weeks to identify an appropriate large legal services organization or law firm that could take the litigation. Stock Decl. ¶¶ 20-23. Ms. Stock approached a number of leading nonprofits, immigration specialists, and prestigious law school clinics. *Id*. ¶ 23-24. None had the capacity to take on a large class action that was likely to be both hotly litigated and require extensive interactions with thousands of individual class members. *Id*. Ms. Stock also approached large full service firms, but was unable to identify one that had both the necessary expertise and the ability to commit significant resources to the case. *Id*. ¶ 25. Ms. Stock eventually connected with Ms. Grisez of Fried Frank, and through her to the case team led by Ms. Wollenberg and Mr. Baruch. *Id*. ¶ 26. That team not only had the requisite litigation and subject matter expertise, but they had a deep bench and the support of a large law firm. *Id*. ¶ 27-29; Baruch Decl. ¶¶ 2-18.

Counsel's 15,000+ hours reflect the enormity and complexity of this class action case against two federal agencies and defended by a large team of DOJ and agency lawyers. The successful representation of Plaintiffs required more than a rare combination of skills. Plaintiffs could not have brought this case without the pro bono assistance of a large law firm with the ability *and willingness* to devote enormous resources to the case. Only a handful of large law firms could have litigated this case—and the two law firms here were the only ones identified by Ms. Stock as actually prepared to commit to such an undertaking. Stock Decl. ¶¶ 23-25; Wollenberg ¶¶ 17-18,

23; Baruch ¶¶ 2-4.

It is somewhat ironic, given the outcome of the case, that Defendants—as was their pattern throughout this case—fought virtually every application sought by Plaintiffs, including the appointment of class counsel. Defendants contended that counsel had not demonstrated their ability to litigate a case of this magnitude, where the lives and futures of thousands of soldiers hung in the balance. The Court dispensed in short order with that frivolous assertion by Defendants. *See Nio II*, 323 F.R.D. at 33 (noting that "plaintiffs' counsel has contributed extensive time and resources to representation of plaintiffs and the proposed class and are part of a large global law firm that has committed to contributing extensive time and resources to representing plaintiffs and the proposed class"). This unnecessary and unwarranted challenge to Plaintiffs' selection of their counsel is emblematic of the Defendants' tactics throughout the litigation.

The record here demonstrates that the "availability of qualified attorneys for the proceedings" was *highly* "limited" and—as the statute provides—this "justifies a higher fee." 28 U.S.C. § 2412(d)(2). A special factor enhancement and award of market rate fees is therefore warranted. *See, e.g.*, *Martin v. Sec'y of Army*, 463 F. Supp. 2d 287, 293 (N.D.N.Y. 2006) (finding a special factor enhancement appropriate in a case involving "specialized knowledge in military and conscientious objector law" and where "there are fewer than a dozen attorneys across the nation who are qualified in this area of law").

b. **LSI *Laffey* Matrix rates are an appropriate measure of Washington, D.C. market rates**

At counsel's standard, market-driven rates, the value of counsel's 15,000+ hours on this case exceeds $13.7 million. Wollenberg Decl. ¶ 30; Exs. 11-13. Counsel's standard rates are set in direct response to market forces, and are broadly commensurate with rates charged by counsel of similar qualifications in the Washington, D.C. market. Baruch Decl. ¶¶ 29, 32, 42-52; *see also*

Exs. 15, 18. A fee award of $13.7 million based on counsel's standard rates would be appropriate.

Plaintiffs do not, however, seek reimbursement in full for counsel's fees. Instead, Plaintiffs request fees based on the lower hourly rates set out in the LSI *Laffey* Matrix available at http://www.laffeymatrix.com/see.html, *see* Ex. 19, which have been repeatedly endorsed by the D.C. Circuit and members of this Court. The D.C. Circuit has discussed the history and provenance of the LSI *Laffey* Matrix in several opinions, most recently *DL v. District of Columbia*, 924 F.3d 585 (2019). As the D.C. Circuit noted, the LSI *Laffey* Matrix addresses hourly rates for "complex federal litigation" in Washington, D.C. and is regularly updated by economist Dr. Michael Kavanaugh using the Bureau of Labor Statistics' Legal Services Index (LSI), a statistic that estimates price increases in the legal market (as opposed to inflation more generally). *Id*. at 589-90; *see also Salazar v. Dist. of Columbia*, 809 F.3d 58, 64-65 (D.C. Cir. 2015) (affirming use of LSI *Laffey* Matrix); *Eley v. Dist. of Columbia*, 793 F.3d 97, 101-02 (D.C. Cir. 2015) (observing that parties had "advocated, to some degree of success" for the LSI *Laffey* Matrix); Ex. 19 at 7 (quoting Dr. Kavanaugh's methodological explanation).

Following the D.C. Circuit's opinions in *DL* and *Salazar*, judges of this court frequently have applied the LSI *Laffey* Matrix in market rate fee awards. *See, e.g.*, *B.J. v. Dist. of Columbia*, No. 19-cv-2163-TSC-ZMF, 2020 WL 8512639, at *3-4 (D.D.C. Nov. 9, 2020) (Faruqui, M.J.); *True the Vote*, 2020 WL 5656694, at *8-9 (Walton, J.); *U.F. v. Dist. of Columbia*, No. 19-2164 (BAH), 2020 WL 4673418, at *6-7 (D.D.C. Aug. 12, 2020) (Howell, C.J.); *Feld v. Fireman's Fund Ins. Co.*, No. 12-1789, (JDB) 2020 WL 1140673, at *8 (D.D.C. Mar. 9, 2020) (Bates, J.) ("Because the Underlying Litigation was 'complex federal litigation,' the LSI *Laffey* Matrix is applicable."); *Am. Oversight v. U.S. Dep't of Justice*, 375 F. Supp. 3d 50, 70 (D.D.C. 2019) (Moss, J.); *Mattachine Soc'y of Wash., DC v. U.S. Dep't of Justice*, 406 F. Supp. 3d 64, 71 (D.D.C. 2019)

(Lamberth, J.); *Hernandez v. Chipotle*, 257 F. Supp. 3d 100, 116 (D.D.C. 2017) (Howell, J.); *Texas v. United States*, 247 F. Supp. 3d 44, 51 (D.D.C. 2017) (Collyer, J.).

As the D.C. Circuit observed in *Salazar*, "[T]he district court's point that the LSI-adjusted matrix is probably a conservative estimate of the actual cost of legal services in this area, does not appear illogical." 809 F.3d at 65. In fact, the LSI *Laffey* Matrix rates are on average nearly 30% lower than counsel's standard rates over the life of this case. *See* Ex. 20. A comparison of the LSI Laffey Matrix rates with Washington, D.C. rates as reported by market surveys also shows that the matrix rates lag behind actual rates charged by Washington, D.C. attorneys. Baruch Decl. ¶¶ 49-52; Ex. 15. In 2018 and 2019, for example, LSI *Laffey* Matrix rates were on average 17% and 13% less than typical Washington, D.C. rates as reported by the Wolters Kluwer Real Rate Report®. *See* Ex. 18. Thus, the LSI *Laffey* Matrix is appropriately viewed as a conservative measure of Washington, D.C. market rates for complex litigation.

Applying the relevant LSI *Laffey* Matrix to the hours reasonably worked, Plaintiffs seek an award of $9,757,453 in attorneys' fees. Wollenberg Decl. ¶ 33-40; Exs. 23, 22, 24, 25.

c. **Alternatively, the EAJA hourly rate should be adjusted to reflect cost of living increases**

If the Court awards fees under § 2412(d) but is not inclined to grant an award of market rate fees, Plaintiffs request in the alternative an award based on the EAJA statutory rate after factoring in increases in the cost-of-living in Washington, D.C. *See Role Models*, 353 F.3d at 969 (EAJA rate routinely adjusted); Baruch Decl. ¶ 3-4 (counsel based in Washington, D.C.).

The cost-of-living adjustment is based on the ratio of price increase in the Consumer Price Index ("CPI") from 1996, when the statutory rate was set, to the CPI for the year in which the relevant services were rendered. *Haselwander v. McHugh*, 797 F.3d 1, 3 (D.C. Cir. 2015) (citing *Role Models*, 353 F.3d at 969); *see also Porter v. Astrue*, 999 F. Supp. 2d 35, 39-41 (D.D.C. 2013)

(discussing cost of living adjustment in detail, and basing adjustment on the DC-MD-VA-WV regional yearly CPI). After adjustment for inflation, the EAJA hourly rates for the Washington, D.C. area during the pendency of these litigations are $209.88 for 2020, $208.95 for 2019, $206.32 for 2018 and $202.19 for 2017. Wollenberg Decl. ¶¶ 44.

Class counsel reasonably devoted 15,107.4 attorney hours to the case. *See* Exs. 6, 7; 27. At the applicable adjusted EAJA rates, the fees for counsel's time are $3,114,816. Wollenberg Decl. ¶¶ 47; Ex. 27. Class counsel were assisted by two paralegals, whose rates are not subject to the EAJA statutory cap. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008); *Conservation Force v. Salazar*, 916 F. Supp. 2d 15, 27 (D.D.C. 2013); Wollenberg Decl. ¶ 48. At their market-based standard rates, the paralegal's 218.1 hours are valued at $66,816.50. Wollenberg Decl. ¶¶ 49; Ex. 27. Thus, *if* the Court is not inclined to grant market rate fees, Plaintiffs request an award of attorney's fees calculated at the applicable EAJA adjusted rates and totaling $3,181,632.

C. Costs and Expenses

Plaintiffs also seek recovery of $34,147 in reasonable costs and expenses. These include filing fees ($1,645.38), legal research ($10,586.83), postage and courier costs ($51.38 and $22.55, respectively), court reporting services ($6,234.44), copying ($1,072.92) and telephone charges ($338.32), all of which are recoverable. *See* Wollenberg Decl. ¶¶ 51-57; Exs. 28 (cost summary), 29 (Morgan Lewis detail), 30 (Fried Frank detail); *see also Aston v. Sec'y of Health and Human Servs.*, 808 F.2d 9, 12 (2d Cir. 1986) (telephone, postage, and photocopying costs are reimbursable under EAJA as reasonable "fees and other expenses"); *Select Milk Producers, Inc. v. Veneman*, 304 F. Supp. 2d 45, 60 (D.D.C. 2004) (costs for filing fees, transcripts, copying and legal research are recoverable); *U.S. v. Adkinson*, 256 F. Supp. 2d 1297, 1320 (N.D. Fla. 2003) (allowing reimbursement for copy and fax charges, court reporter fees, postage, express delivery, and computerized legal research fees because they were all of type routinely billed to clients).

Class counsel also incurred $621.12 in costs related to the hosting and maintenance of the website "MAVNI Federal Class Action Litigation" available at https://dcfederalcourtmavniclasslitigation.org/. Wollenberg Decl. ¶ 55; Exs. 29 & 31. This website is a critical tool that counsel has used to communicate with class members and potential class members in the MAVNI cases. Wollenberg Decl. ¶ 55. This expense is appropriately reimbursable because the EAJA provides for recovery of "the reasonable cost of any study, analysis, engineering report, test, *or project* which is found by the court to be necessary for the preparation of the party's case." 28 U.S.C. § 2412(d)(2)(A) (emphasis added).

In addition, class counsel incurred $13,574.28 in expenses related to the monitoring of several relevant contemporaneous cases such as those involving class members, citizenship issues, or other relevant issues. *See* Wollenberg Decl. ¶ 56; Ex. 31 ("Data Research – Mng Atty" category). This monitoring was in direct support of counsel's work in the litigation and proved quite valuable as it enabled counsel to identify certain positions taken by the government before Judge Huvelle as inconsistent with its positions in other matters. *See* Wollenberg Decl. ¶ 56.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion and award them $9,757,453 in fees as well as $34,147 in costs and other expenses, for a total award of $9,791,600.

Dated: April 9, 2021

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Jennifer M. Wollenberg

Jennifer M. Wollenberg (D.C. Bar No. 494895)
Douglas W. Baruch (D.C. Bar No. 414354)
Susan Baker Manning (D.C. Bar No. 499635)
Kayla S. Kaplan (D.C. Bar No. 996635)
Neaha P. Raol (D.C. Bar No. 1005816)
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004-2541
Telephone: 202.739.3000
Facsimile: 202.739.3001
jennifer.wollenberg@morganlewis.com
douglas.baruch@morganlewis.com
susan.manning@morganlewis.com
kayla.kaplan@morganlewis.com
neaha.raol@morganlewis.com

Counsel for Plaintiffs and the Certified Class