IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, *Defendants*.	No. 1:17-cv-00998-PLF Hon. Paul L. Friedman

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

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I. INTRODUCTION

This case is about the Government's vital interest in protecting the national security of the United States, and ensuring that the immense privilege of naturalization is granted only to those who have been properly vetted and demonstrated eligibility. The Court agreed. In fact, in denying Plaintiffs' first preliminary injunction ("PI") motion, the Court noted:

> Having reviewed under seal the two 2017 classified documents completed by the Inspector General and the Defense Intelligence Agency, the Court cannot ignore (1) the enlistment of foreign nationals in the military implicates national security concerns outlined in the classified documents, and (2) that these national security concerns can bear on an applicant's good moral character, attachment to the Constitution, and disposition towards the United States. Because additional screening for national security risks does not plainly conflict with these relevant factors for examination, and because no statute or regulation prohibits enhanced security screening, this Court cannot conclude that plaintiffs are likely to succeed on their contrary-to-law claim.

ECF No. 44 at 20-2 (internal citations omitted). Ironically, however, Plaintiffs' Equal Access to Justice Act ("EAJA") application fails to discuss—or even acknowledge—the Government's national security concerns, much less the strict requirements Congress has established for naturalization.[1] Instead, whenever the Court opined that relief may not be possible on their current claims, based on national security concerns, Plaintiffs adjusted their claims, until they prevailed on two very narrow sub-claims not elucidated in their Complaint. *See* Exhibit 12, Complaint Comparison Chart.

The "shifting sands" of Plaintiffs' ever-evolving claims left the Court feeling "bamboozled" and created the confusing, protracted litigation for which Plaintiffs now seek to recover nearly $10 million of taxpayer money. Jan. 23, 2018 Tr. at 62:17 and Nov. 14, 2018 Tr. at

[1] The Government provided classified documents to Judge Huvelle *ex parte* for *in camera* review, pursuant to her order. Minute Orders dated June 5 and 6, 2018. Plaintiffs' counsel has never seen these documents, as they remain classified.

60:13, respectively; ECF No. 319-1 at 1. Thus, the Court should deny Plaintiffs' request for fees, costs, and expenses in its entirety, because the Government's positions were substantially justified and it did not act in bad faith. However, if the Court disagrees, Defendants alternatively maintain that Plaintiffs' requested fees are excessive and unsubstantiated by sufficient explanation or documentation, requiring, at minimum, a 50% reduction.

II. BACKGROUND

The Court's prior opinions contain a comprehensive statutory, regulatory, and procedural background. *See* ECF Nos. 44, 72, 73. This summary focuses on providing context to Plaintiffs' EAJA application by illustrating how their own strategy unreasonably prolonged and complicated this litigation and, ultimately, led to their current excessive fee request. As the Court will learn, this case began as a broad attack on all aspects of the enhanced security checks for individuals in the Military Accessions Vital to the National Interest ("MAVNI") program. When that failed—and the Court did not rule in Plaintiffs' favor—Plaintiffs scrambled to amend their complaint and narrow their claims to avoid dismissal. As the case progressed, the Court repeatedly expressed disagreement with Plaintiffs' claims that the background checks were unnecessary and unlawful, particularly given the underlying national security concerns in this case. Ultimately, Plaintiffs narrowed their claim to challenge the final Military Security Suitability Determination (MSSD), or the "tail end" of DoD's background checks.

Plaintiffs filed their complaint on May 25, 2017, seeking to compel the Department of Homeland Security (DHS) to process and expedite their Form N-400, Applications for Naturalization, under the Administrative Procedure Act, 5 U.S.C. § 706(1), and through mandamus relief. Additionally, Plaintiffs sought to enjoin DoD from interfering with the processing of the N-

400 applications, and DHS from complying with any DoD request to delay processing the applications. ECF No. 17.

On July 7, 2017, USCIS headquarters Field Office Directorate (FOD) issued new written guidance to the Field, stating that USCIS had determined that the completion of the DoD background checks is relevant to a MAVNI recruit's eligibility for naturalization. *See* USCIS Certified Administrative Record ("CAR") at 2, 4-6, 8-13, 14-23 ("July 7 Guidance"). The culmination of DoD's background check process is the MSSD. *See* ECF No. 58-3 (October 13, 2017 Memorandum).

At the first PI hearing, on July 19, 2017, the Court expressed doubts about Plaintiffs' unreasonable delay claim and criticized their initial filing for conflating their unreasonable delay claims with their claim that the enhanced DoD background checks were unlawful and not part of the naturalization process. Jul. 19, 2017 Tr. at 91:19-21; 92:13-17. Shortly thereafter, on August 4, 2017, Plaintiffs filed their First Amended Complaint (FAC) challenging the lawfulness of DoD's enhanced background checks and USCIS's July 7 Guidance as an arbitrary and capricious "hold" on MAVNI recruits' N-400 applications. ECF No. 27. Following another PI hearing and the Court's *in camera* review of classified documents regarding Defendants' national security concerns related to the MAVNI screening process, the Court denied Plaintiffs' PI motion finding they were unlikely to succeed on the merits of any of their challenges to USCIS's July 7 Guidance, and any harm the policy caused was not "sufficient to override national security concerns." *Nio v. United States Dep't of Homeland Sec., et al.*, 270 F. Supp. 3d 49, 67 (2017).

On October 13, 2017, to promote progress mitigating national security risks through vetting MAVNI recruits, DoD issued new guidance for Form N-426, Request for Certification of Military or Naval Service, that, as is relevant here, permitted the military to recall and de-certify any Form

N-426 which had been previously certified before the service member completed all new applicable screening and suitability requirements. DoD CAR at 0001, 0004-0007 ("Form N-426 Review").

When Defendants moved to dismiss Plaintiffs' FAC, ECF No. 49, and before the Court decided the motion, Plaintiffs filed a second amended complaint (SAC), again narrowing their claims and also seeking new relief. This time Plaintiffs sought a declaration that DoD could not refuse to issue a Form N-426 for "post-enlistment background investigations or suitability vetting," ECF No. 61, and a Temporary Restraining Order ("TRO") and PI to enjoin DoD's Form N-426 Review, ECF Nos. 63, 67.

On October 27, 2017, the Court granted the PI, and enjoined DoD from implementing the Form N-426 Review by "decertifying" "or otherwise invalidating plaintiffs' or the class' existing" Form N-426s, with some exceptions. ECF No. 74. The Court reasoned that certifying honorable service did not implicate Defendants' relevant national security concerns. Oct. 27, 2017 Tr. at 4:20-25-5:1-20. The Court did not, however, grant any other relief.

When Defendants moved to dismiss Plaintiffs' SAC under Rule 12(b)(6), ECF No. 80, Plaintiffs once again changed their claims before the Court ruled on the motion. At the January 23, 2018 status conference, Plaintiffs—after realizing the Court was not going to grant their broad attack on the enhanced background checks—raised a new (and even narrower) claim targeting these background checks. Since USCIS first issued the July 7 Guidance, Plaintiffs argued that USCIS acted unlawfully by requiring MAVNI recruits to complete DoD background checks before adjudicating their naturalization applications. This new claim, however, only targeted one particular facet of the DoD background check process: the MSSD. As explained in Defendants' prior filings, since the MSSD is the conclusion of DoD's background check process, DoD would

wait until the MSSD was complete before communicating the results of the background check to USCIS. *See* ECF No. 219 at 14. This being "the first time [the Court] heard this argument," Jan. 23, 2018 Tr. at 27:2-3, it posited that the MSSD could not be "cut" (vacated) since a negative MSSD would result in a MAVNI applicant's discharge from military service, and the applicant gained citizenship "in exchange for military service," *id*. at 60:15-18 (Court also reasoned "[i]f the person can't be in the military, I don't see how they can be a citizen"). Having "worked on this case a long time" and given it "a lot of attention," the Court described Plaintiffs' claims as "shifting sands." *Id*. at 62:15-17. The Court had always viewed the MSSD as part of the DoD background check, *id*. at 62:22-25, and questioned, if Plaintiffs had not, why they "didn't [] say anything about it" when there had been "briefing since August" including the number of MSSDs issued, *id* at 65:24-25. The Court repeatedly asked Plaintiffs if they needed to amend their complaint to reach these new claims and Plaintiffs declined. *See e.g.*, *Id*. at 80:8-22; Mar. 26, 2018 Tr. at 19:19-25, 26:2-4, Apr. 11, 2018 Tr. at 77:16-24. Given Plaintiffs' new claims, and insistence no amended complaint was needed, the Court denied Defendants' motion to dismiss without prejudice and with instructions to file a new motion to dismiss, or in the alternative, a motion for summary judgment, addressing the SAC, specifically, "the final agency action"—"DOD's October 13, 2017 Guidance and USCIS's July 7, 2017 Guidance." ECF No. 98; Jan. 23, 2018 Tr. at 89:1-2.

Two days before Defendants' filing deadline, despite saying no amendment was needed, Plaintiffs filed a Motion for Leave to File a Third Amended Complaint ("TAC") explicitly challenging the MSSD requirement. ECF No. 115. Defendants opposed arguing this was a prejudicial "dilatory tactic." ECF No. 117 at 2. Complying with the Court's order, Defendants filed their Motion to Dismiss the SAC and, in the Alternative, for Summary Judgment, arguing that USCIS's July 7 Guidance was not arbitrary and capricious. ECF Nos. 116, 116-1 at 15-16. They

averred that the Form N-426 Review was lawful given the "pressing national security concerns" and Congress' delegation to DoD to certify whether a MAVNI recruit's service was "honorable," which DoD exercised through specified suitability screening measures before certifying honorable service through a Form N-426. ECF No. 116-1 at 2. This was not arbitrary and capricious, Defendants argued, because the change was prompted by "reviews of the MAVNI program [that] revealed weaknesses in the [] vetting process," that raised serious national security concerns. ECF No. 116-1 at 39-41.

On March 16, 2018, Plaintiffs filed another Motion for a TRO and PI seeking, in sum, to speed up their naturalization adjudications, and now also challenging the requirement that USCIS wait for the completion of the MSSD. ECF No. 119. At a hearing on Plaintiffs' new filings, the Court rejected Plaintiffs' excuse that until January 2018 they had not understood that USCIS waited for the MSSD to adjudicate applications, and stated everyone knew that by "September 2016," "at the latest [] July 2017 when" reporting began. Apr. 11, 2018 Tr. at 52:24-53:7, 55:3-2. Although the Court remained skeptical of Plaintiffs' MSSD claim, it was "willing to reach the merits" because "*it's pretty clear . . . that the information is relevant to naturalization,"* including "*the question of the person's character and attachment to the constitution*." *Id*. at 124:6-14 (emphasis added). Judge Huvelle explained "USCIS *should care and should wait*" for the MSSD since it was "not a useful use of resources for them to [try] to duplicate an MSSD" when a negative finding would likely prevent a MAVNI recruit from receiving the honorable service characterization required to naturalize. *Id*. at 125:12-19 (emphasis added). Ultimately, the Court denied Plaintiffs' "very, very ambitious" PI that would give them "anything and everything they could get if they won the whole lawsuit," *id*. at 113:4-6, and denied their request to amend their

complaint because their new claims were "not amenable to class relief" under the Court's definition of the certified class, *id*. at 129:1-4; ECF No. 135.

On August 13, 2018, Plaintiffs filed a Motion for Partial Summary Judgment on the declaratory judgment, APA, and constitutional claims raised in their SAC, and sought to permanently enjoin the MSSD requirement and the Form N-426 Review. ECF No. 177 at 1-2. Defendants opposed and filed their own Motion for Summary Judgment on all claims brought against them. ECF No. 186.

On May 22, 2019, the Court granted partial summary judgment on one minor sub-claim. ECF Nos. 249-50, Memorandum Opinion and Order; 307, Judgment; *Nio v. United States Dep't of Homeland Sec., et al.*, 385 F. Supp. 3d 44 (D.D.C. 2019). The Court vacated USCIS's MSSD requirement as arbitrary and capricious, in violation of 5 U.S.C. § 706(2), because their "purported reasons for waiting for these military suitability adjudications do not comport with the evidence before the Court" where the MSSD provided no new information relevant to naturalization, only DoD's adjudication that may impact an applicant's eligibility to naturalize under Section 1440. *Id*. at 47, 65-66. On August 20, 2020, the Court entered final judgment permanently enjoining DoD's Form N-426 Review, and dismissing all remaining claims with prejudice (not as moot). ECF No. 307; *Nio v. United States Dep't of Homeland Sec., et al.*, 2020 WL 6266304 (D.D.C. Aug. 20, 2020). On April 9, 2021, Plaintiffs filed this EAJA application seeking to recover nearly $10 million in attorney fees, costs, and expenses. ECF No. 319.

III. ARGUMENT

The Court must deny Plaintiffs' request for attorney fees because they fail to meet EAJA's requirements to recover an award. Despite Plaintiffs' contentions, the Government had no desire or intention to use pre-textual means to delay or deny citizenship in any instance. At the same time,

the Government cannot relax its obligation to fully investigate a naturalization applicant's eligibility.

The Government's overall position in this litigation had a reasonable basis in law and fact and was therefore substantially justified. As the Court already noted, "[b]ecause additional screening for national security risks does not plainly conflict with these relevant factors for [naturalization], and because no statute or regulation prohibits enhanced security screening," there can be no finding that the Government acted in bad faith, or that the Government's position was not substantially justified. ECF No. 44 at 20-2. Accordingly, the Court should deny Plaintiffs' EAJA request. Alternatively, even if the Court finds that Plaintiffs are entitled to EAJA fees, they would not be entitled to the full amount they seek. Instead, the Court must apply the EAJA hourly rate as adjusted for increases in the cost of living and deny fees for claimed hours that are excessive, duplicative, or not reasonably documented.

A. Plaintiffs Failed To Comply With The Notice Requirement Of Rule 23(h)

Plaintiffs are not entitled to recover under EAJA because they have failed to comply with the notice requirement of Federal Rule of Civil Procedure ("Rule") 23(h)(1), that notice of a motion for attorney fees must be served on all parties and class members. *Id*. "The rule was promulgated to ensure that the amount and mode of payment of attorney fees are fair and proper." *Cobell v. Norton*, 407 F. Supp.2d 140, 147-48 (D.D.C. 2005) (internal citations and quotation marks omitted). Class members must be given an opportunity to object to the fee petition. Fed. R. Civ. P. 23(h)(2). The Court may hold a hearing and must find the facts and state its conclusions of law. Fed. R. Civ. P. 23(h)(3).

The Advisory Committee notes concerning new Rule 23(h) indicate that the provision was added to give the court (and, presumably, absent class members) more opportunity to supervise class counsel's representation of the class:

> Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action. Fed. R. Civ. P. 23(h) Advisory Committee Note.

Although Rule 23(h) does not itself create any right to recover fees, by its terms the provision applies if class counsel seeks recovery, and the text of Rule 23 requires, without exception, notice be given to class members in order to file a motion for fees and expenses. *See Greenwood v. United States*, 131 Fed. Cl. 231, 243-44 (Fed. Cl. 2017) (Advisory committee notes to analogous Fed. R. Civ. P. 23(h)(1) require "notice ... in all instances."). Additionally, neither the rule nor the accompanying Advisory Committee Note draws any distinctions based upon whether the attorney fees will be paid from the class common proceeds, money paid directly by a defendant, or taxpayer funds available under EAJA.

Here, despite maintaining a website for the specific purpose of communicating with class members—for which Plaintiffs currently seek to recover the cost of maintaining, ECF No. 319-1 at 45—Plaintiffs have apparently made no effort to notify class members about their recovery request. Accordingly, they are not entitled to recovery.

The lack of notice is even more troubling where counsel previously asserted that Fried Frank would represent Plaintiffs "on a pro bono basis" and was "fully committed to deploy and expend the resources necessary to vigorously represent the class in this case" to obtain class certification and appointment as class counsel, ECF No. 52-2, Dec. of Douglas W. Baruch, ¶¶ 4,

9; *see also* ECF No. 30-1 at 9, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, but now seek to recover nearly $10 million of taxpayer money in attorney fees, costs, and other expenses allegedly incurred during this litigation, ECF No. 319-1 at 1. Notably, any award will not benefit the class. Also, counsel's assertion that they might donate the money, or use it to fund their own pro bono practices, while perhaps laudable if true, is unenforceable and irrelevant to whether fees may, or should, be awarded.

B. Plaintiffs Are Not Entitled To Legal Fees Under 28 U.S.C. § 2412(d) Because The Government's Positions Were Substantially Justified In This Litigation.

EAJA bars recovery in this case because Defendants' promulgation, and defense, of their policies were substantially justified. 28 U.S.C. § 2412(d)(1). The Supreme Court has explained that "substantially justified" does not mean "justified to a high degree," but rather "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Essentially, following a plaintiff's allegation that the Government's position was not substantially justified, the Government must prove, by a preponderance of the evidence, that its position on the issues for which a plaintiff prevailed had "a reasonable basis in law and fact" *Air Transport Association of Canada v. Federal Aviation Administration,* 156 F.3d 1329, 1332 (D.C. Cir. 1998); *see* 28 U.S.C. § 2412(d)(1)(A); *Cinciarelli v. Reagan,* 729 F.2d 801, 806 (D.C. Cir. 1984).

The Court must distinguish between a decision on the merits and whether the Government's position was substantially justified. *See e.g., Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005). Indeed, a position can be justified even though a court ultimately finds that it is not correct. *Pierce*, 487 U.S. at 566; *see Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994). Where a "fee petition arises out of a proceeding for judicial review of agency action," the Government must demonstrate the reasonableness of both

its litigation position and the agency's actions, *Am. Wrecking Corp. v. Sec'y of Lab.*, 364 F.3d 321, 325-26 (D.C. Cir. 2004), but still, "only one threshold determination for the entire civil action is to be made," *Comm'r, INS v. Jean*, 496 U.S. 154, 159 (1990). A finding that an agency's action or policy was arbitrary and capricious "does not preclude the Government from demonstrating that [its] actions and its conduct in litigation were 'substantially justified.' " *Wilkett v. ICC,* 844 F.2d 867, 871 (D.C. Cir. 1988); *see FEC v. Rose,* 806 F.2d 1081, 1087 (D.C. Cir. 1986). In this context, the Government's positions were substantially justified if their "actions were slightly more than reasonable." *Rose,* 806 F.2d at 1090. Here, it was, based on two classified reports concerning national security.

Whether a case presents novel legal issues is a significant factor in determining whether the Government's position was substantially justified. As the D.C. Circuit has acknowledged, if "the government lost because it vainly pressed a position flatly at odds with controlling case law, that is one thing; quite another if the government lost because an unsettled question was resolved unfavorably." *Taucher*, 396 F.3d at 1174.

1. USCIS's Policy to Wait for the MSSD Step of DoD's Background Checks to Adjudicate MAVNI Applicants' Naturalization was Substantially Justified

Defendants' positons promulgating and defending USCIS's policy of requiring a MSSD before adjudicating MAVNI applicants' naturalization was substantially justified. This is particularly true where Plaintiffs strategically shifted their claims from a broad challenge to the policy, arguing it caused unreasonable delay, to the one narrow sub-claim on which they prevailed, after the Court had rejected their more general challenges. ECF Nos. 1 (original complaint), 27 (FAC), and 61 (SAC); *see* Exhibit 12, Complaint Comparison Chart.

Following their original complaint, which drew skepticism from the Court that Plaintiffs could prove unreasonable delay and, instead, were "trying to sweep in arbitrary and capricious and

contrary to law" claims not raised in that complaint, Jul. 19, 2017 Tr. 92:13-17, Plaintiffs filed their FAC. ECF No. 27; *see also* ECF No. 33, Plaintiffs' Revised Motion for a PI. For the first time, Plaintiffs identified DoD's background checks, alleged that USCIS had a "hold" on processing MAVNI recruits' applications, and requested that DHS be compelled under the APA (Sections 706(1) and (2)), to adjudicate their applications without waiting for completed DoD background checks. *Id*. When the Court denied Plaintiffs' PI Motion because they were still unlikely to succeed on the merits of their challenges to DHS's policy, and any irreparable harm was not "sufficient to override national security concerns," *Nio*, 270 F. Supp. 3d 49, Plaintiffs filed their SAC, ECF No. 61. Following Defendants' Motion to Dismiss the SAC under Rule 12(b)(6), ECF No. 80, Plaintiffs changed their claims yet again before the motion was decided.

More than six months into this litigation and after unsuccessfully targeting the entire DoD enhanced background checks, Plaintiffs challenged one particular facet at the end of the process: the MSSD. As explained in Defendants' prior filings, DoD regarded the MSSD as the conclusion of their background check process, and, accordingly, until the Court's ruling on the cross-motions for summary judgment, waited until the MSSD was complete before communicating the results of the background check to USCIS. Plaintiffs' real complaint with USCIS's policy of waiting for the conclusion (including MSSDs) was simply that, in their view, it took too long. *See* ECF No. 177, Plaintiffs' Motion for Summary Judgment at 4 (arguing that MAVNI naturalization adjudications are moving at "a snail's pace"). However, they did not raise any MSSD concern until January 23, 2018. This tactic perplexed the Court, who had always believed the MSSD was part of the background check process and questioned, if Plaintiffs had not, why they "didn't [] say anything about it" when there had been "briefing since August." Jan. 23, 2018 Tr. at 62:22-25, 65:24-25.

Initially, the Court believed that the MSSD could not be "cut" since MAVNI applicants gained citizenship "in exchange for military service." *Id*. at 60:15-18.

Plaintiffs' trend of shifting claims to avoid dismissal persisted even after introducing the MSSD claim. Two days before Defendants' Motion to Dismiss the SAC and, in the Alternative, for Summary Judgment, was due, Plaintiffs filed a Motion for Leave to File a TAC explicitly challenging the MSSD requirement. ECF No. 115. When Defendants complied with the Court's order and filed their motion, ECF Nos. 116, 116-1, Plaintiffs countered with another Motion for a TRO and PI seeking, in sum, to enjoin DHS "from applying the July 7, 2017 Policy, the Redundant FBI Check Policy, or the NSD/MSSD Policy" and directing them "to immediately adjudicate the[ir] naturalization applications," ECF No. 119. The Court rejected this tactic and Plaintiffs' repeated excuse that they did not understand USCIS's policy until January 2018, Apr. 11, 2018 Tr. at 52:24-55:25, and reminded them that they had insisted that they "didn't need to get an amended complaint to bring up these problems," *id*. at 77:16-19. The Court reiterated its view since an individual with an unsuitable MSSD "can't serve in the military, they can't be naturalized," *id*. at 56:4-10, so "USCIS's process [only] kicks in" at "the time of the MSSD determination," *id*. at 69:15-19. Again, the Court denied the PI because Plaintiffs were "not likely to succeed" on their MSSD claim, *id*. at 126:19-21, which was not "explicit in the complaint," *id*. at 113:20-23.

Based on Plaintiffs' unclear and increasingly narrowed claims advanced each time they faced dismissal, and the Court's rulings and comments leading up to summary judgment, it is clear that Defendants' positions were substantially justified all along since a reasonable person—Judge Huvelle—had interpreted the law in Defendants' favor and adopted three of their arguments. *See Am. Wrecking Corp.*, 364 F.3d at 325-26; *Rose,* 806 F.2d at 1090.

First, Judge Huvelle agreed with Defendants' argument that waiting for the MSSD was justified by national security concerns. Although Plaintiffs ultimately prevailed on their narrow MSSD sub-claim, throughout the litigation the Court understood how the MSSD may be relevant to an applicant's eligibility for naturalization under the statutory requirements imposed by Congress, and that the information DoD learns during its background check process (which culminates in the issuance of an MSSD) may implicate national security concerns and be relevant to naturalization eligibility. As the Court explained, "if DoD won't take the person . . . after they've done all of these extraordinary security clearances . . . that's something that USCIS [] wants to know and *needs to know*" and they "*should care and should wait and find out*." Apr. 11, 2018 Tr. at 117:14-21 and 125:12-19, respectively (emphasis added). The Court continued that USCIS was not "in a position to sit there and say, We're not going to wait to hear from" DoD on this matter of national security. *Id*. at 81:16-19. Thus, in Judge Huvelle's opinion, the USCIS CAR demonstrated that "they had knowledge of significant national security concerns relating to naturalizing MAVNI recruits before they could complete their screening and that they decided that they would defer to the DoD's expertise on matters of national security" by waiting for the MSSD. *Id*. at 120:17-22.

This aligned with Defendants' arguments that USCIS's policy was supported by national security concerns articulated in the DoD and USCIS CARs. The CARs revealed that DoD had identified derogatory information about individuals who had naturalized before their background checks were complete, that also bore on their moral character and attachment to the Constitution and, consequently, their eligibility to naturalize. ECF No. 116-1 at 15-17; *see Tang v. Chertoff*, 689 F. Supp. 2d 206, 213-14 (D. Mass. 2010) ("Citizenship conferred without a background check *would be difficult to reverse if a subsequent check revealed substantial concerns*.") (emphasis added). It is logical that a non-citizen who is unsuitable for military service based on the threat he

or she poses to the national security of the United States is not likely to demonstrate sufficient good moral character and attachment to the Constitution to qualify to become a citizen of the United States. Thus, Defendants' reasoning, and Judge Huvelle's initial finding, that it was permissible for USCIS to wait for the MSSD due to national security concerns, and the relevant information regarding citizenship qualifications it would yield, was sound. *See e.g. Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (USCIS was substantially justified in delaying petition beyond the statutory period since FBI name checks were essential for national security.)

Second, Judge Huvelle agreed with Defendants' argument that waiting for the MSSD was justified because it promoted efficiency. As she said, it is "not a useful use of resources for [USCIS to try] to duplicate an MSSD." Apr. 11, 2018 Tr. at 125:14-16. Likewise, Defendants argued that it was "entirely rational for USCIS to await the outcome of an MSSD" because a favorable decision would "eliminate the need for USCIS to separately review all of the raw background check material that DoD reviewed," and an adverse decision would "signal[] the presence of derogatory information that may be relevant to naturalization eligibility and may result in a recruit's other than honorable discharge." ECF No. 186 at 25. Significantly, the Court said that it was "willing to reach the merits" of the MSSD claim because "*it's pretty clear . . . that the information is relevant to naturalization*" including "*the question of the person's character and attachment to the constitution*." Apr. 11, 2018, Tr. at 124:1-11 (emphasis added); *see also* ECF No. 135.

Third, Judge Huvelle agreed with Defendants' argument that waiting for the MSSD was justified because an adverse decision may impact an applicant's eligibility to naturalize. In her first ruling on this issue, Judge Huvelle found that Plaintiffs were unlikely to succeed on the merits of their challenge to the MSSD requirement. In her view, if a person received an unsuitable MSSD and, therefore, "can't serve in the military, they can't be naturalized." *Id*. at 56:4-10. As she

explained, MAVNI applicants were "getting naturalized *because* they can serve in the military." *Id*. at 118:3-5 (emphasis added). Thus, she believed that "USCIS's process kicks in" at "the time of the MSSD determination" that they are suitable to serve. *Id*. at 69:15-19. Echoing the Court's earlier statements, Defendants said it was intuitive to wait for the MSSD because MAVNI recruits gained citizenship based on their commitment to serve in the military and an unfavorable MSSD would preclude such service. *Id*. at 43:8-12. Defendants also explained that the possibility of discharging MAVNI recruits close in time to the MSSD would not be problematic because USCIS would still assess the derogatory information under its statutory obligation to investigate each applicant, *id*. at 54:8-55:13, and to develop all "eligibility" issues for potential judicial review, *id*. at 105:12-24.

Judge Huvelle's early endorsement of Defendants' arguments as to why it was rational for USCIS to wait for the MSSD to adjudicate naturalization applications clearly establishes that a reasonable person could have interpreted the law in their favor, as she initially did. Therefore, Defendants' positions were, of course, substantially justified. *See Am. Wrecking Corp.*, 364 F.3d at 325-26; *Rose,* 806 F.2d at 1090.

Additionally, USCIS confronted a novel situation when it learned about DoD's national security concerns regarding weaknesses in the MAVNI screening process. As Plaintiffs put it in their EAJA Motion, "the *Nio* case was first-of-its-kind litigation in that there had been no previous large-scale litigation involving the MAVNI program and the intersection of military service and immigration law built into it." ECF No. 319-4, Stock Declaration, ¶ 24. Prior to Judge Huvelle's opinion, no court had ruled on the novel issues presented, specifically, whether it was arbitrary and capricious for USCIS to wait for completed DoD background checks, including suitability determinations, to adjudicate MAVNI applicants' naturalization. This lack of precedent is reflected

in Judge Huvelle's own evolving opinion as she grappled with these issues of first impression, initially endorsing Defendants' positions and later changing course, as described above. Given this lack of precedent, USCIS's positions cannot be equated to those that the D.C. Circuit has found were not substantially justified, such as when the Government's position was "patently flawed" or "flatly at odds with the controlling case law," *Am. Wrecking Corp*., 364 F.3d at 326-27 (internal quotation marks omitted), "obviously insufficient under well-established precedent," or pressed "[i]n the face of an unbroken line of authority," *Precision Concrete v. NLRB*, 362 F.3d 847, 851-52 (D.C. Cir. 2004), or taken in defiance of a "string of losses." *Contractor's Sand & Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1341 (D.C. Cir. 2000) (internal quotation marks omitted).

Nor does the fact that Judge Huvelle later found the MSSD requirement was arbitrary and capricious change this result. The "question is not whether the [agency] had the better arguments. It is enough that the [agency's] interpretation and legal arguments had a reasonable basis in fact and" law. *Hill v. Gould*, 555 F.3d 1003, 1007-08 (D.C. Cir. 2009). Clearly, Judge Huvelle believed that Defendants' positions met this standard. This Court should find the same.

2. DoD's Policy to Revoke Forms N-426 Issued Before a Completed Background Check was Substantially Justified

DoD was likewise substantially justified in promulgating and defending the Form N-426 Review where the policy reasonably responded to a novel issue implicating national security, as was demonstrated by the Court's early agreement with Defendants' positions and later clarification about its rationale for enjoining the policy, and other courts rulings endorsing these positions.

Since Section 1440 affords certain soldiers who have served honorably during times of war the privilege of seeking naturalization, DoD's limited role in the naturalization process is to "determine whether [they] have served honorably in an active-duty status, and whether separation from such service was under honorable conditions." 8 U.S.C. § 1440(a). The Form N-426 Review

clarified DoD's policy for effectuating that role and was the outgrowth of DoD's comprehensive review of the MAVNI program in 2016. That review revealed that, at least in recent years, DoD had failed to ensure that service members developed an "honorable" service record before certifying their service as "honorable" under Section 1440. *See* Exhibit No. 13, Kirwa ECF No. 17 PI Opp at 19-22).

Historically—for more than a century, *see Patterson v Lamb* 329 U.S. 539, 542 (1947)—an honorable characterization of service was reserved for a solider (1) whose "conduct" "warrant[s] his re-enlistment[,]" (2) whose "service has been honest and faithful," *Davis v. Woodring*, 111 F.2d 523, 524 (D.C. Cir. 1940), and (3) "who performed military service after having become fully and finally absorbed into that service." *Patterson*, 329 U.S. at 542. DoD's Form N-426 Review set forth requirements for determining whether substantial evidence supported each of these principles. First, to ensure a soldier's "conduct" warranted "his re-enlistment," *see Davis*, 111 F.2d at 524, the policy required that service members not be subject to pending disciplinary action, administrative action, law enforcement investigation, or command instigation. Second, DoD required the successful completion of a MSSD. The MSSD provides substantial evidence upon which DoD can determine whether the service member's service is "honest and faithful" to the United States. *See id*. Finally, the policy established certain time-in-service requirements, to build a robust service record upon which to make the honorable service characterization and to ensure that such characterization is reserved for those service members "who performed military service after having become fully and finally absorbed into that service." *Patterson*, 329 U.S. at 542.

As DoD explained in announcing this policy, it had "taken direct actions to mitigate security risks . . . presented by the previous practices vetting Service Members accessed under the

[MAVNI] Pilot Program . . . [and] continued progress depends on a consistent, sustained, and responsive approach." DoD CAR at 0001. Thus, relying on this information and two classified reports, DoD issued the Form N-426 Review. DoD CAR at 0004-0007. In keeping with the policy change, DoD reasonably decided that it needed to correct the military records of those service members who had erroneously been issued certificates of honorable service that were inconsistent with the very principles underlying the characterization. For the *Nio* class members (who had received a Form N-426 and submitted a completed naturalization application, but had not completed the DoD background check), this meant that their Forms N-426 would be de-certified, DoD would complete their background checks consistent with the clarified policy, and those deemed suitable for military service would receive a new Form N-426 to submit in support of their naturalization application. DoD CAR 0007. The Court enjoined this portion of the Form N-426 Review "for the reasons set forth in [its] opinion granting a [PI] in *Kirwa*." *See* ECF No. 74.

In *Kirwa*, the Court found that DoD's policies about characterization of service were reviewable under the APA. *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 35-38 (D.D.C. 2017). As the Court understood the issue before it, DoD's policy governed "whether and when to certify honorable service" and the Court had to decide whether DoD improperly analyzed whether a service member had served honorably prospectively, as opposed to retrospectively. *Id*. at 35. The Court's presumption that the default characterization for entry-level service was "honorable," easily led it to conclude that DoD's policy was arbitrary and capricious. *See* Amended Order, *Kirwa v. Dep't of Defense*, No. 1:17-cv-01793, ECF No. 32.

One case, from the Fourth Circuit, Court of Appeals, has held that the Government's position defending the Navy's revocation of a previously granted Form N-426 was substantially justified, therefore, no EAJA fees should be awarded. *Cody v. Caterisano*, 631 F.3d 136 (4th Cir.

2011). In that case, "[e]ssentially, the Government argued the Navy was mistaken in its original Form N-426 certification and sought to correct its mistake" by revoking it. *Id*. at 143 (citing *Bagheri v. I.N.S.,* 215 F.3d 1332, 2000 WL 335712, at *1 (9th Cir.2000). Noting this was a "case of first impression," the Circuit Court held that where "the Government made reasonable arguments based on statutory interpretation and analogous cases" it was not an abuse of discretion for the district court to find that "the Government's position was substantially justified." *Id*. at 144.

Nio also presented a case of first impression. Evolving national security threats, first identified in 2016, prompted DoD to chart a response to ensure that MAVNI recruits were properly vetted before entering military service. Again, as Plaintiffs described in their EAJA Motion, "the *Nio* case was first-of-its-kind litigation." ECF No. 319-4, Stock Declaration, ¶ 24. While *Cody* offers some guidance, it did not include the novel element of a national security threat. Thus, as with USCIS's policy, prior to Judge Huvelle's opinion, no court had ruled on the novel issues presented, specifically, whether it was arbitrary and capricious for DoD to revoke a previously issued Form N-426 certifying honorable service to ensure that the certification complied with the updated standards, developed to combat threats to national security. Accordingly, as above, DoD's positions cannot be equated to those that the D.C. Circuit has found were not substantially justified because they failed to comply with established law. *See Am. Wrecking Corp*., 364 F.3d at 326-27; *Precision Concrete*, 362 F.3d at 851-52; *Contractor's Sand & Gravel, Inc.*, 199 F.3d at 1341.

As the Government did in *Cody*, Defendants relied on statutory interpretation and analogous case law to argue that "DoD's decision about whether and when to certify honorable service is [] committed to agency discretion by law and is thus unreviewable under the APA." ECF No. 67 at 1-2 (internal citations omitted). Defendants' position was "justified to a degree that could satisfy a reasonable person." *See Taucher*, 396 F.3d at 1173. The statutory analysis of Section

1440, Defendants posited, revealed that "that Congress left it to DoD's discretion to construe the phrase" honorable service and that there was not "*any* standard, timeline, or deadline of how or when honorable service determinations are to be made, which inherently includes decertifying honorable service certifications that were issued in error or prematurely." ECF No. 80 at 4-5 (emphasis in original). Continuing, Defendants said Section 1440's mandate that "the executive department . . . shall *determine* whether persons have served honorably and whether separation from such service was under honorable conditions" (emphasis added), showed that the determination of honorable service—and, by extension, the decision to de-certify prematurely issued honorable service certifications—was delegated to the executive department under which the applicant served. *Id*. at 5. Further relying on Section 1440's legislative history, and the fact that the "characterization of military service is a highly fact-dependent determination," Defendants argued that DoD had inherent "discretion to establish the criteria it deems necessary" for honorable service. *Id*. at 6-7.

Reasonable minds could also disagree about the scope of DoD's ministerial duties under Section 1440. In *Kirwa*, Judge Huvelle repeated an assertion that Section 1440 imposes a ministerial duty on DoD in order to conclude that its policy was reviewable and violated 5 U.S.C. § 706(1), s*ee Kirwa*, at 37-38, 41-42, but this was based on a stray comment in a brief in *Nio*. not a statutory analysis, *see id*. at 38. Defendants have never disputed that Section 1440 imposes a ministerial duty on DoD services to determine whether substantial evidence supports a determination that a soldier has earned an "honorable" characterization of service. But the "ministerial nature of [DoD's] obligations does not mean that [it] must rubberstamp any [Form N-426] it receives but rather that, once [the proper official] has determined that" a solider has earned an honorable characterization of service based on the evidence, "he must" certify it as so.

Commonwealth v. Ferriero, --- F. Supp. 3d. --- 2021 WL 848706, at *12 (D.D.C. Mar. 5, 2021). Viewed from that perspective, DoD's standards for determining whether substantial evidence supported a conclusion that a Form-N-426 should be returned as certifying "honorable" service as opposed to "uncharacterized" service could be viewed as reasonable. Additionally, briefly suspending even the ministerial aspect of the duty to ensure that certifications applied consistent standards could also be considered reasonable.

At least one circuit and one district court have agreed with Defendants' arguments that DoD's decisions about honorable service were made in the agency's discretion and that there is no meaningful standard by which to judge the agency's exercise of that discretion. *Jiahao Kuang v. United States Dep't of Def.*, 778 F. App'x 418, 421 (9th Cir. 2019), *cert. denied sub nom. Jiahao Kuang v. Dep't of Def.*, No. 19-1194, 2021 WL 1602645 (U.S. Apr. 26, 2021) (observing "that military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches" and that "DOD's claim to expertise in this case is not seriously in doubt, and its assertions about national-security risks are not far-fetched");[2] *Kotab v. U.S. Dep't of Air Force*, No. 2:18-CV-2031-KJD-CWH, 2019 WL 4677020, at *9 (D. Nev. Sept. 25, 2019) (finding APA challenge to the October 2017 Memorandum unreviewable).

As for analogous case law, Defendants cited precedent that found the judicial branch had recognized that "the merits of a service secretary's decision regarding military affairs are unquestionably beyond the competence of the judiciary to review." ECF No. 80 at 6-7 (citing

[2] While the Ninth Circuit applied the *Mindes* test in *Kuang*, this Circuit only rejected that test because it "intertwines" justiciability and a merits determination," *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508,1512 (D.C. Cir. 1989) (citation and alteration omitted), and that distinction is irrelevant here where briefing simultaneously addressed both.

Orloff v. Willoughby, 345 U.S. 83, 94 (1953)). Further, when Congress enacted the relevant language in Section 1440, the D.C. Circuit had concluded that characterizations of service in the discharge context were left to the discretion "of the President acting through the Secretary [of War]," so courts were "wholly without any effective power of review" over characterization of service policy. *Davis*, 111 F.2d at 525. This precedent supports Defendants' positions on this issue. *See Taucher*, 396 F.3d at 1177.

Defendants' positions that DoD's characterization of service policies were not arbitrary or capricious and did not violate 5 U.S.C. § 706(1) were also reasonable. ECF No. 67. Reexamining some of the Court's premises in its analysis of this issue "from a different perspective," shows that "a reasonable person" could be satisfied that Defendants' views were justified. *See Taucher*, 396 F.3d at 1173-74 (quotations omitted). A reasonable person could set aside the Court's premise that every entry-level service member gets an honorable characterization of service, *unless* their "conduct" justifies otherwise. *See* Amended Order, *Kirwa*, ECF No. 32. Instead, a reasonable person could view the characterization as an honor that service members earn by establishing substantial evidence that their (1) conduct "warrant[s] re-enlistment[,]" (2) "service has been honest and faithful," *Davis*, 111 F.2d at 524, and (3) performance of "military service" occurred "after having become fully and finally absorbed into that service," *Patterson*, 329 U.S. at 542. Viewed this way, it would be reasonable to disagree with Judge Huvelle's view that Section 1440's retrospective language requires a determination based on past service at the time a certification is requested, and conclude that the substantial evidence to support a certification of honorable service must be demonstrated over time. This conclusion is also consistent with the fact that entry-level soldiers have long served *without* characterization during their entry-level period of service. *See* DoDI 1332.14 Enclosure 4(3)(c)(1)(c) ("With respect to administrative matters outside this

instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization" and entry level service is "uncharacterized").

Defendants' argument that the Form N-426 Review was justified by national security concerns was also reasonable. While, in *Kirwa*, Judge Huvelle explained that "national security issues *may* justify enhanced security screenings . . . but N-426 certification is not related to that process," *Kirwa*, 285 F. Supp. 3d at 39, reasonable minds could differ on this conclusion. Based on the *Nio* record, it would be reasonable to find that a robust background check is required to provide substantial evidence to support a determination that "service had been honest and faithful," *Davis*, 111 F.2d at 524. As Defendants explained, "DoD's view that completion of a background investigation and security screening should be required for [honorable service] certifications is a reasonable construction of its role in the naturalization process, as outlined by § 1440." ECF No. 67 at 2. Explaining further, Defendants said the "DoD CAR demonstrates" that DoD's "reviews of the MAVNI program revealed weaknesses in the military accessions vetting process, and the existence of counter-intelligence, security, and insider-threat concerns within the program." ECF No. 80 at 15. "This included recruits engaging in criminal activity before entering onto active duty status, as well as other counter-intelligence and security concerns." *Id*. These national security concerns justified the policy change, just as prior concerns had incrementally led to increased screening measures to strengthen the MAVNI program and mitigate potential national security threats. *Id*. at 15; ECF No. 116-1 at 39-40. Logically, "while DoD was considering how to proceed with regard [to] N-426s, it did not want to continue issuing N-426s erroneously due to the national security concerns." ECF No. 80 at 16.

To be sure, Judge Huvelle's early findings about the seriousness of Defendants' national security concerns were consistent with this position. She initially denied Plaintiffs' first PI request

to enjoin the Form N-426 Review solely due to a lack of harm since each Plaintiff had "a valid N–426, and DOD" had not said that it would "imminently revoke" them. *Nio*, 270 F. Supp. 3d at 53, 61-62. By contrast, in that same decision, Judge Huvelle found that Plaintiffs were unlikely to succeed on the merits in their claims against USCIS, and that any harm caused by that policy was not "sufficient to override national security concerns." *Id*. at 67. Thus, where the Court had found that any harm caused by USCIS's policy was outweighed by national security concerns, and had not ruled on whether the Form N-426 Review would cause harm, it was reasonable for Defendants to continue to litigate the issue of whether DoD's policy was also justified by the same reasons. After all, the origin of these concerns was that insufficiently vetted non-citizens were previously able to serve in the military (and naturalize based on that service). After enjoining the Form N-426 Review, Defendants' positon was supported by Judge Huvelle's statement that she regretted that decision "severely" and clarification that she had equated honorable service with "attendance" not with the absence of "national security concerns." Apr. 11, 2018 Tr. at 81:7-13. Further, she reiterated that she had already ruled that DoD's national security concerns were "not frivolous" and not for her "to second-guess." *Id*. Thus, it was unquestionably rational for Defendants to continue to argue that the Form N-426 Review was justified based on these concerns.

The Court's ultimate disagreement with Defendants on these issues does not change this result. *See Pierce*, 487 U.S. at 566; *Cooper*, 24 F.3d at 1416; *Wilkett,* 844 F.2d at 871; *Rose,* 806 F.2d at 1087. Indeed, later, Judge Huvelle reflected that, "in hindsight," in enjoining the Form N-426 Review, "I think to myself, God, you know, I created a monster." *Id*. at 105.

In sum, Defendants' position with respect to DoD's challenged policies was substantially justified. The Court's rulings on the merits rely on *no* "controlling Supreme Court authority or D.C. Circuit precedent" with respect to what Section 1440 precisely requires of DoD, because

none exists. *See Taucher*, 396 F.3d at 1178. "The only [relevant] circuit" and Supreme Court "authority—although arguably distinguishable" because it arises in the discharge context"—had *upheld*" similar policies or held that they were unreviewable. *See id*. (emphasis in original); *see also Patterson*, 329 U.S. at 542; *Davis*, 111 F.2d at 524. As DoD's position was not "flatly at odds with controlling case law," *Am. Wrecking Corp.*, 364 F.3d at 326-37 (internal quotation marks omitted), and not "obviously insufficient under well-established precedent," *Precision Concrete*, 362 F.3d at 851-52, its position was substantially justified. *See also Cody*, 631 F.3d 136 (upholding finding Government's position revoking an erroneously issued Form N-426 was substantially justified). Therefore, this Court should deny Plaintiffs' fee application outright.

C. Plaintiffs Are Not Entitled to Fees Under 28 U.S.C. § 2412(b) Because Defendants Did Not Act In Bad Faith.

Since the legal standards and record establish that Defendants did not act in bad faith, this Court must deny Plaintiffs' request to recover fees under 28 U.S.C. § 2412(b). None of the alleged examples approach the "*stringent*" standard of *clear and convincing evidence* that the Government's position was *entirely meritless and motivated by an improper purpose* required to recover a bad-faith award. *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1988*)*; 28 U.S.C. § 2412(b). Indeed, "'attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand.'" *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 187 F.3d 655, 661 (D.C. Cir. 1999) (internal citation and quotation marks omitted). The Supreme Court has recognized that only an "exceptional case" will "permit[] a trial court to shift all of a party's fees . . . in one fell swoop." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017). This is not that "extraordinary" case.

Moreover, here, a bad-faith award would contravene the fundamental principle, recognized in *Goodyear*, that such awards are only available to compensate for *specific* misconduct and may

not be extended to cover all phases of a case absent specific findings that the fees would not have been incurred "but for" the bad-faith conduct. As the Court explained, a bad-faith fee award "may go no further than to redress the wronged party for losses sustained; it may not impose an additional amount as punishment for the sanctioned party's misbehavior." *Id.* at 1186 (internal quotation marks omitted). "[I]f an award extends further than that—to fees that would have been incurred without the misconduct"—the Court explained, "it crosses the boundary from compensation to punishment," and requires the "procedural guarantees applicable in criminal cases." *Id.*

Plaintiffs cannot prove both that Defendants' positions were entirely meritless *and* motivated by an improper purpose, as required, or that their fees would not have been incurred "but for" Defendants' alleged conduct. *Wells*, 855 F.2d at 46 ("The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice.") (citation omitted); *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186. As explained *supra*, Defendants' positions were substantially justified and, therefore, cannot be entirely meritless. *Wells*, 855 F.2d at 46. Likewise, Defendants' success on a majority of the claims raised in this litigation further precludes a finding that their positions were entirely meritless. Defendants acted in good faith throughout this litigation, and Judge Huvelle never indicated otherwise.

Defendants' motives throughout this case have been to protect the national security of the United States by ensuring that appropriate background checks are completed before granting citizenship—an indisputably proper purpose.[3] Judge Huvelle agreed—she recognized the validity of Defendants' national security concerns and never wavered on this point. When Plaintiffs raised

[3] Plaintiffs' citation to *CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n*, No. 14-CV-1191 JLS (KSC), 2019 WL 6527951, at *23 (S.D. Cal. Dec. 4, 2019), is inapposite as this non-binding decision granted sanctions under Federal Rule of Civil Procedure 37(e) for willfully withholding discovery, not attorney fees under EAJA for bad faith.

similar claims—that Defendants were "making false representations" and "lied" to the Court or were "committing, as [Plaintiffs] term it, misconduct"—she found the allegations amounted to nothing more than Defendants being "a little inefficient." Apr. 11, 2018 Tr. at 45:21-46:2.

By contrast, the record consistently disproves Plaintiffs' claim that Defendants were motivated by a secret desire to avoid naturalizing individuals (either by discharging them or because they lacked the resources to conduct enhanced background checks). ECF No. 319-1 at 19. This particular allegation is curious where Plaintiffs never alleged that Defendants denied or completely refused to process Plaintiffs' naturalization applications and only ever sought to have their applications adjudicated faster and without input from DoD's background checks. In any event, the record consistently shows that Defendants continued to work to naturalize Plaintiffs and class members throughout this litigation. *See* ECF No. 116-1 at 14-15 (citing *e.g.*, ECF Nos. 93, 98, 61 ¶ 162) (Defendants explained their reports and supporting declarations clearly demonstrated that DoD had the resources to conduct the background checks, completed the checks, and Plaintiff class members were naturalizing in due course). Even before the Court's Partial Summary Judgment Order requiring USCIS to adjudicate applications without the MSSD, a majority of class members (1,217 of approximately 2,000) had already naturalized. ECF No. 248-1. Thus, any claim that Defendants were motivated by a desire to avoid naturalizing individuals is incredible.[4]

Defendants' consistent naturalization of Plaintiffs and class members also disproves Plaintiffs' allegations that they "refused" to follow the Court's orders. ECF No. 319-1 at 30-31. These allegations overstate the record in an effort to create the appearance of bad faith and actually

[4] This also rebuts Plaintiffs' assertion that 2,000 soldiers naturalized as a "direct result of this litigation and the Court-ordered relief," ECF No. 319-1 at 16, which presents a misleading and inflated portrayal of the results they obtained, as the numbers above indicate that a majority of the class members did not benefit from the relief granted by the Court.

refer to individual mistakes. Judge Huvelle recognized that mistakes would happen in this large bureaucratic endeavor, noting "there are always going to be imperfections," and "some person that maybe runs into a problem," but the proper focus was that, overall, the parties and the Court had "done a great job" eliminating delay. Nov. 20, 2019 Tr. at 20:20-21:12, 22:19-25. USCIS admitted that it was "a mistake" when isolated members of some Field Offices incorrectly advised Plaintiffs that they must submit a new Form N-426. Sept. 23,19 at 20:24-25. USCIS's remedial actions—"review[ing] that e-mail box," "contact[ing] the region and the field office with those particular cases," and if "there was error," "send[ing] guidance" so they could "proceed forward," including that "military cases are a priority," *id*. at 21:1-9-22:23-25—demonstrate that these mistakes were not motivated by an improper purpose.

As to Defendant's compliance with the Court's Partial Summary Judgment Order, Plaintiffs simply mischaracterize not having their applications adjudicated on their desired timeline with an outright refusal to adjudicate, as they have throughout this litigation. Jun. 17, 2019 Tr. at 19:24, 17-20 (Court responding to Defendants' statement that it was unclear how long an FBI background check would take, "From [Plaintiffs'] point of view, any period of time is too long."). Plaintiffs attach emails from November 13, 2019, as a supposed example, ECF No. 319-7, Exhibit 2, but *fail to mention* that by the next court appearance one week later, the issue appeared to be resolved. Nov. 20, 2019 Tr. at 49:22-25-52:21 (USCIS explained they were "not waiting for anything" from the Army, but scheduling interviews was unintentionally delayed since typically a more senior officer would conduct the interview). Similarly, in their own cited material, ECF No. 252, (their proposal for implementation of the order), Plaintiffs averred that Defendants' "assign[ment of] minimal resources to the process," constituted "an opposite approach to

implementation," when, this actually showed that Defendants had not "refused" to process applications, but had assigned resources to do so.

Plaintiffs' specific allegations also fail as none rise to the stringent standard of bad faith, and all are either directly rebutted by the record or raise claims about other cases. For example, Plaintiffs' bold assertion that the Court determined that Defendants' policies "irreparably harmed" them citing "*Nio I*, 270 F. Supp. 3d at 62-63," ECF No. 319-1 at 21, conveniently omits that the Court went on to deny their PI request since they had not shown a likelihood of success on the merits and "a balancing" of any harm "against the public interest [in national security] does not tip decidedly in plaintiffs' favor." *Nio*, 270 F. Supp. 3d at 62-65. Likewise, Defendants did not do "nothing to help" or "refuse[] to provide MAVNI recruits with the protections of Deferred Action," as Plaintiffs suggest, ECF No. 319-1 at 22—like all other applicants, Deferred Action was available on a case-by-case basis upon demonstrating "urgent humanitarian reasons or significant public benefit," under the authority granted to DHS by INA § 212(d)(5). Further, despite having "to end the Naturalization at Basic Training Initiative [] based on managing government resources," ECF No. 128 at 12-13, Defendant USCIS still actively sought to identify Army basic training locations with sufficient resources to naturalize some MAVNI recruits on site. May 14, 2018 Tr. at 37:6-19, May 21, 2018 Tr. at 19:21-20:14, 34:2-7.

Other claims rely on contortions of the record, like Plaintiffs' claims that Defendants' pre-*Nio* policies were "obviously unlawful" and changed "before they could be subjected to judicial scrutiny." ECF No. 319-1 at 23. The so-called "leaked memo" referenced was a rejected "initial proposal" to address the national security concerns by "separat[ing] the people from the Army," Oct. 27, 2017 Tr. at 17:1-12; *see also* Jul. 19, 2017 Tr. at 46:19, 24-25-47:1-3 (Defendants explained what Court called an "action plan" was "a recommendation," and "a pre-decisional

document[that] is not self-executing.").[5] Instead, as defense counsel explained, DoD took "a good faith step," and "decided to do right by these soldiers and extend their time in the DTP and continue to process all of the security vetting" so they could eventually serve and naturalize. Oct. 27, 2017 Tr. at 17:1-12. As the Court recognized, Plaintiffs' allegation that Defendants' policies were "a sham" designed "to throw all these people out and do nothing for them" was disproven, Jan. 23, 2018 Tr. at 77:23-25-78:1-3, and contradicted by their commitment "to put more resources" towards naturalizing Plaintiffs and class members, and success naturalizing those that were qualified. Mar. 20, 2019 Tr. at 82:1-3.[6]

Defendants also did not make the alleged misrepresentations or omissions Plaintiffs claim. As opposed to trying to "hide" any "hold" on MAVNI applications, ECF No. 319-1 at 24, Defendants fully described their policies in their very first declarations filed in this matter, ECF No. 19-6. They correctly said that there was no MAVNI-wide, or blanket, hold (which was true at the time of the representation), and were always candid about the limited hold on certain subsets of MAVNI recruits' applications, including the fact that when the lawsuit was filed the limited hold did not impact the adjudication of the named Plaintiffs' applications. ECF Nos. 19-6, ¶¶ 27-42; 23-1 at 11-13.[7] Nor did Defendants withhold information until the Court compelled its

[5] The *Tiwari* Court's findings about the "leaked memo" are irrelevant here where Judge Huvelle knew about the memo and its contents, but never reached any conclusion about it.

[6] Nor did Defendants "implicitly admit" that USCIS's former policy "was *not* lawful." ECF No. 319-1 at 24 (emphasis in original). Plaintiffs' only evidence to support this claim—Class Counsel's own recollection about an untranscribed teleconference nearly four years ago, ECF No. 319-2 Wollenberg Dec. ¶ 8 n.1—is a self-serving, wholly unsubstantiated statement by counsel who stands to recover millions of taxpayer dollars in this application, and is obviously insufficient to establish clear and convincing evidence of bad faith. Moreover, logically, a statement that a new policy will be lawful says absolutely nothing about the lawfulness of a prior policy.

[7] Whether the July 7 Guidance was a "hold" was a separate issue. Defendants argued it was not since it was merely a background check requirement, though it did result in a delay of adjudication while waiting for the DoD background checks.

production. As Judge Huvelle explained when Plaintiffs argued Defendants had done so, she was not "engaging in high level, big time law firm civil discovery" so if Defendants "left out things . . . fine." Aug. 23, 2017 Tr. at 77:12-15. Although withholding discovery can constitute bad faith, *see CrossFit, Inc.* 2019 WL 6527951, Judge Huvelle's assertion that she was not engaging in discovery shows that she did not believe Defendants' omission of the documents was bad faith.[8]

Similarly, Plaintiffs' claim that Defendants misrepresented to the "Court that there was no plan in place to invalidate the N-426s of *Nio* plaintiffs" before the Form N-426 Review was issued, ECF No. 319-1 at 28-29, is unsupported by the record. As Plaintiffs' citation to the Court's opinion, "*Nio*, *I*, 270 F. Supp. 3d at 61-62 (citing the July 28, 2017 Miller Decl.)," reveals, Defendants clearly stated in the relied upon Declaration that previously issued Forms N-426 "may be decertified upon the completion of a review of the existing standards for certifying approximately 400 existing N-426s, and upon the establishment of revised criteria for all future N-426 certifications." ECF No. 25-2 Miller Dec. at 7; *see also* Jul. 19, 2017 at 22:2-5, 24:7-15, 25:12-17, 59:24-25-60:1-2 (Defendants correctly stated there was no current plan to revoke all MAVNI recruits' Forms N-426, but revocations were possible as the "whole program is under review."); Aug. 23, 2017 Tr. at 79:3-15. Thus, Defendants accurately informed the Court that there was no current policy to revoke Forms N-426, but that revocation was possible in the future due to ongoing review of the policy.

[8] Similarly, Defendants were not "forced to produce" the military naturalization application processing times, and never "sought to conceal" them. ECF No. 319-1 at 28. Defendants erroneously reported the general national processing time of about nine months, however, when asked in Court "what this means," Defendants volunteered, "I don't think the nine months is for MAVNI people. I think that's for the national average for naturalization." Jul. 19, 2017 Tr. at 41:10-12. This immediate, voluntary, and candid response shows that Defendants were not trying to "conceal" the difference between the processing times. Also, once alerted to this error by the Court's question, Defendants provided the corrected information. ECF No. 25-1 at 3-1.

Another example represents nothing more than Plaintiffs' dissatisfaction with processes the Court endorsed. Plaintiffs' assertion that Defendants "purposefully cut off MAVNI sources of information," ECF No. 319-1 at 22, is untrue. USCIS created the *Nio* Inquiries E-mail Inbox ("*Nio* Inbox") on April 28, 2018 (over Plaintiffs' objection) to address issues as promptly and efficiently as possible, but Plaintiffs inexplicably refused to use this source of information until September 2018. *Id.*[9] Defendants worked diligently to respond to Plaintiffs' requests for information, inquiries, and complaints, and many concerns were resolved in just one or two days. Valverde Dec., ¶¶ 3-5. Additionally, Defendants were subject to extensive reporting requirements that provided a plethora of information to Plaintiffs on a regular basis. *See e.g.* ECF Nos. 87, 147, 248, 301 (examples of status reports). Thus, Plaintiffs' true contention is that the production of the volumes of information that they demanded throughout this litigation was not provided in their preferred format and on their unreasonable timelines. Judge Huvelle recognized Plaintiffs' demanding nature more than once, stating "you can't ask somebody to file things in 24 hours," Apr. 11, 2018 Tr. at 75:15-16, and that their "61 requests" and "e-mails that say [] the Army is supposed to tell us everything we want to know in 24 hours or otherwise we're going to the judge [are] not useful." Nov. 14, 2018 Tr. at 29:3-6.

Likewise, Plaintiffs' suggestion that Defendants failed to inform the Court of discharges and "USCIS would never look at the background check information," ECF No. 319-1 at 28, merely

[9] Incredibly, Plaintiffs claim that Defendants were "forced" to create the *Nio* Inbox, ECF No. 319-1 at 31, when *Defendants* proposed the inbox and *Plaintiffs opposed it*. *See* Exhibits 1-11; Valverde Dec., ¶¶ 3-5; Apr. 30, 2018 Tr. at 15: 18-20; May 14, 2018 Tr. at 21:10-20. Additionally, if the number of emails exchanged with the *Nio* Inbox is indicative of anything, it is Plaintiffs' abusive practice of repeatedly requesting time-consuming updates on individual cases that were outside the scope of this class action litigation. *See* Nov. 20, 2019 Tr. at 24:15-17 (Court saying it was "not babysitting [] individual plaintiffs," it was "babysitting a class"), Mar. 9, 2020 Tr. at 13:13-17 (Court noting litigation was not for "individual gripes").

reiterates their rejected claims. As USCIS informed the Court, "[i]f the MSSD is adverse, USCIS requests further information from DoD regarding whether the recruit has been discharged from the military and if so, how the discharge was characterized" to see if an uncharacterized discharge rendered them ineligible, and "obtains further details on the derogatory information" "as needed." ECF No. 128-1, ¶¶ 4-5. Thus, Defendants acknowledged discharges occurred and explained that they would review the background check information under certain circumstances. *See also* Mar. 20, 2019 Tr. at 102:17-109:16.[10]

Plaintiffs' complaint that "Defendants regularly misreported that MAVNI soldiers had been discharged" resulting in denial of their naturalization, ECF No. 319-1 at 29, ignores the relatively benign nature of this mistake, the small number of MAVNI recruits impacted, and the remedial steps taken to correct it. The record reveals that this issue was caused by an error reconciling the separate, hand-generated MAVNI lists kept by DoD and USCIS. When Plaintiffs raised this issue, out of 12 naturalization denials, 8 MAVNI recruits were potentially impacted, and USCIS was already investigating each instance, reopening their adjudications, and in some cases had already naturalized the impacted individual. *See* Aug. 14, 2019 Tr. at 33:3-37:7. Thus, at a minimum, Defendants worked to identify those impacted and to remedy any potential errors.

A different allegation merely mischaracterizes a process designed to help MAVNI recruits. Plaintiffs' complaint that Defendants "falsely characterized MAVNI soldiers as bad actors" for communicating with "their parents in a foreign country," ECF No. 319-1 at 22, actually refers to the MSSR (Military Service Suitability Recommendation) process that gave MAVNI recruits

[10] Their one cited extreme example of a class member who was denied naturalization, and later arrested and indicted for allegedly fraudulently seeking an immigration benefit, ECF 319-1 at 29-30, was a unique, undoubtedly unfortunate, incident with individual circumstances clearly not representative of the vast majority of the class, who naturalized without incident.

notice of the derogatory information uncovered during the DoD background check, and the opportunity to be heard on this information, before being discharged.[11]

Multiple allegations refer to alleged bad faith related to the *Calixto* litigation and, thus, even if true, are not recoverable in this EAJA application. This is particularly true where the *Nio* litigation pre-dated the *Calixto* litigation and, consequently, the *Calixto* litigation cannot be a "but-for" cause of the fees for work in *Nio*, *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186., or a necessary step in advancing this litigation, *see Lundin v. Mecham*, 980 F.2d 1450, 1463 (D.C. Cir. 1992) (although cased presented similar legal issues "that is not equivalent to holding that they were necessary to the vindication of [Plaintiffs'] claims."). The fact that some individuals are members of both the *Nio* and *Calixto* classes does not alter this result. Judge Huvelle was very clear that Plaintiffs needed to keep the MAVNI-related cases separate, so the fact that Plaintiffs need to reach beyond the *Nio* record to bolster their bad faith claim shows their recognition of its lack of merit.[12]

One allegation, that Defendants "attempted to discharge MAVNI soldiers—without due process," ECF No. 319-1 at 22, is the very crux of the *Calixto* litigation. *See Calixto v. United States Dep't of the Army*, No. CV 18-1551 (ESH), 2019 WL 2139755, at *1 (D.D.C. May 16, 2019) (Huvelle, J.). In fact, when Plaintiffs tried to raise this issue before Judge Huvelle, she explicitly

[11] This Court should reject Plaintiffs' attempt to trivialize, and continued refusal to recognize, the real national security concerns present in this case that Judge Huvelle found justified USCIS waiting for completed DoD background checks before adjudicating naturalization. Plaintiffs have never seen the classified information reviewed by Judge Huvelle.

[12] As the *Calixto* litigation remains pending, it would be inappropriate for this Court to opine on the merits of these claims. If Plaintiffs can substantiate any *Calixto*-related claims, they will have the opportunity to raise them in that litigation. Likewise, should Plaintiffs prevail in *Calixto*, they may seek recovery for these allegations in a separate EAJA application at that time.

said, "[t]his is obviously a *Calixto* problem." Sept. 23, 2019 Tr. at 50:24-51:7. She further rejected their argument that it was a "*Nio* problem" because Defendants could discharge the "remainder of the class," since the Court and Plaintiffs knew Defendants were actively implementing measures to ensure that MAVNI recruits received due process. *Id*. at 51:8-22.[13]

Their remaining allegations are also meritless. Their vague and incendiary blanket assertion that Defendants "retaliated against MAVNI recruits for suing Defendants," ECF No. 319-1 at 28, was never credited by Judge Huvelle, despite Plaintiffs raising this "concern . . . in all of [their] requests for relief." Apr. 11, 2018 Tr. at 102: 3-10 (Plaintiffs' clarifying request to enjoin DoD from discharging plaintiffs pending adjudication).[14] Their allegation that Defendants tried "to convince" MAVNI recruits to "waive" their rights, ECF No. 319-1 at 22, appears to reference a "Voluntary Waiver of Notification of Adverse MSSR" that Plaintiffs acknowledged "were mistaken letters sent out to" 13 recruits, which obviously cannot support a finding of bad faith. Jan. 21, 2020 Tr. at 35:10-12; *see* Exhibit 15, *Calixto* ECF No. 111-1, ¶¶ 3-7 Accordingly, these current allegations of bad faith are meritless and a fee award is simply untenable in this case.

[13] Plaintiffs' related allegations about the "time-out" rule are similarly unavailing. Originally, MAVNI recruits were ineligible to ship to basic training without a completed background check and, due to the enhanced checks, were "timing out" based on the Army's policy that recruits must ship to basic training in two years. *See* 10 U.S.C. § 513. *See* Exhibit 14, *Calixto* ECF No. 101. Defendants applied this law until the Court instructed otherwise and did not conceal that some MAVNI recruits had "timed out," ECF No. 319-1 at 28, or encourage Army recruiters to "drop" them "from service"—an issue never litigated in *Nio*, ECF No. 319-1 at 22. Instead, the Army voluntarily extended the "time-out" rule to three years, and reinstated those that had "timed out" before this change. *See* Exhibit 14, *Calixto* ECF No. 101; Public Law 102-484 § 1115(c)(2); Exhibit 15, *Calixto* ECF No. 111-1, ¶¶ 3-7; ECF No. 26 at 4; Aug. 23, 2017 Tr. at 31:19-21.

[14] If this refers to claims that after the *Calixto* litigation commenced, the military sought volunteers to review MAVNI recruits' background checks to find "dirt." ECF No. 319-4, Stock Dec., ¶ 51, Plaintiffs' own exhibits show that DoD explained that this request was made to ensure that they were "following federal guidelines" and that "the packages were complete and accurate given the ongoing MAVNI litigation.'" *See* ECF Nos. 319-50-51 (similar quote).

But, should this Court disagree and find an award under 28 U.S.C. § 2412(b) is justified, Plaintiffs' recovery should be reduced as they have failed to establish that LSI-*Laffey* Matrix constitutes the fair market value for the Washington D.C. Region.

"In both *DL* and *Salazar* it was undisputed that the cases were properly characterized as 'complex federal litigation,' and the Court found that the record was sufficient to establish the prevailing rates." *Barton v. U.S. Geological Surv.*, No. CV 17-1188 (ABJ), 2019 WL 4750195, at *6 (D.D.C. Sept. 29, 2019) (citing *DL v. D.C.*, 924 F.3d 585, 591, 593-94 (D.C. Cir. 2019); *Salazar ex rel. Salazar v. D.C.*, 809 F.3d 58, 64-65 (D.C. Cir. 2015)). The record here contains only one of the three categories provided in the "pile of evidence" that supported the Circuit's finding. *DL*, 924 F.3d at 590 ("affidavits from economists and attorneys; various commercially-available rate surveys; and information regarding fees requested, awarded, and settled on in other cases."); *see also Salazar ex rel. Salazar*, 809 F.3d at 64-65. Moreover, none of the evidence Plaintiffs provided demonstrates that it reflects the market rates for "complex federal litigation"—a critical factor in the *DL* Court's rejection of the USAO Matrix. *DL.*, 924 F.3d at 593-94 (proper focus is "market rate . . . for *the same type of litigation*") (criticizing submissions that failed to show "new matrix is based on rates for complex federal litigators") (citations and quotation marks omitted). Where Plaintiffs have not "relied on the same types of evidence in essentially the same level of detail to support the same rate matrix" as was relied upon in *DL* and *Salazar*, this Court is not compelled to find that they have established the LSI-*Laffey* Matrix should apply. *DL*, 924 F.3d at 591.[15]

[15] While the *DL* Court rejected the USAO Matrix for including data beyond the "community" where the case "arose." 20 U.S.C. § 1415(i)(3)(C), that reasonable limit in the Education Law where plaintiffs bring a "case on behalf of District of Columbia residents regarding District of Columbia schools against the District of Columbia," *DL*, 924 F.3d at 592, does not extend to litigating nationwide immigration or military cases.

Indeed, Plaintiffs' evidence, and calculations, suffer from many of the same deficiencies that led the *DL* Court to reject the USAO Matrix. *DL*, 924 F.3d at 592-94. Initially, they offer no evidence of the market rate fees for 2017 and a different source of evidence for every year after requiring a separate analysis of each year and making comparison difficult.

Next, Plaintiffs use an illogical practice area and the incorrect firm size for their fee comparison. For 2018, Plaintiffs offer an incomplete excerpt from the Real Rate Report ("RRR") for Q3 (through September 2018, as opposed to the complete annual RRR provided for 2019), for the Washington D.C. region listed by practice area and firm size.[16] Plaintiffs use the "Commercial" practice area to compare fees because it "includes 'contract breach or dispute,'" ECF No. 319-3, Baruch Dec., ¶ 44, but no actual contract claims were raised in *Nio*. Plaintiffs also provide no evidence that this category actually reflects "complex federal litigation"—a fatal deficiency in the *DL* Court. *DL*, 924 F.3d at 593-94. Based on the RRR descriptions it would be more suitable to compare fees under "Employment and Labor," which includes "Immigration Law," or "Government Relations," which includes "agency and policy hearings" and "general/other" (as *Nio* evaluated agency action), ECF No. 319-21 at 17-18.[17] Plaintiffs also use the incorrect firm size for comparison. They list the RRR rates for a firm with more "than 1,000 lawyers," *compare* ECF Nos. 319-21 and 319-23, but, by their own telling, Fried Frank—where they worked in 2018—employed "approximately 500 lawyers" ECF No. 319-3, Baruch Dec., ¶ 4, making the

[16] While Plaintiffs claim the RRR is relied upon by "U.S. district courts around the country," ECF No. 319-3, Baruch Dec., ¶ 47, a Westlaw search for that title undermines that claim as it has only been cited once in this District and the overwhelming majority of other citations (102 out of 112 total) are from California district courts.

[17] Curiously, page 128, that would logically include the Q3 2018 Employment and Labor figures based on the alphabetical listing of the practice areas, is missing from Plaintiffs' exhibit so that comparison is unavailable, *see* ECF No. 319-21 at 8-9, however, it is available for 2019, ECF No. 319-22 at 10.

"201-500" firm size a more apt comparison. Perhaps unsurprisingly, the median rate at the appropriate firm size and practice area, is lower than that at the much larger commercial practice, making Plaintiffs' proposed LSI-*Laffey* Matrix appear more reasonable by comparison.

The 2019 RRR suffers from the same deficiencies, ECF No. 319-22, and the report for 2020—Peer Monitor ("PM")—is both over- and under-inclusive for the 2020 calculations since its rates are calculated from November 2019 (two months before 2020) through December 2020 (two months after Plaintiffs' final billing entry), and, again, reports a lower rate than Plaintiffs' requested LSI-*Laffey* Matrix, making it appear more reasonable by comparison.[18]

Given all of these errors, inconsistencies, and hurdles to a meaningful comparison and analysis, Plaintiffs have failed to establish that the LSI-*Laffey* Matrix reflects fair market value in this case.

D. If an EAJA Award is Justified, the Amount Plaintiffs Claimed Should be Reduced Based on the Limited Scope of Their Success

Judge Huvelle best summarized Plaintiffs' limited success when she explained that she was "only ruling on the tail end" of DoD's background check process (the MSSD) and cautioned that Plaintiffs "only got" that because she read it into the complaint and "without that tail end," she would have adhered to her "original ruling" they were unlikely to succeed on the merits. Aug. 14, 2019 Tr. at 58:1-8.

Plaintiffs are a prevailing party eligible to recover attorney fees under EAJA if the Government was not substantially justified; however, if any recovery is awarded, it should reflect the narrow scope of the Court's judgment. The Supreme Court has recognized that where plaintiffs "achieved only limited success, the district court should award only that amount of fees that is

[18]A Westlaw search for "Peer Monitor" showed it has never been cited in a Circuit Court or this District, and has only been cited 14 times in district courts, half of which were in California.

reasonable in relation to the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983); *see also Farrar v. Hobby*, 506 U.S. 103, 114 (1992). "The result is what matters," and "the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435; *see also Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 857 F. Supp. 3d 907, 912 (D.C. Cir. 2017) (affirming reduction of award for Plaintiffs' "partial" or "limited" success); *Dickens v. Friendship–Edison P.C.S.*, 724 F. Supp. 2d 113, 122 (D.D.C. 2010) (50% reduction for same).

Here, the results Plaintiffs actually obtained are "far more limited than if the Court had accepted their overarching claim that DHS" had to complete its adjudication of naturalization applications irrespective of when *any part* of the DoD background checks were completed. *Washington All. of Tech.*, 202 F. Supp. 3d at 28. Of the five counts contained in Plaintiffs' SAC (the operative complaint), they only prevailed on two narrow sub-claims, and the Court dismissed all remaining counts in the operative complaint with prejudice (not as moot). First, the Court granted partial summary judgment on the MSSD claim that prevented USCIS from waiting for the "tail end" of the DoD background check to complete its adjudication of Plaintiffs' naturalization applications. *Nio*, 385 F. Supp. 3d at 44; ECF No. 307, Judgment.[19] Second, the Court permanently enjoined the Form N-426 Review. *Nio*, 2020 WL 6266304, at *1; ECF No. 307, Judgment.

The true result Plaintiffs sought was an order for USCIS to adjudicate MAVNI applicants' naturalization immediately, without the benefit of any review of information returned through the DoD background check process. ECF No. 1. To be sure, "success" on that claim "would have certainly provided greater relief than plaintiff[s] actually achieved." *Washington All. of Tech.*, 202

[19] Even this success was uncertain and more attributable to the Court's agreement to read the MSSD claim into the complaint than Plaintiffs' shifting claims. ECF Nos. 27 (FAC), 61 (SAC), 115 (Motion to file TAC); *see* Aug. 14, 2019 Tr. at 58:1-8.

F. Supp. 3d at 28. Instead, Judge Huvelle specifically allowed USCIS to wait for the completion of the "investigatory phase" of the DoD background checks to adjudicate the MAVNI applicants' naturalization, and only restricted them from waiting for the very last step in the process when DoD completed its MSSD. Aug. 14, 2019 Tr. at 58:1-8; Jun. 17, 2019 Tr. at 45:7-12 (Court explaining USCIS can "wait for the investigations"). Since Plaintiffs' prevailing claims requested entirely different relief from their dismissed claims, they were not alternative legal grounds that could justify recovery, and any award granted by this Court should reflect the narrow scope of Plaintiffs' actual success. *Hensley*, 461 U.S. at 435; *Washington All. of Tech.*, 202 F. Supp. 3d at 28.

E. If an EAJA Award is Justified, Plaintiffs' Requested Amount Should be Reduced Because They Billed for Time, Costs, and Expenses That are Not Compensable, at an Excessive Hourly Rate

Plaintiffs seek to recover nearly $10 million for their work in this case. As the D.C. Circuit has recognized, courts should be cognizant of the fact that the taxpayer will ultimately pay this award and that "items of expense or fees that may not be unreasonable between a first class law firm and a solvent client[] are not always supported by indicia of reasonableness sufficient to allow [the court] to tax the same against the United States." *American Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996). Plaintiffs' billing records, ECF Nos. 319-11-12, 319-34-35, demonstrate that their billing rates completely disregard the EAJA statutory cap and enumerated list of recoverable costs, they have billed for time that is clearly not compensable, many entries are too vague to assess whether the request is compensable, let alone reasonable, and they frequently overstaffed the case or engaged in excessive billing practices. Further, as previously noted, any recovery awarded should reflect the narrow scope of the two sub-claims upon which

Plaintiffs prevailed. *See supra*, at 8-10. Accordingly, should this Court award fees at all (it should not), Defendants seek the below reductions.[20]

1. Attorney Fees Shall Not be Awarded in Excess of the EAJA Cap

Under EAJA "attorney fees shall not be awarded in excess of $125 per hour," adjusted for "an increase in the cost of living," with certain other limited exceptions that Plaintiffs have failed to demonstrate apply here. The cost of living adjustment to the EAJA cap is based on the Consumer Price Index for Urban Consumers (CPI-U) for "all items" and calculated using "historic" (*i.e.*, inflation adjustments made for the year the work was performed) rates, available on the United States Department of Labor, Bureau of Labor Statistics CPI-U data website. *See* United States Department of Labor, Bureau of Labor Statistics, *Consumer Price Indexes, available at* http://www.bls.gov/cpi/home.htm. The proper formula to calculate the adjustment is:

$$\frac{\text{X (rate to be charged as a fee)}}{\$125} = \frac{\text{CPI-new (date of most recent CPI-U figure available)}}{\text{CPI-1996 (CPI-U on date current \$125 fee cap enacted)}}$$

Ramon-Sepulveda v. INS, 863 F.2d 1458, 1463 n.4 (9th Cir. 1988). The D.C. Circuit uses the regional CPI-U to calculate this adjustment. *Role Models of America, Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *see also Porter v. Astrue*, 999 F. Supp.2d 35, 39 (D.D.C. 2013) (same). Applying the CPI-U rates for the Washington D.C. Region in the applicable years, the total amount available for recovery (if all of the time billed is compensable), would be $3,181,632.49.[21] For the

[20] Plaintiffs incorrectly request "fees for 15,577.6 hours of counsel's time," ECF No. 319-1 at 33, when their billing records list the total number of hours worked as 15,325.5 (their calculations appear to use the latter number), including those worked by paralegals. Also at "counsel's standard, market-driven rates," the value of their *work* does not exceed "$13.7 million," ECF No. 319-1 at 41— this figure is only reached when their request for $34,147.22 in costs and expenses is added.

[21] Although a higher CPI-U rate in now available for 2020, Plaintiffs' calculations are based on the CPI-U that was available in December 2020. Thus, Defendants proceed based on Plaintiffs' 'calculations.

reasons that follow, if the Court is inclined to award fees, this amount should be reduced by at least 50%, to $1,590,816. *See e.g.* Exhibit 19, Billing Records Analysis.

a. Clear and Controlling D.C. Circuit Precedent Requires Application of EAJA Rate, Absent a Finding of Bad Faith

Clear and controlling D.C. Circuit precedent has held that the *Laffey* "Matrix *does not apply in cases in which the hourly rate is limited by statute, as is so with EAJA*. 28 U.S.C. § 2412(d)." *Haselwander v. McHugh*, 797 F.3d 1, 4 (D.C. Cir. 2015) (citing *Role Models,* 353 F.3d at 968-69) (emphasis added).[22] Nevertheless, Plaintiffs attempt to mislead this Court and garner sympathy by arguing that rather than seeking recovery of their outrageous alleged standard billing fee of nearly $13.8 million, they only "request fees based on the lower hourly rates set out in the LSI-*Laffey* Matrix" which, they say, has "been repeatedly endorsed by the D.C. Circuit and members of this Court." ECF No. 319-1 at 42. Nothing in Plaintiffs' cited D.C. Circuit cases, which do not address applications for fees under EAJA, undermines the *Haselwander* holding. *See DL*, 924 F.3d 585 (recovery under the Individuals with Disabilities Education Act (IDEA)); *Eley v. District of Columbia*, 793 F.3d 97 (D.D.C. 2015) (same); *Salazar*, 809 F. 3d at 60 (42 U.S.C. § 1983 recovery).

There is no argument that Plaintiffs were unaware of this controlling case law because they cited page three of the four-page *Haselwander* opinion on the next page of their brief to explain

[22] While *Haselwander* addressed the United States Attorney's Office for the District of Columbia's *Laffey* Matrix—which sets lower fees than Plaintiffs' requested LSI *Laffey*-Matrix—that distinction is immaterial since the reasoning that fee matrixes do not apply when a statue imposes a cap on fees applies with equal—if not greater—force to Plaintiffs' requested higher fee matrix.

how the "cost-of-living adjustment" is calculated. ECF No. 319-1 at 43.[23] Based on this clear and controlling precedent, this Court must reject Plaintiffs' request to apply the LSI-*Laffey* Matrix.

b. Plaintiffs Fail to Prove that they are Entitled to a "Special Factor Enhancement"

To recover a special factor enhancement calculated at market rates based on a "limited availability of qualified attorneys," a party must show that counsel possessed "some distinctive knowledge or specialized skill" that is "necessary" in the litigation and "can be obtained only at rates" above the EAJA cap. *See Pierce*, 487 U.S. at 572; 28 U.S.C. § 2412(d)(2)(A). This designedly narrow exception requires that counsel be "qualified for the proceedings in some specialized sense, rather than just in their general legal competence." *Pierce*, 487 U.S. at 572. Examples provided by the Supreme Court include, "an identifiable practice specialty such as patent law, or knowledge of foreign law or language." *Id*. Accordingly, the D.C. Circuit has held this fee enhancement is limited to lawyers whose specialty "requir[es] technical or other education outside the field of American law," *Waterman Steamship Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1124 (D.C. Cir. 1990), and that "expertise in administrative law in a particular area, such as communications, railroads, or firearms," or federal election law, do not qualify, *F.J. Vollmer Co. v. Magaw,* 102 F.3d 591, 598-99 (D.C. Cir. 1996); *In re Sealed Case 00–5116,* 254 F.3d 233, 236 (D.C. Cir. 2001). Since Plaintiffs fail to prove any of the three required elements, this Court must deny their request for a special factor enhancement. ECF No. 319-1 at 37-41.

Plaintiffs allege four areas of qualification that they posit entitle them to a special factor enhancement—immigration law and experience with the military, and class action and government

[23] Only one of Plaintiffs' cited examples of applying the LSI-*Laffey* Matrix even mentions EAJA in the context of a bad-faith fee award, which is not justified here. *True the Vote, Inc. v. Internal Revenue Serv.*, No. CV 13-734 (RBW), 2020 WL 5656694, at *8 (D.D.C. Sept. 23, 2020).

litigation. None of these areas qualifies individually, nor do all four taken together, as one of the narrow grounds that justify a special factor enhancement.

"Mastery of administrative or immigration issues, while challenging, are not among the skills this court believes the EAJA and *Pierce* were attempting to describe" because "[o]utside of ordinary diligence, neither require distinctive knowledge or specialized skill[and] no technical education is necessary to excel in either. *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Lab.*, 962 F. Supp. 191, 198-99 (D.D.C. 1997), *aff'd and remanded sub nom. Nat'l Ass'n of Mfrs. v. Dep't of Lab.*, F.3d 597 (D.C. Cir. 1998). Another District Court recently reached the same conclusion, reasoning that while "[i]mmigration law can be complex, and it is a legal specialty of its own," *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), "'a complex statutory and regulatory framework' alone [] does not qualify as a special factor under the EAJA." *Nat'l Venture Cap. Ass'n v. Nielson*, 318 F. Supp. 3d 145, 152 (D.D.C. 2018) (quoting *In re Sealed Case 00-5116*, 254 F.3d at 236). As that court noted, the "Supreme Court has counseled against allowing exceptions of such 'broad and general application.'" *Id*. (quoting *Pierce*, 487 U.S. at 573). *See also Masonry Masters, Inc. v. Barr*, No. CIV. A. 86-201 (CRR), 1992 WL 13208, at *3 (D.D.C. Jan. 9, 1992) ("Immigration law is not a discrete specialty for which higher fees [under EAJA] are justified, nor have Plaintiffs shown that is there a limited availability of immigration lawyers in the Washington metropolitan area").

Even if immigration expertise qualified, Plaintiffs have not demonstrated that they possess such expertise. Of the 18 resumes attached to this application, only 1 mentions any immigration experience outside of this case. ECF Nos. 319-13-14. The remainder, which include practice areas,

do not mention immigration at all, other than an award for this litigation.[24] For example, Mr. Baruch's and Ms. Wollenberg's resumes each list nine and seven practice areas, respectively, none of which are immigration law. Indeed, during the *Nio* proceedings, when the Court asked counsel about the vetting required as part of immigration process, counsel replied, "I don't know what the lawful permanent residents have to go through." Apr. 11, 2018 Tr. at 70:22-25-71:1-4. This undermines any claimed expertise in immigration law.

Military experience or knowledge also does not qualify for a special factor enhancement in the D.C. Circuit. *See Haselwander*, 797 F.3d at 4 (no special factor enhancement for "special military board" case presenting "garden-variety administrative law matter"); *see also Doe v. Rumsfeld*, 501 F. Supp.2d 186, 191 (D.D.C. 2007) (same for "expertise in the combined areas of military justice, administrative law, and national security"); *Lynom v. Widnall,* 222 F. Supp. 2d 1, 6-7 (D.D.C. 2002) (same for "extensive experience in military law"). Further, while Plaintiffs state that their "team also included multiple attorneys with military experience," ECF No. 319-1 at 38, they provide no details about this experience or why it was necessary for this litigation. If expertise in military law does not qualify for a special factor enhancement, then bald assertions of ordinary military experience certainly cannot. Nor does experience with government, class action, or complex federal litigation. *See United States v. Waksberg*, 942 F. Supp.40, 44 (D.D.C. 1996) (rejecting "expertise in litigating cases against" agency including "familiarity with . . . its internal procedures, applicable statutes and regulations").

Additionally, there is no evidence that "some distinctive knowledge or specialized skill" was "necessary" in this litigation. This case presented a class action challenge under the APA to

[24]As counsels' only listed immigration experience, the 2018 award undercuts their claimed pre-*Nio* expertise. Learning an area of law for litigation is precisely the ordinary work that does not qualify for a special factor enhancement. *Pierce,* 487 U.S. at 572; *Role Models*, 353 F.3d at 969.

two agencies' policies. *Nat'l Venture Cap. Ass'n*, 318 F. Supp. 3d at 152 (applying EAJA rate since "immigration expertise" was not necessary in a APA case) (internal citations and quotation marks omitted). The only arguably distinguishing factor was the military involvement, but, in reality, that did not change the litigation needs of this case—the Court applied the APA to DoD's written policy the same way it did to USCIS's policy. Novel and complex issues, and "issues about a unique part" of the law that "overlap" with another area of law, ECF No. 319-1 at 39, arise frequently in immigration, administrative, class action, and military litigations, but each of those areas of federal law does not require the type of "distinctive knowledge or specialized skill" that the Supreme Court explains justifies an enhancement over the statutorily capped fees. 28 U.S.C. § 2412(d)(2)(A); *Pierce*, 487 U.S. at 572. "[N]othing in EAJA or its legislative history indicates that the Congress intended to entitle all lawyers practicing administrative law in technical fields' to a fee enhancement." *Truckers United for Safety v. Mead*, 329 F.3d 891, 895 (D.C. Cir. 2003) (citation and quotation marks omitted). If it did, it would render the EAJA cap meaningless.

Plaintiffs even admit that this case "involved all of the *usual* complexities of a class action," ECF No. 319-1 at 39 (emphasis added), undermining their claim that this was an exceptional case. Although Defendants opposed class certification on the basis that the proffered counsel, then employees of Fried Frank, who were unaccompanied by any advocacy groups who routinely practice in the immigration class action arena, had not prosecuted class action cases before, let alone immigration class actions, ECF No. 48 at 22-24, the advanced "challenges" and "practical considerations" are simply insufficient to show that any distinctive knowledge or specialized skill, as defined by the Supreme Court, was necessary in this litigation. *See Nat'l Venture Cap. Ass'n*, 318 F. Supp. 3d at 152; *Truckers United for Safety*, 329 F.3d at 895.

A cursory review of recent class action cases filed in this District eviscerates the argument that there is a "limited availability" of attorneys in the Washington, D.C. Region qualified to practice immigration or military law, or engage in class action, government, or complex federal litigation. *See Role Models*, 353 F.3d at 968-69 ("there seems to be nothing particularly 'complex' about this [case]—indeed, it appears just the type of garden-variety administrative law matter that large Washington law firms handle routinely"). Limited availability is a high standard—the D.C. Circuit has held that even when a "case required attorneys who specialize in federal election law, are experienced in federal litigation, and were familiar with the sealed administrative record," it was still "not the type of 'special factor' or 'limited availability' contemplated by the EAJA." *In re Sealed Case 00-5116*, 254 F.3d at 234, 236-37.

Ms. Stock's unverified, undocumented, and vague statements that she spoke to "a number of other immigration attorneys" or "dozens of attorneys around the United States" is also insufficient to meet this high burden. ECF No. 319-4, Stock Dec., ¶¶ 20, 23. Her more specific statements fare no better. Her "belief" that it would be "difficult" for a law school clinic or non-profit organizations like the ACLU to handle the case misses the point. *Id*., ¶ 24. Availability does not mean it will not be "difficult" for other qualified attorneys to take the case, it means that they do not exist. "The 'novelty and difficulty of issues,' 'the undesirability of the case,' the 'work and ability of counsel,' and 'the results obtained,' . . . are little more than routine reasons why market rates are what they are," not proof of the unavailability of qualified attorneys. *Pierce,* 487 U.S. at 573 (citations omitted). Moreover, her personal "belief" about who could take the case is not evidence that these other attorneys actually could not. Additionally, she lists four other large law firms she contacted about this case, demonstrating that other qualified attorneys do exist. ECF No. 319-4, Stock Dec., ¶ 25. In fact, Ms. Stock did not think to contact Fried Frank or Morgan Lewis

for this case, but only connected with them when someone at Fried Frank contacted her and said "some lawyers at her firm were potentially interested in handling the matter." *Id*., ¶ 26. Further, other attorneys and organizations have, and currently do, represent the plaintiffs in other MAVNI-related litigation demonstrating, once again, that other qualified attorneys are available. Thus, a special factor enhancement is not justified.

2. Plaintiffs Billed for Time that is not Compensable

Hours that are not "reasonably expended" must be excluded from any fee calculation. *Hensley*, 461 U.S. at 433-434. Consequently, counsel seeking attorney fees must subtract from their fee requests hours that are "excessive, redundant or otherwise unnecessary." *Weiberg v. DOJ*, 745 F.2d 1476, 1499 (D.C. Cir. 1984); *see also Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 554 n.2, 566-67 (1986) (affirming 48% and 33.33% reductions for "unnecessary, unreasonable or unproductive" work).

Deductions from Plaintiffs' alleged hours are warranted by the substantial number of vague time entries, most of which lack sufficient detail and/or clarity to determine whether the work is compensable. An attorney must, at least, "identify the general subject matter of [their] time expenditures." *Hensley*, 461 U.S. at 437 n.12. Indeed, it is well-established that courts may reduce a fee award where documentation of hours is "inadequate." *Id*. at 433; *see also Cobell*, 407 F. Supp. 2d at 158-59 (35% reduction for inadequately described hours). Examples of time entries that are so "vaguely generic" that a court "cannot determine with certainty whether the activities they purport to describe were . . . reasonable" include entries that: (1) provide "little or no reference to the substance of the work claimed," such as "read cases;" (2) make "no mention . . . of the subject matter of a meeting, telephone conference or the work performed," such as "conference

call with [co-counsel];" and, (3) contain "vague and cryptic designations," such as "Discussed strategy w/ [co-counsel]." *Cobell*, 407 F. Supp. 2d at 158-59.

Most of Plaintiffs' entries fall well short of their burden to show that the hours for which they seek compensation were actually and reasonably expended. Several entries, for instance, do not mention the particular aspect of the case being worked on or refer simply to participating in meetings and calls about "strategy," neither of which is a sufficiently detailed billing entry. *Id*.; *see* Exhibit 19, Billing Record Analysis.

Further, a myriad of entries address Plaintiffs' work assisting individual class members with their individual cases. For example, in June 2018 alone, Plaintiffs billed nearly 50 hours and $50,000 for tasks like "Address MAVNI issues/concerns/updates; work on plaintiff case" and "Review/revise/cite-check plaintiff complaint." ECF No. 319-12 at 98-105; *see* Exhibit 19, Billing Record Analysis. These vague entries show no connection to this class action litigation and, therefore, are not compensable.

Moreover, Plaintiffs fail to establish how these entries relate to the limited injunction of the Forms N-426 Review or the vacature of the MSSD requirement—which affected a limited number of class members—as opposed to merely assisting individual soldiers obtain Forms N-426 or oath ceremonies. As Plaintiffs know, time spent helping individual soldiers is not compensable because it is not related to the litigation or to the limited relief they obtained. Also, many of these vague entries involve "correspondence" with MAVNI recruits and others, or are identified by little more than "respond to *Nio* inbox emails" or "Address MAVNI issues." Defendants' concern about the necessity of whatever actions underlie these vague entries is fortified by the fact that the Court never found that Defendants failed to comply with the limited relief ordered, despite Plaintiffs' constant claims at each hearing. The prevalence of vague entries warrants a substantial deduction.

Plaintiffs also seek compensation for numerous hours addressing the *Nio* inbox. Yet these do not relate to any motion that was ever filed in this case. Time spent on unnecessary or unexplained activities is not compensable. *See Conservation Force v. Salazar*, 916 F. Supp. 2d 15, 29 (D.D.C. 2013). Moreover, Plaintiffs' assertion that this inbox contained "over 26,000 communications" is irrelevant. ECF No. 319-1 at 35. Plaintiffs mistake quantity of emails for applicability to this class action case, but that number does not prove that hours spent monitoring the *Nio* Inbox were reasonably spent. Moreover, a majority of these emails sought to address individual issues, mostly about delay of adjudication, Valverde Dec., ¶¶ 3-5, which, as noted, are not a part of this class action litigation and raised issues explicitly rejected by the Court. ECF No. 307, Judgment. These unreasonably spent hours, doing exactly what Judge Huvelle had repeatedly asked Plaintiffs not to do, warrant further deductions to any fees awarded.

Plaintiffs also seek compensation for work on entirely other litigation, including work on one case for which they have already pursued compensation in a settlement of their EAJA claims, such as "review/revise filing in Nio, Kirwa, Calixto cases," or "draft proposed orders for Nio, Kirwa, Calixto." *See* Exhibit 19, Billing Record Analysis. All entries related to time spent on non-*Nio* matters warrant deduction.

3. Overstaffing, Block Billing, and Billing Judgment

Plaintiffs' billing records show that they consistently overstaffed and overbilled for hearings, status conferences, teleconferences, and meetings. This time is not compensable because it is "excessive, redundant or otherwise unnecessary." *See Weisberg v. DOJ*, 745 F. 2d 1476, 1499 (D.C. Cir. 1984). They regularly billed for eight attorneys' participation in relatively short proceedings, which yielded exorbitant billing totals. For instance, for the January 23, 2018 Status Conference, which lasted approximately 2 hours and 35 minutes, Plaintiffs billed for 133.3 hours

between 8 attorneys preparing for, attending, and meeting after the conference, totalling nearly $124,000, or billing more than one hour per minute, at a rate of $1,000 per minute.

Forcing the taxpayer to compensate eight attorneys for their time attending these proceedings to observe is excessive and unwarranted, especially where the Department of Justice had only three (or fewer) *Nio* attorneys present in Court. *See, e.g.*, *Salazar v. District of Columbia*, 991 F. Supp. 2d 38, 54 (D.D.C. 2014) (observing "oral argument" was not compensable); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) ("where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time"). The excessiveness of Plaintiffs' overstaffing is underscored by the fact that one attorney—Ms. Wollenberg—addressed the Court for virtually all of this litigation. While Defendants understand not every attorney will address the Court, when essentially only one individual ever did, it is unreasonable for the taxpayer to pay for seven of the other attorneys who attend the proceeding.

Many of Plaintiffs' entries involve block billing, which, by listing multiple tasks, obscures the amount of work spent on particular tasks and complicates any effort to segregate expenditures that might be compensable from those that are not. *See* Exhibit 19, Billing Record Analysis. In one example, on August 10, 2018, Ms. Wollenberg billed 12.5 hours, or $12,812.50, for at least four discrete issues, all of which are vague: "Address MAVNI issues/concerns/updates, including discussions with MAVNIs and others; emails with DOJ re MAVNI issues; work on SJ brief materials; discussions with team members." Block billing "make[s] it impossible for the court to determine, with any degree of exactitude, the amount of time billed for a discrete activity." *In re Olson*, 884 F.2d 1415, 1428-29 (D.C. Cir. 1989). Block billing may also increase time by 10 to 30%" above the amount properly billed, *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1223 (9th Cir. 2010). Consequently, courts faced with fee requests containing

ambiguous time entries have excluded those entries in their entirety, *see, e.g.*, *In re Donovan*, 877 F.2d 982, 995 (D.C. Cir. 1989), or applied across-the-board reductions to account for the deficiencies, *see, e.g.*, *Role Models*, 353 F.3d at 973 (50% reduction). Such a deduction is warranted here if EAJA fees are awarded at all.

The fee applicant must also "exercise 'billing judgment' with respect to hours worked." *Hensley*, 461 U.S. at 437. This entails making "a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id*. at 434; *see Action on Smoking & Health v. C.A.B.*, 724 F.2d 211, 222 (D.C. Cir. 1984) (1/3 reduction); *Cobell v. Jewell,* 234 F. Supp. 3d 126, 177 (D.D.C. 2017), *aff'd sub nom. Cobell v. Zinke*, 741 F. App'x 811 (D.C. Cir. 2018) (30% reduction). While Plaintiffs summarily state that they exercised billing judgment and that this is a "conservative statement of the reimbursable time," ECF No. 319-1 at 33, the vast number of vague and unsupported billing entries, constant overstaffing of attorneys throughout this case, and excessive billing rates requested suggest otherwise. Their claim is also unsubstantiated by any documentation of the alleged "1,200 hours" or "dozens" of attorneys for which they say they did not bill. *Id*. Moreover, these supposed deductions should be weighed against the fact that Plaintiffs still seek recovery for over 15,000 hours worked by 20 attorneys and 2 paralegals totaling nearly $10 million. In perspective, this 8% reduction of total billing hours hardly demonstrates sound billing judgment. *Cf. Open Communities All. v. Carson*, No. CV 17-2192 (BAH), 2018 WL 8622230, at *6 (D.D.C. June 15, 2018) (10% reduction demonstrated proper exercise of billing judgment); *Lewis v. Berryhill*, No. 3:15-CV-02307-BR, 2017 WL 1371270, at *3 (D. Or. Apr. 14, 2017) (same for 20% reduction). This lack of billing judgment is particularly surprising after Plaintiffs, from the outset of this pro bono case, were clear about their intent to recover attorney fees. *See* ECF No. 1 at 30 (original complaint requesting attorney fees

under EAJA as part of relief sought); ECF No. 27 at 59 (FAC, same); ECF No. 61 at 65 (SAC, same). Where, as here, counsel fails to exercise appropriate billing judgment, the Court will do it for them. *See Okla. Aerotronics v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1993) (affirming 40% reduction); *Am. Hosp. Ass'n v. Sullivan*, No. 88-2027, 1990 WL 91808, at *3-4 (D.D.C. May 24, 1990) (33% reduction).

4. Recovery for Costs and Expenses Must Be Limited to the Itemized List in 28 U.S.C. § 1920 and Those Necessary for the Litigation

Only a small fraction of Plaintiffs' requested $34,147.22 in costs and expenses is compensable if fees are awarded at all.

Title 28, United States Code, Section 1920 permits a judge to tax six enumerated categories of expenses, only four of which Plaintiffs seek: (1) fees of the clerk and marshal; (2) fees of the court reporter; (3) fees and disbursements for printing and witnesses; and, (4) fees for exemplification and copies of papers necessarily obtained for use in the case. No other costs are recoverable and all requests must be supported by adequate documentation. Applying this to Plaintiffs' requests, they may only recover $1,072.92 for printing and duplicating. *Id*.

Plaintiffs seek to recover $1,645.38 in filing fees. ECF Nos. 319-1 at 44, 319-33. The D.C. Circuit and courts in this District have only awarded recovery for the initial filing fee. *See Cooper*, 24 F.3d at 1419 ($100 filing fee); *Porter*, 999 F. Supp. 2d at 44 ($350 filing fee). Plaintiffs' itemized records reveal that none of their "filing fee" requests are for an initial—or any other—filing fee, but are all for transcripts. Four entries appear to limit their request to the transcript fees, but these are not properly recoverable as filing fees (or court reporting fees absent showing they were necessary for this litigation). The remaining two requests seek recovery for travel to obtain documents, which is also not compensable. ECF No. 319-35 at 5, entry dated 10/22/2017 ("Travel to the USDC Maryland to obtain pleadings"), 7, entry dated 1/22/2018 ("Obtain documents for B.

McNamara at the Court"); *Precision Concrete,* 362 F.3d at 854 (deducting "expenses for travel"); *Cobell*, 407 F .Supp. 2d at 165 (same); *Lake Pilots Ass'n, Inc. v. U.S. Coast Guard*, 310 F.Supp.2d 333, 347 (D.D.C. 2004) (same). Thus, this Court must deduct Plaintiffs' entire $1,645.38 request.

Nor can Plaintiffs recover for any of their requested court reporting fees since they have failed to adequately identify the transcripts they obtained, much less prove that they were "necessarily obtained for use in this case," as 28 U.S.C. § 1920 (2) requires. If the Court chooses to award some court reporting fees, Plaintiffs' misleading itemized records warrant reduction. ECF No. 319-35. A majority of entries have no case caption, which creates the impression that all seek to recover for court reporting related to *Nio*, but that is false. A cross-reference of the *Nio* Docket reveals that 11 out of the 19 requests are for transcripts of proceedings from other cases, totaling $1,993.80. Cross-referencing the *Calixto* Docket reveals that 3 of those 11 entries were for *Calixto* transcripts and request $246.30.[25] This is particularly egregious where, as counsel in *Calixto* Plaintiffs necessarily had access to all *Calixto* transcripts. Thus, their request should be reduced by $1,993.80. Additionally, Defendant request that Plaintiffs' entries seeking full recovery for transcripts of *Nio*-*Calixto* joint proceedings totaling $761.45, be reduced by 50%, to $380.73, to account for the multiple cases heard in one proceeding. Applying these reductions, if any award for court reporting fees is justified at all, Plaintiffs may recover $3,859.91.

None of Plaintiffs requested expenses are compensable where they have failed to adequately explain how they were necessary to this litigation.

Plaintiffs request $13,574.28 for "Data Research—Mng Atty," ECF No. 319-35 at 2, which includes entries for court alerts tracking *Nio* and 13 other cases, and PACER charges. Their

[25] If this Court awards any *Calixto*-related costs, should Plaintiffs prevail in *Calixto* and submit an EAJA application, they should be precluded from double-recovery.

summarily-stated explanation that this "monitoring was in direct support" of their work because "it enabled [them] to identify" the Government's allegedly inconsistent positions, without providing even one example, ECF No. 319-1 at 45, fails to justify this significant expense. This alleged motivation is directly contradicted by Plaintiffs' request to recover $818.65 for tracking *Nio* 33 times, because, as counsel for *Nio*, there obviously is no need to track this litigation. Likewise, several tracked cases were irrelevant to *Nio* and, therefore, also did not require tracking. *See e.g.*, *Jane Doe, et al. v. Donald Trump, et al.*, 17-cv-1597 (D.D.C.) (Plaintiffs seek to recover approximately $800 for 20 times tracking case raising constitutional challenge to ban on military service by transgender individuals). Other tracked cases were resolved quickly, so they could not have revealed "inconsistent positions," yet Plaintiffs tracked them for years. *See e.g. Lawal v. United States Department of Homeland Security et al.*, No. 1:17cv1010 (D.D.C.) (Plaintiffs seek to recover approximately $1,320 for 33 tracking entries from July 1, 2017, until January 13, 2020, when case was voluntarily dismissed on July 27, 2017). The taxpayer should not have to pay for these wasteful expenses.

Likewise, Plaintiffs' PACER charges should also be deducted as they have not explained how they used this service and any argument that they used it to research other cases is belied by the dearth of case tracking charges and request for more than $10,000 in Westlaw charges. *Salazar v. D.C.*, No. CV 93-452 (GK), 2014 WL 12695696, at *15 (D.D.C. Jan. 30, 2014) (reimbursing for PACER where Plaintiffs established it was used "to research and quickly locate documents").

While Defendants acknowledge "that a plaintiff may receive an award of costs for legal research; the issue at hand is how much of this cost the Government must pay." *Porter*, 999 F. Supp. 2d at 43. Here, given the large sum Plaintiffs seek to recover—in excess of $10,000—combined with their claimed expertise and total lack of explanation justifying this sum, the Court

should deny their request. *Id*. at 43-44. The duration of this litigation and its complex and novel nature alone do not to justify this expense. Indeed, Plaintiffs cannot recover for background or otherwise irrelevant research such as research "on US immigration law" or "PI standard, factors." *Id*. (50% reduction) (citing *Chesser v. West,* 11 Vet.App. 497, 503-04 (1998)) (1/3 reduction).

Plaintiffs' remaining requests for $22.55 for courier services, $51.38 for postage, and $338.32 for teleconferencing, are explicitly not compensable under EAJA in the D.C. Circuit. This Circuit reasoned that even as technology changes legal practice, recovery under EAJA remains limited to the itemized list in the statute. *Precision Concrete,* 362 F.3d at 854 (deducting request for reimbursement for "expenses for travel, courier expenses, overnight delivery, facsimile transmissions, telephone costs, and taxis"); *see also Cobell*, 407 F. Supp.2d at 165 (deducting taxi and telephone charges); *Lake Pilots Ass'n, Inc.*, 310 F. Supp. 2d at 347 (deducting "telephone charges, postage, telecopier expenses, [] courier charges, taxi charges, [] meal expenses, and travel expenses"). Extending this reasoning to Plaintiffs' request for $621.12 to maintain their *Nio* litigation website, they may also not recover for that expense. Thus, the Court should deduct all of these expense requests from any award.[26]

F. Plaintiffs' Repeated Practice of Raising Individual Issues and Changing Claims Further Warrants a Reduction of any Award Under 28 U.S.C. § 2412(d)(1)(C)

This Court should reduce any award based on Plaintiffs' conduct that "unduly and unreasonably protracted the final resolution" of this case. 28 U.S.C. § 2412(d)(1)(C).

Plaintiffs' constant adjustment of claims to avoid dismissal, refusal to clarify their claims when asked to do so, and insistence on raising individual issues, severely protracted the resolution

[26] Should the Court disagree, Defendants request that Plaintiffs' request to recover for "Westlaw" and "Data Research—Mng Atty," be reduced by 50% bringing their recovery for expenses to $12,080.56, and their total recover for costs and expenses to $17,013.39. Exhibit 18, EAJA Costs and Expenses Summary.

of this case. Indeed, Plaintiffs' actions often necessitated multiple rounds of hearings and briefings to resolve what should have been straightforward issues, and work outside the scope of this class action litigation.

Indisputably, Plaintiffs' original complaint did not raise any claims related to 5 U.S.C. § 706(2) (the only claim upon which they partially prevailed). It solely sought to compel USCIS to process and adjudicate naturalization applications without completed DoD background checks. ECF No. 1. Describing these initial claims as "messy," and in an effort "to be fair," the Court instructed Plaintiffs to amend their complaint "to make it clear exactly what" APA claims they raised *Id*. at 101-02. Despite the Court's warnings, Plaintiffs refused to clarify their claims, unless they believed it would help them avoid dismissal. Again, on January 23, 2018, when Plaintiffs first raised the MSSD claim after almost 18 months of litigation, the Court explained that Plaintiffs "can't have it every which way" and "it is very important to be precise" because not only was the new claim not "explained in the complaint," it was so drastically different it would require them to amend their "whole case." Jan. 23, 2018 Tr. at 77:3-4, 13-14; 78:21-22.

Confusion about Plaintiffs' lack of specificity in their claims persisted throughout this case. For instance, the Court asked Plaintiffs what "specifically" their claim was because the MSSD claim was not in the complaint and the court was "getting a little bit concerned that [it was] eating up the whole case," that had been "an APA claim and a 706(1)." Jun. 20, 2018 Tr. at 4:4-11 When Plaintiffs said that they were "not sure that we need to limit our claims," the Court explained, "No, you do. . . . [o]therwise we can't litigate the case." *Id*. at 7:6-7 Recognizing that Plaintiffs "would like to have things very loosey-goosey," the Court expressed that it was "concerned about [its] prior decision." *Id*. at 7:9-16. When the Court asked how defendants could "respond" and everyone could "figure out what's in the record if we don't know precisely what the claim is," Plaintiffs

attempted to avoid the question and shift blame positing that "the reverse way to look at this . . . is what is their policy," *Id*. at 6:22-7:20, knowing full well that the final agency action under review in this APA challenge had not changed since the day the policies were enacted (July 7, 2017 for USCIS and October 13, 2017 for DoD). Understandably, the Court wondered if it was "a mistake" to allow Plaintiffs to challenge the MSSD requirement at all, *id*. at 4:12-14. And the Court dismissed the remainder of the claims with prejudice.

Further, Plaintiffs continually raised individual—as opposed to class-wide—issues and claims of delay of adjudication, despite Judge Huvelle's repeated, clear instructions that those claims were not properly before her. This caused significant delays and expenditure of time and resources by the Court, USCIS, DoD, and defense counsel to sort through and address these claims. As Judge Huvelle put it, "You seem to think because the person's in the Nio class, they're entitled to all the things you complain about, and that's caused a basic problem . . . [because] yes, there are things that could be done more smoothly, but the're not class issues." Apr. 11, 2018 Tr. at 65:12-18. In her opinion, the litigation had gone "way, way beyond the policies" she had certified by "confronting . . . a lot of individual circumstances" that "are not amenable to class relief." *Id*. at 129:1-7; *see id*. at 62:7-8 (Court telling Plaintiffs "We don't have that class" or "subclass"). Judge Huvelle explained to Plaintiffs that any possible resolution was "simply not through a class action," *id*. at 64:16-17, and warned if they "keep on pulling the plug," constantly changing claims, they would "have a lot fewer [clients] naturalized," *id*. at 75:1-4.

As the litigation dragged on, Judge Huvelle regretted that she "did not force some kind of amendment" to clarify Plaintiffs' claims. Jun. 20, 2018 Tr. at 8: 6-8. Nearly a year later, the Court was uncertain what Plaintiffs would "accomplish[] as a practical matter" for their "clients" by continuing to raise unreasonable delay claims. Mar. 20, 2019 Tr. at 96:14-18-97:7-16; Jun. 17,

2019 Tr. at 29:1-21. But Plaintiffs continued to raise them, forcing the Court to explain, yet again, that "the unreasonable delay" was not "amenable to class certification or class action" and that they only achieved the success they did on the "tail end" because the Court had read it into their complaint. Aug. 14, 2019 Tr. at 57:9-58:8.

This protracted litigation also required USCIS to continue reporting for more than a year after the class-wide issues were resolved. *See e.g.* ECF Nos. 251, 280, 301. Still unpersuaded that Plaintiffs' individual or delay claims had merit, Judge Huvelle, repeatedly informed them that they could not drag this litigation out until every single class member had naturalized. Nov. 20, 2019 Tr. at 22:17-18 (Court stated, "I am not going to wait until the entire class gets naturalized or denied"), 23:20-22 (Court informs Plaintiffs "the case won't stay open to see each person get naturalized or denied"). The Court even "invite[d] the government to consider decertifying the [Section 706(1)] class," Jun. 17, 2019 Tr. at 28, and ultimately denied the Section 706(1) claim with prejudice (not as moot), ECF No. 307, Judgment. This complete lack of clarity about Plaintiffs' claims and insistence on raising individual and unreasonable delay issues unduly and unreasonable protracted the resolution of this case such that any recovery awarded should be reduced. 28 U.S.C. § 2412(d)(1)(C).

IV. CONCLUSION

Plaintiffs' request to recover attorney fees, costs, and expenses under EAJA must be denied since Defendants' positions promulgating and defending the challenged policies were substantially justified—which Judge Huvelle repeatedly telegraphed—and Defendants did not act in bad faith. If this Court finds recovery is justified, Defendants request that any award reflect the limited scope of the results obtained, how Plaintiffs' conduct unduly and unreasonably protracted this litigation, and be reduced as described above.

DATED: May 29, 2021,

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. All parties are registered CM/ECF users and will be served electronically.

/s/ Jordan K. Hummel

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,	)	
Plaintiffs,	)	**Civil Action No.**
	)	
v.	)	**1:17-cv-00998-ESH-PLF**
	)	
U.S. DEPARTMENT OF HOMELAND SECURITY (DHS), et al.;	)	
	)	
Defendants.	)	

DECLARATION OF MICHAEL VALVERDE

I, Michael Valverde, make the following declaration, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this declaration will be filed in the above-captioned civil action with the United States District Court for the District of Columbia. I hereby certify:

1. I am employed by the United States Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), as Acting Associate Director, Field Operations Directorate ("FOD"), USCIS Headquarters ("HQ"). I have held this position since approximately January 20, 2021. Previously, I served as Deputy Associate Director of FOD from September 2015 through January 2021. I have been employed by USCIS and its predecessor agency, the former Immigration and Naturalization Service ("INS"), in various capacities since 1997. I make this declaration based on my personal knowledge and review of official documents and records maintained by USCIS.
2. In both my current capacity and my prior capacity, I supervised FOD personnel in regional offices and field offices across the country who worked to adjudicate the naturalization applications of *Nio* class members and other military naturalization applicants efficiently, accurately, and in compliance with all applicable statutes, regulations, and orders of the *Nio* Court. Additionally, I supervised the efforts of HQ FOD employees as they relate to this

litigation, beginning in May 2017 and continuing to the present. Specifically, HQ FOD employees coordinated adjudications, disseminated information and updates to the 88 field offices adjudicating the applications, and responded rapidly to numerous requests for information from the Court and inquiries and complaints from class counsel and class members. As our reporting to the Court throughout the *Nio* litigation demonstrates, this litigation required the dedication of a substantial amount of FOD's resources to provide regular updates regarding USCIS's progress advancing *Nio* class members through the naturalization adjudication process and to respond to individual inquiries from class counsel and class members to the best of our ability. By July 22, 2020, when the data was finalized for our last report to the Court, USCIS had naturalized a total of 1,957 individuals included in the *Nio* reporting. Only 68 naturalization applications were still pending. *See* ECF 301.

3. From the outset of the *Nio* litigation, USCIS worked diligently to respond to the many requests for information, inquiries, and complaints that this litigation generated. Early in this litigation, class counsel began sending to USCIS a high volume of status inquiries and complaints about USCIS's handling of individual class member cases. These inquiries initially reached USCIS primarily through the Office of Immigration Litigation ("OIL"). In order to promptly and efficiently address the inquiries, on April 28, 2018, HQ FOD created a *Nio* Inquiries email inbox ("*Nio* inbox") for class counsel to send these inquiries to HQ FOD personnel directly, but class counsel refused to use the *Nio* inbox until mid-September 2018. By May 2019, USCIS had answered over 179 unique inquiries from class counsel received through either the *Nio* inbox or other contact points.
4. Whether an inquiry reached USCIS through the *Nio* inbox or by some other means, HQ FOD worked to address it as efficiently as possible. Each inquiry was assigned to a military naturalization subject matter expert at HQ FOD and was thoroughly reviewed at the HQ level in consultation with the relevant regional and field points of contact. HQ FOD typically provided a response to class counsel within 10 business days of the time the inquiry was received. Numerous concerns that class counsel raised were fully resolved within one to two days of receipt of the inquiry. For example, see Exhibits 1-4.

5. Unfortunately, *Nio* class counsel persistently sent the *Nio* inbox unnecessary inquiries about cases that were proceeding as expected through normal adjudicative processes, where no HQ FOD intervention was needed. The inquiries were often duplicative, and it was typical to receive two to six follow-up emails from class counsel about each individual case that FOD addressed through the *Nio* inbox. For example, see Exhibit 5 (four emails received in less than two months about a case with pending background checks); Exhibit 6 (two emails received in less than one month about a case where the applicant had been interviewed nine business days before the first email, and required adjudication and then judicial oath scheduling); Exhibit 7 (three emails received in less than one month about a case that was scheduled for an interview); Exhibit 8 (four emails received in less than one month about a case that remained pending because the adjudicating field office was awaiting a file containing a separate pending application for the same applicant). Whereas the *Nio* inbox was intended to address errors or mistakes in USCIS adjudications, class counsel sent numerous emails about cases where there was no problem identified except their perceived delay. For example, see Exhibit 9 (email seeking an interview for a case pending less than nine months, during the COVID-19 pandemic). Additionally, USCIS received at least one inquiry to the *Nio* inbox from an individual other than class counsel, despite the fact that USCIS shared the address only with class counsel and specifically requested that class counsel refrain from further disseminating the address. See Exhibit 10.
6. USCIS's *Nio*-related workload continued to expand during the litigation, due in part to the volume of inquiries class counsel sent to the *Nio* inbox, but also due to USCIS's successful efforts to comply with the Court's partial summary judgment order to adjudicate class member applications that had previously been awaiting the issuance of a final Military Service Suitability Determination ("MSSD"). In August 2019, a second permanent military naturalization subject matter expert was added to HQ FOD to help support the litigation effort. To meet the demands of the *Nio* litigation, keep USCIS's regional and field offices informed, and ensure that each class member's case was efficiently and accurately adjudicated, HQ FOD eventually required a team of employees, including two GS-15

supervisors; two GS-14 full-time officers who each worked at least 20 hours per week exclusively on *Nio* litigation cases; a GS-13 officer who worked on these cases for about 8 months while on detail to HQ FOD; and a student intern. Each regional and field office similarly dedicated employees to work on *Nio* class member cases.

7. From August 2019 through August 2020, the HQ FOD team met daily to address MAVNI and military naturalization issues, many of which arose due to the *Nio* litigation. HQ FOD dedicated – and continues to dedicate – extensive resources and hours to provide military naturalization guidance and training to FOD officers. For example, HQ FOD regularly sends guidance emails to all relevant personnel and reviews draft military naturalization denials and requests for evidence to ensure compliance with the law.
8. The demands of the *Nio* litigation resulted in numerous short deadlines impacting all FOD personnel. For example, see Exhibit 11 (email from HQ FOD to regional POCs dated August 21, 2019, identifying 144 class member cases that had been designated as priorities by the *Nio* Court and requiring action and updates for each of them by August 26, 2019). The result of this agency-wide collective effort was that 1,217 individuals included in the *Nio* reporting naturalized between the issuance of the Court's partial summary judgment order on May 22, 2019, and USCIS's final report to the Court in July 2020. *See* ECF 301 and ECF 306. Many of these naturalizations occurred even during pandemic-related office closures and the new challenges brought on by heightened safety requirements upon reopening.
9. In summary, USCIS persistently strived throughout this litigation, and continues to strive, to complete military naturalization applications efficiently, accurately, and in compliance with all applicable statutes, regulations, and orders of the *Nio* Court. USCIS acted in good faith before, during, and after the *Nio* litigation to adjudicate class members' applications to the best of its ability.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this__26_ day of May, 2021, at Washington, D.C.

MICHAEL VALVERDE Digitally signed by MICHAEL VALVERDE
Date: 2021.05.26 08:38:36 -04'00'

Michael Valverde
Acting Associate Director
Field Operations Directorate
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

From: Booker, Rodney D
To: Wilkinson, Lorra M; Weidemann, James A
Cc: Gallagher, Kevin E; Reynolds, Patti J
Subject: Final Adjud: Nio Inquiry; [redacted]; HOU
Date: Thursday, July 12, 2018 9:22:46 AM

Hello Lorra/James,

The military applicant was interviewed and approved. The oath was administered to him Wednesday afternoon, (07/11/2018).

Regards,

Rodney D. Booker, MBA
Regional ISO | CRO | Operations
Ph# [redacted]

From: Wilkinson, Lorra M
Sent: Thursday, July 12, 2018 5:57 AM
To: Booker, Rodney D
Cc: Weidemann, James A
Subject: RE: Nio Inquiry; [redacted]; HOU

Copying James because I have to run into Seattle this AM. Have you heard anything back yet?

Thanks!

Lorra

From: Booker, Rodney D
Sent: Wednesday, July 11, 2018 8:28 AM
To: Wilkinson, Lorra M
Subject: RE: Nio Inquiry; [redacted]; HOU

Morning Lorra,

Reaching out to Houston now….

Regards,

Rodney D. Booker, MBA
Regional ISO | CRO | Operations
Ph# [redacted]

From: Wilkinson, Lorra M
Sent: Wednesday, July 11, 2018 6:20 AM
To: Gallagher, Kevin E; Reynolds, Patti J; Booker, Rodney D
Cc: Short, Gina L; Young, Claudia F; Weidemann, James A

Subject: Nio Inquiry; [redacted]; HOU
Importance: High

Greetings,

FOD received the following inquiry:

1. Issue: [redacted] (A[redacted]) is scheduled to ship to Basic Training on July 16, 2018. Allegedly, the Houston Field Office received the file on July 5, 2018, and has not yet scheduled a naturalization interview.
2. Resolution Plaintiffs Seek: To have the applicant interviewed, and if eligible, administered the oath, prior to [redacted]'s ship date
3. Field Office Action:

We understand it was just received into the FO and the officer is just now laying eyes on the case for review, but any assistance HOU can give would be greatly appreciated by HQ.

Best Regards,

Lorra

From: Booker, Rodney D
To: OFO Citizenship; Wilkinson, Lorra M; Weidemann, James A
Cc: Short, Gina L; Reynolds, Patti J; Cathey, Aaron M; Zamanillo, Christi N; Dabrah, Jacqueline D
Subject: FW: Nio Inquiry; [redacted]; HOU (Due 09/13/2018)
Date: Wednesday, September 12, 2018 11:24:18 AM

Hello Lorra,

The military Nio class case applicant referenced above is scheduled for an interview on September 18, 2018 @ 0700 in Houston, Texas.

The applicant has confirmed that he will be in attendance on 09/18/2018 @ 0700. He was physically in the HOU office on yesterday inquiring on his case.

Regards,

Rodney D. Booker, MBA
Regional ISO | CRO | Operations
Ph# [redacted]

From: Siegl, Mark T
Sent: Wednesday, September 12, 2018 9:02 AM
To: Booker, Rodney D <[redacted]>
Cc: Reynolds, Patti J <[redacted]>; Zamanillo, Christi N <[redacted]>; Cathey, Aaron M <[redacted]>; Tarango, Tracy <[redacted]>
Subject: RE: Nio Inquiry; [redacted]; HOU (Due 09/13/2018)

Rodney,

This soldier has been scheduled for a naturalization interview at the USCIS Houston Field Office on September 18, 2018 at 0700.

Thank You,

Mark Siegl
Field Office Director
Houston Field Office
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
☎: [redacted]

From: Booker, Rodney D
Sent: Tuesday, September 11, 2018 3:26 PM
To: Siegl, Mark T
Cc: Reynolds, Patti J; Zamanillo, Christi N; Cathey, Aaron M
Subject: FW: Nio Inquiry; [redacted]; HOU (Due 09/13/2018)
Importance: High

Mr. Siegl,

Could your office please provide an update on the following Nio class case, by 3PM CDT Thursday, September 13, 2018?

Regards,

Rodney D. Booker, MBA
Regional ISO | CRO | Operations
Ph# [redacted]

From: Wilkinson, Lorra M
Sent: Tuesday, September 11, 2018 3:17 PM
To: Gallagher, Kevin E [redacted]>; Reynolds, Patti J <[redacted]>; Booker, Rodney D <[redacted]>
Cc: Short, Gina L <[redacted]>; Weidemann, James A <[redacted]>; Young, Claudia F <[redacted]>
Subject: Nio Inquiry; [redacted]; HOU
Importance: High

Greetings,

FOD received the following inquiry:

1. Issue: Class member [redacted] (A[redacted]) is scheduled to ship to BCT on September 24, 2018. The USCIS military helpline has confirmed that this soldier's file is at the Houston Field Office, and on-line the soldier's naturalization application status has been "In-line for interview" for a few weeks. However, the soldier has not been scheduled for an interview. The soldier has had difficulty making an INFOPASS appointment to speak to someone at the field office.
2. Resolution Plaintiffs Seek: Please schedule this soldier for a naturalization interview, if possible, before the scheduled BCT ship date on September 24, 2018. Please send to us and the soldier the location/date/time of the interview.
3. Field Office Action:

Though it may appear the case has been in queue for "some weeks", it appears the case is newly arrived at HOU. Please advise within 24- 48 business hours.

Best Regards,

Lorra

From: Wilkinson, Lorra M
To: Wilkinson, Lorra M
Subject: FW: SER Response: Nio Inquiry, [redacted]; MEM
Date: Thursday, May 6, 2021 12:06:48 PM

From: Tilley, Wendy M <[redacted]>
Sent: Wednesday, December 19, 2018 12:46 PM
To: Wilkinson, Lorra M <[redacted]>; Borgen, Randi C <[redacted]>; Bace, Philip R <[redacted]>
Cc: Short, Gina L <[redacted]>; Weidemann, James A <[redacted]>; Young, Claudia F <[redacted]>; Escudero, Edward E (Ed) <[redacted]>; SER Citizenship <[redacted]>
Subject: SER Response: Nio Inquiry, [redacted]; MEM

Good Afternoon,

The Memphis office received the file on December 12th and have reached out to the applicant. A mutually agreeable interview date was set for January 4, 2019 at 7:30am. If eligible (approved) the applicant will take a same-day oath in the office.

MEM was able to shift the case into their jurisdiction in C4 Legacy and CSOL should also, now, show the correct status (scheduled for interview).

Please let us know if you need any further information to fulfill this inquiry.

Respectfully,

Wendy Tilley

Regional Immigration Services Officer
Southeast Region Office: [redacted]
[redacted]
SER Citizenship Mailbox: [redacted]

From: Wilkinson, Lorra M [redacted]>
Sent: Wednesday, December 19, 2018 8:18 AM
To: Borgen, Randi C <[redacted]>; Bace, Philip R <[redacted]>; Tilley, Wendy M <[redacted]>
Cc: Short, Gina L <[redacted]>; Weidemann, James A <[redacted]>; Young, Claudia F <[redacted]>
Subject: FW: Nio Inquiry, [redacted]; MEM

Greetings SER,

FOD received the following inquiry,

1. Issue: Class member [redacted] (A[redacted]) has a completed MSSD and is scheduled to ship to BCT on February 2, 2019. The soldier has been told by USCIS contradictory information about the location/status of her application.

2. Resolution Plaintiffs Seek: Please schedule her for an interview that will allow this soldier, assuming approval, to be naturalized **before she ships on February 2**. Please send the date/time/location of the interview (and, assuming approval, oath ceremony) to us and the soldier.

3. Field Action:

Please let us know if FOD can assist. Please respond within 24-48 hours.

Best,

Lorra

From: Wilkinson, Lorra M
To: Wilkinson, Lorra M
Subject: FW: SER Response: Nio Inquiry; [redacted]; MGA
Date: Thursday, May 6, 2021 12:12:54 PM

From: Wilkinson, Lorra M
Sent: Friday, February 8, 2019 6:16 AM
To: Tilley, Wendy M <[redacted]>; Borgen, Randi C <[redacted]>; Yeager-Bowser, Keri K <[redacted]>
Cc: Short, Gina L <[redacted]>; Young, Claudia F <[redacted]>; Weidemann, James A <[redacted]>; Escudero, Edward E (Ed) <[redacted]>
Subject: RE: SER Response: Nio Inquiry; [redacted]; MGA

Thank you SER.

Best,

Lorra

From: Tilley, Wendy M <[redacted]>
Sent: Thursday, February 7, 2019 3:10 PM
To: Wilkinson, Lorra M <[redacted]>; Borgen, Randi C <[redacted]>; Yeager-Bowser, Keri K <[redacted]>
Cc: Short, Gina L <[redacted]>; Young, Claudia F <[redacted]>; Weidemann, James A <[redacted]>; Escudero, Edward E (Ed) <[redacted]>; Tilley, Wendy M <[redacted]>
Subject: SER Response: Nio Inquiry; [redacted]; MGA

Good afternoon,

The Montgomery Office has been working to schedule the applicant into a mutually agreeable date. Last week they received a SRMT from the applicant requesting interview at AIT school; however, the office determined that due to logistics the applicant would be unavailable for interview at that location. The prior interview (February 1st) had already been descheduled by NBC.

The information you have provided indicates the applicant's new availability (March 18-22); therefore, **an interview has been scheduled for March 18, 2019 at 11am.**

C4 was just updated to reflect the new interview date, and CSOL should be showing it as well.

Please let us know if anything further is needed.

Respectfully,

Wendy Tilley

Regional Immigration Services Officer
Southeast Region Office: [redacted]
[redacted]
SER Citizenship Mailbox: [redacted]

From: Wilkinson, Lorra M <[redacted]>
Sent: Wednesday, February 06, 2019 2:41 PM
To: Borgen, Randi C <[redacted]>; Bace, Philip R <[redacted]>; Tilley, Wendy M <[redacted]>
Cc: Short, Gina L <[redacted]>; Young, Claudia F <[redacted]>; Weidemann, James A <[redacted]>
Subject: Nio Inquiry; [redacted]; MGA

Greetings SER,

FOD received the following inquiry:

1. Issue: [redacted] (A[redacted]) has completed BCT and currently is attending AIT with an expected graduation date of March 15. This soldier's naturalization application has been pending for five months, and this soldier's MSSD was completed favorably over seven months ago. This soldier was scheduled for a naturalization interview on February 13, but cannot attend that interview because of AIT obligations.

2. Resolution Plaintiffs Seek: Please schedule this soldier for an interview (and, assuming approval, oath ceremony) at the Alabama - Montgomery Field Office during a time on March 18 through March 22. Please send the date/time/location of the interview (and, assuming approval, oath ceremony) to us and the soldier.

3. Field Action:

We understand the tight schedule request may be too much for the office, and it appears the office has already been working with the applicant. Please let us know if this is the case and we can manage expectations. It is not uncommon for the applicant to have already worked with the FO to handle such matters. Please respond within 24-48 hours.

Best regards,

Lorra

From: Nio.Class.Inquiries
To: Wilkinson, Lorna M
Subject: FW: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]
Date: Thursday, May 6, 2021 10:29:07 AM
Attachments: image001.png

From: Rush, Charles C. <charles.rush@morganlewis.com>
Sent: Tuesday, August 11, 2020 1:24 PM
To: Nio.Class.Inquiries <[redacted]>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

We request an update regarding class member [redacted] background checks. Please reschedule the soldier's naturalization interview (see attached notice cancelling his March 31 interview) and send us and the soldier the date/time/location of the soldier's interview. On June 8 2020 at a *Nio* status conference USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority" yet this soldier has been waiting for more than 2 years for naturalization.

Charles C. Rush*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Direct: 1.202.739.5244 | Main: 1.202.739.3000 | Mobile: 1.814.404.7839 | Fax: 1.202.739.3001
charles.rush@morganlewis.com | www.morganlewis.com
Assistant: Nima T. Romero-Aranibar | 1.202.739.5683 | nimia.romeroaranibar@morganlewis.com
*Admitted in Pennsylvania only; Practice supervised by DC Bar members

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From: Nio.Class.Inquiries [redacted]>
Sent: Thursday, July 30, 2020 12:32 PM
To: Rush, Charles C. <charles.rush@morganlewis.com>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

[EXTERNAL EMAIL]
Good afternoon

Thank you for your inquiry. This case remains pending USCIS background checks.

Regards
Nio Class Inquiries Team

From: Rush, Charles C. <charles.rush@morganlewis.com>
Sent: Thursday, July 30, 2020 11:33 AM
To: Nio.Class.Inquiries <[redacted]>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

We request an update regarding class member [redacted] background checks. Please reschedule the soldier's naturalization interview (see attached notice cancelling his March 31 interview) and send us and the soldier the date/time/location of the soldier's interview. On June 8 2020 at a *Nio* status conference USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority" yet this soldier has been waiting for more than 2 years for naturalization.

Charles C. Rush*
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*Admitted in Pennsylvania only; Practice supervised by DC Bar members

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From: Wong, Michelle L. [redacted]> **On Behalf Of** Nio.Class.Inquiries
Sent: Wednesday, July 15, 2020 2:52 PM
To: Rush, Charles C. <charles.rush@morganlewis.com>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

[EXTERNAL EMAIL]
Good afternoon

Thank you for your inquiry. This case is currently pending USCIS background checks.

Regards
Nio Class Inquiries Team

From: Rush, Charles C. <charles.rush@morganlewis.com>
Sent: Tuesday, July 14, 2020 3:49 PM
To: Nio.Class.Inquiries <[redacted]>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]
Importance: High

We request an update regarding class member [redacted] background checks. If the background checks have been completed please reschedule the soldier's naturalization interview (see attached notice cancelling his March 31 interview) and send us and the soldier the date/time/location of the soldier's interview. If the background checks are still pending please let us know which background checks still need to be completed. Additionally on June 8 2020 at a *Nio* status conference USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority" yet this soldier has been waiting for more than 2 years for naturalization.

Charles C. Rush*
Morgan, Lewis & Bockius LLP
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Assistant: Nima T. Romero-Aranibar | 1.202.739.5683 | nimia.romeroaranibar@morganlewis.com
*Admitted in Pennsylvania only; Practice supervised by DC Bar members

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From: Nio.Class.Inquiries [redacted]>
Sent: Thursday, June 25, 2020 2:04 PM
To: Rush, Charles C. <charles.rush@morganlewis.com>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: RE: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

[EXTERNAL EMAIL]
Thank you for your inquiry. [redacted] case is currently pending USCIS background checks. We do not have a time frame for completion of the checks.

Respectfully

Nio Class Inquiries Team

From: Rush, Charles C. <charles.rush@morganlewis.com>
Sent: Wednesday, June 24, 2020 2:23 PM
To: Nio.Class.Inquiries <[redacted]>; Colin.Kisor@usdoj.gov; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Raol, Neaha P. <neaha.raol@morganlewis.com>; Nio Class Counsel <NioClassCounsel@morganlewis.com>
Subject: Los Angeles County Field Office Needs to Reschedule an Interview for Class Member [redacted]

Class member [redacted] applied for naturalization over two years ago (see below) was scheduled to appear for a naturalization interview on March 31 2020 at USCIS's Los Angeles County field office (see attached). However due to the COVID-19 pandemic USCIS cancelled the soldier's naturalization interview (see attached). The soldier has not received any information from USCIS regarding rescheduling the naturalization interview.

Currently according to USCIS's website its Los Angeles County field office is open to the public and has begun rescheduling naturalization interviews. Additionally on June 8 2020 at a *Nio* status conference USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority."

Please reschedule this soldier's naturalization interview without further delay to ensure that the MSSD process does not get in the way of a fair naturalization decision by USCIS and send us and the soldier the date/time/location of the soldier's naturalization interview.

Name	ALIEN_NBR	DOI_DT	Enistment Date	Naturalization Application Filing Date 1	Naturalization Application Filing Date 2	CI Report Completion Date	MSIR Result	MSIR Date	Date MSIR Notification Sent to Class Member	MISD Completion Date	MISD Result	Effective Discharge Date	Discharge Revoked?	Date MSIR Report Provided to USCIS	Date CI Report provided to USCIS	Date materials provided to FDNS	Date USCIS sent the individual's materials to FOD	Date materials provided to NBC	Date Materials provided to USCIS field office	Naturalization Interview Scheduled	Naturalization Interview Completed	Naturalization Interview Date 1	Naturalization Interview Date 2	Naturalization Case Status	Naturalization Date
[redacted]			4/7/2016	6/4/2018		11/18/2019	Non-Recommend	11/1/2019	Pending	Reinstate	Pending		Yes	N/A	7/17/2019	7/17/2019	8/1/2019	8/6/2019	12/4/2019					Pending	

Charles C. Rush*
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Assistant: Nim a T. Romero-Aranibar | 1.202.739.5683 | nimia.romeroaranibar@morganlew s.com
*Adm tted in Pennsylvania only; Pract ce supervised by DC Bar members

From: Nio.Class.Inquiries
To: Wilkinson, Lorra M
Subject: FW: Oath Ceremony Needed for [redacted]
Date: Thursday, May 6, 2021 10:55:14 AM

From: Nio.Class.Inquiries
Sent: Wednesday, May 1, 2019 2:40 PM
To: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>; Adebonojo, Kenneth (USADC) <Kenneth.Adebonojo@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>
Subject: RE: Oath Ceremony Needed for [redacted]

Good Afternoon,

Thank you for your inquiry regarding Mr. [redacted]'s case.

The Washington (Fairfax) Field Office has advised Mr. [redacted] that because he resides in the Western District of Virginia, his case is in an exclusive Federal Court Jurisdiction for Naturalization Oath Administration. The Field Office made the request of the Court for expedited oath and is awaiting the Court's response.

We hope you find this information useful.

Respectfully,

Nio Class Inquiries Team

From: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>
Sent: Friday, April 26, 2019 3:39 PM
To: Nio.Class.Inquiries <[redacted]>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>; Adebonojo, Kenneth (USADC) <Kenneth.Adebonojo@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>
Subject: Oath Ceremony Needed for [redacted]

USCIS has informed Mr. [redacted] that his case was approved, but he has yet to receive an oath ceremony notice. Please provide the date/time/location of Mr. [redacted]'s oath ceremony to us and to the soldier.

Jennifer M. Wollenberg
Jennifer.Wollenberg@friedfrank.com | Tel: +1 202 639 7278

Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW Washington, DC 20006
friedfrank.com

From: Nio.Class.Inquiries <[redacted]>
Sent: Tuesday, April 2, 2019 9:08 AM
To: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>; Adebonojo, Kenneth (USADC) <Kenneth.Adebonojo@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>
Subject: RE: Oath Ceremony Needed for [redacted]

Good Morning,

Thank you for your inquiry regarding Mr. [redacted]'s case.

According to the attached Naturalization Interview Results, his case was not recommended for approval at the time of interview. USCIS cannot, and will not provide an oath date or time on an undetermined case.

Mr. [redacted]'s case is currently being reviewed.

We hope you find this information useful.

Respectfully,

Nio Class Inquiries Team

From: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>
Sent: Monday, April 1, 2019 11:33 AM
To: Nio.Class.Inquiries <[redacted]>; Kisor, Colin (CIV) <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV) <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV) <Carlton.F.Sheffield@usdoj.gov>; Adebonojo, Kenneth (USADC) <Kenneth.Adebonojo@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>
Subject: Oath Ceremony Needed for [redacted]

Class member [redacted] (additional details in Defendants' Report excerpt below and attached document) was interviewed for naturalization on March 19 and passed all the required tests (see attached). But, this soldier still is awaiting an oath ceremony (even though he previously was told he would be provided a same-day oath). Please send the date/time/location of the oath ceremony to us and to the soldier.

[redacted]	[redacted]	[redacted]	1/19/2018	5/21/2018	Pending	2/21/19	Recommend	Pending

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From: Nio.Class.Inquiries
To: W.kinser, Laura M
Subject: FW: San Jose Fie d O fice Needs to Schedu e Interview for [redacted]
Date: Thursday May 6 2021 10:28:18 AM

From: Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>
Sent: Monday July 20 2020 12:15 PM
To: Nio.Class.Inquiries [redacted]>; colin.kisor_usdoj.gov <colin kisor@usdoj.gov>; Perez Elianis (CIV) <Elianis.Perez@usdoj.gov>; Sheffield C. Fred (CIV) <Carlton F.Sheffield@usdoj.gov>; Kenneth.Adebonojo@usdoj.gov; Walters Jessica S <[redacted]>
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Raol Neaha P. <neaha.raol@morganlewis.com>
Subject: FW: San Jose Field Office Needs to Schedule Interview for[redacted]

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We request clarification with respect to your email below. Has the date/time been changed with notification to the soldier? If not are you confirming that the USCIS employees necessary for this soldier's naturalization interview and decision and oath ceremony will be in the San Jose field office on August 3 even if the contemplated furlough occurs? If not then we request that the naturalization interview be held on or prior to July 31 so that this soldier's application especially given the Army's reporting that this soldier was sent an MSSR letter in November 2019 is not further delayed. And assuming approval we request a same-day oath ceremony for this soldier.

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jennifer o.len erg@morganle s.com | morganle is.com
Ass stant: Joyce Burroughs | 1.202.739.5703 | joyce rro ghs@morganle s.com

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From: Wong Michelle L [redacted] > **On Behalf Of** Nio.Class.Inquiries
Sent: Wednesday July 15 2020 3:04 PM
To: Raol Neaha P. <neaha.raol@morganlewis.com>; Co in.Kisor@usdoj.gov; Perez Elianis (CIV <Elianis.Perez@usdoj.gov>; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>; Walters Jessica S [redacted] >
Subject: RE: San Jose Field Office Needs to Schedule Interview fo [redacted]

[EXTERNAL EMAIL]
Good afternoon

Thank you for the inquiry [redacted] s interview remains scheduled for the date and time previously indicated on the notice. If the date or time changes the applicant will be notified.

Regards
Nio Class Inquiries Team

From: Raol Neaha P. <neaha.raol@morganlewis.com>
Sent: Tuesday July 14 2020 7:59 PM
To: Nio.Class.Inquiries [redacted]>; Colin.Kisor@usdoj.gov; Perez Elianis (CIV <Elianis.Perez@usdoj.gov>; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>
Subject: RE: San Jose Field Office Needs to Schedule Interview fo [redacted]

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Thank you. Defendants' counsel in the *Nio* case previously informed the Court and us that USCIS has a budget shortfall and absent funding from Congress many USCIS employees will be furloughed effective Monday August 3. As you know USCIS has scheduled Mr [redacted] 's interview for August 3.

Please confirm that any upcoming furlough will not impact Mr [redacted] 's August 3 interview or processing of his naturalization application. If you cannot provide this confirmation please reschedule Mr [redacted] 's interview so that can take place before the furlough takes effect on August 3.

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neaha.raol@morganlew s.com | www.morganlewis.com
Ass stant: Patricia Annette Bryant | 1.202.739.5302 | patricia.bryant@morgan ewis.com

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From: Wong Michelle L [redacted] > **On Behalf Of** Nio.Class.Inquiries
Sent: Monday July 13 2020 9:21 PM
To: Raol Neaha P. <neaha.raol@morganlewis.com>; Co in.Kisor@usdoj.gov; Perez Elianis (CIV <Elianis.Perez@usdoj.gov>; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>
Subject: RE: San Jose Field Office Needs to Schedule Interview fo [redacted]

[EXTERNAL EMAIL]
Good afternoon

Thank you for your inquiry [redacted] is scheduled for a naturalization interview at the San Jose field office on 3 August 2020 at 0945 am. Please see the attached notice.

Regards
Nio Class Inquiries Team

From: Raol Neaha P. <neaha.raol@morganlewis.com>
Sent: Thursday July 02 2020 5:51 PM
To: Nio.Class.Inquiries [redacted]>; Colin.Kisor@usdoj.gov; Perez Elianis (CIV <Elianis.Perez@usdoj.gov>; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>
Subject: San Jose Field Office Needs to Schedule Interview for[redacted]

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Class member [redacted] applied for naturalization in December 2019 and his f le has been at the San Jose field office since April 13 2020 (see excerpt of Defendants' June 1 report below). Nonetheless the field office has yet to schedule his interview.

On June 8 at a *Nio* status conference USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority." Additionally Defendants' reporting states that the Army sent an MSSR Not fication to the class member on November 20 2019 – over seven months ago. Thus this soldier's app ication is supposed to be prioritized.

Please schedule this soldier's naturalization interview and adjudicate his application without further delay to ensure that the MSSD process does not get in the way of his naturalization. Please provide the date time and location of his interview to us and to the soldier.

NAME	ALIEN_NBR	DOB_DT	Enl stment Date	Natural zation Application Fil ng Date 1	Naturalizat on Appl cation Filing Date 2	CI Report Completion Date	MSSR Result	MSSR Date	Date MSSR Notification Sent to Class Member	MSSD Completion Date	MSSD Result	E fective Discharge Date	D scharge Revoked?	Date MSSR Report Prov ded to USC S	Date CI Report provided to USCIS	Date mater als provided to FDNS	Date USC S sent the individual s mater als to FOD	Date materials provided to NBC	Date Materials provided to USC S field off ce	Natural zat on Interview Scheduled	Naturalizat on Interview Completed	Naturalization Interview Date 1	Naturalization Interview Date 2	Naturalization Case Status	Natural zation Date
[redacted]	[redacted]	[redacted]	5/26/2016	12/4/2019		1/26/2018	Non-Recommend	11/27/2018	11/20/2019	Pending	Pending		N/A	4/3/2020	4/6/2020	4/6/2020	4/10/2020	4/13/2020	4/13/2020					Pend ng	

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Ass stant: Patricia Annette Bryant | 1.202.739.5302 | atricia ryant@morgan e is.com

From: Nio.Class.Inquiries
To: Wilkinson, Leora M
Subject: FW: Latham Field Office Needs to Schedule Interview for Class Member [redacted]
Date: Friday, May 7, 2021 7:06:13 AM

From: Guo, Ivon <ivon.guo@morganlewis.com>
Sent: Wednesday, June 24, 2020 10:22 PM
To: Nio.Class.Inquiries <[redacted]>; Kisor, Colin (CIV <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV <Carlton.F.Sheffield@usdoj.gov>
Cc: Raol, Neaha P. <neaha.raol@morganlewis.com>; Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Havermann, Donald L. <donald.havermann@morganlewis.com>; McMahan, Sean <sean.mcmahan@morganlewis.com>
Subject: RE: Latham Field Office Needs to Schedule Interview for Class Member [redacted]

It has almost been another 7 days since our June 18 email and we still have not received any substantive update on our initial June 4 inquiry. This extraordinary delay is inexcusable in light of USCIS's representation to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization application is being treated as a "top priority."

To reiterate our previous request, please (1) explain USCIS's delay in transferring this soldier's asylum file to the Latham field office – where his N-400 file has been for over nine months; (2) confirm the immediate transfer of this soldier's asylum file to the appropriate field office (if this has not happened yet); and (3) schedule this soldier's naturalization interview without further delay and provide the date, time, and location of his interview to us and to the soldier.

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---

From: Guo, Ivon
Sent: Thursday, June 18, 2020 11:25 AM
To: 'Nio.Class.Inquiries' <[redacted]>; Kisor, Colin (CIV <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV <Carlton.F.Sheffield@usdoj.gov>
Cc: Raol, Neaha P. <neaha.raol@morganlewis.com>; Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Havermann, Donald L. <donald.havermann@morganlewis.com>; McMahan, Sean <sean.mcmahan@morganlewis.com>
Subject: RE: Latham Field Office Needs to Schedule Interview for Class Member [redacted]

Thanks for your response. This email confirms safe receipt of your June 9 correspondence.

On May 19, 2020, a USCIS representative from the Latham field office called class member [redacted] and the communication was verbal. As you know, many of the class members correspond with USCIS via the telephone, whether it be with the USCIS military helpline or through telephone calls with USCIS representatives at their field offices. And, in many circumstances, despite asking for email or contact information that would enable a soldier to have written communication, the soldier was not provided with such information. As Mr. [redacted] s recent correspondence was via telephone, there is no written "copies" of "communications" we can provide to you. However, attached please find a phone call history provided by this soldier which reflects the incoming call he received from the field office on May 19 that was referenced in our prior email.

Again, it is improper to delay in adjudicating a naturalization application because of another pending application. And, as you know, this is one example of many (various soldiers at various field offices) in which we have raised concerns about delays caused by this issue in particular.

As you have stated in your reply that USCIS is "looking into this matter," please let us know what you have determined with respect to the delays in processing/adjudicating Mr. [redacted] s application. If you have not yet looked into this matter, please explain the reason for the delay. Please also schedule this soldier's naturalization interview without further delay, or provide us with the reason for the delay.

Best,

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---

From: Nio.Class.Inquiries <[redacted]>
Sent: Tuesday, June 16, 2020 9:22 AM
To: Guo, Ivon <ivon.guo@morganlewis.com>; Kisor, Colin (CIV <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV <Carlton.F.Sheffield@usdoj.gov>
Cc: Raol, Neaha P. <neaha.raol@morganlewis.com>; Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Havermann, Donald L. <donald.havermann@morganlewis.com>; McMahan, Sean <sean.mcmahan@morganlewis.com>
Subject: RE: Latham Field Office Needs to Schedule Interview for Class Member [redacted]

[EXTERNAL EMAIL]
Thank you for your inquiry. On 9 June, 2020, we responded with the attached response. We deeply regret if it was not received. Please attach all documents requested as we continue to look into the matter.

Respectfully,

Nio Class Inquiries Team

From: Guo, Ivon <ivon.guo@morganlewis.com>
Sent: Tuesday, June 16, 2020 9:17 AM
To: Nio.Class.Inquiries <[redacted]>; Kisor, Colin (CIV <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV <Carlton.F.Sheffield@usdoj.gov>
Cc: Raol, Neaha P. <neaha.raol@morganlewis.com>; Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Havermann, Donald L. <donald.havermann@morganlewis.com>; McMahan, Sean <sean.mcmahan@morganlewis.com>
Subject: RE: Latham Field Office Needs to Schedule Interview for Class Member [redacted]

It has been 12 days since our June 4, 2020 inquiry email and we have not received any update regarding class member [redacted]. On June 8, at a Nio status conference, USCIS represented to the Court that adjudicating applications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority." But this is not happening for Mr. [redacted] s application.

Without incurring further delay, please (1) explain USCIS's delay in transferring this soldier's asylum file to the Latham field office – where his N-400 file has been for over nine months; (2) immediately transfer this soldier's asylum file to the appropriate field office (if this has not happened yet); and (3) schedule this soldier's naturalization interview without further delay and provide the date, time, and location of his interview to us and to the soldier.

Thanks.

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From: Raol, Neaha P. <neaha.raol@morganlewis.com>
Sent: Thursday, June 4, 2020 3:22 PM
To: Nio.Class.Inquiries <[redacted]>; Kisor, Colin (CIV <Colin.Kisor@usdoj.gov>; Perez, Elianis (CIV <Elianis.Perez@usdoj.gov>; Sheffield, C. Fred (CIV <Carlton.F.Sheffield@usdoj.gov>
Cc: Baruch, Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg, Jennifer M. <jennifer.wollenberg@morganlewis.com>; Havermann, Donald L. <donald.havermann@morganlewis.com>; McMahan, Sean <sean.mcmahan@morganlewis.com>; Guo, Ivon <ivon.guo@morganlewis.com>
Subject: Latham Field Office Needs to Schedule Interview for Class Member [redacted]

Class member [redacted] applied for naturalization over three years ago, and it has been nearly nine months since his file was submitted to the Latham, NY field office (excerpt of Defendants' June 1 report below). On May 19, a USCIS representative from the local field office informed Mr. [redacted] that his interview could not be scheduled because he has a pending asylum application. The USCIS representative further informed this soldier that the Latham field office has not received his asylum application from the Newark, NJ field office and that withdrawing his asylum application would "help speed up the transfer."

We are concerned that the field office is improperly delaying adjudication of this soldier's N-400. As you know, USCIS should not delay adjudicating a class member's naturalization application because another application (such as a green card application or asylum application) is pending. Nor should USCIS be suggesting that a soldier "withdraw" the other application to "speed up the transfer." And, it makes no sense for USCIS to delay a naturalization application based on a green card or asylum application because naturalizing those soldiers will moot the need for the other applications, thereby saving USCIS time and effort.

Notably, this issue (delay in adjudicating a naturalization application because of another pending application) is a recurring problem, and we have informed you of this with respect to numerous other class members at various field offices.

Moreover, Defendants' reporting states that the Army sent a MSSR Notification to the class member on January 10, 2020 – nearly five months ago. Thus, this soldier's application is supposed to be prioritized, but this is not happening.

Please: (1) explain USCIS's delay in transferring this soldier's asylum file to the Latham field office – where his N-400 file has been for over nine months; (2) immediately transfer this soldier's asylum file to the appropriate field office (if this has not happened yet); and (3) schedule this soldier's naturalization interview without further delay and provide the date, time, and location of his interview to us and to the soldier.

Name	ALIEN_NBR	DOB_DT	Enlistment Date	Naturalization Application Filing Date 1	Naturalization Application Filing Date 2	CI Report Completion Date	MSSR Result	MSSR Date	Date MSSR Notification Sent to Class Member	MSSD Completion Date	MSSD Result	Effective Discharge Date	Discharge Revoked?	Date MSSR Report Provided to USCIS	Date CI Report provided to USCIS	Date materials provided to FDNS	Date USCIS sent the individual's materials to FOD	Date materials provided to NBC	Date Materials provided to USCIS field office	Naturalization Interview Scheduled	Naturalization Interview Completed	Naturalization Interview Date 1	Naturalization Interview Date 2	NaturaEization Case Status	Naturalization Date
[redacted]	[redacted]	[redacted]	5/19/2016	3/22/2017		3/5/2018	Non-Recommend	9/24/2018	1/10/2020	Pending	Unsuitable		N/A	6/27/2019	7/3/2019	7/3/2019	9/5/2019	9/18/2019	9/20/2019					Pending	

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Assistant: Patricia Annette Bryant | +1.202.739.5302 | patricia.bryant@morganlewis.com

From: N o Class Inqu ries
To: Wilk nson Lorra M
Subject: FW: C ass Membe [redacted] (Sui able MSSD) Needs an Interv ew (Bos on F e d Office)
Date: Friday May 7 2021 7 05 25 PM

From: Raol Neaha P. <neaha.raol@morganlewis.com>
Sent: Monday July 13 2020 8:07 PM
To: Nio.Class.Inquiries - [redacted] >; Colin.Kisor@usdoj.gov; Perez E ianis (CIV <Elianis.Perez@usdoj.gov>; Carlton.F.Sheffield@usdoj.gov
Cc: Baruch Douglas W. <douglas.baruch@morganlewis.com>; Wollenberg Jennifer M. <jennifer.wollenberg@morganlewis.com>
Subject: Class Member [redacted] (Suitable MSSD) Needs an Interview (Boston Field Office)

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Class member [redacted] (excerpt of Defendants' report below) who received a suitable MSSD and completed basic training and AIT in April 2019 has had a naturalization application pending since October 24 2019. Further the soldier has not received any indication that the Boston field office has scheduled a naturalization interview.

On June 8 at a *Nio* status conference USCIS represented to the Court that adjudicating app ications and scheduling interviews and oath ceremonies for military naturalization applicants is a "top priority."

Please schedule this soldier's naturalization interview and adjudicate the application without further delay. Please provide the date time and location of the interview to us and to the soldier.

NAME	ALIEN_NBR	DOB_DT	Enlistment Date	Natural zation Application Filing Date 1	Naturalization Applicat on Fil ng Date 2	Cl Report Completion Date	MSSR Result	MSSR Date	Date MSSR Notif cation Sent to Class Member	MSSD Completion Date	MSSD Resu t	Effect ve Discharge Date	D scharge Revoked?	Date MSSR Report Provided to USCIS	Date Cl Report prov ded to USCIS	Date materials provided to FDNS	Date USCIS sent the Ind v dual s materials to FOD	Date materials provided to NBC	Date Materials prov ded to USCIS f eld office	Naturalizat on Interview Scheduled	Naturalization Interview Completed	Natural zation Interv ew Date 1	Naturalization Interview Date 2	Naturalizat on Case Status	Naturalizat on Date
[redacted]	[redacted]	[redacted]	3/25/2016	10/24/2019		12/19/2017	Recommend	8/7/2018	N/A	5/11/2018	Su table		N/A											Pending	

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Assistant: Patric a Annette Bryant | 1.202.739.5302 | patric a.bryant@morgan ewis.com

From: Nio.Class.Inquiries
To: Wilkinson, Lorra M
Subject: FW: Naturalization interview question
Date: Thursday, May 6, 2021 10:38:42 AM

From: [redacted] <[redacted]@gmail.com>
Sent: Thursday, September 5, 2019 12:47 AM
To: Nio.Class.Inquiries <[redacted]>
Subject: Naturalization interview question

Hello,

My name is [redacted], I am [redacted] years old of Haitian descent. I was born on [redacted]. I am currently living on [redacted] in [redacted]. My N-400 receipt number is [redacted]. I completed my naturalization interview on August 29 2019. The Immigration officer told me a decision would be made in August 30 but nothing has happened yet. I am wondering what the issue is?

Thanks,
[redacted]

From:	OFO Citizenship
To:	Borgen, Randi C; Gallagher, Kevin E; Goodwin, Shelley M; Woo, Ellen Y; Bace, Philip R; Kern, Suzanne C; Reynolds, Patti J; Schoser, Joseph R; Booker, Rodney D; May, Joshua J; Palmer, S J (Justin); Rucienski, Jason S; Lee, Daniel D; White, Carla; Zug, Renee H; Tilley, Wendy M
Cc:	Short, Gina L; Wilkinson, Lorra M; Palmer, S J (Justin)
Subject:	**URGENT**DUE COB Monday, August 26th - Priority Nio Case Spreadsheet
Date:	Wednesday, August 21, 2019 6:00:00 PM
Attachments:	Priority Nio Case Spreadsheet.xlsx
Importance:	High

Greetings Regional POCs,

Please find the MAVNI case list spreadsheet attached for your review as referenced during today's monthly military call today.

Background:

DoD notified USCIS that it contacted the applicants in the attached to possibly pursue issuing discharge orders. Because of the sensitivity related to these cases, the court has required USCIS to prioritize those MAVNI cases. At this time, there are 144 cases but the number is expected to rise somewhat more.

Actions to Take:

The field office upon receipt of the file, must schedule the case within 5 business days unless extenuating circumstances within the case require more time for review. Guidance indicates that the office has 30 days to then interview the applicant. However, in these circumstances, the field office **MUST** schedule the applicant **AS SOON AS POSSIBLE**. Again, field offices should not do so for cases where the case needs more time for review.

Attached is a spreadsheet containing information, including the current status about each case, which was directly pulled from either from Claims 4 and/or ELIS. Cases needing particular attention are red. The red indicates:

1. Case has not be scheduled for interview OR
2. Appears to be scheduled past September 4

Each of these 144 cases must be prioritized per the court requirement. We understand that extenuating circumstance do come up, but the presumption is that each of these cases is given top scheduling priority, and any stated extenuating circumstances should reflect that priority. We seek the Region's assistance to contact the field offices to understand why cases in the spreadsheet have not been scheduled for interview OR have been scheduled past September 4. As we mentioned before, we understand the 35 day time period is in the CHAP but MAVNI cases, in particular these ones, need to be scheduled quicker.

The regions are to update the excel with the interview scheduled date or provide an explanation in the "Comments" providing a reason(s) for not scheduling a case.

Please email your updated spreadsheet to me with the date an interview is scheduled or an

explanation why an interview was not scheduled no later than COB Monday, August 26. We will be updating the spreadsheet based upon new information from both DOD AND the case management systems.

Contact Michelle Wong for information and clarification.

Thank you

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Nio Complaints Comparison Chart

	Original Complaint (ECF 1)	**FAC** (ECF 27)	***SAC*** (ECF 61)	**TAC** (ECF 115)
Filed	5/24/2017	8/4/2017	*10/20/2017*	3/14/2018 (motion to file)
Decision	N/A	MTD (ECF 49) → denied as moot (ECF 71 10/27/2017)	*MTD (ECF 116) → den w/o prej (Min. Entry 6/20/2018)*	Denied 4/12/2018 (ECF 135)
JD	28 U.S.C. § 1346 (US as D); 28 U.S.C. § 1331 (fed Q); 28 U.S.C. § 2201 (dec j); and the Mandamus Act, 28 U.S.C. § 1361.	28 U.S.C. § 1331 (federal question) and the APA, 5 U.S.C. § 701 et seq.	*Same as FAC*	Same as FAC
Venue	28 U.S.C. § 1391(e) [officers' names]	28 U.S.C. § 1391(e) [officers' titles, not names]	*Same as FAC*	Same as FAC
Count I: Dec. J	(i) DoD's role pursuant to 8 U.S.C. § 1440 is limited to executing Form N-426 confirming whether a service member has served or is serving honorably; (ii) the DoD background checks, including the SSBI/Tier 5, are not part of the requirements for naturalization set forth in 8 U.S.C. § 1440; and (iii) DHS may not, on the basis of DoD instruction, suspend, delay, or hold the processing of the naturalization applications of MAVNIs with honorable service (as may be confirmed	(i) same as OGC (ii) the DoD background checks, including the SSBI/Tier 5, CI, NIAC, and "issue-oriented interview and/or issue-oriented polygraph" checks, are not part of the requirements for naturalization set forth in 8 U.S.C. § 1440; (iii) DHS and USCIS may not, on the basis of DoD instruction or otherwise, stop, suspend, delay, or hold the processing or final adjudication of the naturalization applications of MAVNIs with honorable service (as may be confirmed by a MAVNI's	*(i) same as OGC* *(ii) Congress has not imposed post-enlistment DoD background checks, including the SSBI/Tier 5, CI review or interview, NIAC, and "issue-oriented interview and/or issue-oriented polygraph" checks, and/or suitability vetting as naturalization conditions for persons applying for naturalization under 8 U.S.C. § 1440;* *(iii) same as FAC; and* *(iv) DoD may not (a) refuse to issue or withhold Form N-426s, (b) refuse to certify honorable service, and/or (c) revoke, rescind, or invalidate previously*	(i) same as OGC; (ii) Congress has not imposed post-enlistment DoD background checks or adjudications, including the SSBI/Tier 5, CI review or interview, NIAC, "issue-oriented interview and/or issue-oriented polygraph" checks, and/or the MSSD or NSD, as naturalization conditions for persons applying for naturalization under 8 U.S.C. § 1440; (iii) DHS and USCIS may not, on the basis of DoD instruction or otherwise, stop, suspend, delay, or hold the processing or final adjudication of the

Highlighted = new / change from previous complaints *Italics = operative complaint* Underline = prevailing claim

	by a MAVNI's commander on Form N-426).	commander on Form N-426) pending completion of any SSBI/Tier 5, CI, NIAC, "issue-oriented interview and/or issue-oriented polygraph" checks, or other military- or DoD-specific background investigations other than the DCII; and (iv) DoD may not (a) refuse to issue or withhold Form N-426s, (b) refuse to certify honorable service, and/or (c) revoke, rescind, or invalidate previously issued N-426 certifications, for members of the Selected Reserve on the basis that such service members have not served in an active duty status.	*issued N-426 certifications, for members of the Selected Reserve on the basis that such service members have not served in an active duty status or pending post-enlistment background investigations or suitability vetting.*	naturalization applications of MAVNIs with honorable service (as may be confirmed by a MAVNI's commander on Form N-426) pending completion of any SSBI/Tier 5, CI, NIAC, "issue-oriented interview and/or issue-oriented polygraph" checks, MSSD or NSD adjudications, or other military- or DoD-specific background investigations or adjudications (other than the DCII); (iv) DHS and USCIS may not, on the basis of DoD instruction or otherwise, stop, suspend, delay, or hold the processing or final adjudication of the naturalization applications of MAVNIs with honorable service (as may be confirmed by a MAVNI's commander on Form N-426) pending so-called "official" notification from DoD of completion of any DoD background investigations or adjudications, completion of a redundant FBI background check, and/or service in active duty (including at BCT or AIT); and

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				(iv) [mis-labeled, should be (v)] same as SAC (iv)
Count II:	**PI & Permanent**	**PI & Permanent**	***Temp, PI & Perm***	**Temp, PI & Perm**
Count II: DHS PI	(i) to compel the DHS Defendants to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 to process without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (ii) to compel the DHS Defendants to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date.	(i) to place and maintain the parties in the pre-dispute status quo; (ii) to preliminarily set aside the DHS Defendants' "hold" on the processing and final adjudication of Plaintiffs' N-400 Applications for Naturalization; (iii) to preliminarily compel the DHS Defendants to immediately resume adjudicating Plaintiffs' N-400 Applications for Naturalization to decision (and citizenship oath if warranted) without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, or (c) any review or re-evaluation by DoD of its policies regarding certification of honorable service or issuance of Forms N-426s; and	*(i) same as FAC* *(ii) same as FAC* *(iii) to preliminarily compel the DHS Defendants to immediately resume adjudicating Plaintiffs' N-400 Applications for Naturalization to decision (and citizenship oath if warranted) without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, or (c) any revocation, recall, or decertification of Plaintiffs' existing N-426 honorable service certifications; and* *(iv) to compel the DHS Defendants to provide weekly reports to the Court and Plaintiffs of the status of the adjudication of Plaintiffs' and the Class' N-400 Applications for Naturalization.*	(i) same as FAC (ii) same as FAC (iii) to preliminarily compel the DHS Defendants to immediately resume adjudicating to decision (and citizenship oath if warranted) the N-400 Applications for Naturalization filed by Plaintiffs and the Class without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, (c) any revocation, recall, or decertification of Plaintiffs' existing N-426 honorable service certifications, (d) BCT, AIT, or any other active-duty service by the soldier, (e) any NSD, MSSD, or other military-related suitability or vetting determination or adjudication pertaining to the soldier, or (f) any second, redundant FBI check pertaining to the soldier (iv) to temporarily and preliminarily compel the DHS

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		(iv) to compel the DHS Defendants to provide bi-weekly reports to the Court and Plaintiffs of the status of the adjudication of Plaintiffs' N-400 Applications for Naturalization		Defendants to immediately adjudicate to decision (and citizenship oath if warranted) the N-400 Applications for Naturalization filed by Plaintiffs and the Class who have completed their DoD Enhanced Background Investigations; and (v) to compel the DHS Defendants to provide regular reports to the Court and Plaintiffs of the status of the adjudication of Plaintiffs' and the Class' N-400 Applications for Naturalization.
Count II: DHS Perm	Not alleged	(i) same as (ii) above (ii) to compel the DHS Defendants to adjudicate to decision (including oath if warranted) the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, or (c) any review or re-evaluation by DoD of its policies regarding certification of honorable	*(i) same as FAC* *(ii) to compel the DHS Defendants to adjudicate to decision (including oath if warranted) the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class without awaiting (a) any "enhanced DoD security checks," (b) any review or re-evaluation by DoD of already-issued Form N-426s, or (c) any revocation, recall, or decertification of Plaintiffs' existing N-426 honorable service certifications*	(i) Same as FAC (ii) same as (iii) above, but omitting (f) (iii) same as (iv) above (iv) same as SAC (iii) (v) same as FAC (iv)

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		service or issuance of Forms N-426s; (iii) to compel the DHS Defendants to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 to process without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (iv) to compel the DHS Defendants to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date.	*(iii) to compel the DHS Defendants to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 and to process without further delay and without imposing any additional requirements for naturalization the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and* *(iv) same as FAC*	
Count II: DOD PI / Temp (SAC & TAC)	enjoining from interfering with the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class	(i) to place and maintain the parties in the pre-dispute status quo; (ii) to preliminarily set aside the DoD Defendants' policy requiring service in an active duty status for certification of honorable	*(i) same as FAC* *(ii) to temporarily and preliminarily set aside the application to Plaintiffs and the Class of any policy of DoD Defendants that requires service in an active duty status for certification of honorable*	(i) same as FAC; (ii) same as SAC; (iii) same as SAC; (iv) to temporarily and preliminarily compel the DoD Defendants to notify DHS Defendants and the respective

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		service under 8 U.S.C. § 1440(a); (iii) to preliminarily restrain the DoD Defendants from decertifying, rescinding, or otherwise invalidating Plaintiffs' existing and duly issued Form N-426s, except as related to the conduct of an individual Plaintiff and based on sufficient grounds generally applicable to members of the military for re-characterization of service; and (iv) to preliminarily restrain the DoD Defendants from discharging Plaintiffs pending adjudication of their N-400 Applications for Naturalization, except as related to the conduct of an individual Plaintiff and based on sufficient grounds generally applicable to members of the military for discharge from service.	*service under 8 U.S.C. § 1440(a);* *(iii) to temporarily and preliminarily restrain the DoD Defendants from decertifying, rescinding, recalling, revoking, or otherwise invalidating Plaintiffs' existing and duly issued Form N-426s pursuant to the New DoD N-426 Policy or otherwise, except as related to the conduct of an individual Plaintiff and based on sufficient grounds generally applicable to members of the military for re-characterization of service; and* *(iv) to temporarily and . . . same as FAC*	member of the Class of completion of the DoD Enhanced Background Investigations for each Class member immediately upon, and no later than five business days after, completion of the DoD Enhanced Background Investigations for such Class member; and (v) FAC and SAC (iv)
Count II: DOD Perm	Not alleged	(i) to enjoin the DoD Defendants from interfering with the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class;	*(i) to enjoin the DoD Defendants from interfering with the processing and adjudication of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class;*	(i) same as SAC; (ii) same as SAC; (iii) same as SAC; (iv) same as above; and

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		(ii) same as above (iii) same as above (iv) same as above	*(ii) same as above* *(iii) to restrain the DoD Defendants from decertifying, rescinding, revoking, or otherwise invalidating the existing and duly issued Form N-426s of Plaintiffs and the Class pursuant to the New DoD N-426 Policy or otherwise, except as related to the conduct of an individual Plaintiff or member of the Class and based on sufficient grounds generally applicable to members of the military for re-characterization of service; and* *(iv) to restrain the DoD Defendants from discharging Plaintiffs or members of the Class pending final adjudication of their N-400 Applications for Naturalization, except as related to the conduct of an individual Plaintiff or member of the Class and based on sufficient grounds generally applicable to members of the military for discharge from service*	(v) same as SAC (iv)
Count II: PI - DHS & DOD	enjoining from taking any retaliatory actions against the Plaintiffs and the Class.	Same as OGC	*Same as OGC*	Same as OGC
Count III: APA 706 (1) - DHS	(i) to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 to immediately act upon and	(i) same as OGC (ii) to grant priority to, and expedite, the processing of	*(i) to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 and otherwise to immediately act upon and*	(i) to comply with their statutory obligations pursuant to 8 U.S.C. § 1440 and otherwise to immediately act

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	process without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (ii) to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date.	the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm.	*process without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class* *(ii) same as FAC*	upon, process and adjudicate without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class (ii) same as FAC
Count III: APA 706 (2) - DHS	Not alleged	(i) holding unlawful and setting aside DHS Defendants' directive requiring the completion of "enhanced DoD security checks" as a prerequisite to adjudication of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; (ii) declaring such directive arbitrary, capricious, otherwise not in accordance with law and without observance of procedure required by law; and (iii) enjoining DHS Defendants from applying	*(i) same as FAC;* *(ii) same as FAC; and* *(iii) same as FAC*	(i) holding unlawful and setting aside DHS Defendants' July 7, 2017 Policy, NSD/MSSD Policy, FBI Check Policy, and Other Unlawful Naturalization Policies and Actions; (ii) declaring such policies and actions arbitrary, capricious, otherwise not in accordance with law and without observance of procedure required by law; (iii) enjoining DHS Defendants from applying such policies or taking such actions in relation to the processing of the N-400

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		such directive to the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class.		Applications for Naturalization duly filed by Plaintiffs and the Class; and (iv) compelling DHS Defendants to immediately adjudicate the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class.
Count III: APA 706 (2) - DOD	Not alleged	(i) holding unlawful and setting aside DoD Defendants' policy precluding the certification of honorable service for members of the Selected Reserve who have not served in an active duty status; (ii) declaring such policy not in accordance with law; (iii) enjoining DoD Defendants from withholding issuance of N-426s or certifications of honorable service on the basis of such policy; and (iv) enjoining DoD Defendants' from applying the policy to Plaintiffs and the Class.	*(i) same as FAC;* *(ii) same as FAC;* *(iii) enjoining DoD Defendants from revoking or withholding issuance of N-426s or certifications of honorable service on the basis of the mid-2017 policy or New DoD N-426 Policy; and* *(iv) enjoining DoD Defendants from applying these policies to Plaintiffs and the Class.*	(i) same as FAC; (ii) same as FAC; (iii) same as SAC; and (iv) same as SAC.
Count IV: Mandamus	(i) to comply with their statutory obligations pursuant	(i) same as OGC; and	*(i) same as OGC; and*	(i) same as OGC; and

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- DHS	to 8 U.S.C. § 1440 to immediately act upon and process without further delay the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class; and (ii) to grant priority to, and expedite, the processing of the N-400 Applications for Naturalization duly filed by Plaintiffs and the Class to avoid further harm as the harm that has been caused by the unlawful processing suspension that has been imposed on such applications to date	(ii) same as OGC.	*(ii) same as OGC.*	(ii) same as OGC
Count V: Const. Vio. (only SAC and TAC)	***SAC*** *Under the Constitution, namely, the "Uniform Rule of Naturalization" clause, Congress has the sole power to establish criteria for naturalization.* *NOT REQUIRED:* • *persons seeking naturalization under Section 1440 must first complete enhanced military background investigations – including the Tier 5/SSBI requirements being imposed on Plaintiffs and the Class* • *condition of naturalization that such persons – already serving in the military – undergo any further suitability vetting* *If Plaintiffs and the Class are statutorily eligible to become naturalized under this statute (as they so allege), DHS must grant their applications; DHS has no discretion to deny naturalization to a person who satisfies the criteria established by Congress for naturalization* *Defendants' imposition of unauthorized, unlawful, and arbitrary conditions on Plaintiffs' ability to apply for and have timely adjudicated their applications for naturalization violates Plaintiffs' right to due process under the Fifth Amendment to the U.S. Constitution because*			**TAC** Same as SAC NOT REQUIRED: • same as SAC • condition of naturalization that such persons – already serving in the military – undergo any further suitability vetting or any of the other requirements being imposed by Defendants in this case, such as service in an active-duty capacity or duplicative, sequential FBI background checks

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	these soldiers cannot lawfully be denied immigration benefits – namely naturalization – for which they are eligible and are seeking			same as SAC
Count IV: Eq. Estop. (only TAC)	Plaintiffs request that the Court grant appropriate equitable relief and estop Defendants from refusing to provide the promised naturalization assistance			
Prayer For Relief	1. Assume jurisdiction over this action; 2. Issue the declaratory judgment requested in Count I of this Complaint; 3. Grant the preliminary and permanent injunctive relief requested in Count II of this Complaint; 4. Grant the relief requested pursuant to the APA (Count III of this Complaint); 5. Issue the mandamus requested in Count IV of this Complaint; 6. Award Plaintiffs and the Class reasonable costs and attorneys' fees, including under the Equal Access to Justice Act; 7. Award such further relief as the Court deems just or appropriate.	Same as OGC	*Same as OGC +* *Grant the relief requested pursuant to Count V of this Complaint;*	Same as SAC + 7. Grant the relief requested in Count VI of this Complaint;

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE and JAMES MATTIS, in his official capacity as Secretary of Defense, Defendants.	Civil Action No. 1:17-cv-01793 The Honorable Ellen Segal Huvelle

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Military Accessions Vital to the National Interest ("MAVNI") program carried out by Defendants, the Department of Defense ("DoD") and DoD Secretary James Mattis, in his official capacity, permits foreign persons legally present in the United States but without permanent residency status to seek expedited naturalization in exchange for military service in areas deemed to be critical to the national interest. Although the Department of Homeland Security ("DHS") is the executive agency that adjudicates naturalization applications, as part of that process, DoD has been tasked by Congress with the role of certifying that qualifying soldiers have served honorably. DoD's current informal policy is to make such certifications when a MAVNI soldier is participating in initial entry training (aka boot camp or basic training), following the completion of certain background checks, security screening, and DoD's evaluation of a soldier's fitness for military service.

Plaintiffs, three individuals who enlisted in the Army via the MAVNI program and who are currently serving in the Selected Reserve of the Ready Reserve, bring this challenge to DoD's policy. Despite not yet having completed background investigations or security screening, and not yet having attended initial entry training, Plaintiffs contend that DoD has a ministerial, non-discretionary duty to certify their service as honorable and that DoD's current policy is contrary to law. These claims must fail for several reasons. DoD's decisions about whether and when to certify a solider as having served honorably is a decision committed to agency discretion by law and is thus not reviewable by courts. Even if such decisions were reviewable, no ministerial, non-discretionary obligation to certify members of the Selected Reserve before they attend initial entry training exists, and DoD's policy is within the scope of its statutory authority. Nor can Plaintiffs prevail on their request for mandamus relief, for similar

reasons. Accordingly, the Court should deny Plaintiffs' motion for a preliminary injunction and grant Defendants' cross-motion for summary judgment.

BACKGROUND

A. Overview of MAVNI program

First begun in 2008, the MAVNI pilot program provides an exception to the general rule that individuals desiring to enlist in the military be U.S. citizens or lawful permanent residents ("LPRs"). *See Nio, et al. v. DHS, et al.* ("*Nio*"), 17-cv-998-ESH (D.D.C. 2017), Decl. of Stephanie Miller ¶¶ 3-4, ECF No. 19-7 ("First Miller Decl."). The program was created pursuant to DoD's authority to enlist individuals who do not meet these residency requirements when their enlistment is deemed to be "vital to the national interest," *see* 10 U.S.C. § 504(b)(2), as well as its authority to enlist non-LPRs during periods in which the United States is engaged in military operations involving armed conflict with a hostile foreign force, as determined by the President, *see* 8 U.S.C. § 1440(a). The United States has been engaged in a qualifying armed conflict since the attacks of September 11, 2001. *See* Executive Order No. 13269, 67 Fed. Reg. 45,287 (July 3, 2002).

The MAVNI program is specifically designed to recruit health care professionals and persons who possess critical foreign language skills. *See* First Miller. Decl. ¶ 4. Among other requirements, MAVNI recruits must meet the minimum enlistment standards applicable to all military recruits, including medical screening, physical fitness, and moral conduct/criminal activity screening. *Id*. ¶¶ 8-9. Also like all recruits, MAVNI enlistees must undergo a "military-service determination" (also known as a "suitability-for-service determination"). *Id*. ¶ 10. This assessment is an analysis of whether, "based on all available information, there is no reasonable basis for doubting the person's loyalty to the Government of the United States." *Id*. (quoting

DoD 5200.2-R ¶ C2.1.3). Included in this assessment is a review of the soldier's "criminal history (regardless of disposition) or questionable conduct character." *Id*. (quoting Army Reg. 601-210 ¶ 4-2(e)(1)). Since the beginning of the MAVNI program, DoD has intended for the suitability-for-service determination to be completed prior to a recruit assessing into initial entry training (colloquially known as "boot camp"). *Id*. ¶¶ 9, 11.

One of the key features of the MAVNI program is that it permits foreign persons who lack lawful permanent residence in the United States to obtain U.S. citizenship on an expedited basis. *Id*. ¶ 9. As provided by statute, "[a]ny person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States" during qualifying periods of time "may be naturalized" if certain conditions are met. 8 U.S.C. § 1440(a). The statute further makes explicit mention of DoD's role in this process, stating that "[t]he executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions . . . ." *Id*; *see also id*. § 1440(b)(3) (stating that "service in the military, air or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status during" a qualifying period). DoD makes this certification on a Form N-426, Request for Certification of Military or Naval Service ("N-426"), a U.S. Citizenship and Immigration Services ("USCIS") form, and DoD and its military branches are the only federal agencies that make this certification. First Miller Decl. ¶ 6. DoD's honorable-service certification constitutes a necessary part of an recruit's application for naturalization with DHS, *see* 8 C.F.R. § 329.2 (b), and DoD now

contemplates that MAVNI recruits will submit their application for naturalization at the time they arrive at initial entry training, following the successful completion of security screening (discussed below) and a favorable suitability-for-service determination, *see* First Miller Decl. ¶ 10; *see also* The 2016 MAVNI Information Paper at 5-6, ECF No. 11-15 ("The Army, along with [USCIS] has implemented expedited citizenship processing for all non-citizens at each of the Army's Basic Combat Training (BCT) locations."; further directing "DO NOT MAIL YOUR CITIZENSHIP PACKET BEFORE YOU SHIP TO BCT").

B. Recent changes to the MAVNI program

The MAVNI program is subject to ongoing review and reauthorization, *see* First Miller Decl. ¶ 4, and DoD has made changes to the program in recent years in response to national security concerns. Specifically, program reviews have revealed there to be counter-intelligence, security, and insider-threat concerns with the MAVNI program, including MAVNI enlistees engaging in pre-accession criminal activity or posing significant counter-intelligence security threats.[1] *Id*. ¶¶ 10, 15. To help manage these threats, DoD currently requires MAVNI recruits to undergo enhanced security screening prior to their suitability-for-service determinations (and prior to their shipment to initial entry training). *Id*. ¶ 10. This enhanced security screening currently consists of a Tier 3 or Tier 5 background check, a National Intelligence Agency Check ("NIAC"), a counter-intelligence focused security review, and an issue-oriented interview, if necessary. *See* First Miller Decl. ¶ 14. In addition, in April 2017, senior leaders from DoD informed USCIS that it was concerned about the naturalization of individuals for whom

[1]This Court has previously recognized that these security concerns are significant. *See Nio v. DHS*, --- F.Supp.3d ----2017 WL 3917006, at *10 (D.D.C. Sept. 6, 2017) (recognizing that enlistment of foreign nationals in the military implicates national security concerns which can bear on an applicant's good moral character, attachment to the Constitution, and disposition towards the United States.).

background checks and counterintelligence security reviews had not yet been completed. *Id.* ¶ 17-18.

Most relevant to this case, DoD also recently reassessed its honorable-service certification for members of the Army's Delayed Training Program ("DTP"). *See Nio*, Second Decl. of Stephanie P. Miller in Resp. to July 19, 2017 Order of the Court at 6, ECF No. 25-2 ("Second Miller Decl."). DoD will not certify MAVNI recruits as having served honorably until they attend initial entry training, following the completion of their background checks and receipt of a favorable suitability-for-service determination. *See id.* at 7. On August 17, 2017, the Lieutenant General of the Army issued a memo reinforcing the practice of requiring MAVNI soldiers to have initial entry training in order to receive N-426 certification. *See* Mem. from Charles D. Luckey, Lieutenant General, U.S. Army Chief of Army Reserve/Commanding General, U.S. Army Reserve Command, Re: Certification of Honorable Service Pursuant to 8 U.S. Code § 1440 (Aug. 17, 2017), ECF No. 11-10 (withholding the "authority to certify the honorable service (N-426) of Soldiers who have not yet attended Initial Entry Training").

DoD's current honorable-service certification policy is an interim measure. DoD is currently in the process of evaluating its procedures for making honorable-service determinations for purposes of N-426 forms. *See Nio*, Defs.' Weekly Status Rep. for the Week of Sept. 30, 2017 to Oct. 7, 2017, ¶ 8, ECF No. 56; *see also* Second Miller Decl. at 7 (noting ongoing review to "establish[] [] revised criteria for all future N-426 certifications"). DoD is also currently not certifying any new N-426s for MAVNI soldiers. *See* First Miller Decl. ¶ 19.

C. Procedural history

Plaintiffs, three MAVNI enlistees who are currently serving in the Selected Reserve of the Ready Reserve, initiated the instant action on September 1, 2017. Compl., ECF No. 1, ¶¶ 2-

3. All three Plaintiffs allege that they have requested honorable-service certification for purposes of the N-426 form but were denied because they do not yet have qualifying service. *Id.* ¶¶ 57-62. According to Plaintiffs, "DoD has a mandatory, non-discretionary duty" to certify honorable service for MAVNI soldiers, including Plaintiffs, who are in the Selected Reserves, and that DoD is unlawfully withholding this duty. *Id.* ¶ 52. Plaintiffs also assert that DoD's honorable-service certification policy "lack[s] rationality, coherence, and consistency." *Id.* ¶ 53. Plaintiffs seek relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(1) and § 706(2), and they request various types of declaratory and injunctive relief. *Id.* ¶¶ 82-99. They also request the issuance of a writ of mandamus to compel DoD to comply with its purportedly ministerial obligation to certify Plaintiffs and other MAVNI soldiers in the Selected Reserve as having served honorably. *Id.* ¶¶ 100-05.

The instant action has been designated as a related case to *Nio v. DHS*, which is also pending before this Court. *See* Notice of Related Case, ECF No. 2. In *Nio*, several MAVNI enlistees who had been certified as having served honorably but who had not yet been naturalized as U.S. citizens challenged USCIS's decision to place the plaintiffs' naturalization applications on hold pending the outcome of the new enhanced security screening requirements, and DoD's requirement that an enlistee have active-duty service before receiving honorable-service certification. *See Nio*, 2017 WL 3917006, at *1. Plaintiffs moved for a preliminary injunction, which the Court denied on September 6, 2017. *Id.* In particular, the Court concluded that the *Nio* plaintiffs were not being harmed by any actions of DoD because they had already received honorable-service certifications on their N-426 forms and that they were unlikely to succeed on the merits of their claims against DHS. *Id.* at *8-*13.

Plaintiffs in this case also have also moved for a preliminary injunction, filing a motion with the Court less than three weeks after filing the complaint. *See* Pls.' Mot. for a Prelim. Inj., ECF No. 11 ("Pls.' Mot."). Defendant moved for an extension of time, noting that the DoD policy for the DTP now permits members of the Selected Reserve like Plaintiffs to stay in DTP for up to three years. *See* Def.'s Mot. for Extension of Time ¶ 6, ECF No. 13. Under this policy, Plaintiffs are eligible to remain in DPT until December 2018, February 2019, and June 2019, respectively. *Id*. (citing Decl. of Alicia M. Glanz ¶ 5). The Court then issued an order consolidating Plaintiffs' preliminary injunction motion with summary judgment and resetting the briefing schedule. *See* Sept. 25, 2017 Order, ECF No. 16.

STANDARD OF REVIEW

Where, as here, a court has consolidated a motion for a preliminary injunction with summary judgment, it applies only the standard of review for summary judgment and does not engage in an analysis of the four-factor test applied to requests for emergency injunctive relief. *See Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 236-38 (D.D.C. 2012); *New Life Evangelistic Ctr., Inc. v. Sebelius*, 672 F. Supp. 2d 61, 70 (D.D.C. 2009). Ordinarily, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because Plaintiffs seek relief pursuant to the Administrative Procedure Act ("APA"), however, the standard of review from that statute should guide the Court's review. *See Ark Initiative*, 895 F. Supp. 2d at 238 (noting that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness" (citation omitted)). The statute permits courts to "compel agency action unlawfully withheld or unreasonably delayed" as well as to set aside agency actions that are, among other things, "arbitrary [and] capricious, an abuse of discretion,

or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2). "This standard of review is highly deferential to the agency," and a court "is not entitled to substitute its judgment for that of the agency." *New Life Evangelistic Ctr.*, 672 F. Supp. 2d at 70-71; *see also Ark Initiative*, 895 F. Supp. 2d at 238 (describing the standard review under the APA as "narrow" given the courts' directive to "defer to the agency's expertise" (citation omitted)).

ARGUMENT

Defendants are entitled to judgment in this case because Plaintiffs cannot prevail on their claims under § 706(1) and § 706(2) of the APA. To begin, these claims fail as a matter of law because DoD's decision about whether and when to certify honorable service is a decision committed to agency discretion by law and is thus unreviewable under the APA. But even if honorable-service certification decisions were reviewable, Plaintiffs' claims would still fail. DoD has no ministerial, non-discretionary duty under § 1440 to certify honorable service for members of the Selected Reserve by a certain point in time, nor has it committed any unreasonable delay of such decisions. In addition, DoD's view that accession to initial entry training should be required for such certifications is a reasonable construction of its role in the naturalization process, as outlined by § 1440; even if it were not, Plaintiffs would still not be entitled to the relief they seek in this case. As a final matter, Plaintiffs' request for mandamus should be denied because it is duplicative of their claims under the APA. For all of these reasons, Plaintiffs' motion for a preliminary injunction should be denied, and Defendants' motion for summary judgment should be granted.

A. Plaintiffs fail to state a claim under the APA because the decision whether to certify a soldier as having served honorably is committed to agency discretion by law

As an initial matter, both Plaintiffs' § 706(1) claim and § 706(2) claim must fail because the decision whether and when to certify that a soldier has served honorably is committed to

agency discretion by law. The APA grants a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. It withdraws that cause of action, however, "to the extent that . . . agency action is committed to agency discretion by law." *Id.* § 701(a)(2). "Agency action is committed to agency discretion by law when 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Review under the APA is thus unavailable when "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Heckler*, 470 U.S. at 830 (citation omitted).

As the Supreme Court has explained, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). A court thus draws guidance from the text of the statute, from "specific legislative history that is a reliable indicator of congressional intent," and from "inferences of intent drawn from the statutory scheme as a whole." *Id.* at 349. Similarly, in determining whether action is committed by law to agency discretion, courts consider "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002).

In this case, the statute governing DoD's honorable-service certifications sets forth no meaningful standard to evaluate either *whether* DoD should certify a soldier as having served honorably or *when* DoD should so certify. The relevant provision states that "[t]he executive

department under which such person [seeking naturalization] served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions." 8 U.S.C. § 1440(a). This language contains no further guidance or instruction as to what constitutes "honorable" service for purposes of certification, leaving it completely up to the relevant military branch—here, the Department of the Army—to make that determination. Notably, the statute does provide some guidance as to what does *not* constitute honorable service, *see id*. (stating that persons who have been separated on account of alienage or, who were conscientious objectors who "performed no military, air, or naval duty whatever or refused to wear the uniform" cannot be certified as having served honorably), but it is within DoD's discretion to determine, as an affirmative matter, what type of service suffices as "honorable." Indeed, to the extent the statute offers any guidance regarding what type of service should be certified as "honorable," it suggests that a soldier must have completed active-duty status, *id*. (instructing the relevant branch of the military to "determine whether persons have served honorably in an active-duty status"), which none of the Plaintiffs have done. Congress's silence as to what type of conduct should be deemed "honorable" signals that such a determination is left to the prerogative of DoD.

Nor did Congress provide any standard for determining when DoD should certify that a soldier has served honorably. The relevant statutory language is written in the past tense, *see id*. (instructing DoD to determine whether such persons "have served honorably"), which suggests that certification need not necessarily occur concurrent with a soldier's enlistment. Further to this point, the statute even permits DoD to make an honorable service determination following a soldier's separation from the military. *See id*. (instructing DoD to determine whether a person has served honorably, "and whether separation from such service was under honorable

conditions"). Having imposed no time restrictions for DoD to abide by in certifying honorable service, § 1440(a) leaves the pace of certifications within the discretion of DoD.

The conclusion that DoD's honorable-service certifications are committed to agency discretion is further compelled by the judiciary branch's recognition that "[t]he existence of broad discretionary power in an agency often suggests that the challenged decision is the product of political, military, economic, or managerial choices that are not really susceptible to judicial review." *See Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 579 (3d Cir. 1979). In *National Federation of Federal Employees v. United States*, for example, the D.C. Circuit held that DoD's closing of certain military bases and reassigning of troops was not subject to judicial review under § 701(a)(2). 905 F.2d 400, 405-06 (D.C. Cir. 1990). The court reasoned that, although DoD's statutory authority to close bases contained a set of criteria for making those decisions, judicial review of the closings and reassignments "would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure." *Id*. at 406 (concluding that "the federal judiciary is ill-equipped to conduct reviews of the nation's military policy" and that "[s]uch decisions are better left to those more expert in issues of defense"). Other military decisions courts have determined to be non-reviewable include the transfer of registry of maritime vessels, *see District No. 1, Pac. Coast Dist., Maritime Engineers' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) ("Were we to decide whether the [defendant's decision to transfer] is reasonable, we would necessarily be 'second guessing' not only the Executive's determinations regarding the military value of the eight vessels but also its judgments on questions of foreign policy and national interest." (citation omitted)); and the reassignment, downgrading, and termination of civil servants in reductions in force, *see Am. Fed'n of Gov't*

Empls., Local 1872 v. Stetson, No. 77-2146, 1979 WL 1919, at *5 (D.D.C. July 24, 1979) (holding that such a decisions are "managerial, and committed to agency discretion"); *see also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.").

The honorable-service certifications at issue in this case likewise concern the military's judgment about how best to oversee its personnel and evaluate a soldier's fitness. Such decisions are especially sensitive in light of the results of DoD's internal reviews of the MAVNI program, which revealed the existence of counter-intelligence, security, and insider-threat concerns within the program, including recruits engaging in criminal activity before being accessed to active-duty status as well as other counter-intelligence and security concerns. *See* First Miller Decl. ¶¶ 15-17. Given the military's expertise in this area, DoD is uniquely situated to make the qualitative determination about which MAVNI recruits have served honorably and when such certifications should be made.

B. Plaintiffs cannot succeed on their § 706(1) claim because § 1440(a) does not impose a clear legal obligation to certify members of the Selected Reserve as having served honorably prior to their attendance in basic military training or other active-duty status

Even if the Court concludes that honorable-service certifications are not committed to agency discretion by law, Defendants are entitled to judgment on Plaintiffs' claim under § 706(1) because § 1440(a) imposes no clear legal obligation on DoD and because, even if DoD has delayed honorable-service certifications, any such delay is not unreasonable.

1. Section 1440 does not impose a ministerial, non-discretionary duty on DoD

Summary judgment for Defendants with respect to Plaintiffs' § 706(1) claim is first warranted because DoD has no ministerial obligation to certify honorable service within a defined period of time. Under § 706(1), courts have the authority to "compel agency action unlawfully withheld or unreasonably delayed." As the Supreme Court explained in *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), "the only agency action that can be compelled under the APA is action legally required," 542 U.S. 55, 63 (2004), that is, "when the agency has failed to act in response to a clear legal duty," *Citizens for Responsibility and Ethics in Washington v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (citing *SUWA*, 542 U.S. at 63–64). The D.C. Circuit has further explained that "[w]hen agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). But such injunctive relief is only appropriate "if the court's study of the statute and relevant legislative materials cause[s] it to conclude that the defendant official ha[s] failed to discharge a duty that Congress intended him to perform." *Covelo Indian Cmty. v. Watt*, 551 F. Supp. 366, 381 (D.D.C. 1982), *aff'd as modified* (Dec. 21, 1982), *vacated as moot* (Feb.1, 1983).

Requiring a "clear statutory duty" before the court may compel agency action is akin to the inquiry at *Chevron* step one, where, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984). Thus, as in the context of *Chevron*, in inquiring whether Congress's intent is clear, this Court should "examine the meaning of certain words or phrases in context and also exhaust the traditional tools of statutory construction, including examining the statute's legislative history to

shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (citation omitted). Critically, "Section 706[(1)] does not provide a court with a license to substitute its discretion for that of an agency merely because the agency is charged with having unreasonably withheld action." *Am. Ass'n of Retired Pers. v. EEOC*, 823 F.2d 600, 605 (D.C. Cir. 1987). Rather, in order for a court to order an agency to act, there must exist a "ministerial or non-discretionary act" that the agency has failed to take. *SUWA*, 542 U.S. at 64-65.

No such ministerial, non-discretionary obligation exists in this case. Section 1440(a) states that DoD "shall determine" whether foreign persons or non-citizen nationals "have served honorably," but it contains no instruction as to when such a determination must be made. Given the absence of any Congressional guidance as to the pace of making honorable-service determinations, DoD is not obligated to act within any particular amount of time. *See Beshir v. Holder*, 10 F. Supp. 3d 165, 172 (D.D.C. 2014) ("Because no guidelines compel USCIS to adjudicate adjustment applications by or within a certain time, plaintiff plainly cannot assert that USCIS has failed to adjudicate her application [for adjustment of status to that of a lawful permanent resident] within a time period in which it was required to do so." (citing *Orlov v. Howard*, 523 F. Supp. 2d 30, 34 (D.D.C. 2007)); *Orlov*, 523 F. Supp. 2d at 34 ("If Congress intended to constrain the USCIS to adjudicate an application within a specific amount of time, this Court believes it would have provided a time limitation [in the statutory language]."). Further demonstrating the lack of any required timeline, § 1440(a) permits DoD to certify honorable service even *after* a soldier has separated from military service. *See* 8 U.S.C. § 1440(a) (directing DoD to determine "whether separation from such service was under honorable conditions").

Nor is there any compulsory language in the statute that pertains to persons in the Selected Reserve of the Ready Reserve, as Plaintiffs seem to suggest. Although the first sentence of § 1440(a) states that any "alien or a noncitizen national of the United States" who has served honorably in the Selected Reserve or in active-duty status may be naturalized, the second sentence—which specifically addresses the role of DoD—provides that the relevant executive branch shall determine whether such a person "ha[s] served honorably in an *active-duty status*" and makes no mention of members of the Selected Reserve. Section 1440(b)(3) also refers to DoD's role in the naturalization process, and it similarly is silent with respect to Selected Reserve service. *See* 8 U.S.C. § 1440(b)(3) ("[S]ervice in the military, air or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status . . . .").[2] Thus, to the extent § 1440 can be read as imposing a ministerial obligation on DoD—which it does not—that obligation is imposed with respect to soldiers in active-duty status only. The statute contains no clear directive to DoD to honorably certify members of the Selected Reserve or to certify them prior to their attending initial entry training.[3]

[2] Congress's use of the word "shall" in both § 1440(a) and § 1440(b)(3) does not establish the existence of a mandatory, non-discretionary duty to act by DoD. To the contrary, the word "shall" can fairly be read as differentiating DoD's role in the naturalization process from that of DHS by making clear that DoD, not DHS, "shall" be the part of the Executive Branch tasked with making honorable-service certifications.

[3] Plaintiffs cite to a statement in the Government's brief in *Nio*, claiming that it constitutes an admission that DoD has a ministerial obligation to certify honorable service. *See* Pls.' Mot. at 14 (quoting *Nio*, Defs.' Mem. of Law in Opp'n. to Pls.' Mot. for Prelim. Inj. at 36, ECF No. 19 ("[T]he fact that DoD serves a ministerial role in determining if an individual is serving honorably does not prevent from USCIS using its own judgement to determine that it needs to specific, additional information" in processing naturalization applications). This statement came in the context of discussing DHS's decision to wait until the completion of background checks

The legislative history of § 1440 likewise confirms the absence of mandamus-like duty imposed on DoD. As Plaintiffs correctly note, the first sentence of § 1440(a) was amended in 2004 to add the reference to members of the Selected Reserve. Senator Edward Kennedy, who co-sponsored the bill, explained in debate on the bill that the purpose of this language was to "provide[] expedited naturalization for members of the Selected Reserves [sic] during military conflicts." S. 7280, 108th Cong., 1st Sess. (June 4, 2003). At no point during the debate does any member of the Senate attempt to define for DoD what "honorable service" consists of or to suggest that DoD should make its certifications by a particular point in time. The legislative history is thus silent regarding any ministerial duty being imposed on DoD.

2. Even if DoD has delayed honorable-service certifications, the delay is not unreasonable

To the extent DoD's certification of honorable service for Plaintiffs could be said to be delayed, any such delay has not been unreasonable. "There is no per se rule as to how long is too long to wait for agency action." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citation omitted). The D.C. Circuit has formulated six factors to assess whether an agency's delay is so unreasonable that it warrants mandamus. *See Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"). The first, and most important factor, is that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id*. at 80 (citation omitted). The remaining five factors are

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before adjudicating a naturalization application, *see Nio*, Defs.' Mem. of Law in Opp. to Mot. for Prelim. Inj. at 32-37, and thus cannot be read to constitute any sort of admission on behalf of DoD for purposes of § 706(1). At most, the passage quoted by Plaintiffs stands for the proposition that DoD retains the discretion to determine the criteria for making honorable-service certifications and control over the timing of the process, but that once such a determination has been made, DoD has an obligation to share its determination with DHS by completing the relevant section of a N-426 form.

> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

Id.

Collectively, these factors weigh against a finding of unreasonable delay in this case. To begin, DoD's decision not to certify MAVNI soldiers until they attend initial entry training is governed by a rule of reason because it is consistent with the recent policy changes DoD has made to the MAVNI program. DoD currently requires MAVNI recruits to complete enhanced security screening before they receive a favorable suitability-for-service determination, which in turn allows them to qualify for active-duty status and ship to initial entry training (boot camp or its equivalent). *See Nio*, 2017 WL 3917006, at *2. This program change was made in response to security concerns about the MAVNI program that have come to light in recent years, concerns that this Court has previously determined to be weighty. *See id*. at *10-*11, *13 (concluding, in denying plaintiffs' request for preliminary injunction, that USCIS policy change was not arbitrary and capricious given the "present national security concerns," and that although plaintiffs were suffering some irreparable harm, that harm was not sufficient "to override national security concerns"). If the enhanced background check reveals unmitigatable derogatory information, then the MAVNI enlistee will receive an unfavorable suitability determination and may be discharged at that point in time under "other than honorable conditions." *Id*. at *2 (citation omitted). DoD's decision to wait until this point in time to certify a MAVNI soldier as having served honorably thus makes perfect sense: it is only following the

results of the background check and other security screening measures that DoD possesses the full slate of information that it needs to make such a determination.

The remaining *TRAC* factors similarly weigh against an unreasonable delay finding in this case. With regard to the second factor, § 1440(a) and (b), which authorizes DoD to make the honorable-service certifications, provides no timeline by which DoD must act. As to the third factor, the health and welfare of the Plaintiffs are not currently in jeopardy because they currently face no threat of being discharged from the Army Reserve DTP. *See* Decl. of Alicia M. Glanz ¶¶ 3-5, ECF No. 13-1 (stating that, in light of a waiver recently issued by the Secretary of Defense, recruits in the DTP have three years from their date of enlistment to deploy, giving the Plaintiffs in this action until December 2018, February 2019, and June 2019, respectively to deploy).

The fourth factor also cuts against a finding of unreasonable delay; requiring DoD to expedite its timeline for making honorable-service determinations would likely force DoD to make such decisions prior to the completion of the enhanced security screening, thereby depriving it of relevant information it needs to make such determinations. This, in turn, could result in some MAVNI recruits being certified as having served honorably prior to the completion of their security screening, even where the results of that screening later reveal there to be national security or other concerns about the same recruits. Assuming these soldiers had not already become naturalized U.S. citizens, DoD would then need to revoke their N-426 forms. As to the fifth factor, this Court has already concluded that DoD's efforts to address the national security concerns with the MAVNI program outweigh any potential harm to MAVNI recruits. *See Nio*, 2017 WL 3917006, at *13. In this case, moreover, any such harm has been mitigated by the recent waiver giving enlistees in DTP an extra year before they must be prepared to

deploy in combat. *See* Glanz Decl. ¶¶ 3-6 (further noting that the Plaintiffs in this case have until December 2018, February 2019, and June 2019 to access to initial entry training). Sixth and finally, the Court has previously indicated that the security concerns raised by the MAVNI program are real and legitimate, rather than stemming from any sort of impropriety. *See Nio*, 2017 WL 3917006, at *10 ("Having reviewed [reports discussing DoD's national security concerns about the MAVNI program], the Court cannot ignore . . . that enlistment of foreign nationals in the military implicates national security concerns . . . ."). The *TRAC* factors accordingly all weigh against an unreasonable delay finding in this case.

C. Because DoD's current honorable-service certification policy is not contrary to law, Defendants are entitled to judgment on Plaintiffs' § 706(2) claim

In addition to their claim under § 706(1), Plaintiffs also assert a claim under § 706(2), claiming that DoD's present policy of requiring attendance at initial entry training for purpose of N-426 certification is contrary to law. *See* Compl. ¶ 29; Pls.' Mot. at 15. This claim, too, is without merit, and the Court should enter summary judgment in favor of Defendants. But even if the Court agrees with Plaintiffs that DoD's current policy is contrary to law, it is without authority under the APA to enter the type of relief Plaintiffs request here.

1. <u>DoD's current honorable-service certification policy is not contrary to law</u>

DoD's interim policy of requiring attendance at initial entry training for honorable-service certification is a reasonable construction of its authority under § 1440. When reviewing an agency's interpretation of its authority under a particular statute, courts apply the familiar two-part test from *Chevron*. At the first step, "applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *City*

of Arlington, Tex. v. FCC, 569 U.S. 290, 296 (2013) (quoting *Chevron*, 467 U.S. at 842-43). But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

DoD should prevail at the first step of the *Chevron* test for reasons similar to those discussed above. Stated simply, § 1440 imposes no obligation to certify a non-citizen's service as honorable within a specific time period, nor does the statute purport to give DoD any criteria about what makes service "honorable." The statute makes two references to DoD's role in the naturalization process, and, in both places, Congress explicitly referred only to certifications for active-duty status. *See* 8 U.S.C. § 1440(a) ("The executive department under which such person served shall determine whether persons have served honorably in an active-duty status . . . ."); § 1440(b)(3) ("[S]ervice in the military, air or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status . . . ."). "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion," *City of Arlington*, 569 U.S. at 296, and here, Congress left both the timing of and criteria used for honorable-service certifications within the absolute discretion of DoD, electing not to provide DoD either criteria by which service should be judged as "honorable" or a deadline for making certifications. DoD's requirement that MAVNI soldiers access to initial entry training in order to receive honorable-service certification is accordingly consistent with the express language of § 1440.

To the extent the Court concludes that the language of § 1440 is ambiguous, however, relief under § 706(2) would still not be warranted because DoD's current honorable-service

certification policy is a reasoned and permissible construction of the statute. Although the first sentence of § 1440(a) states that persons who have served honorably in the Selected Reserve may be naturalized, the two specific references to DoD's role in the certification process refer only to "active-duty status," as noted above. Given that DoD was given discretion to determine what constitutes "honorable" service and control over the timing of the process, it reasonably concluded that such determinations should be made following attendance at initial entry training. This policy change followed a period of internal review of the MAVNI program, during which DoD became aware of security concerns about the program, including the fact that some MAVNI enlistees may have engaged in pre-accession criminal activity and that some enlistees pose a significant counter-intelligence security threat. *See* First Miller Decl. ¶ 15. In response to this review, DoD instituted enhanced security screening measures for MAVNI enlistees, including the completion of a Tier 3 or Tier 5 background check, a NIAC, a counter-intelligence focused security review, and an issue-oriented interview, if necessary, before making a suitability-for-service determination. *Id*. ¶¶ 14-15. Even with these heightened reviews, DoD was concerned that MAVNI recruits were being naturalized as citizens prior to the completion of their background checks and security reviews. *Id.* ¶ 18. To ensure that its decision whether to certify a MAVNI recruit as having served honorably is made following completion of these security reviews, DoD determined that it should be made following the recruit's accession into initial entry training. Second Miller Decl. at 6-7. Notably, the alignment of the honorable-service certification with basic military training is consistent with DoD's guidance to MAVNI recruits to wait until they attend basic military training to apply for naturalization. *See* Second Miller Decl. at 6; *see also* 2016 MAVNI Information Paper at 3.

Plaintiffs rely heavily on the fact that DHS issued a regulation mirroring the "Selected Reserve of the Ready Reserve or in an active duty status" language from the first sentence of § 1440(a), but this regulation does not make DoD's present policy contrary to law. DHS's regulation implementing § 1440(a) is, by its own terms, limited to the criteria for the naturalization eligibility of alien and non-citizen soldiers. *See* 8 C.F.R. § 329.2 (listing the criteria for a soldier "[t]o be eligible for naturalization under [8 U.S.C. § 1440(a)]," including that the applicant has served honorably as a member of the Select Reserve of the Ready Reserve or in an active-duty status). The regulation does not purport to define for DoD what constitutes "honorable" service, nor does it state that a solider must receive honorable-service certification by a certain point in time. Rather, the regulation merely states that, for purposes of DHS's adjudication of naturalization applications, certification of honorable service in either the Select Reserve or in active-duty status is sufficient. DoD still retains the discretion to determine what constitutes "honorable" service and when such a determination should be made. Plaintiffs' contention that DoD's policy is discordant with the DHS regulation is simply incorrect.[4]

2. The relief Plaintiffs seek is not available under the APA

Even if the Court were to conclude that Plaintiffs should prevail on their claim under § 706(2), Plaintiffs would still not be entitled to the relief that they seek, which is incompatible with well-established principles of administrative law. Unlike where it hears a "garden variety civil suit," a district court's role in reviewing a final agency action is different because the court

[4] Even if there is a direct conflict between DHS's regulation and DoD's current policy, that still would not mean that Plaintiffs should prevail on their § 706(2) claim here. *See Am. Bar Ass'n v. FTC*, 671 F. Supp. 2d 64, 81 (D.D.C. 2009) ("[I]n the end, as instructive as it might be, one agency's interpretation of a congressional statute is not controlling on another agency's interpretation of that same statute." (citation omitted)) *vacated and remanded on other grounds*, 636 F.3d 641 (D.C. Cir. 2011); *see also Old Colony R. Co. v. Comm'r of Internal Revenue*, 284 U.S. 552, 562 (1932) (holding that the rules of accounting enforced by the Interstate Commerce Commission are not binding upon the IRS).

"does not perform its normal role, but instead sits as an appellate tribunal." *Palisades Gen. Hosp. Inc. v. Leaveitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (citation omitted). Accordingly, "under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with correct legal standards." *Id*. (citation omitted); *see also N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) ("When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal."). A district court lacks authority to order specific relief where it finds a § 706(2) violation. *Palisades Gen. Hosp.*, 426 F.3d at 403.

Much of Plaintiffs' requested relief in this case exceeds the scope of a court's authority under the APA. Rather than simply asking that the Court invalidate DoD's current policy, Plaintiffs request that the Court enter various types of specific relief, including that the Court require DoD to complete N-426 forms for members of the Selected Reserve, *see* Pls.' Mot. at 2 (asking the Court to "preliminarily restrain Defendants from refusing to sign and issue Form N-426s to members of the Selected Reserve"); issue criteria for DoD's honorable-service determinations, *see id*. ("restrain Defendants from refusing to certify honorable service to members of the Selected Reserve, except as related to the conduct of an individual Plaintiff or Class member as reflected in that soldier's service record and based on sufficient grounds generally applicable to all members of the military"); preclude DoD from discharging or separating non-naturalized MAVNI soldiers except on terms dictated by the Plaintiffs, *see id*. ("restrain Defendants from discharging or separating Plaintiffs or members of the Class pending

completion of their N-426 Forms and processing of their naturalization applications, except as related to the conduct of an individual soldier and based on sufficient grounds generally applicable to members of the military for discharge from service"); and micromanage DoD's MAVNI program, *see id.* ("compel Defendants to provide weekly reports to the Court, Plaintiffs, and the Class" regarding the status of individual honorable service certifications and any plans to discharge certain individuals).[5]

Not only does Plaintiffs' requested relief exceed the power conferred on a court by the APA, but it furthermore fails to account for the inherently individualized, context-specific nature of most military personnel decisions. Plaintiffs are effectively asking this Court to craft a one-sized-fits-all standard for both the honorable-service certifications and discharge of MAVNI soldiers who have not received honorable-service certifications. *See id*. Yet both of those decisions require assessments that are unique and specific to particular individuals. Handcuffing DoD by dictating the terms by which it certifies a soldier as having served honorably and requiring those certifications to occur by a particular point in time would intrude on area where courts have historically given the military the most deference. *See, e.g.*, *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979) ("[G]iven the special circumstances in which the military must operate, the courts are ill-equipped to resolve controversies arising from the use of discretionary powers specifically designed to provide military authorities with the freedom and flexibility needed to establish and maintain a well-trained and well-disciplined armed force."). The Court cannot, and should not, award Plaintiffs this type of relief.

D. Plaintiffs cannot state a claim for mandamus relief

[5] Plaintiffs further request that the Court enter an order "plac[ing] and maintain[ing] the parties in the pre-dispute status quo," Pls.' Mot. at 2, but it is not clear what form this relief would take. Plaintiffs had not received honorable-service certifications prior to the initiation of this lawsuit, so the pre-dispute status quo has not changed.

For largely the same reasons discussed above, Plaintiff also cannot invoke the mandamus statute as a basis for their claims here. Many courts have treated the standards for mandamus and relief under 5 U.S.C. § 706(1) as indistinguishable. *See, e.g., Covelo Indian Cmty.*, 551 F. Supp. at 381 ("Mandatory injunctive relief under § 706(1) or 28 U.S.C. § 1361 is appropriate if the court's study of the statute and relevant legislative materials cause[s] it to conclude that the defendant official ha[s] failed to discharge a duty that Congress intended him to perform." (citation omitted)). To the extent the mandamus action is distinct, the requirements necessary for the issuance of a writ of mandamus are even more onerous than those under the APA. As described by the D.C. Circuit:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances. Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.

Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (citations omitted). Even if a plaintiff can carry its burden of satisfying these three elements, "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

Here, Plaintiff has met none of those elements. First, for the reasons discussed above in Section B, Plaintiff does not have a clear right to relief, nor does DoD have a "clear duty to act." The statutory text at issue makes it clear that DoD has no ministerial, non-discretionary obligation to certify members of the Selected Reserve as having served honorably or to do so within a particular amount of time.

Moreover, Plaintiffs cannot establish that they have no other available remedy. Indeed, Plaintiffs' mandamus claim is entirely duplicative of their § 706(1) claim under the APA. *Compare* Compl. ¶¶ 94-96 (§ 706(1) claim), *with id*. ¶¶ 100-05 (request for mandamus). The two counts seek virtually identical relief, and are premised on the same underlying legal theories.

Id. Thus, whatever judicial review Plaintiffs are entitled to here, there is no question that Plaintiffs can obtain that review through the APA only. When a plaintiff has alternative means of obtaining its desired relief, then by definition there are no extraordinary circumstances warranting the drastic remedy of mandamus. *See Kerr v. U.S. Dist. Court for N. Dist. Cal.*, 426 U.S. 394, 402-03 (1976) ("As a means of implementing the rule that the writ [of mandamus] will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires[.]"); *see also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The availability of a remedy under the APA technically precludes [the plaintiff's] alternative request for a writ of mandamus[.]"). Thus, any claims under the mandamus statute are meritless.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for a Preliminary Injunction and grant Defendants' Cross-Motion for Summary Judgment.

Dated: October 10, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO, *et al.*, Plaintiffs, vs. DEPARTMENT OF THE ARMY, *et al.*, Defendants.	Civil Action No. 18-1551 (ESH)

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to the Court's Order entered on May 24, 2019 (ECF No. 96), Defendants the Department of the Army ("Army") and the Secretary of the Army Dr. Mark T. Esper (collectively, "Defendants"), by and through counsel, respectfully submit this sur-reply memorandum in opposition to Plaintiffs' renewed motion for class certification and appointment of class counsel (hereinafter, "Motion for Class Certification") (ECF No. 62).

I. INTRODUCTION

MAVNIs,[1] whether they are DEP recuits or DTP recruits, are processed for separation for non-MSSD reasons in the exact same manner as every other DEP and DTP in the Army, regardless of the recruit's mode of accession into the Army. The procedures for DEPs and DTPs are meaningfully different because DEPs, who are assigned only to USAREC, are subject only to USAREC Regulation 601-210, *Enlistment and Accessions Processing* (July 20, 2018) (Reference

[1] This memorandum utilizes the following acronyms that have been frequently used throughout this litigation and defined in prior memoranda: Military Accessions Vital to the National Interest ("MAVNI"), Delayed Entry Program ("DEP"), Delayed Training Program ("DTP"), Military Service Suitability Determination ("MSSD"), United States Army Recruiting Command ("USAREC"), United States Army Reserve Command ("USARC"), and Army Regulation ("AR" followed by the regulation number).

1) and do not fall under the provisions of AR 135-178, *Army National Guard and Reserve Enlisted Administrative Separations* (Nov. 7, 2017) (Reference 2), which sets forth the enlisted administrative separation procedures for the Army Reserve. DTPs, who are assigned to both USAREC and USARC, are subject to the requirements of both USAREC Regulation 601-210 and AR 135-178.

DTPs discharged from USARC for non-MSSD reasons under AR 135-178 are discharged on any number of bases and are therefore subject to the specific pre-notification procedures and requirements of the specific provision relative to the reason for their discharge. The substance of the required discharge procedures vary significantly from one basis to another, from the requirement for a determination that a pregnant soldier was pregnant at the time of enlistment or became pregnant after enlistment (AR 135-178 ¶ 6-3 and ¶ 6-6); to whether a soldier's enlistment or reenlistment was fraudulent (*id*. ¶ 7-4); to a judgment call by a commander that a soldier will not develop to participate satisfactorily in further training (*id*. ¶ 9-2); to a commander's determination of whether a soldier's misconduct is a minor disciplinary infraction, a pattern of misconduct, or a serious offense (*id*. ¶ 11-1).

The Army processes discharges for all DEP and DTP recruits—to include MAVNIs—in accordance with the applicable regulations. MAVNI DEPs and DTPs are processed for separation in exactly the same manner as non-MAVNI recruits, except MAVNIs subject to separation for an unfavorable MSSD, who are processed for separation in accordance with the Army's October 26, 2018 policy memorandum (ECF No. 50-1).

II. THE COURT'S MAY 24, 2019 ORDER

On May 24, 2019, the Court ordered Defendants to file a sur-reply regarding Plaintiff's motion for class certification. Order (ECF No. 96). The Court ordered that the sur-reply be no

more than 10 pages and address the following for proposed sub-class 2[2] (*i.e.*, putative class members discharged for non-MSSD reasons):

> 1. Defendants shall identify the specific regulations that defendants allege apply to discharges of DTPs and DEPs, and the specific ways in which the substance of the required discharge procedures for each group differ, if at all.
>
> a. If Defendants argue that the discharge procedures meaningfully differ for DTPs and DEPs, defendants should address, for example, why a DEP soldier who under AR 135-178 ¶ 14-7 appears to be entitled to the notification procedure outlined in chapter 3, sec. II of AR 135-178 should not be in the same class as a DTP soldier discharged for entry-level performance and conduct, who under AR 135-178 ¶ 8-4 also appears to be entitled to the notification procedure outline in chapter 3, sec. II of AR 135-178.
>
> 2. Since defendants argue that differences among putative class members in the reason for their discharge should prevent class certification (Defs.' Opp. to Mot. for Class Cert. at 26-27, ECF No. 89), defendants shall identify the specific regulations that defendants allege apply to discharges of MAVNI soldiers for *each* "basis for discharge" category listed on ECF No. 27-2, and the specific ways in which the substance of the required discharge procedures differ for each discharge category, if at all.
>
> 3. Is it Defendants' position that each MAVNI soldier discharged for non-MSSD reasons, including but not limited to those listed on ECF No. 27-2, received the procedures required by the applicable regulations?

Id. (emphasis in original).

III. ARGUMENT

USAREC Regulation 601-210 applies to discharges of all DTPs and DEPs,[3] including MAVNIs, who do not have an unfavorable MSSD and will not be subject to the Army's October 26 policy memorandum.

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[2] Plaintiffs' proposed sub-class 2 includes recruits who do not have an unfavorable MSSD and will not be subject to the procedures outlined in the October 26 policy memorandum. ECF No. 62 at 3-4.

[3] This regulation applies to **all** DEP and DTP recruits, not just MAVNIs. Plaintiffs have argued in this litigation that Defendants are discharging MAVNIs under these procedures for discriminatory reasons, *i.e.*, *because they are MAVNIs*. These procedures, however, apply to all DEPs and DTPs, regardless of their mode of accession into the Army.

Army Regulation 601-210, *Regular Army and Reserve Components Enlistment Program* (Aug. 31, 2016) (Reference 3), Chapter 5, Section VII, Paragraph 5-28.a., authorizes the Commanding General ("CG") of USAREC "to—(1) Organize and administer the Army Reserve Control Group (DEP) to which enlistees will be assigned." Paragraph 5-29.b. identifies the recruiting battalion commander as the delegated authority to separate DEP enlistees as directed by the Commanding General of USAREC or the Deputy Chief of Staff, G-1 ("DCS, G-1"). "In addition, recruiting battalion commanders may void enlistments according to AR 635-200 [*Active Duty Enlisted Administrative Separations*] or AR 135-178, when appropriate." *Id*.

Pursuant to the authority of Army Regulation 135-178, ¶ 1-11, the Commanding General of USAREC may order DEP and DTP separations prior to the expiration of their service obligation. *Id*. ¶ 1- 11.b.(6). Under the same authority, the Commanding General of USAREC may delegate to the commander of a U.S. Army recruiting battalion separation authority for DEP, Reserve DEP, and DTP members. A recruiting battalion commander may also void enlistments of soldiers under his jurisdiction. *Id*.

In accordance with these authorities, USAREC Headquarters issued USAREC Regulation 601-210, Appendix I, which "outlines procedures for processing DEP/DTP/DS [Delayed Status] separations after the initial Oath of Enlistment." *Id*. Appx. I ¶ I-1. USAREC Regulation 601-210 is thus the controlling regulation and authority governing processing of all DEP and DTP discharges from USAREC for non-MSSD reasons, whether the DEP or DTP recruit assessed through the MAVNI program or not.

1. All DEPs and DTPs—including MAVNIs—are Processed for Separation from USAREC In Accordance With USAREC Regulation 601-210, Appendix I.

Requests for separation from the DEP or DTP are approved for valid reasons identified in AR 601-210 and AR 135-178, and fall into three broad categories: (1) the result of a request

from a member of the DEP or DTP; (2) the discovery of an erroneous or fraudulent enlistment; or (3) medical disqualifications. *Id.* ¶ I-2. From these three broad categories, USAREC Regulation 601-210 contemplates at least sixteen specific bases for separation and an additional "other" basis. USAREC Reg. 601-210, Appx. I, Table I-1. Each basis requires specific documentation and sometimes requires different separation procedures. *See id.*

The procedures for separating DEPs and DTPs from USAREC for one of the sixteen disqualifying reasons are set forth in USAREC Regulation 601-210, Appendix I, ¶ I-4. When a valid reason exists to separate a DEP or DTP from USAREC under AR 135-178 (as identified in Tables I-1 and I-2), USAREC initiates a separation request using USAREC Form ("UF") 601-210.21 (example provided as Exhibit A). The UF 601-210.21 must be signed by the DEP/DTP, but if the DEP/DTP is unavailable or refuses to sign, the command is directed to "write 'unavailable for signature' or 'refuses to sign' in the remarks section of the form." USAREC Reg. 601-210, Appx. I, ¶ I-4.a.(1). According to the regulation, Battalion Operations ("Bn Ops") "will cancel the [training] reservation" and "will publish appropriate separation orders within 14 days." *Id.* ¶ I-4.a.(2)-(3). The regulation further clarifies that this provision applies specifically to DEPs/DTPs: "[w]hen a FS [Future Soldier] enlists into DEP/DTP, . . . [t]he [Battalion] publishes the discharge order within 14 days of the cancellation of the reservation." *Id.* ¶ I-4.c.

In the case of a DEP, who is assigned solely to USAREC, the USAREC discharge order issued in accordance with USAREC Regulation 601-210, Appendix I, cancels their enlistment contract, removes them from the DEP, and removes them from USAREC.

1.a. Once Their Training Reservations are Revoked Via USAREC Orders, DTPs are Processed for Discharge from the USARC In Accordance With AR 135-178

Once USAREC issues its discharge order to a DTP (thereby cancelling the DTP's reservation for initial entry training), the DTP's separation action is forwarded to the United

States Army Reserve (USAR) Troop Program Unit (TPU)[4] for further separation processing. The unit follows the provisions of AR 135-178 for the particular basis of separation the recruit is subject to. There is no specific reference to the "DTP" in AR 135-178, but because DTPs are assigned to the USAR, the USAR utilizes the separation procedures of the specific provisions of AR 135-178 that applied to the individual being processed for discharge.

While each reason for discharge follows the notification procedure in AR 135-178, Chapter 3, Section II (provided an under other than honorable conditions discharge is not authorized), the required discharge procedures and requirements are significantly different, depending on the reason for discharge. In other words, there are significant differences in the pre-notification procedures and requirements for each chapter of AR 135-178. To determine if a discharge was processed in accordance with regulation and therefore lawful, any review would have to include assessment of the propriety and lawfulness of the basis for discharge, the pre-notification procedural requirements (including counseling and rehabilitative efforts)[5], the notification requirements, and whether the proper separation authority took action.

The following chart identifies the reason for discharge and citations to AR 135-178 setting out extensive pre-notification procedures and requirements for each basis for discharge.

* * *

[4] The Troop Program Unit is the DTP's assigned unit in the Army Reserve.

[5] "Counseling and rehabilitative efforts are a prerequisite to initiation of separation proceedings only as far as expressly set forth under the specific requirements for the separation. An alleged or established inadequacy in previous rehabilitation efforts does not bar separation. AR 135-178, ¶2-4.

Reason for Discharge	Pre-Chapter 3, Section II Notification Procedures
Pregnancy	AR 135-178, ¶ 6-3, recruit's voluntary request for discharge; ¶ 6-6, involuntary – not medically qualified
Failure to Meet Medical Procurement Standards	AR 135-178, ¶ 6-6.a-c. – requirements for soldiers not medically qualified under procurement medical fitness standards
Fraudulent Enlistment	AR 135-178, ¶ 7-4.b.(1) – first test for establishing fraudulent enlistment; ¶ 7-4.b.(2) – second test for fraud
Entry Level Performance and Conduct	AR 135-178, ¶ 8-1; Counseling (¶ 2-4, ¶ 8-2)
Unsatisfactory Performance	AR 135-178, ¶ 9-2; Counseling (¶ 2-4, ¶ 9-3)
Misconduct	AR 135-178, ¶ 11; Counseling (¶ 2-4, ¶ 11-5)
Other Reasons	AR 135-178, ¶ 14
Failure to Meet Army Body Composition Standards	AR 135-178, ¶ 15-2; Counseling (¶ 2-4, ¶ 15-3)

For example, for a soldier who fails to meet medical procurement standards, the Army is required to follow the pre-notification procedures outlined in AR 135-178, ¶ 6-6. The Army must obtain a medical finding from the staff surgeon that the "Soldier has a medical condition that –

> (a) Would have permanently disqualified them from entry into the Army had it been detected at the time of enlistment; and
> (b) Does not qualify them from retention under the provisions of AR 40-501."[6]

Id.

In contrast to the few pre-notification requirements in ¶ 6-6, a separation for fraudulent enlistment requires extensive pre-notification actions. In accordance with AR 135-178, ¶ 7-4 (fraudulent enlistments or reenlistments), a soldier may be separated "on the basis of procurement of a fraudulent enlistment or reenlistment through any deliberate material misrepresentation, or concealment of which, if known at the itme of the enlistment or reenlistment migh have resulted in rejection." *Id*. To establish fraud, the Army must apply one

[6] AR 40-501, *Standards of Medical Fitness* (June 14, 2017), is the controlling regulation for medical fitness standards for induction, enlistment, appointment, and retention in the Army.

of two tests, approporiately entitled the "first test" or "second test" after completeing fact-finding. *Id*. These tests are used to determine if the enlistment or reenlistment was, in fact, fraudulent. The Army command determines if the evidence found substantiates a fraudulent enlistment. If the information found does not amount to a disqualification, if the defect is no longer present, or if the defect is waivable (and a waiver has been obtained by the appropriate authority), then there is not a fraudulent enlistment and separation would not be authorized.

On the other hand, if after fact-finding and application of one of the two tests, the Army finds the enlistment was fraudulent, then (and only then) may it initiate separation under AR 135-178, ¶ 7-4. These extensive requirements and pre-notification procedures are just a couple of examples of the significant differences in the procedures required by each chapter of AR 135-178. A legal sufficiency review of a discharge would therefore require assessment of the propriety and lawfulness of the basis for discharge, the pre-notification procedural requirements (including counseling and rehabilitation requirements, if applicable), notification requirements, and whether the proper separation authority took action.

These requirements (and the other requirements for specific discharges set forth in AR 135-178) underscore the specific ways in which the substance of the required discharge procedures differ for each discharge category.

2. USAREC Regulation 601-210 Applies to MAVNIs in the DEP and DTP; AR 135-178 Applies Only to MAVNIs in the DTP

The specific ways in which the substance of the required discharge procedures differ for each discharge category are too extensive to fully identify in this brief, but the chart below identifies the reasons for discharge listed in ECF No. 27-2, the regulations that apply to each specific basis for discharge, and the paragraphs that contain the specific ways in which the substance of the required discharge procedures differ for each discharge listed in ECF No. 27-2.

Reason for Discharge	Applicable Regulation/Paragraph
Apathy/Personal Problem	AR 135-178, Chapter 6 (Convenience of the Government – dependency or hardship), ¶ 14-5; USAREC Reg. 601-210, Appx. I ¶ I-4
Declined to Ship	USAREC Reg. Appx. I ¶ I-11, ¶ I-4
Refuse to Enlist	USAREC Reg. Appx. I ¶ I-7, ¶ I-4
Failed Medical/Physical Procurement Standards	AR 135-178 ¶ 6-6; USAREC Reg. Appx. I ¶ I-4, ¶ I-11
Entry Level Performance and Conduct	AR 135-178, Chapter 11; USAREC Reg. Appx. I ¶ I-11
Pregnancy	AR 135-178 ¶ 6-3, ¶ 14-5; USAREC Reg. Appx. I ¶ I-11
Education	AR 135-178, Chapter 14; USAREC Reg. Appx. I ¶ I-11
Police Record/Charge After DEP Enlistment	AR 135-178, Chapter 11, 14
Moral/Legal Reason	AR 135-178, Chapter 9, 11, 14
Fraudulent Enlistment	AR 135-178 ¶ 7-4; USAREC Reg. Appx. I

3. Each MAVNI Discharged for Non-MSSD Reasons, Including but Not Limited to Those Listed on ECF No. 27-2, Received the Procedures Required by the Applicable Regulations.

The Army processes and did process discharges for all DEP and DTP recruits—to include MAVNIs—in accordance with the applicable regulations. MAVNI DEPs and DTPs are processed for separation in exactly the same manner as non-MAVNI recruits, except MAVNIs subject to separation for an unfavorable MSSD. If an individual MAVNI contends that the Army failed to properly follow discharge procedures and wishes to contest her discharge on any basis, the appropriate authority to review the alleged deficiency is the Army Review Boards Agency, including the Army Discharge Review Board ("ADRB") and the Army Board for the Correction of Military Records ("ABCMR").

For example, named plaintiff Xing Lu[7] sought ABCMR review of her discharge and was reinstated in the Army. Plaintiff Lu enlisted as a recruit in the DEP and did not attend IET for a

[7] Plainitff Lu is a DEP recruit and the only named plaintiff in the DEP. 2d Am. Compl. (ECF No. 61) ¶¶ 110-114.

period of over two years. Therefore, due to two-year statutory requirement,[8] she had to be separated from the DEP. Plaintiff Lu should have been included in a group petition to the ABCMR seeking to allow DEP recruits who had already been in the Army beyond the two-year period to continue in the DEP. The ABCMR granted relief to the group by correcting their military records to move the enlistment date a year forward, allowing them to serve beyond the two-year mark. Due to an error, Plaintiff Lu was not included in the group. Plaintiff Lu sought reinstatement through the Army and filed a petition with the ABCMR seeking reinstatement and approval for continued service in the DEP. Her petition was granted on January 15, 2019, correcting her enlistment date from January 19, 2016 to January 19, 2017. As a result, Plaintiff Lu was found eligible to continue to serve in the DEP. *See* ECF No. 89-2 (Ex. A to St. Clair Dec.) (ABCMR documents pertaing to Xing Lu).[9]

As Plaintiff Lu's application to the ABCMR demonstrates, the Army has an existing administrative procedure for addressing claims for wrongful or erroneous discharge for all servicemembers discharged from the Army, regardless of their mode of accession.

CONCLUSION

For the reasons stated above and in Defendants' opposition memorandum (ECF No. 89), Defendants respectfully request that the Court deny Plaintiff's Motion for Class Certification.

Dated: June 9, 2019

Respectfully submitted,

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

[8] In accordance with 10 U.S.C. § 513, members of the DEP are required to attend Initial Entry Training ("IET") and enter the active duty Army within two years from the time they contract to serve in the Army via the DEP.

[9] On January 22, 2019, the Army issued a favorable MSSD for Specialist Xing Lu and she shipped to basic training on May 30, 2019.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of June 2019, I served upon counsel for Plaintiffs the foregoing Defendants' sur-reply memorandum in opposition to Plaintiffs' motion for class certification by filing said document using the Court's Electronic Case Filing System.

Dated: June 9, 2019

/s/ Roberto C. Martens, Jr.
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Special Assistant United States Attorney

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY, et al., Defendants.	Civil Action No. 1:18-cv-01551 The Honorable Ellen Segal Huvelle

DECLARATION OF LIN H. ST. CLAIR

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I make this declaration to provide the Court with the results of an inquiry into the July 3rd report of waiver memorandums being forwarded without proper authorization. The Army was made aware on July 3, 2019, that Lucas Calixto, a named Plaintiff, received a second unauthorized Voluntary Waiver of Notification of Adverse MSSR memorandum.

2. I am currently the Assistant Deputy for Recruiting, Office of the Assistant Secretary of the Army (Manpower & Reserve Affairs). In this capacity, I am responsible for serving as the Senior Advisor on all matters relating to military accessions and retention for the Assistant Secretary of the Army for Manpower and Reserve Affairs, the Principal Deputy, and the Deputy Assistant Secretary of the Army for Military Personnel. I have oversight responsibilities for the Army's officer and enlisted accessions and retention programs across all components. In this capacity, I serve as the action officer oversight for non-citizen recruiting (MAVNI and Lawful Permanent Residents). I have previously submitted declarations in this case. *See* ECF No. 22-1; ECF No. 24-1; ECF No. 48; ECF No. 103-1.

3. On June 17, 2019, the Army informed the Court that copies of an unauthorized version of the "Voluntary Waiver of Notification of Adverse MSSR" were distributed by one recruiter to 13 recruits, including named plaintiff Lucas Calixto, between on or about May 21, 2019 and on or about May 31, 2019. On May 31, 2019, USAREC Headquarters informed all Recruiting Battalions that use of the Waiver Memo was not authorized. *See* ECF No. 103. The Army has not authorized the distribution of any Voluntary Waiver of Notification of Adverse MSSR Memos since providing the status report on June 17, 2019.

4. On June 18, 2019, the Army issued an adverse MSSR notification to Plaintiff Calixto.

5. On June 26, 2019, a Soldier assigned to Headquarters, US Army New England Recruiting Battalion ("Battalion"), prepared the monthly Down Report ("DOWNREP")[1] to send to the New England Recruiting Stations. In preparing the DOWNREP, the Soldier cut and pasted the information contained in the prior DOWNREP from May 2019; in so doing, he unintentionally neglected to remove the prior month's references to issuing MAVNI Soldiers the Voluntary Waiver of Notification of Adverse MSSR memoranda prior to receiving MSSR notifications. Moreover, the DOWNREP was not properly edited prior to release. The DOWNREP, as well as another copy of the same unsigned Voluntary Waiver of Notification of Adverse MSSR memorandum sent in May 2019 (but dated 27 June 2019), was emailed from the Battalion on June 27, 2019, and received by Plaintiff Calixto's recruiter that same day.

6. The recruiter assumed that the Voluntary Waiver of Notification of Adverse MSSR memorandum attached to the DOWNREP was a newer authorized version of the prior month's memorandum. Believing that he was acting on his battalion headquarters' instructions,

[1] A DOWNREP is a written document that Battalions periodically send out (usually monthly) as a way to disseminate information from the Battalion to its Recruiting Stations.

the recruiter e-mailed the Voluntary Waiver of Notification of Adverse MSSR memorandum to Plaintiff Calixto on July 2, 2019. Plaintiff Calixto acknowledged receipt of the memorandum via e-mail on July 3, 2019.

7. The Voluntary Waiver of Notification of Adverse MSSR memorandum was distributed as a result of human oversight within the Battalion, not as part of any attempt to circumvent the court order or to coerce Plaintiff Calixto to waive his rights. Indeed, the Battalion was aware that they were to send no further memoranda—on June 3, 2019, the Battalion acknowledged the Army's directive prohibiting further sending of Voluntary Waiver of Notification of Adverse MSSR memoranda to any MAVNI Soldiers. The Battalion subsequently passed that directive to each of its Recruiting Stations. The Battalion was unaware of the error until I informed them on July 9, 2019.

6. The Battalion has confirmed that the waiver memorandum guidance will not be included in any subsequent DOWNREPs and that the recruiter was informed again that he is to have no contact with Plaintiff Calixto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2019.

Lin H St. Clair Digitally signed by Lin H St. Clair
Date: 2019.07.09 16:00:43 -04'00'

LIN H. ST. CLAIR

Nio – Potential Recovery Totals

Fees (based on 15,325.50 hours)

	Plaintiffs' Standard Billing	Plaintiffs' Requested LSI-*Laffey* Matrix	EAJA	EAJA w/ COLA
Fees (no reduction)	$13,690,246	$9,757,453	$1,915,687.50	$3,181,632.49
Fees (50% reduction)	$6,845,123	$4,878,726.50	$957,843.75	$1,590,816

Costs + Expenses

Plaintiffs' Requested Costs and Expenses	Recoverable Costs and Expenses	Plaintiffs' Requested Costs	Recoverable Costs	Plaintiffs' Requested Expenses	Recoverable Expenses
$34,147.22	$4,932.83	$8,952.74	$4,932.83	$24,194.48	$0

Fees + Costs + Expenses

	Plaintiffs' Standard Billing	Plaintiffs' Requested LSI-*Laffey* Matrix	EAJA	EAJA (50% reduction)	EAJA w/ COLA	EAJA w/ COLA (50% reduction)
Fees + Plaintiffs' Requested Costs and Expenses	$13,724,393.22	$9,791,600.22	$1,949,834.72	$991,990.97	$3,215,779.71	$1,607,889.86
Fees + Recoverable Costs and Expenses (50% reduction to expenses)	$13,707,259.39	$9,774,466.39	$1,932,700.89	$974,857.14	$3,198,645.88	$1,599,322.94
Fees + Recoverable Costs and Expenses (excluding Westlaw and Data)	$13,695,178.83	$9,762,385.83	$1,920,620.33	$962,776.58	$3,186,565.32	$1,593,282.66

LSI-Laffey Matrix and Real Rate Report / Peer Monitor Comparison[1]

2018 Real Report Rates ("RRR") **(**all rates are for "Q3" and "Median")

Attorney	2018 Standard Rate	2018 LSI-*Laffey* Matrix	2018 RRR Commercial: 1k+	2018 RRR Commercial: 201-500	2018 RRR Govt. Relations: 501-1k*	2018 RRR Emp. & Labor:
Baruch (P)	1,350	894	857	640	809	missing from Plaintiffs' exhibit, likely available on p.128
Wollenberg (P)	1,025	742	857	640	809	
Raol (A)	945	658	574	427	unavailable	
LoPresti (A)	545	371	574	427	unavailable	

2019 Real Report Rates ("RRR") **(**all rates are for "Median")

Attorney	2019 Standard Rate	2019 LSI-*Laffey* Matrix	2019 RRR Commercial: 1k+	2019 RRR Commercial: 201-500	2019 RRR Govt. Relations: 501-1k*	2019 RRR Emp. & Labor: 201-500
Baruch (P)	1,415	899	950	664	784	701
Wollenberg (P)	1,075	747	950	664	784	701
Raol (A)	1,000	661	625	438	No asso. listed	625
LoPresti (A)	575	372	625	438	No asso. listed	625

2020 Peer Monitor (all rates are for "Mean")

Attorney	2020 Standard Rate**	2020 LSI-*Laffey* Matrix	2020 Peer Monitor
Baruch (P)	1,195	914	1,139
Wollenberg (P)	895	759	986
Raol (A)	725	759	823
Mendelson (A)	565	465	591

** Data for the appropriate Firm Size "201-500" was unavailable for the Government Relations practice area.*
***Counsel moving from Fried Frank to Morgan Lewis between 2019 and 2020 firms likely explains these lower rates.*

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[1] *To facilitate comparison, and in the interests of brevity and clarity, a sampling of two partners (P) and two associates (A)(a more senior and junior associate) are included.*

Nio – EAJA Costs and Expenses Summary

Summary of Recoverable Costs (if any fees are awarded)

Cost under 28 U.S.C. § 1920	Amount Requested	Amount Recoverable
Filing fees	$1,645.38	0
Court reporting	$ 6,234.44	$3,859.91
Printing and Duplicating	$1,072.92	$1,072.92
Total	*$8,952.74*	*$4,932.83*

Summary of Recoverable Expenses (if any fees are awarded)

Expenses	Amount Requested	Amount Recoverable
Courier Service	$22.55	0
Data Research - Mng Atty	$13,574.28	0
Postage	$51.38	0
Teleconferencing	$338.32	0
Website	$621.12	0
Westlaw	$10,586.83	0
Total	*$25,194.48*	*$0*

Summary of Recoverable Costs and Expenses (if any fees are awarded)

	Amount Requested	Amount Recoverable
Costs	$8,952.74	$4,932.83
Expenses	$25,194.48	$0
Total	*$34,147.22*	*$4,932.83*

Should the Court decide to award some recovery for expenses, Defendants believe that a 50% reduction is warranted and would yield the following calculations:

Summary of Recoverable Expenses (if any fees are awarded, 50% reduced expenses)

Expenses	Amount Requested	Amount Recoverable
Courier Service	$22.55	0
Data Research - Mng Atty	$13,574.28	$6,787.14
Postage	$51.38	0
Teleconferencing	$338.32	0
Website	$621.12	0
Westlaw	$10,586.83	$5,293.42
Total	*$24,194.48*	*$12,080.56*

Summary of Recoverable Costs and Expenses (if any fees are awarded, 50% reduced expenses)

	Amount Requested	Amount Recoverable
Costs	$8,952.74	$4,932.83
Expenses	$25,194.48	$12,080.56
Total	*$34,147.22*	*$17,013.39*

Sampling of Billing Records Analysis

This exhibit provides a sampling of the inadequacies of Plaintiffs' billing records. Pages were selected at random and cover the course of the litigation to provide a more accurate sampling. Upon the Court's requests, Defendant will provide a complete billing records analysis.

As block billing was prevalent throughout the records, and would overlap, and thereby interfere, with identifying other inadequacies, it is not specifically identified. The following colors are used to identify different inadequacies:

Green	Vague / insufficiently detailed to determine whether work is compensable
Yellow	Work on individual cases, as opposed to class action issue
Blue	Work on cases other than *Nio*
Pink	Monitoring *Nio* inbox
Gray	Overstaffing

EXHIBIT 6

Nio v. DHS, et al.

Morgan Lewis Timesheets

Timekeeper	Title	Worked Date	Hours	Amount	Narrative
WOLLENBERG, JENNIFER M.	Partner	7/22/2019	0.70	626.50	Discussions with MAVNIs concerning issues/updates/concerns.
BARUCH, DOUGLAS W.	Partner	7/23/2019	2.00	2,390.00	Address status/strategy; call w. plaintiff.
WOLLENBERG, JENNIFER M.	Partner	7/23/2019	4.20	3,759.00	Discuss issues/concerns/updates, including call with plaintiff, emails with team members, and emails with other MAVNIs.
BARUCH, DOUGLAS W.	Partner	7/24/2019	1.50	1,792.50	Draft guidance to MAVNI; address status/strategy.
WOLLENBERG, JENNIFER M.	Partner	7/24/2019	4.40	3,938.00	Address MAVNI naturalization processing issues/updates/concerns, including discussions with team members, common interest counsel, and MAVNIs (including plaintiff).
BARUCH, DOUGLAS W.	Partner	7/25/2019	1.50	1,792.50	Address counsel correspondence, status, and strategy.
WOLLENBERG, JENNIFER M.	Partner	7/25/2019	5.20	4,654.00	Address MAVNI naturalization processing issues/updates/concerns, including discussions with MAVNIs, team members, and common interest counsel.
WOLLENBERG, JENNIFER M.	Partner	7/26/2019	3.90	3,490.50	Address MAVNI naturalization processing issues, including discussions with MAVNIs, team members, and common interest counsel.
WOLLENBERG, JENNIFER M.	Partner	7/27/2019	1.20	1,074.00	Emails from MAVNIs and common interest counsel re naturalization application processing updates/questions/concerns.
BARUCH, DOUGLAS W.	Partner	7/28/2019	1.50	1,792.50	Address status and case management.
WOLLENBERG, JENNIFER M.	Partner	7/28/2019	4.90	4,385.50	Address MAVNI questions/update/concerns re naturalization application processing, including discussions with MAVNIs and others.
WOLLENBERG, JENNIFER M.	Partner	7/29/2019	2.50	2,237.50	Address MAVNI naturalization processing issues and questions, including discussions with MAVNIs and others.
BARUCH, DOUGLAS W.	Partner	7/30/2019	0.70	836.50	Meet and confer w. DOJ counsel and follow-up.
WOLLENBERG, JENNIFER M.	Partner	7/30/2019	4.30	3,848.50	Address MAVNI issues/updates/concerns, including discussions re denial following non-discharge and discussions with MAVNIs and common interest counsel; discussions re DOJ's decertification argument; meet and confer with DOJ counsel and follow-up re same.
WOLLENBERG, JENNIFER M.	Partner	7/31/2019	3.50	3,132.50	Address naturalization application processing issues and questions, including discussions with MAVNIs re same.
BARUCH, DOUGLAS W.	Partner	8/1/2019	0.50	597.50	Address MAVNI correspondence and calls.
WOLLENBERG, JENNIFER M.	Partner	8/1/2019	3.50	3,132.50	Address MAVNI naturalization application processing, including discussions with MAVNIs and common interest counsel.
WOLLENBERG, JENNIFER M.	Partner	8/2/2019	4.20	3,759.00	Address MAVNI naturalization application processing issues/questions/concerns, including discussions with MAVNIs; conference with ML attorneys re matter.
BARUCH, DOUGLAS W.	Partner	8/2/2019	1.20	1,434.00	Address status, strategy, other issues; conference with ML attorneys re matter.
WOLLENBERG, JENNIFER M.	Partner	8/4/2019	0.30	268.50	Emails re MAVNI naturalization application processing concerns/questions.
WOLLENBERG, JENNIFER M.	Partner	8/5/2019	5.90	5,280.50	Address MAVNI naturalization application processing issues/questions/concerns, including discussions with MAVNIs and others.
BARUCH, DOUGLAS W.	Partner	8/5/2019	1.50	1,792.50	Address class inquiries, strategy and status.
BARUCH, DOUGLAS W.	Partner	8/6/2019	1.20	1,434.00	Address DOJ correspondence and status.
WOLLENBERG, JENNIFER M.	Partner	8/6/2019	5.20	4,654.00	Address questions/updates/concerns regarding MAVNI naturalization application processing, including discussions with MAVNIs and common interest counsel.
BARUCH, DOUGLAS W.	Partner	8/7/2019	1.90	2,270.50	Address DOJ filings and respond to client inquiries.
WOLLENBERG, JENNIFER M.	Partner	8/7/2019	5.50	4,922.50	Address MAVNI naturalization application processing issues/updates/concerns, including discussions with MAVNIs and review of recent Government class-wide reporting.
WOLLENBERG, JENNIFER M.	Partner	8/8/2019	4.80	4,296.00	Address MAVNI soldiers' naturalization application processing issues/updates/concerns, including discussions with MAVNIs and common interest counsel.

Nio v. DHS, et al.

Morgan Lewis Timesheets

Timekeeper	Title	Worked Date	Hours	Amount	Narrative
WOLLENBERG, JENNIFER M.	Partner	10/15/2019	4.90	4,385.50	Address N-400 processing issues, including calls with MAVNIs.
BARUCH, DOUGLAS W.	Partner	10/15/2019	1.50	1,792.50	Calls w. MAVNIs re naturalization policies/practices of USCIS.
WOLLENBERG, JENNIFER M.	Partner	10/16/2019	7.40	6,623.00	Address MAVNI naturalization application processing issues/updates/concerns, including discussions with MAVNIs and others.
BARUCH, DOUGLAS W.	Partner	10/16/2019	0.80	956.00	Calls w. MAVNIs re USCIS naturalization policies/practices.
WOLLENBERG, JENNIFER M.	Partner	10/17/2019	4.30	3,848.50	Address MAVNI N-400 processing issues/updates/concerns.
BARUCH, DOUGLAS W.	Partner	10/18/2019	1.80	2,151.00	Address class member updates/concerns; address class inquiries.
WOLLENBERG, JENNIFER M.	Partner	10/18/2019	4.80	4,296.00	Address MAVNI N-400 issues.
WOLLENBERG, JENNIFER M.	Partner	10/19/2019	3.30	2,953.50	Address MAVNI naturalization application processing issues, including discussions with MAVNis.
BARUCH, DOUGLAS W.	Partner	10/20/2019	2.40	2,868.00	Edits and revisions to descriptions of MAVNI N-400 problems.
WOLLENBERG, JENNIFER M.	Partner	10/20/2019	2.30	2,058.50	Address MAVNI naturalization application processing issues/updates/concerns, including emails with MAVNIs and others.
BARUCH, DOUGLAS W.	Partner	10/21/2019	1.20	1,434.00	Drafting re N-400 processing problems.
RAOL, NEAHA P.	Associate	10/21/2019	1.50	1,065.00	Review Nio inbox activity and identify various follow-up action items/class member correspondence and status.
WOLLENBERG, JENNIFER M.	Partner	10/21/2019	4.50	4,027.50	Address MAVNI naturalization application processing issues/updates/concerns, including discussions with MAVNIs and others.
MENDELSON, BENJAMIN WALLACE	Associate	10/22/2019	1.20	600.00	Discussed with N. Raol the Nio and Kirwa class counsel inboxes and responding to emails.
BARUCH, DOUGLAS W.	Partner	10/22/2019	3.80	4,541.00	Drafting re N-400 processing problems.
KAPLAN, KAYLA S.	Associate	10/22/2019	1.30	923.00	Prepare summaries for common interest counsel.
RAOL, NEAHA P.	Associate	10/22/2019	2.00	1,420.00	Review various emails from class members and respond; confer with B. Mendelson re: case background, Nio inbox and class member inquiries/responses.
WOLLENBERG, JENNIFER M.	Partner	10/22/2019	3.60	3,222.00	Address MAVNI naturalization application processing issues, including emails with MAVNI and common interest counsel.
BARUCH, DOUGLAS W.	Partner	10/23/2019	1.50	1,792.50	Edits and revisions to descriptions of MAVNI N-400 problems.
RAOL, NEAHA P.	Associate	10/23/2019	3.50	2,485.00	Review class member inquiries and draft responses; review information and follow-up re: class members.
MENDELSON, BENJAMIN WALLACE	Associate	10/23/2019	2.10	1,050.00	Reviewed Nio class counsel inbox; replied to Nio class counsel inbox emails with N. Raol.
WOLLENBERG, JENNIFER M.	Partner	10/24/2019	3.90	3,490.50	Address MAVNI naturalization application issues/updates/concerns, including emails with MAVNIs and draft materials re MAVNI naturalization problems.
BARUCH, DOUGLAS W.	Partner	10/24/2019	2.40	2,868.00	Drafting re N-400 processing problems.
KAPLAN, KAYLA S.	Associate	10/24/2019	1.30	923.00	Prepare summaries of MAVNI N-400 issues/problems.
MENDELSON, BENJAMIN WALLACE	Associate	10/24/2019	1.40	700.00	Searched Nio and Kirwa class counsel inboxes for names of certain MAVNI soldiers per request of J. Wollenberg.
WOLLENBERG, JENNIFER M.	Partner	10/25/2019	1.00	895.00	Address class members issues/problems.
RAOL, NEAHA P.	Associate	10/25/2019	1.90	1,349.00	Correspondence with class members; confer with class member re: next steps, class member status.
KAPLAN, KAYLA S.	Associate	10/25/2019	3.80	2,698.00	Drafting re MAVNI N-400 issues.
MENDELSON, BENJAMIN WALLACE	Associate	10/25/2019	2.50	1,250.00	Review Nio class counsel inbox and respond to MAVNI soldiers' emails.
BARUCH, DOUGLAS W.	Partner	10/26/2019	1.40	1,673.00	Drafting re MAVNI N-400 concerns/issues.
BARUCH, DOUGLAS W.	Partner	10/28/2019	2.60	3,107.00	Research and revisions re descriptions of MAVNI N-400 issues/problems.
KAPLAN, KAYLA S.	Associate	10/28/2019	0.80	568.00	Update class action website.
MENDELSON, BENJAMIN WALLACE	Associate	10/28/2019	0.20	100.00	Review emails to Nio class counsel inbox.

Nio v. DHS, et al.

Morgan Lewis Timesheets

Timekeeper	Title	Worked Date	Hours	Amount	Narrative
WOLLENBERG, JENNIFER M.	Partner	1/14/2020	3.50	3,132.50	Address MAVNI N-400 processing issues, including discussions with MAVNIs, common interest counsel, and team members.
BARUCH, DOUGLAS W.	Partner	1/15/2020	1.10	1,314.50	Address mediation, client inquiries, and USCIS/DoJ correspondence.
KAPLAN, KAYLA S.	Associate	1/15/2020	0.30	219.00	Email correspondence regarding mediation and status hearings.
RAOL, NEAHA P.	Associate	1/15/2020	5.90	4,277.50	Correspondence with class members and named plaintiff updates; draft and send individual inquiries / issues for class members to USCIS / DOJ; internal correspondence re: same; review and update spreadsheet/tracker for class members.
WOLLENBERG, JENNIFER M.	Partner	1/15/2020	2.30	2,058.50	MAVNI N-400 processing delays emails and other updates.
RAOL, NEAHA P.	Associate	1/16/2020	2.50	1,812.50	Review responses/correspondence form USCIS re: various class members; follow-up with class members re: same and draft/send follow-up inquiries to USCIS / DOJ; review DOJ correspondence to court re: reporting; internal correspondence re MAVNI issues/complaints.
BARUCH, DOUGLAS W.	Partner	1/16/2020	2.30	2,748.50	Multiple emails to USCIS; correspondence w. Court re reporting.
KAPLAN, KAYLA S.	Associate	1/16/2020	0.20	146.00	Email correspondence regarding reporting requirements.
MENDELSON, BENJAMIN WALLACE	Associate	1/16/2020	0.70	395.50	Update MAVNI website.
WOLLENBERG, JENNIFER M.	Partner	1/16/2020	4.30	3,848.50	Address N-400 processing issues/emails/updates.
BARUCH, DOUGLAS W.	Partner	1/17/2020	0.40	478.00	Address correspondence w. DOJ/USCIS.
RAOL, NEAHA P.	Associate	1/17/2020	4.50	3,262.50	Correspondence with class members; draft/follow-up with USCIS/DOJ re: same (oath ceremony details); confer with team, naturalized class member.
WOLLENBERG, JENNIFER M.	Partner	1/17/2020	4.30	3,848.50	Address MAVNI naturalization processing issues, complaints, and concerns, including discussions with MAVNIs and common interest counsel and team members.
RAOL, NEAHA P.	Associate	1/18/2020	2.60	1,885.00	Review and respond to class member emails; update class member spreadsheet.
RAOL, NEAHA P.	Associate	1/19/2020	0.40	290.00	Class member correspondence.
RAOL, NEAHA P.	Associate	1/20/2020	6.10	4,422.50	Correspondence with class members and follow-up re: USCIS responses; draft emails for USCIS / DOJ re: class member issues; conferences with class members, common interest counsel, J. Wollenberg re: various class members passing 120 days.
WOLLENBERG, JENNIFER M.	Partner	1/20/2020	4.80	4,296.00	Address N-400 processing issues, including discussions with MAVNIs, common interest counsel, and team members.
BARUCH, DOUGLAS W.	Partner	1/21/2020	0.90	1,075.50	Status hearing before Judge Huvelle; correspondence w. USCIS/DOJ.
RAOL, NEAHA P.	Associate	1/21/2020	5.10	3,697.50	Status conference with Judge Huvelle re: same; draft response to DOJ re: 1/10 update to court and reinstatement issues; correspondence with class members; draft/send class member issues / inquiries to USCIS and DOJ; internal correspondence re: above items
WOLLENBERG, JENNIFER M.	Partner	1/21/2020	1.70	1,521.50	Prepare for and attend status hearing re Nio and Calixto matters.
WOLLENBERG, JENNIFER M.	Partner	1/21/2020	4.50	4,027.50	Review emails regarding and address MAVNI N-400 processing and delays issues/updates/concerns.
RAOL, NEAHA P.	Associate	1/22/2020	3.60	2,610.00	Correspondence with class members; draft / revise emails to DOJ re: specific class member issues; internal correspondence re: same.
WOLLENBERG, JENNIFER M.	Partner	1/22/2020	1.50	1,342.50	MAVNI N-400 processing issues/concerns/updates.
BARUCH, DOUGLAS W.	Partner	1/23/2020	0.30	358.50	Address correspondence w. USCIS and follow-up.
RAOL, NEAHA P.	Associate	1/23/2020	1.40	1,015.00	Confer with class members; follow-up Nio inbox correspondence re: same.
WOLLENBERG, JENNIFER M.	Partner	1/23/2020	2.50	2,237.50	Address MAVNI N-400 processing issues, including emails from MAVNIs and discussions with team members.
BARUCH, DOUGLAS W.	Partner	1/24/2020	0.80	956.00	Address strategy and correspondence w. DOJ/USCIS.
MENDELSON, BENJAMIN WALLACE	Associate	1/24/2020	1.30	734.50	Update MAVNI website.

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Morgan Lewis Timesheets

Timekeeper	Title	Worked Date	Hours	Amount	Narrative
KAPLAN, KAYLA S.	Associate	4/14/2020	1.70	1,241.00	Discuss case with D. Baruch, J. Wollenberg, and N. Raol; prepare email communication.
BARUCH, DOUGLAS W.	Partner	4/14/2020	1.60	1,912.00	Address staffing and strategy; team meeting.
RAOL, NEAHA P.	Associate	4/15/2020	4.60	3,335.00	Confer with J. Wollenberg regarding various class member updates; correspondence with various class members re: pending naturalization applications and status / delays; advise re: same and next steps/updates re: litigation status, DOJ reporting.
WOLLENBERG, JENNIFER M.	Partner	4/15/2020	3.70	3,311.50	Address MAVNI N-400 processing delays, including review of non-interviewed class members with N. Raol and discussions with common interest counsel and MAVNIs.
RAOL, NEAHA P.	Associate	4/16/2020	0.90	652.50	Confer with J. Wollenberg re: status of remaining class members; correspondence with class members re: status/next steps.
WOLLENBERG, JENNIFER M.	Partner	4/16/2020	2.10	1,879.50	Address N-400 processing issues, including discussions with N. Raol re non-naturalized class members' issues.
RAOL, NEAHA P.	Associate	4/17/2020	1.10	797.50	Review Nio inbox correspondence; respond to various class member inquiries and advise re: naturalization application/interview delays.
WOLLENBERG, JENNIFER M.	Partner	4/18/2020	0.40	358.00	Emails from Nio class members.
RAOL, NEAHA P.	Associate	4/20/2020	0.20	145.00	Review court's order; internal correspondence re: same.
WOLLENBERG, JENNIFER M.	Partner	4/20/2020	2.40	2,148.00	Emails with Nio class members, team members, and common interest counsel; assess MAVNI status/projects.
MENDELSON, BENJAMIN WALLACE	Associate	4/21/2020	1.00	565.00	Update MAVNI website.
WOLLENBERG, JENNIFER M.	Partner	4/21/2020	1.20	1,074.00	Address Court scheduling order and mediation emails; discussions with MAVNIs, common interest counsel, and team members re N-400 processing.
RAOL, NEAHA P.	Associate	4/22/2020	8.80	6,380.00	Review defendants' reporting re: current Nio class members; correspondence with class members re: naturalization application status, next steps, communications/notices from USCIS; confer with J. Wollenberg, individual class counsel re: same and next steps.
WOLLENBERG, JENNIFER M.	Partner	4/22/2020	15.50	13,872.50	Assess remaining class members' needs with N. Raol; discussions with MAVNIs, team members, and common interest counsel re N-400 processing delays and issues.
RAOL, NEAHA P.	Associate	4/23/2020	3.60	2,610.00	Communication with numerous class members - regarding naturalization applications and next steps/delays; review defendants' reporting re: current Nio class members and update information re: class member delays.
WOLLENBERG, JENNIFER M.	Partner	4/23/2020	1.80	1,611.00	Analyze remaining Nio class members' needs with N. Raol; address MAVNI N-400 processing issues and concerns, including discussions with common interest counsel, team members, and MAVNIs.
WOLLENBERG, JENNIFER M.	Partner	4/24/2020	2.80	2,506.00	Address MAVNI issues/updates/concerns, including team email re outstanding projects and emails with common interest counsel, MAVNIs, and team members.
RAOL, NEAHA P.	Associate	4/27/2020	1.20	870.00	Correspondence with class members regarding status of naturalization applications, next steps and update status/files re: same; correspondence with individual counsel to class member.
WOLLENBERG, JENNIFER M.	Partner	4/27/2020	1.30	1,163.50	Address MAVNI N-400 processing issues, including discussions with team member and common interest counsel.
BARUCH, DOUGLAS W.	Partner	4/28/2020	0.90	1,075.50	Review correspondence and class member status.
RAOL, NEAHA P.	Associate	4/28/2020	1.60	1,160.00	Confer/correspondence with individual counsel for class member with delayed naturalization application processing; correspondence with J. Wollenberg re: same; correspondence with class members regarding next steps / defendants' reporting.
WOLLENBERG, JENNIFER M.	Partner	4/28/2020	1.20	1,074.00	Address MAVNI issues/updates/concerns re N-400 processing, including discussions with MAVNIs, team members, and common interest counsel.

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Morgan Lewis Timesheets

Timekeeper	Title	Worked Date	Hours	Amount	Narrative
BARUCH, DOUGLAS W.	Partner	7/14/2020	0.60	717.00	Address DOJ correspondence.
RAOL, NEAHA P.	Associate	7/14/2020	3.10	2,247.50	Confer with J. Wollenberg, C. Rush re: status of various class members; confer with class members regarding next steps, USCIS status/delays; draft/review emails to USCIS re: class member inquiries / follow-up; correspondence with class members re: same.
WOLLENBERG, JENNIFER M.	Partner	7/14/2020	5.60	5,012.00	Address MAVNI N-400 processing updates and next steps, including discussions with team members, common interest counsel, and MAVNIs.
RAOL, NEAHA P.	Associate	7/15/2020	1.30	942.50	Review correspondence from USCIS and follow-up with class members re: same; draft/send email inquiries to USCIS; internal correspondence/conference re: various class member and next steps with J. Wollenberg; correspondence with class member individual counsel.
BARUCH, DOUGLAS W.	Partner	7/15/2020	0.80	956.00	Address strategy and correspondence w. USCIS.
WOLLENBERG, JENNIFER M.	Partner	7/15/2020	4.20	3,759.00	Address N-400 processing issues and concerns, including discussions with MAVNIs, common interest counsel, and team members.
BARUCH, DOUGLAS W.	Partner	7/16/2020	0.70	836.50	Confer w. client re response to government and follow-up.
KAPLAN, KAYLA S.	Associate	7/16/2020	0.20	146.00	Discuss case with D. Baruch, J. Wollenberg, and B. Mendelson.
RAOL, NEAHA P.	Associate	7/16/2020	3.20	2,320.00	Conference with class member regarding USCIS naturalization application; internal follow-up re: same; correspondence with potential class member re: N400 status.
WOLLENBERG, JENNIFER M.	Partner	7/16/2020	3.90	3,490.50	Address N-400 processing issues and questions, including discussions with MAVNIs.
BARUCH, DOUGLAS W.	Partner	7/17/2020	0.50	597.50	Address correspondence w. USCIS and strategy.
RAOL, NEAHA P.	Associate	7/17/2020	2.30	1,667.50	Internal conferences re: various class member status, N400 delays, and next steps; correspondence will class members.
WOLLENBERG, JENNIFER M.	Partner	7/17/2020	7.90	7,070.50	Address N-400 processing issues, updates, and concerns, including discussions with MAVNIs and team members.
BARUCH, DOUGLAS W.	Partner	7/20/2020	0.80	956.00	Case closure strategy and USCIS correspondence.
RAOL, NEAHA P.	Associate	7/20/2020	4.10	2,972.50	Internal conference with J. Wollenberg, S. McMahon, and I. Guo re: status of various class members and next steps/follow-up; internal correspondence re: USCIS inbox responses and next steps; correspondence with individual counsel re: status/USCIS updates.
WOLLENBERG, JENNIFER M.	Partner	7/20/2020	6.90	6,175.50	Address MAVNI N-400 processing delays/questions/concerns, including discussions with team members.
BARUCH, DOUGLAS W.	Partner	7/21/2020	1.80	2,151.00	Class member calls re strategy.
WOLLENBERG, JENNIFER M.	Partner	7/21/2020	7.20	6,444.00	Address MAVNI N-400 processing questions and concerns, including discussions with MAVNIs and team members.
WOLLENBERG, JENNIFER M.	Partner	7/22/2020	2.70	2,416.50	Address MAVNI updates and questions re N-400 processing, including discussions with MAVNIs and common interest counsel.
BARUCH, DOUGLAS W.	Partner	7/23/2020	1.40	1,673.00	Counsel call re class member litigation strategy; USCIS correspondence; internal call re status and strategy.
WOLLENBERG, JENNIFER M.	Partner	7/23/2020	5.40	4,833.00	Address class members' questions and issues re N-400 processing, including discussions with USCIS mailbox, MAVNIs, team members, and common interest counsel.
WOLLENBERG, JENNIFER M.	Partner	7/24/2020	4.50	4,027.50	Address MAVNI N-400 processing issues/updates/concerns, including discussions with MAVNIs, common interest counsel, and team members.
BARUCH, DOUGLAS W.	Partner	7/27/2020	0.70	836.50	Address strategy and preparation for hearing.
RAOL, NEAHA P.	Associate	7/27/2020	2.70	1,957.50	Analysis and review of Defendants' report filed regarding individual class members; confer with J. Wollenberg re: same; draft declaration re: client issues with USCIS; review correspondence from USCIS, class members regarding N400 status/updates.

EXHIBIT 7

Nio v. U.S. Dept. of Homeland Security
Fried Frank Time Records

Date	Timekeeper	Narrative	Hours	Rate	Amount
5/1/2017	Baruch, Douglas W.	Background reading re potential class action.	3.0	$ 1,285	$3,855.00
5/2/2017	Baruch, Douglas W.	Address MAVNI matter.	1.5	$ 1,285	$1,927.50
5/3/2017	Baruch, Douglas W.	Address MAVNI class action.	3.8	$ 1,285	$4,883.00
5/3/2017	Wollenberg, Jennifer	Review MAVNI background and discussions re same.	5.3	$ 975	$5,167.50
5/4/2017	Baruch, Douglas W.	Address MAVNI matter.	4.5	$ 1,285	$5,782.50
5/4/2017	Gates, Shaun	Review materials from J. Wollenberg regarding MAVNI case.	1.7	$ 695	$1,181.50
5/4/2017	Wollenberg, Jennifer	Review MAVNI background and discussions re status and strategy.	6.5	$ 975	$6,337.50
5/5/2017	Baruch, Douglas W.	Address MAVNI matter.	3.0	$ 1,285	$3,855.00
5/5/2017	Gates, Shaun	MAVNI -- review materials sent by J. Wollenberg; draft outline for screening interview.	4.3	$ 695	$2,988.50
5/5/2017	St. Romain, Kate	Review all initial materials from J. Wollenberg regarding potential MAVNI lawsuit; review materials about potential MAVNI plaintiffs; analyze appellate opinion's application to potential MAVNI lawsuit; review examples of complaint for declaratory and injunctive relief based on deprivation of constitution rights, first amended complaint and memorandum in support of motion for preliminary injunction and analyze the application for MAVNI lawsuit.	3.6	$ 600	$2,160.00
5/5/2017	Wollenberg, Jennifer	Review MAVNI background and discussions re status and strategy; emails to MAVNIs.	6.1	$ 975	$5,947.50
5/6/2017	Wollenberg, Jennifer	Address MAVNI matter, including email from K. Grisez.	0.3	$ 975	$292.50
5/7/2017	Wollenberg, Jennifer	Address MAVNI matter, including emails re scheduling interviews of potential plaintiffs.	1.5	$ 975	$1,462.50
5/8/2017	Beary, Webster	Team meeting to discuss MAVNI pro bono case with J. Wollenberg; conduct research in support of complaint.	7.7	$ 780	$6,006.00
5/8/2017	Gates, Shaun	Address MAVNI. Team meeting; research regarding lawsuits brought under 8 USC 1440.	3.0	$ 695	$2,085.00
5/8/2017	St. Romain, Kate	Attend pro bono meeting regarding case background and strategy/tasks; research re potentially relevant decision; watch videos explaining MAVNI program; draft and edit document of biographical information for potential MAVNI plaintiffs and distribute to the team; edit interview screening outline and prepare email to team regarding the same.	5.5	$ 600	$3,300.00
5/8/2017	Wollenberg, Jennifer	Address MAVNI matter, including screening questionnaire, scheduling interviews, and team meeting.	8.5	$ 975	$8,287.50
5/9/2017	Baruch, Douglas W.	Meetings and calls re MAVNI litigation.	4.0	$ 1,285	$5,140.00
5/9/2017	Beary, Webster	Discuss case with J. Wollenberg, D. Baruch, J. LoBue, and K. St. Romain; interview potential clients; conduct legal research on MAVNI program.	8.7	$ 780	$6,786.00
5/9/2017	Gates, Shaun	MAVNI. Screening interviews with potential plaintiffs.	4.6	$ 695	$3,197.00

Nio v. U.S. Dept. of Homeland Security
Fried Frank Time Records

Date	Timekeeper	Narrative	Hours	Rate	Amount
9/7/2017	McNamara, Brendan	Attend MAVNI team meeting to discuss issues and strategy going forward.	1.5	$ 295	$442.50
9/7/2017	Raol, Neaha	Team meeting; review news/articles with DoD statements re: MAVNI.	2.1	$ 895	$1,879.50
9/7/2017	St. Romain, Kate	Attend MAVNI team meeting; review articles discussing MAVNI lawsuit and DACA policies and prepare email to N. Raol and J. Wollenberg analyzing articles; analyze preliminary injunction decision and meet with J. Wollenberg and D. Baruch regarding opinion.	2.5	$ 695	$1,737.50
9/7/2017	Wollenberg, Jennifer	Team meeting to discuss status and strategy; call with various clients re PI Order; emails and other discussions with team, common interest counsel, and others regarding status and strategy; emails with common interest counsel.	3.9	$ 975	$3,802.50
9/8/2017	Baruch, Douglas W.	Address report and DOD conduct.	1.4	$ 1,285	$1,799.00
9/8/2017	Gates, Shaun	Review article on PI opinion.	0.2	$ 745	$149.00
9/8/2017	LoBue, Joseph J.	Review defendant's weekly report to the court.	0.2	$ 1,180	$236.00
9/8/2017	Raol, Neaha	Review client correspondence; defendants' weekly report; review press coverage/articles re: matter.	1.0	$ 895	$895.00
9/8/2017	St. Romain, Kate	Review Defendants' weekly status report, distribute to clients, and hold telephone call with J. Wollenberg regarding distribution.	0.5	$ 695	$347.50
9/8/2017	Wollenberg, Jennifer	Emails with common interest counsel and team re MAVNI updates, including discharges and the like; calls with various clients re PI Order.	3.1	$ 975	$3,022.50
9/9/2017	Wollenberg, Jennifer	Review emails from common interest counsel; team email re Deferred Action denial.	0.3	$ 975	$292.50
9/11/2017	Baruch, Douglas W.	Address status and strategy.	1.8	$ 1,285	$2,313.00
9/11/2017	Gates, Shaun	Call with putative class member; correspondence regarding interview.	0.7	$ 745	$521.50
9/11/2017	St. Romain, Kate	Hold telephone call with S. Gates and potential MAVNI class member, and report to J. Wollenberg regarding story of MAVNI.	0.5	$ 695	$347.50
9/11/2017	Wollenberg, Jennifer	Emails with clients re updates and concerns; emails with common interest counsel re updates and strategy.	2.6	$ 975	$2,535.00
9/12/2017	Baruch, Douglas W.	Address client inquiries and status.	1.5	$ 1,285	$1,927.50
9/12/2017	Raol, Neaha	Review updates from clients, potential class members; review D. Md. government papers filed.	2.0	$ 895	$1,790.00
9/12/2017	St. Romain, Kate	Prepare email to potential MAVNI plaintiff regarding scope of representation and class action and proposed email to contact from common interest counsel.	0.5	$ 695	$347.50
9/12/2017	Wollenberg, Jennifer	Call with potential class member re MAVNI updates; emails with K. Grisez re MAVNI immigration issue; address updates regarding MAVNIs.	2.9	$ 975	$2,827.50
9/13/2017	Baruch, Douglas W.	Address strategy and new developments.	2.5	$ 1,285	$3,212.50
9/13/2017	Gates, Shaun	Correspondence on mass removals; t/c with common interest counsel.	1.7	$ 745	$1,266.50
9/13/2017	LoBue, Joseph J.	Conference calls with joint-interest counsel regarding status of cases and action items; meetings with D. Baruch and J. Wollenberg regarding class member discharges; meetings with D. Baruch and J. Wollenberg regarding case status and action items.	3.4	$ 1,180	$4,012.00

Nio v. U.S. Dept. of Homeland Security
Fried Frank Time Records

Date	Timekeeper	Narrative	Hours	Rate	Amount
2/26/2018	Szlarb, Natalia	Prepare for conference calls; conference call with Nio class members; draft and review declarations of Nio class members; communications with Nio class members.	5.4	$ 545	$2,943.00
2/26/2018	Wollenberg, Jennifer	Address MAVNI issues/concerns, including emails with MAVNIs and others and email to DOJ.	2.3	$ 1,025	$2,357.50
2/26/2018	Woods, Elizabeth	Prepare declarations for members of Nio class; coordinate telephone conferences with class members regarding preparation of declarations; telephone conference with class members regarding preparation of declarations.	3.6	$ 545	$1,962.00
2/27/2018	Baruch, Douglas W.	Address amended complaint and PI.	1.8	$ 1,350	$2,430.00
2/27/2018	Beary, Webster	Review MAVNI materials; respond to MAVNIs; compile email to DOJ.	1.9	$ 860	$1,634.00
2/27/2018	Gogadze, Helene	Legal research and analysis for the opposition to Government arguments.	9.7	$ 960	$9,312.00
2/27/2018	LoBue, Joseph J.	Conference calls with MAVNI soldiers regarding declarations in support of preliminary injunction; meeting with team regarding preliminary injunction motion; draft Third Amended Complaint.	4.8	$ 1,240	$5,952.00
2/27/2018	McNamara, Brendan	Conduct legal research on various issues for motion for reconsideration; prepare drafts of MAVNI declarations.	4.1	$ 315	$1,291.50
2/27/2018	Stachniak Kaplan, Kayla	Discuss case with D. Baruch, J. LoBue, J. Wollenberg, and S. Gates; prepare preliminary injunction brief; review background material.	5.5	$ 960	$5,280.00
2/27/2018	Szlarb, Natalia	Draft and review declarations of Nio class members; communications with Nio class members.	3.4	$ 545	$1,853.00
2/27/2018	Wollenberg, Jennifer	Address MAVNI issues/concerns, including emails with MAVNIs and common interest counsel, plus discussions with team members.	6.5	$ 1,025	$6,662.50
2/27/2018	Woods, Elizabeth	Prepare declarations for members of Nio class; telephone conference with class members regarding preparation of declarations.	3.1	$ 545	$1,689.50
2/28/2018	Baruch, Douglas W.	Analyze DOJ filings and strategy re same.	1.3	$ 1,350	$1,755.00
2/28/2018	Beary, Webster	Review MAVNI materials; respond to MAVNIs; compile email to DOJ; draft declarations; discuss case with J. Wollenberg.	7.3	$ 860	$6,278.00
2/28/2018	Gates, Shaun	Research in support of TRO/PI motion re: security clearances.	3.8	$ 785	$2,983.00
2/28/2018	Gogadze, Helene	Team meeting and discussion; draft opposition to Government arguments.	9.7	$ 960	$9,312.00
2/28/2018	LoBue, Joseph J.	Review Government bi-weekly reporting; review Government declarations relating to reporting requirements; review materials in support of Third Amended Complaint; draft Third Amended Complaint.	5.4	$ 1,240	$6,696.00
2/28/2018	McNamara, Brendan	Conduct legal research on various issues for motion for reconsideration; prepare drafts of MAVNI declarations.	4.9	$ 315	$1,543.50
2/28/2018	Raol, Neaha	Review USG filings/status update.	0.5	$ 945	$472.50
2/28/2018	Stachniak Kaplan, Kayla	Prepare motion for preliminary injunction.	3.0	$ 960	$2,880.00
2/28/2018	Szlarb, Natalia	Draft and review declarations of Nio class members; communications with Nio class members.	7.2	$ 545	$3,924.00

Nio v. U.S. Dept. of Homeland Security
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Date	Timekeeper	Narrative	Hours	Rate	Amount
7/3/2018	St. Romain, Kate	Email N. Szlarb regarding Nio inbox responses; respond to MAVNI soldier emails from the Nio inbox; edit response regarding the admissibility of USCIS's May 17 2018 guidance and meet and email with J. Wollenberg and N. Raol regarding the same.	2.0	$ 730	$1,460.00
7/3/2018	Szlarb, Natalia	Audit the Nio Mailbox; respond to Nio class members communications; update the table with details of the Nio class members; draft e-mails to DOJ.	3.1	$ 545	$1,689.50
7/3/2018	Wollenberg, Jennifer	Prepare response re May memo in Nio case; address updates.	11.6	$ 1,025	$11,890.00
7/4/2018	St. Romain, Kate	Email J. Wollenberg regarding response regarding the admissibility of USCIS's May 17 2018 guidance; draft update to clients regarding upcoming deadlines, filings and Calixto lawsuit; email plaintiff regarding discharge; respond to MAVNI soldier emails from the Nio inbox; email team regarding naturalization.	1.0	$ 730	$730.00
7/4/2018	Wollenberg, Jennifer	Address MAVNI issues/concerns/updates, including emails with MAVNIs.	3.5	$ 1,025	$3,587.50
7/5/2018	Baruch, Douglas W.	Address summary judgment issues; team meeting to discuss strategy and assignments.	4.5	$ 1,350	$6,075.00
7/5/2018	Gates, Shaun	Research for summary judgment motion.	1.3	$ 785	$1,020.50
7/5/2018	Kiziltay Carter, Melis	Work on summary judgment motion.	8.2	$ 630	$5,166.00
7/5/2018	LoBue, Joseph J.	Meeting with litigation team regarding case status and action items; meeting with litigation team regarding summary judgment motion; review legal research for summary judgment motion.	2.8	$ 1,240	$3,472.00
7/5/2018	Raol, Neaha	Team conference re: summary judgment motion outline with D. Baruch, J. LoBue, J. Wollenberg, M. Kiziltay; follow up with M. Kiziltay re: case background, legal arguments, outline.	3.2	$ 945	$3,024.00
7/5/2018	St. Romain, Kate	Email N. Szlarb regarding Nio inbox responses; respond to MAVNI soldier emails from the Nio inbox; prepare client alert and email J. Wollenberg regarding alert results.	0.3	$ 730	$219.00
7/5/2018	Szlarb, Natalia	Audit the Nio Mailbox; respond to Nio class members communications; update the table with details of the Nio class members; draft e-mails to DOJ.	6.1	$ 545	$3,324.50
7/5/2018	Wollenberg, Jennifer	Address MAVNI issues/concerns/updates; team meeting re SJ preparation.	10.7	$ 1,025	$10,967.50
7/6/2018	Kiziltay Carter, Melis	Work on summary judgment motion.	8.0	$ 630	$5,040.00
7/6/2018	LoBue, Joseph J.	Review research for summary judgment motion; draft outline for summary judgment motion; draft summary judgment motion.	4.7	$ 1,240	$5,828.00
7/6/2018	Raol, Neaha	Prepare summary judgment outline; conferences with M. Kiziltay re: same.	2.0	$ 945	$1,890.00
7/6/2018	Szlarb, Natalia	Audit the Nio Mailbox; respond to Nio class members communications; update the table with details of the Nio class members; draft e-mails to DOJ.	3.9	$ 545	$2,125.50
7/6/2018	Wollenberg, Jennifer	Address MAVNI issues/updates/concerns; calls with MAVNIs.	12.2	$ 1,025	$12,505.00
7/7/2018	Szlarb, Natalia	Audit the Nio Mailbox; respond to Nio class members communications; update the table with details of the Nio class members; draft e-mails to DOJ.	3.8	$ 545	$2,071.00
7/7/2018	Wollenberg, Jennifer	Emails re MAVNI issues/questions, including with internal team members.	1.4	$ 1,025	$1,435.00
7/8/2018	Wollenberg, Jennifer	Emails re Nio action.	2.6	$ 1,025	$2,665.00
7/9/2018	Baruch, Douglas W.	Summary judgment research.	2.5	$ 1,350	$3,375.00

Nio v. U.S. Dept. of Homeland Security
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Date	Timekeeper	Narrative	Hours	Rate	Amount
11/19/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; prepare email messages to J. Wollenberg regarding responding to class member questions and legal research concerning related cases.	3.2	$ 545	$1,744.00
11/19/2018	Raol, Neaha	Confer/correspondence with various class members; internal correspondence re: same and next steps/strategy; confer with K. St. Romain, others re: correspondence with class members/status.	2.7	$ 960	$2,592.00
11/19/2018	Stachniak Kaplan, Kayla	Discuss case with D. Baruch.	0.2	$ 960	$192.00
11/19/2018	Wollenberg, Jennifer	Address MAVNI issues/updates/concerns, including calls with MAVNIs.	5.5	$ 1,025	$5,637.50
11/20/2018	Baruch, Douglas W.	Address summary judgment.	3.5	$ 1,350	$4,725.00
11/20/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; prepare email messages to J. Wollenberg regarding class member situation; prepare email messages to K. Grisez regarding class member situation; prepare email messages to common interest counsel regarding class member situation.	3.6	$ 545	$1,962.00
11/20/2018	LoPresti, Elizabeth	Legal research regarding Judge Huvelle's cases involving extra-administrative record issues; correspondence with D. Baruch regarding Judge Huvelle research.	6.2	$ 545	$3,379.00
11/20/2018	Wollenberg, Jennifer	Address MAVNI issues/updates/concerns, including calls with MAVNIs.	4.3	$ 1,025	$4,407.50
11/21/2018	Baruch, Douglas W.	DOJ correspondence and research re summary judgment.	1.5	$ 1,350	$2,025.00
11/21/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; prepare email messages to K. Grisez regarding class member situation.	3.8	$ 545	$2,071.00
11/21/2018	Raol, Neaha	Review DOJ filing; confer with class member.	0.6	$ 960	$576.00
11/21/2018	Wollenberg, Jennifer	Address MAVNI issues/updates/concerns, including calls with MAVNIs.	5.2	$ 1,025	$5,330.00
11/22/2018	Wollenberg, Jennifer	Address MAVNI updates/issues/concerns.	2.3	$ 1,025	$2,357.50
11/24/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; prepare email messages to J. Wollenberg regarding class member situation; prepare email message to B. McNamara regarding class member situation.	2.0	$ 545	$1,090.00
11/25/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; prepare email messages to B. McNamara regarding class member situation.	0.3	$ 545	$163.50
11/26/2018	Baruch, Douglas W.	Address summary judgment and DOJ correspondence.	1.5	$ 1,350	$2,025.00
11/26/2018	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions.	7.3	$ 545	$3,978.50
11/26/2018	Raol, Neaha	Review class member correspondence/voicemails; internal correspondence re: same.	0.8	$ 960	$768.00
11/26/2018	Wollenberg, Jennifer	Address MAVNI issues/updates/concerns, including communications with MAVNIs and others.	4.2	$ 1,025	$4,305.00
11/27/2018	Baruch, Douglas W.	Multiple emails to DOJ; confer with J. Wollenberg; research.	1.5	$ 1,350	$2,025.00

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Date	Timekeeper	Narrative	Hours	Rate	Amount
7/25/2019	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions.	0.2	$ 575	$115.00
7/25/2019	Raol, Neaha	Confer with various class members; calls with B. McNamara and class members.	0.9	$ 1,000	$900.00
7/26/2019	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions; attend teleconferences with Nio class member; attend teleconference with B. McNamara regarding responding to Nio class member.	0.5	$ 575	$287.50
7/26/2019	McNamara, Brendan	Respond to soldiers' emails regarding issues related to naturalization.	2.6	$ 335	$871.00
7/26/2019	Raol, Neaha	Confer with various class members; followup re: same internally.	2.3	$ 1,000	$2,300.00
7/29/2019	McNamara, Brendan	Restructure content on MAVNI federal class action website; respond to soldiers' emails regarding naturalization.	3.1	$ 335	$1,038.50
7/29/2019	Raol, Neaha	Confer with B. McNamara, various class members re: guidance, website, new counsel info.	0.5	$ 1,000	$500.00
7/30/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization; research status of several soldiers and draft email to N. Raol and J. Wollenberg.	2.4	$ 335	$804.00
7/30/2019	Raol, Neaha	Confer with various class members re: next steps, guidance, etc.	0.9	$ 1,000	$900.00
7/31/2019	McNamara, Brendan	Review Government reports and compile analysis of certain soldiers for N. Raol and J. Wollenberg.	1.6	$ 335	$536.00
8/1/2019	Raol, Neaha	Confer with various class members re: status.	0.5	$ 1,000	$500.00
8/2/2019	Raol, Neaha	Confer with J. DeSantis, J. Wollenberg, class members; review DD214 issue.	1.0	$ 1,000	$1,000.00
8/7/2019	McNamara, Brendan	Respond to soldiers' emails regarding Army service and naturalization.	0.5	$ 335	$167.50
8/8/2019	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions.	0.2	$ 575	$115.00
8/8/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization and related issues.	0.5	$ 335	$167.50
8/9/2019	McNamara, Brendan	Discuss soldiers' status with N. Raol; respond to soldiers' emails regarding naturalization.	1.2	$ 335	$402.00
8/11/2019	McNamara, Brendan	Review transcripts for comments about deporting soldiers.	0.5	$ 335	$167.50
8/13/2019	McNamara, Brendan	Respond to soldiers' emails regarding adverse MSSR notices and naturalization.	0.5	$ 335	$167.50
8/19/2019	McNamara, Brendan	Respond to soldiers' emails regarding questions concerning naturalization.	0.9	$ 335	$301.50
8/22/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	2.4	$ 335	$804.00
8/23/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	1.8	$ 335	$603.00
8/26/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	2.5	$ 335	$837.50
8/28/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	0.3	$ 335	$100.50
8/29/2019	Johnson, Sam	Prepare email messages to Nio class members responding to class member questions.	0.2	$ 575	$115.00
8/30/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	0.7	$ 335	$234.50
9/3/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization; discuss website updates with J. Wollenberg.	1.5	$ 335	$502.50
9/4/2019	McNamara, Brendan	Respond to soldiers' emails regarding naturalization.	2.3	$ 335	$770.50