

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 1:17-cv-998-PLF

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS,  
AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

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## **I. INTRODUCTION**

Defendants’ attempt to rewrite the history of this litigation is meritless. No amount of obfuscation and self-serving rationalizations can detract from the record of Defendants’ misbehavior and the resounding legal defeat of their ever-changing positions. As well documented in the record, including internal documents revealing Defendants’ intent to deprive class members of their right to naturalize, Defendants sought to conceal their illicit intentions. They then sought to shield their actions from scrutiny by erecting a “national security” façade and by changing their policies in an attempt to keep one step ahead of legal reckoning. It was only through Plaintiffs’ dogged efforts, substantially aided by Court-ordered reporting of Defendants’ practices, that Defendants’ true intentions were exposed and halted by injunction and judgment.

From the outset of this litigation, Plaintiffs’ singular goal was to overcome the unlawful obstacles that Defendants kept placing along their path to the military naturalization they had earned through service in the U.S. Army. Absent this lawsuit, that goal never would have been achieved. What Defendants now trivialize as minor victories on ancillary issues are nothing of the sort. The results speak for themselves. It is beyond serious dispute that—because of the relief ordered by this Court pursuant to legal claims raised by Plaintiffs—more than 2,000 U.S. Army soldiers, whom Defendants callously and unlawfully planned to discharge, deny naturalization, and ultimately deport, have now become United States citizens. The 15,000 hours devoted by class counsel—amounting to an average of less than 8 hours per naturalized class member—were necessary to expose Defendants’ conduct and obtain the sought-after legal relief.

## **II. THE COURT CAN AND SHOULD AWARD FEES, COSTS, AND EXPENSES**

### **A. Plaintiffs Have Complied with Rule 23**

First, we address and dispense with a non-issue. Defendants baselessly contend that Plaintiffs “apparently made no effort” to comply with the Rule 23(h)(1) notice requirement. Opp.

at 9. This is not true, and Defendants would know that if, before filing their Opposition, they visited the [DCFederalCourtMAVNIClassLitigation.org](http://DCFederalCourtMAVNIClassLitigation.org) website that, as Defendants and the Court are well aware, served as a principal means for communicating important litigation information to class members. *See, e.g.*, Declaration of Jennifer M. Wollenberg (Apr. 9, 2021) (ECF 319-2) (“Wollenberg Decl. I”) ¶¶ 9(a), 55 (discussing use of website throughout the litigation); Sept. 23, 2019 Tr. at 31-36 (hearing discussing providing information to class including through website). In fact, an “Attorneys’ Fees Notice” link is prominently displayed at the top of the homepage and leads directly to a page where Plaintiffs posted the complete Motion and now also post Defendants’ Opposition and other relevant filings. *See* Declaration of Jennifer M. Wollenberg (July 1, 2021) (“Wollenberg Decl. II”) ¶ 2; Pl. Ex. 51. Plaintiffs have thus complied with any Rule 23 notice requirements. *See Cobell v. Norton*, 407 F. Supp. 2d 140, 148 (D.D.C. 2005) (approving notice via website); *Vietnam Veterans of America v. Central Intelligence Agency*, 2018 WL 4827397, \*1 (N.D. Cal. Oct. 4, 2018) (same).<sup>1</sup>

### **B. The Government’s Position Was Not Substantially Justified**

In an attempt to justify their actions and avoid attorneys’ fees, Defendants grossly mischaracterize the record. These mischaracterizations take many forms. Apart from minimizing Plaintiffs’ wins (even though Plaintiffs obtained complete relief), Defendants seek to blame Plaintiffs for taking actions that prolonged the litigation and served to inflate the overall legal fees. How or why Plaintiffs would have litigated in that manner—prolonging their injuries—Defendants

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<sup>1</sup> Similarly misinformed and misguided is Defendants’ gratuitous assertion that a fee recovery would be incompatible with class counsel’s pro bono representation of the class. The D.C. Circuit has soundly rejected such arguments. *See, e.g., Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989) (a “lawyer who had donated services to a client would be entitled to fees under EAJA”); *Save Our Cumberland Mtns., Inc. v. Hodel*, 857 F.2d 1516, 1520 (D.C. Cir. 1988) (en banc) (“the public spirited attorney ... [may] be awarded [attorneys’ fees] for his pro bono efforts”).

do not explain. Defendants also trot out their “national security” bromide, as if that label somehow is relevant or excuses their illicit behavior. The Court need only understand that the classified documents Judge Huvelle reviewed<sup>2</sup>—none of which currently are before the Court—did not dissuade her from setting aside the relevant USCIS policy and enjoining the relevant DoD policy. Indeed, as Judge Huvelle recognized, this case never was about dictating to the military how it addressed national security concerns, nor was it about forcing USCIS to naturalize anyone who did not meet the statutory criteria for military naturalization. *See* Section II(B)(4), *infra*. Instead, this case always was about challenging Defendants’ policies that were intended to—and did—deprive class members of their statutory right to seek naturalization on account of their honorable service in the U.S. military. No amount of misleading, out-of-context snippets from the more than 2,000 pages of hearing transcripts in this matter can alter that reality. Below, Plaintiffs address these mischaracterizations and reaffirm that—for the reasons set forth in Plaintiffs’ opening brief—Defendants’ policies and litigation positions were characterized by bad faith and, at a minimum, were not “substantially justified.”<sup>3</sup>

### **1. Defendants Mischaracterize the Applicable Legal Standards**

As a preliminary matter, it is important to clarify the applicable legal standard. “[T]he burden is on the government to show that its litigation position was substantially justified on the

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<sup>2</sup> It is not clear which classified reports Defendants purport to rely upon. The documents Defendants reference at page 1, note 1 of their Opposition were provided to Magistrate Judge Meriweather (not Judge Huvelle) for her *in camera* review nine months after the Court issued the order Defendants quote on the same page.

<sup>3</sup> Where, as here, the Government engaged in either bad-faith conduct that gave rise to the litigation or bad-faith conduct during the litigation, Plaintiffs may recover their attorneys’ fees at prevailing market rates pursuant to 28 U.S.C. § 2412(b). *See* Mot. at 11-12. Alternatively, 28 U.S.C. § 2412(d)(2)(B) provides for Plaintiffs’ recovery of fees and expenses at specified rates, unless the Government’s position was “substantially justified” or any other special circumstances would make an award unjust. *See* Mot. at 12-13.

law and the facts.” *Air Transp. Ass’n of Canada v. Fed. Aviation Admin.*, 156 F.3d 1329 (D.C. Cir. 1998). “The government’s ‘position’ includes both its pre-litigation and litigation positions.” *Jacobs v. Schiffer*, 204 F.3d 259, 263 (D.C. Cir. 2000). Plaintiffs can recover EAJA fees even if the Court were to find that only *some* of the Government’s actions were substantially unjustified. *See Air Transp.*, 156 F.3d at 1332 (“[I]t cannot be the case that Congress intended that a party who prevails on an essential ground of a petition to set aside government action cannot recover the congressionally contemplated fees because the government’s action was substantially unjustified on only one of several possible bases.”).

Defendants insist that a finding that the policy was arbitrary and capricious “does not preclude the Government from demonstrating that [its] actions and its conduct in litigation were ‘substantially justified.’” Opp. at 11 (citing *Willett v. ICC*, 844 F.2d 867, 871 (D.C. Cir. 1988)). That general proposition, standing alone, is not in dispute. But, this is not a case where the finding was due to the mere omission of consideration of a relevant factor or like behavior. As relevant here, where Defendants deliberately failed to complete their clear duties to provide N-426s and to process military naturalization applications, Defendants fail to appreciate that “a finding that an agency acted arbitrarily and capriciously by denying equal treatment to two similarly situated parties, or by failing to enforce a rule in a situation to which it plainly applied, renders it much more likely that the Government’s action was not substantially justified.” *Willett*, 844 F.2d at 871.

## **2. Defendants Mischaracterize the Relief that Plaintiffs Won**

Defendants repeatedly downplay the remarkable, hard-fought relief that counsel secured for the class, seeking to paint a picture of Plaintiffs “scrambl[ing] to amend their complaint and narrow their claims to avoid dismissal,” Opp. at 2, and somehow lucking into “narrow” or “minor” wins on immaterial “sub-claims,” Opp. at 1, 7, 11, 14, 40. Nothing could be further from the truth.

As the record makes clear, Plaintiffs had one goal from the outset of this case: to remove

the government-imposed roadblocks—in whatever form they took—that were preventing MAVNI soldiers from receiving the expedited naturalization process they were promised when they signed up to serve our country. Mot. at 15. By any objective measure, they obtained this relief notwithstanding Defendants’ bitter defense of their conduct and attempts to scuttle any relief for these soldiers. Mot. at 19; Declaration of Margaret Stock (ECF 319-4) (“Stock Decl.”) ¶¶ 17-19. Two thousand naturalized MAVNIs—each one tracked by the Court through mandated reporting—puts the lie to Defendants’ trivialization campaign. *See* Stock Decl. ¶ 36; July 29, 2020 Hrg. at 5; ECF 301 at 2.

Remarkably, the few times when Defendants actually acknowledge this outcome, they brazenly try to take credit for it, pretending that Defendants would have naturalized those MAVNIs anyway. *See* Opp. at 28; *id.*, n.4. This is absurd and readily disproven. In fact, Judge Huvelle consistently recognized that the naturalization of *Nio* class members was attributable to Plaintiffs’ efforts, the Court’s orders, and the Government’s *resulting* compliance. Early in the case, Judge Huvelle repeatedly criticized the Government for its failure to process *Nio* class members’ naturalization applications. *See* Oct. 27, 2017 Hrg. at 7:16-18 (COURT: “[W]e haven’t gotten any of them through yet.”); April 11, 2018 Hrg. at 124:19-24 (COURT: “[T]hese people can’t very well face the three-year mark with you [the Government] sitting there having not done what needs to be done to move them along.”). Then, after more than two years of hard-fought litigation, Judge Huvelle credited the “remarkable” results that *Plaintiffs’ counsel* had obtained for their clients:

COURT: ***[T]he figures, from a class perspective, are remarkable, absolutely remarkable. I can sit and say that, as a result of what the plaintiffs have done here with the Court’s assistance, 1600 people got naturalized who might not have. . . .***

PLAINTIFFS: Your Honor, we agree with you. And we’re very happy with these numbers that have only happened because of this case.

See Nov. 20, 2019 Hrg. at 32:14-33:3 (emphasis added).

Nor were Plaintiffs' victories limited, as Defendants repeatedly insist, to judgment on a "sub-claim." Plaintiffs defeated two motions to dismiss (ECF 98, 159) and won multiple motions, including a preliminary injunction motion (ECF 74); a motion for partial summary judgment (*Nio v. U.S. Dep't of Homeland Sec.*, 385 F. Supp. 3d 44 (D.D.C. 2019) (ECF 249) ("*Nio IV*"), ECF 250); and a permanent injunction (*Nio v. U.S. Dep't of Homeland Sec.*, No. 17-0998, 2020 WL 6266304, at \*1 (D.D.C. Aug. 20, 2020) (ECF 307) ("*Nio V*")), which struck down the portions of the Government policies that stood in the way of MAVNIs' naturalization. These combined victories cleared the way for the naturalization of the *Nio* class members.<sup>4</sup> These collective victories—throughout the course of the litigation—contradict Defendants' absurd claim that "a majority of the class members did not benefit from the relief granted by the Court." Opp. at 28, n.4. Notably, Defendants' contentions that the litigation wins were of no consequence are undermined by their repeated efforts to reverse the injunction, decertify the class, and avoid reporting on class members, as well as their short-lived appeal of both the permanent injunction and final judgment.

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<sup>4</sup> For example, if the DoD's N-426 policy had not been enjoined in October 2017, (a) all existing N-426s would have been revoked, (b) all pending naturalization applications would have been denied for failure to provide adequate evidence of honorable service (*i.e.*, the N-426), (c) hundreds of class members would not have been able to obtain an N-426 and apply or re-apply for naturalization (starting now-lengthy naturalization application processing by USCIS) until after their enhanced background checks were fully adjudicated favorably, they were shipped to and completed approximately six months of active duty training, and then served for another year after that, and (d) the other hundreds of class members never would have been able to obtain an N-426 and pursue naturalization because DoD, to this day, still has not completed their MSSDs, much less shipped them to active duty training. See ECF 58 at Ex. 1; *Calixto v. Dept. of Army*, No. 1:18-cv-1793-PLF, Defendants' Status Report (ECF 169) (July 27, 2020) (reporting on status of hundreds of soldiers for whom the Army had issued MSSRs (and for which the Army was to provide soldiers with notice of and an opportunity to respond to the MSSR notice before issuing their MSSDs).

In addition to the injunctive relief and summary judgment, Defendants ignore the countless “informal” victories obtained by class counsel during the course of the litigation. Each time Plaintiffs raised concerns about the status of individual MAVNI applications or newly discovered aspects of Defendants’ policies, it set in motion events that culminated in favorable outcomes for the class. For example, beginning in August 2017, at Plaintiffs’ urging, Judge Huvelle ordered Defendants to file regular status reports regarding the status of individual Plaintiffs. ECF 36. She later expanded that reporting requirement to include the status of each *Nio* class member. ECF 135; *see also* ECF 159 (ordering Defendants to provide class counsel with a preliminary copy of each report “for corrections”); Opp. at 33 (admitting that “Defendants were subject to extensive reporting requirements that provided a plethora of information to Plaintiffs on a regular basis”). In total, Defendants submitted more than 70 reports regarding the status of Plaintiffs and class members. In total, the Court issued more than *thirty* orders requiring Defendants to answer specific questions, provide supporting documents, or submit status reports addressing the status of individual Plaintiffs and class members.<sup>5</sup>

Those mandated Government disclosures were the direct result of class counsel’s persistence and zealous advocacy, even though Judge Huvelle occasionally expressed frustration with *the parties* for having to work through these issues in excruciating detail. *See, e.g.*, January 23, 2018 Hrg. at 17:7-16 (COURT: “I’d like to get, one thing I would like to get standardized is a way that we can -- the reporting not only helps me but it helps respond to some of their complaints. So I would like to know what kind of reporting makes sense so that we get close to accurate. We had only focused at least in one of the cases, *Nio*, on eight people. And they’ve been going at a

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<sup>5</sup> *See* ECF Nos. 22, 29, 36, 43, 46, 91, 97, 124, 135, 150, 159, 198, 232, 239, 259, 266, 275, 284, 293, 296, 303 as well as Minute Orders dated 2/20/18, 3/9/18, 4/30/18, 5/15/18, 5/24/18, 5/31/18, 6/5/18, 6/6/18, 6/28/18, 7/11/18, 7/12/18, 7/17/18, 8/15/18, 3/21/19, 4/19/19, 6/17/19, and 7/7/19.

snail's pace when you think about it. We've been working on them since July. None of them have cleared, none of the eight."); *id.* at 24:11-17 (class counsel flagging the inaccuracy of Defendants' reporting); *id.* at 62:7-13 (COURT: "I think the only thing I can do is send the question of what kind of reporting we need and will help us, if you can't work it our yourselves, I'll send it to a magistrate judge . . . to come up with some kind of regular reporting system and a way to resolve individual disputes to the extent they can be."); *id.* at 68:22-25 (similar); April 11, 2018 Hrg. at 131:5-23, 134:13-15, 140:4-12 (Court issuing additional reporting requirements); June 20, 2018 Hrg. at 66:6-13 (same); Jan. 21, 2020 Hrg. at 3:17-19 ("I think that the reporting is extremely helpful to me, and I know the plaintiffs want it as well.").

As another example, after the Court enjoined the DoD's N-426 policy in October 2017, "the agencies took a number of steps to try to get the same result as the enjoined policy by forcing the soldiers to complete at least six months or so of 'initial training' before naturalizing them. ***Class counsel had to bring these issues to the Court's attention and the defendants had to be instructed by the Court*** to get class members naturalized before they shipped to training." Stock Decl. ¶ 50 (emphasis added); *see* ECF 135 at 2. This, plus class counsel's diligent follow-up showing that class members were being shipped to basic training without being naturalized put pressure on Defendants to push through *Nio* class members' naturalization applications. *See, e.g.*, Apr. 11, 2018 Hrg. at 36:5-6, 83:22-84:8, 130:8-21; Apr. 30, 2018 Hrg. at 10:2-10, 24:2-10, 32:4-37:15. Absent these efforts, Defendants would have continued to delay and block naturalization.

Yet another informal victory is shown by Defendants abandoning their original plan to mass discharge the MAVNIs (*see* ECF 17-8 at 2) only after Plaintiffs noted to the Court that the USCIS July 7 Policy of waiting for DoD to complete background checks was a farce if DoD simply was discharging the soldiers (and not completing the background checks). In addition, it was only

after initiation of this lawsuit and litigation over the original preliminary injunction motion that DoD began re-scheduling previously cancelled background check interviews with class members. *See, e.g.*, ECF 89 at 4 (Defendants’ Jan. 8, 2018 Report showing that named plaintiffs’ interviews did not take place until September 2017 or later). And only after Plaintiffs raised concerns to the Court regarding the DoD’s “time-out” discharge policy did DoD adjust that rule for MAVNIs, thereby ensuring that MAVNI soldiers were not discharged before having an opportunity to have their naturalization applications considered. *See* ECF 26; Mot. at 28; Stock Decl. ¶ 49; Opp. at 36, n.13 (admitting that Defendants “applied this law [i.e., the original time-out policy] *until* the Court instructed otherwise”) (emphasis added). Without Plaintiffs’ efforts, the DoD background checks would not have been completed and the class members would have been discharged from the Army and denied naturalization on the basis of that “uncharacterized” discharge. *See, e.g., Miriyeva v. U.S. Citizenship & Immigration Services*, No. 1:19-cv-03351 (ECF 1 ¶ 5) (Nov. 6, 2019) (related case in which one named plaintiff was an early “time-out” discharge (pre-Judge Huvelle instruction) who was denied naturalization solely on the basis of his “uncharacterized” discharge).

### **3. Defendants Mischaracterize Why Plaintiffs Had to Amend Their Claims and Raise New Issues**

Defendants also mischaracterize why Plaintiffs had to assert new claims and raise new issues with the Court. Amendments here were compelled by litigation circumstances, not out of some desire to prolong the litigation or narrow the claims or in anticipation of a larger fee recovery. Defendants’ reckless and nonsensical speculation otherwise deserves no credit. The record shows that Plaintiffs properly amended their complaint in response to Defendants’ shifting policies.<sup>6</sup>

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<sup>6</sup> This pattern continues in related litigation, as recognized by this Court. *See Calixto v. Dept. of Army*, No. 1:18-cv-1793-PLF, Order (ECF 196) (June 3, 2021 D.D.C.) (“The Court also concludes that plaintiffs’ failure to include the newly alleged facts and named plaintiffs in their second amended complaint was not a result of their own lack of diligence. Rather, it was a result of the Army’s changing policies. . . . In addition, plaintiffs have only sought to amend their complaint in

A concise summary of this case’s key procedural developments reveals this causal pattern. Plaintiffs filed their original complaint in May 2017 and their preliminary injunction motion in June 2017 based on the Government’s original unannounced but obvious “hold” on MAVNI naturalization applications. Mot. at 6, 8-9. *After* USCIS issued its July 7, 2017 policy, Plaintiffs filed an amended complaint. Mot. at 9.<sup>7</sup> *After* DoD issued its October 13, 2017 N-426 policy, Plaintiffs filed a second amended complaint and sought a preliminary injunction challenging that new policy as applicable to the putative class. Mot. at 9.<sup>8</sup> *After* the Court’s June 20, 2018 motion to dismiss order directed Plaintiffs to file a targeted summary judgment motion regarding the MSSD portion of the July 7 policy (ECF 159)—because by that time Plaintiffs had forced Defendants to abandon their mass discharge efforts and re-schedule and conduct all background check interviews, thus mooted the “background check” portion of the July 7 policy—Plaintiffs successfully did so. Mot. at 10. And *after* Plaintiffs and the Court spent over three years holding

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response to the Army’s changing representations and policies concerning the discharge of MAVNI soldiers.”).

<sup>7</sup> Defendants selectively quote a July 2017 hearing transcript to emphasize that Plaintiffs raised “new” claims (*see* Opp. at 12), but that was because Plaintiffs had just learned that USCIS changed its policy on July 7, 2017. *See* July 19, 2017 Tr. at 61:16-22 (COURT: “Well, we’re learning a whole new case here.” [Plaintiffs]: “Yes, Your Honor. The story changes quite a bit. We’ve been trying to keep up with it or try to anticipate it as best we can.”). Plaintiffs, the Court, and even Defendants acknowledged the significance of this new policy and the unavoidable impact it had on the litigation. *Id.* at 99:9-14 (Defendants: “So, I did not take from any part of their complaint a challenge to the July 7 hold, nor could it because the complaint was filed before. So to the extent they want to amend their complaint . . . I suppose that’s within their power”); *id.* at 101:8-9 (COURT: “I think after today you may feel that you need to amend. It’s messy.”); *id.* at 102:25-103:2 (Plaintiffs: “We didn’t have the benefit of the July 7<sup>th</sup> culmination or any of these documents, for that matter, until we filed a P.I. motion.”).

<sup>8</sup> Contrary to Defendants’ assertions, Judge Huvelle acknowledged that it was the Government’s changing policies and practices—not “shifting” positions or “narrowed” claims asserted by Plaintiffs—that materially changed the case. *See* Oct. 27, 2017 Hrg. at 23:7-10 (COURT: “But in both cases we had no basis for a preliminary injunction in my opinion in this case until you [the Government] decided to take away what they already had which was N-426.”).

the Government accountable for actions and policies that delayed or prevented the naturalization of *Nio* class members, the Court closed out the case without stripping away any of the relief obtained by confirming the summary judgment decision and converting the preliminary injunction into a permanent injunction (over Defendants' objections and efforts to de-certify the class). Mot. at 10-11. As a result of *all* these efforts, more than 2,000 class members have become naturalized citizens. *See* July 29, 2020 Hrg. at 5; ECF 301 at 2. Again, without these efforts, those same class members would have been discharged from the Army and ineligible for military naturalization under USCIS policy concerning "uncharacterized" discharges, and many would have been unable to work lawfully in the U.S. and subject to deportation to countries where they would be persecuted for having joined the U.S. military and sworn allegiance to the U.S.

This record refutes Defendants' false portrayal of a "shifting" litigation prolonged by Plaintiffs' actions, as opposed to Plaintiffs' necessary *reactions* to Defendants' litigation-induced policy changes and information revealed in Defendants' Court-ordered reporting.

**4. Defendants Mischaracterize the Relevance of "National Security" Interests to Defendants' Litigation Position**

Defendants' substantial justification arguments center on one flawed premise: that the Government's position was justified "based on two classified reports concerning national security." Opp. at 11; *see also* Opp. at 1 ("This case is about the Government's vital interest in protecting the national security of the United States."); Opp. at 19. Waving the "national security" banner here is wasted effort.

The policies and conduct at issue in this litigation did not seek in any manner to intrude upon any national security prerogatives, nor did Plaintiffs try to dictate who should serve in the military or what type of background checks service members should undergo. Nor was this case about the Government's purported inability to "relax its obligation to fully investigate a

naturalization applicant’s eligibility.” Opp. at 8. Those red herring arguments—made repeatedly by Defendants during the litigation—served only to confuse the issues. Defendants do not point to any evidence that Plaintiffs were challenging national security decisions because there is no such evidence. Instead, Plaintiffs’ Complaint made clear that they were challenging unlawful policies that were (a) interfering with their statutory right to pursue naturalization under 8 U.S.C. § 1440 and (b) adding naturalization eligibility requirements that were contrary to law.

For sure, early on in the litigation, Judge Huvelle considered Defendants’ proffered national security arguments in denying Plaintiffs’ initial preliminary injunction motion. But that does not mean that Defendants’ pre-litigation and litigation positions were substantially justified. Notwithstanding the initial preliminary injunction denial, Judge Huvelle—*after* considering certain classified documents—nevertheless *granted* a preliminary injunction a few months later and subsequently entered summary judgment in Plaintiffs’ favor. In so doing, Judge Huvelle found the challenged USCIS’s and DoD’s policies to be unlawful and not justified by any national security concern:

In an attempt to explain the [policy] change [in the Oct. 13, 2017 guidance], defendants’ counsel repeated the now-familiar refrain that DOD has made the change for “national security” purposes. But DOD’s Guidance is not justified by any national security concerns. As the Court recognized in *Nio*, national security issues may justify enhanced security screening, *see Nio* [*v. U.S. Dept. of Homeland Security*, 270 F. Supp. 3d 49 (D.D.C. 2017)], but N–426 certification is not related to that process.... ***DOD has given no reasoned justification why certifying a form N–426 for immigration and naturalization purposes implicates our national security.***

*Kirwa v. Dept. of Defense*, 285 F. Supp. 3d 21, 39 (D.D.C. 2017) (emphasis added); ECF 74 (entering preliminary injunction prohibiting Defendants from implementing Section III of DoD’s October 13, 2017 guidance “for the reasons set forth in the Court’s opinion granting a preliminary

injunction in *Kirwa*”);<sup>9</sup> Oct. 27, 2017 Hrg. at 4:20-22, 5:16-18 (COURT: “I am constantly confronted by this argument that some way or another they relate to national security concerns. . . . ***It seems to me that the government’s justification to try in some way piggyback the N-426s onto national security is misguided given its past practice.***”) (emphasis added); *see also Nio V*, 2020 WL 6266304 (converting Oct. 2017 preliminary injunction to a permanent injunction).<sup>10</sup> And with respect to USCIS’s July 7, 2017 Policy, Judge Huvelle said this: “[A]ny information that could bear on national security is collected before the MSSR/MSSD process and thus cannot justify the MSSD Requirement.” *See Nio v. Dept. of Homeland Security*, 385 F. Supp. 3d 44, 67 n.16 (granting summary judgment).<sup>11</sup>

##### 5. Defendants’ Other Attempts to Justify Their Defense of Their July 7, 2017 and October 13, 2017 Policies Fall Short

Judge Huvelle vacated the “challenged portion”<sup>12</sup> of USCIS’s July 7, 2017 policy—under

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<sup>9</sup> Defendants take Judge Huvelle’s statement that she “created a monster” out of context to suggest she regretted having rejected Defendants’ national security concerns. This is a blatant mischaracterization, as evidenced by the full quotation to Plaintiffs’ counsel: “What you got – and don’t throw back – I think, you know, as a matter of strategy, to throw back the one win and say, Well, I did it for the N-426, that really doesn’t help us because I, you know – in hindsight, I think to myself, God, you know, I created a monster, ***but it’s succeeded, you know? You got your guys moving and some protection from immigration.***” Apr. 11, 2018 Hrg. at 105:5-11.

<sup>10</sup> Defendants’ same “national security” justification also was rejected in parallel, related litigation. *See Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1166, n.21 (W.D. Wash. 2019) (Stephanie Miller’s testimony on behalf of the Government concerning purported MAVNI national security concerns was found to be unpersuasive and even raised credibility concerns); Stock Decl. ¶ 44.

<sup>11</sup> Defendants bear the evidentiary burden to prove substantial justification. Mot. at 12. They cannot satisfy that burden by relying on “two classified reports” that Plaintiffs have never seen and are not even before the Court on this motion. *See Opp.* at 1; *id.* at 35, n.11 (acknowledging that Plaintiffs’ counsel still has never seen these reports). Moreover, if Defendants truly believed that their policies were necessary for national security reasons, they had the opportunity, at multiple points in this litigation, to seek appellate review of Judge Huvelle’s orders, but they did not.

<sup>12</sup> Plaintiffs’ challenge to the DoD investigatory phase ultimately became “moot” because—due to Plaintiffs’ diligent litigation efforts, which prompted Court-ordered disclosures and applied significant pressure to the Government, as discussed above—the Government completed that phase “for essentially all class members” before this motion. *Nio IV*, 383 F. Supp. 3d at 59.

which USCIS declined to naturalize MAVNI applicants until they had been deemed suitable for service by the DoD and the U.S. Army—as arbitrary and capricious. *Nio IV*, 383 F. Supp. 3d at 47. Having lost on the merits, Defendants now seek to justify their enforcement of, and arguments in support of, the MSSD Requirement. The Court summarized Defendants’ position as based on “two primary rationales”: (1) “that waiting until the Army renders the MSSD allows USCIS to collect ‘adverse information that may be relevant to an applicant’s eligibility for naturalization under the statutory requirements imposed by Congress;’” and (2) “that the information DOD learns during its process may implicate national-security concerns.” *Nio IV*, 383 F. Supp. 3d at 60.

Defendants insist that Judge Huvelle “endorse[d]” these arguments “early” (Opp. at 16) and “agreed” that waiting for the MSSD was justified (i) by national security concerns (Opp. at 14), (ii) because it promoted efficiency (Opp. at 15), and (iii) because an adverse decision may impact an applicant’s eligibility to naturalize (Opp. at 16). To the contrary, Judge Huvelle expressly found that “USCIS’s purported reasons” and “explanation” for the policy ran “counter to the evidence.” *Nio IV*, 383 F. Supp. 3d at 60; *see id.* at 47 (“USCIS’s purported reasons for waiting for these military suitability adjudications do not comport with the evidence”). She found that the Government’s “justifications may well support USCIS waiting until the end of the DOD investigatory phase, when any such information would be discovered. They do *not*, however, justify the MSSD Requirement.” *Id.* at 36-37 (“The MSSD Requirement results in USCIS receiving no new derogatory information, and thus defendants’ need for information bears no ‘rational connection’ to the MSSD Requirement.”). Defendants cannot blame their irrational justification on “early” comments by Judge Huvelle, especially given Defendants’ repeated failures to provide complete and accurate information to the Court.

Defendants also cannot show substantial justification by blaming Judge Huvelle for

supposedly getting it wrong. Opp. at 21, 23. Defendants claim that they were right that DoD had unfettered discretion to create and implement the N-426 policy, even in the face of their admission, in this very case, that DoD's role in immigration matters—limited to looking at service records and translating that to the Form N-426—was “ministerial.” Opp. at 21. If Defendants truly believed that Judge Huvelle got it wrong and that the N-426 Policy was necessary for national security reasons, they would have appealed Judge Huvelle's decisions in this matter and the related *Kirwa* matter. The fact that they—agencies tasked with national security roles—did not appeal belies their supposed “substantial justifications.”

Defendants' point that this was “a case of first impression” does not aid their cause. *See* Opp. at 16, 20. Nothing in the EAJA limits fees to only those cases where the Government acts in direct defiance of binding precedent. The question before the Court is whether the Government's position was “justified to a degree that could satisfy a reasonable person' or, in other words, has ‘a reasonable basis both in law and fact.’” *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Pierce*, 487 U.S. at 565). The Government cannot short circuit that analysis simply because it had not already lost on the same issues in another court. *Pierce*, 487 U.S. at 569 (“[T]he fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified.”).

#### **6. Defendants Have Made No Effort to Justify Their Pre-litigation Policies**

Defendants bear the burden of showing that their positions—including their pre-litigation position—was substantially justified. *See Jacob v. Schiffer*, 204 F.3d 259, 263 (D.C. Cir. 2000). But Defendants make no effort at all to defend their pre-litigation position.

It is little wonder the Government would prefer not to talk about what they were doing when Plaintiffs filed this case. Prior to the litigation, DoD and USCIS had placed a secret “hold”

on MAVNI naturalization applications and then denied that any hold existed. *See* Mot. at 10, 23-25. Defendants intentionally enacted this pre-litigation policy on the errant gamble that enhanced screening of non-citizen MAVNI soldiers would be less egregious than trying to screen them after they became citizens. But they knew what they were doing was risky and unlawful. According to a Memo prepared for the Secretary of Defense, “[t]here are significant legal constraints to subjecting this population [of naturalized MAVNIs] to enhanced screening without an individualized assessment of cause.” ECF 17-8 at 2; *see also* *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1166 (W.D. Wash. 2019) (finding that the quoted text “shows that the DoD was aware of the equal protection violations that would arise if naturalized MAVNI soldiers were treated differently from other citizens” and that “it nevertheless persisted” in continuous monitoring policy that unconstitutionally discriminated based on national origin).

Defendants’ own documents thus reveal that their goal from the outset was to prevent MAVNIs from naturalizing and that they knew that doing so would violate the MAVNIs’ legal rights. And the Government’s plans went beyond the unlawful hold; DoD planned to summarily discharge the *Nio* class *en masse*. *See* ECF 17-8 at 2 (MAVNIs drilling in the Selected Reserve “will be separated by Secretarial plenary authority”). Those discharges then would have left MAVNIs ineligible for naturalization under current USCIS policy.

This secret pre-litigation “hold” policy was directly contrary to the INA, and USCIS’s refusal—at DoD’s behest—to process properly submitted naturalization applications was obviously unlawful. DoD has no role in the MAVNI naturalization process under 8 U.S.C. § 1440 other than the ministerial task of certifying a soldier’s honorable service, and it has no authority to seek a hold or otherwise interfere with the naturalization process. *See* Opp. at 21 (“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.”); *Kirwa*, 285 F. Supp. 3d at 28. And pursuant to both the INA and USCIS regulations, USCIS has a mandatory, nondiscretionary duty to adjudicate naturalization applications. *See* 8 U.S.C. § 1446; 8 C.F.R. § 316.14(b)(1); 8 C.F.R. § 335; *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 51 (D.D.C. 2008) (noting in another context that USCIS does not have “unfettered discretion to relegate aliens to a state of limbo, leaving them to languish there indefinitely”) (internal quotations and citations omitted).

As soon as Plaintiffs brought suit, USCIS scrambled to create a new policy and then tried to avoid revealing the pre-litigation policy. *See* ECF 17-8. This alone strongly indicates that the pre-litigation position was not substantially justified, and the government knew it.

### **C. The Government Acted in Bad Faith**

The substantial justification and bad-faith analysis overlap to the extent that, as argued in Plaintiffs’ opening brief, the same actions that demonstrate Defendants’ bad faith establish that their litigation positions were not substantially justified. Similarly, Defendants raise many of the arguments addressed above in response to Plaintiffs’ bad-faith arguments. *See* Opp. at 27-28 (invoking national security concerns and claiming credit for adjudicating applications of MAVNI soldiers independent of Plaintiffs’ summary judgment victory as evidence that Defendants were not motivated by an improper purpose); *id.* at 35, n.11 (taking issue with Plaintiffs’ “refusal to recognize[] the real national security concerns present in this case”); *id.* at 28 (arguing that *Nio* class members were naturalized due to Defendants’ efforts, not in response to this litigation or Court-ordered relief). Plaintiffs therefore incorporate by reference their arguments from Section II(B), *supra*, to the extent they apply to Defendants’ bad-faith arguments. In addition, Defendants’ efforts to dispute the significance of the bad-faith evidence presented in Plaintiffs’ opening brief (Mot. at 18-27) fall short for the following reasons.

### 1. Defendants Invoke the Wrong Legal Standard

Defendants rely on an out-of-circuit opinion for the proposition that Plaintiffs must prove the Government’s position was both “entirely meritless and motivated by an improper purpose” to recover a bad-faith award. Opp. at 26-27 (citing *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1988)). While Plaintiffs have met that standard, it is not the standard applicable in this Circuit. In the D.C. Circuit, attorneys’ fees can be awarded based on bad-faith conduct that occurs during the litigation or that gave rise to the litigation “when extraordinary circumstances or dominating reasons of fairness so demand.” *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 187 F.3d 655, 660 (D.C. Cir. 1999); see also *Lipsig v. Nat’l Student Mktg. Corp.*, 663 F.2d 178, 181-82 (D.C. Cir. 1980) (affirming bad faith finding where party misled the court); *Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36, 39-41 (D.D.C. 2004) (finding bad faith where the agency violated clear statutory duty).

### 2. Defendants’ Repeated Non-Compliance with Court Orders and Misconduct are Evidence of Bad Faith – Not “Mistakes”

Unable to deny that they repeatedly failed to comply with Court orders, Defendants—without any supporting witness attestation—characterize this conduct as a series of “individual mistakes.” Opp. at 29; see also Opp. at 34 (admitting that Defendants regularly misreported that MAVNI soldiers had been discharged resulting in the denial of their naturalization, but claiming this was a “relatively benign...mistake”). Similarly, Defendants acknowledge that they sent letters to MAVNI recruits that prompted them to waive their rights, but dismiss those letters as yet another “mistake.” Opp. at 36. These were not isolated incidents, and the Government can only admit to having made so many “mistakes” throughout the case before it reflects a clear pattern of non-compliance. Nor should Defendants be credited for admitting these “mistakes” or taking what Defendants characterize as “remedial actions” *only after* Plaintiffs exposed them and the Court

took issue with them. Opp. at 29; *see also* Opp. at 32, n. 8 (trying to claim credit for responding to the Court’s pointed questions regarding inaccuracies in data provided by the Government); *id.* at 34, n. 10 (trying to gloss over Plaintiffs’ cited example of a class member who was denied naturalization and indicted for allegedly fraudulently seeking an immigration benefit as an “extreme example” that was “unique” and “undoubtedly unfortunate”).

### **3. Defendants Cannot Bury Plaintiffs’ “Bad Faith” Evidence**

Defendants employ numerous footnotes throughout this section of their brief, as they try to downplay the significance of evidence to which they lack any effective response. For example, Defendants try to dismiss—but cannot rebut—the *Tiwari* Court’s findings about the significance of the DoD’s leaked memo and what it says about the Government’s improper goals. Opp. at 31, n. 5. Defendants similarly offer no evidence to refute Plaintiffs’ counsel’s sworn statement regarding the assertions that Defendants made about the lawfulness (or lack thereof) of USCIS’s former policy. Instead, Defendants resort to smears, shamelessly and falsely characterizing the declaration by Plaintiffs’ counsel as “a self-serving, wholly unsubstantiated statement by counsel who stands to recover millions of taxpayer dollars in this application.” Opp. at 31, n.6. This accusation of personal gain is nonsensical and completely discredited by, among other things, Plaintiffs’ undisputed evidence regarding how the fee recovery will serve charitable purposes. *See* Decl. of Douglas Baruch (ECF No. 319-3) (“Baruch Decl.”) ¶ 26. As another example, Defendants dismiss Plaintiffs’ allegations about the “time-out” rule as “unavailing,” despite admitting that they implemented that rule “until the Court instructed otherwise” in this lawsuit. Opp. at 36, n. 13.

### **4. Defendants’ Bad-Faith Conduct Permeated the Litigation**

This is not a case where Defendants engaged in one bad-faith action to which a discrete subset of Plaintiffs’ attorneys’ fees are attributable. Rather, as detailed in Plaintiffs’ opening brief, Defendants’ bad-faith conduct precipitated and then permeated throughout the entire lawsuit. Mot.

at 18-32. Defendants’ misconduct—which encompassed changing policies, non-compliance with Court orders, and oft-inaccurate and misleading disclosures of Court-ordered information directly resulted in dozens of hearings, multiple iterations of complaints, and extensive motion practice. *See, e.g., id.*; Sections II(B)(2)-(3), *supra*; Aug. 23, 2017 Hr’g Tr. at 86:11-15 (The Court: “Yeah, but what I’m worried about is [the government] starting to pull the rug from under me. I really do worry about it, because you don’t even know what your clients are doing no offense, this latest thing that came out.”); *id.* at 86:17-22 (ordering reporting). This is precisely the type of “exceptional case” described in *Goodyear* where Defendants’ bad-faith conduct so permeated the case as to make that misconduct a but-for cause of all of Plaintiffs’ attorneys’ fees from the start of this matter. *Goodyear Tire & Rubber v. Haeger*, 137 S.Ct. 1178, 1187, 1189 (2017).

### **III. PLAINTIFFS’ REQUESTED AWARD OF FEES, COSTS AND EXPENSES**

Class counsel devoted enormous time and effort to the successful representation of Plaintiffs and the class, and as a direct result more than 2,000 MAVNI soldier class members—including all class representatives—have naturalized. Although Defendants make several objections to counsel’s hours, there is very little analysis—and less substance—to those challenges. Similarly, Defendants’ objections to the LSI *Laffey* Matrix rates cannot overcome the fact that those rates are supported by undisputed evidence, and have been approved repeatedly in the D.C. Circuit. As explained in the Motion and below, Plaintiffs should be awarded fees of \$9,753,756 for 15,319.7 hours of work, as well as \$33,734 in costs and other expenses, for a total award of \$9,787,490. *See* Wollenberg Decl. II ¶¶ 9-13 (noting small reductions in the number of hours and the costs included in the Motion); *see also* Pl. Ex. 23.

#### **A. Class Counsel Properly Devoted Over 15,000 Hours to This Highly Complex, Hard-Fought Class Action on Behalf of Thousands of Vulnerable U.S. Soldiers**

Defendants’ principal objection to the amount of time included in the Motion is that

counsel's work went beyond what *Defendants* deemed necessary. They assert that much of counsel's work—but notably, not *how much* of counsel's work—related to individual class members, or somehow went beyond the relief obtained. *See* Opp. at 50. And Defendants again advance the fanciful claim that the fee award should be reduced because Plaintiffs supposedly protracted the resolution of the case. The Court should reject this rhetoric.

**1. Class Counsel's Billing Records and Other Evidence Properly and Fully Support a Fee Award for All Work Performed**

**a. Work involving specific class members was essential**

Defendants argue that fees should not be awarded for time spent on “individual issues,” such as counsel's time spent communicating with the class through the *Nio* email inbox. Opp. at 51. Defendants' assertion that those communications “do not relate to any motion that was ever filed in this case” is wrong. Judge Huvelle always was cognizant that the class consisted of real people whose lives were affected by Defendants' policies and conduct, and she managed the litigation based on that correct understanding. In August 2017, Judge Huvelle ordered Defendants to file regular status reports regarding the individual Plaintiffs, and later expanded that reporting to include the status of each individual *Nio* class member. *See* Section II(B)(2), *supra*; e.g., ECF 36, 97, 135, 159, 232. The Court required Defendants to submit dozens of reports over a three-year period. And Defendants requested that Plaintiffs review those reports in advance of Defendants submitting them to the Court. June 20, 2018 Hr'g Tr. at 67:24-68:18 (Defendants struggled so much with accurate reporting that they asked class counsel to review their reports before their submission to the Court); *see also* ECF 159. Yet, now Defendants complain about the very efforts by Plaintiffs' counsel that *Defendants* requested.

Defendants even set up their own email inbox to address *Nio* class members' so-called

individual issues.<sup>13</sup> Apr. 30, 2018 Tr. at 8:2-6 (Government: “So what we would propose . . . is USCIS can set up an e-mail inbox, and plaintiffs’ counsel, when they become aware that there’s a problem with an individual person, can e-mail this directly to USCIS, and USCIS could look into it.”); May 21, 2018 Tr. at 3:23-5:2 (confirming that Defendants’ *Nio* inbox is for individual issues, not class issues). As Plaintiffs have explained, class counsel’s extensive communications with the class of nearly 2,600 MAVNI soldiers was critical to obtaining the benefits of the Court’s orders, and ensuring that Defendants were following those orders and their own stated policies. Mot. at 34-35; Wollenberg Decl. I ¶ 9(a), (d)-(g).

Defendants’ claim that “individual issues” are irrelevant is simply divorced from the reality of how Judge Huvelle thought about and managed the case, as well as class counsel’s responsibilities to class members. The immigration status and experience of individual MAVNI soldiers was critical to the case, and a regular focus of the Court’s attention, inquiries, and orders. Defendants cannot be heard to object now that these issues were not properly before the Court, or outside the proper scope of a fee award.

**b. Recoverable fees are not limited to Plaintiffs’ work on the successful motions for injunctive relief and summary judgment**

Defendants suggest that class counsel should not be awarded fees for any work other than their successful efforts to obtain preliminary, and later permanent, injunctive relief and summary judgment. Opp. at 50-51. But that is not the law. An EAJA “fee award presumptively encompasses all aspects of the civil action.” *Comm’r, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990)

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<sup>13</sup> Defendants confuse the *Nio* email inbox that class counsel used to communicate with class members—which the time records refer to as the “*Nio* inbox” and which included over 26,000 emails—with the different email inbox that the government set up for class counsel to communicate with Defendants regarding *Nio* class members’ individual issues and which, according to Defendants, included fewer than 200 emails. See Opp. at 51; Raol Decl. ¶ 5; Wollenberg Decl. (ECF 319-2) ¶ 9(a); Declaration of Michael Valverde (ECF 326-1) ¶ 3.

(internal quotation omitted). Although an award may be reduced where the prevailing party engaged in “unreasonably dilatory conduct,” the unanimous *Jean* court also held that the case should be evaluated as a whole. “While the parties’ postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.” *Id.* at 161-62; *see also generally Ass’n of Am. Physicians & Surgeons, Inc. v. U.S. Food & Drug Admin.*, 391 F. Supp. 2d 171, 179 (D.D.C. 2005) (following *Jean* and denying government request to reduce the fee award under § 2412(d)(1)(C)). There is no basis to limit a fee award to only dispositive motions, and even if there were, all of the work done by Plaintiffs throughout the litigation led up to and made possible the successful dispositive motions.

**c. Plaintiffs do not seek fees incurred in other cases**

Contrary to Defendants’ assertions, Plaintiffs do not seek compensation for work unrelated to this case. Defendants point to two supposed instances of work that allegedly concerned other cases, *see* Opp. at 51, but both time entries relate to work on a single protective order motion that was cross-captioned and filed in each of *Nio*, *Kirwa*, and *Calixto*, and appropriately split between the cases. *See* Declaration of Neaha Raol (“Raol Decl.”) ¶¶ 2-4; ECF 194. As such, Defendants’ attempt to discount a fee recovery on this basis is unsubstantiated.

**d. Billing judgment**

Class counsel exercised billing judgment to exclude approximately 1,320 hours worked—approximately 8% of counsel’s total time—and Plaintiffs do not seek any fees for more than two dozen timekeepers who worked on the case. *See* Mot. at 33-34; Wollenberg Decl. I ¶¶ 15, 21, 25. Defendants argue this is not enough to “demonstrate[] sound billing judgment,” but cite *Open Communities All. v. Carson*, No. 17-cv-2192-BAH, 2018 WL 8622230 (D.D.C. June 15, 2018) for the proposition that a “10% reduction demonstrated proper exercise of billing judgment.” Opp. at

53. 8% versus 10% is not determinative. The issue is whether counsel made “a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.”

*Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Class counsel have done exactly that.

**e. Defendants’ argument for reducing fees under § 2412(d)(1)(C) is baseless**

As explained above, it is demonstrably false that Plaintiffs unreasonably protracted the litigation, or that their claims were unclear. The facts and issues evolved over the course of the litigation as Defendants issued new policies, changed their practices, and were required to provide detailed reporting. But it is hardly unusual for parties to obtain information in litigation that enables them to sharpen their legal claims or adapt to developing facts. That is how cases get resolved on the merits, and that is exactly what happened here. Defendants selectively quote Judge Huvelle’s June 20, 2018 colloquy with the parties about the scope of the claims, *see* Opp. at 58-59, but ignore the outcome of that hearing: denial of Defendants’ motion to dismiss and an order setting a summary judgment briefing schedule. *See* Min. Order (June 20, 2018). And although Defendants complain that the Court “required USCIS to continue reporting for more than a year after” ruling against them on summary judgment, Opp. at 60, a fees motion is not the place to relitigate Court-imposed reporting obligations. There can be no serious claim that *Plaintiffs* unreasonably protracted the litigation; to the contrary, it is *Defendants’* conduct that made this case the long and litigious slog that it was. *See* Section II(B)(3), *supra*.

**2. Defendants Have Not Justified Their Arbitrary Fee Reduction Request Based on the Billing Records**

In addition to objecting to the substance of counsel’s work, Defendants also criticize counsel’s billing records on several grounds, but do not substantiate *any* of those criticisms. Although Defendants describe their Exhibit 19 as a “sampling” of their “billing records analysis,” it is merely a clean copy of 11 of the 215 pages of billing records Plaintiffs submitted. *Compare*

Def. Ex. 19 (ECF 326-20) *with* Pl. Exs. 6 & 7 (ECF 319-11 & 319-12). Regardless, Defendants’ take on just 5% of the billing entries could not, even in theory, justify the whopping and obviously arbitrary 50% reduction they seek. *See* Opp. at 2, 43.<sup>14</sup> The Court and Plaintiffs are not obligated to guess which time entries Defendants object to or the analysis for them. “[I]f a party does not object to particular billing entries as inadequately documented, the court is not obligated *sua sponte* to sift through fee records searching for vague entries or block billing. ***It is a common practice for courts to address only those potentially inadequate entries brought to the court’s attention.***” *KeyCorp v. Holland*, No. 3:16-CV-1948, 2017 WL 606617, at \*7 (N.D. Tex. Feb. 15, 2017) (emphasis added).

Courts take a practical approach to the level of detail and specificity required to support a fee award. The standard is met where a description “contains sufficient clarity and detail” to allow the Court to evaluate the reasonableness of the time entry. *See Pigford v. Vilsack*, 89 F. Supp. 3d 25, 34 (D.D.C. 2015) (Friedman, J.) (awarding fees where the time entry at issue “is vague, but not so vague as to prevent a determination” that the hours and fees “are reasonable”).

Plaintiffs’ fee application is supported by the complete billing records for all time included in the Motion, summaries of those records, and a narrative overview of counsel’s work. *See* Pl. Exs. 6, 7, 11-13; Wollenberg Decl. I ¶¶ 6-12, 13-26; Baruch Decl. ¶¶ 19-24. Counsel’s contemporaneously recorded time entries were created in accordance with counsel’s customary time entry and billing practices and reviewed in detail before being submitted to the Court.

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<sup>14</sup> Defendants’ offer to “provide a complete billing records analysis” “upon the Court’s requests” is inappropriate. Def. Ex. 19 at 1. If Defendants *did not* do the work of preparing a “complete” analysis before filing their Opposition, especially when they have had the billing records since December 2020, then they must accept the consequences of that decision. If Defendants *did* prepare a “complete” analysis, but withheld it—in which case Defendants are relying on more of an analysis than they have even attempted to provide, *see* Opp. at 50-52 (offering unsubstantiated figures)—then they must live with that strategic decision too.

Wollenberg Decl. I ¶¶ 19-22, 24-26. Counsel’s time recording practices here are consistent with their practices when working for commercial clients, and fully support the fee request. *Id.* ¶¶ 19, 24; *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (“If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more.”).

Defendants assert that the billing records include a “substantial number” of vague time entries, but give only two examples. *Opp.* at 50-51. Although Defendants criticize Plaintiffs for spending 50 hours and nearly \$50,000 on certain tasks, Defendants do not identify the tasks or explain their calculation. *Opp.* at 50. Here again, the Court has no obligation to conduct a *sua sponte* search of the time records for potential objections that Defendants have not made. *KeyCorp*, 2017 WL 606617 at \*7. Contrary to Defendants’ claims, the record contains more than enough information for the Court to understand that entries like “[a]ddress MAVNI issues/concerns/updates” refer to lead counsel’s extensive—and necessary—work with class members to enforce the Court’s orders and help her clients obtain the benefit of the Court’s injunction. *See, e.g.*, *Ex. 7* at 105 (June 26, 2018 J. Wollenberg time entry); Wollenberg Decl. I ¶¶ 8(k), 8(w), 8(bb), 9(a), 9(d)-(g), 9(i). Defendants’ unsupported objections carry no weight.

Defendants’ criticism of the common practice of block billing similarly is unavailing, and Defendants again do not identify the allegedly offending time entries. Block billing is problematic only where it hampers a court’s ability to evaluate the reasonableness of the requested award. *See, e.g., Knauf Insulation, LLC v. Johns Manville Corp.*, No. 115-CV-00111, 2019 WL 10947458, at \*4 (S.D. Ind. Feb. 27, 2019) (describing block billing as “a common and accepted practice in fee requests”); *Mirsky v. Horizon Blue Cross & Blue Shield of New Jersey*, No. CIV.A. 11-2038 DMC, 2014 WL 654596, at \*6 (D.N.J. Feb. 19, 2014) (“[A]n attorney’s use of block billing is common practice and is entirely appropriate so long as a reviewing court can determine whether the hours

reasonably correlate to all of the activities performed within each block entry.”) (citation and internal quotation omitted). Where tasks are interrelated or block billing does not materially hamper the analysis, there is no basis to reduce a fee award. *See Pigford*, 89 F. Supp. 3d at 34 (“there appears no reason to subdivide . . . time entries, where the tasks appear interrelated”).

Defendants quote Ninth Circuit *dicta* for the proposition that block billing “may increase time by 10 to 30%.” Opp. at 52 (quoting *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1223 (9th Cir. 2010)). But there is no basis whatsoever to accuse class counsel of overstating their hours. Both Morgan Lewis and Fried Frank require all timekeepers to accurately and concisely record their time, including accurately recording the time spent working on behalf of a client each day. Wollenberg Decl. II ¶ 4. Class counsel approach their ethical duties—including their duties to their clients and this Court—with the utmost seriousness, and Defendants’ casual suggestion of misconduct is baseless. *Id.* ¶ 5. Here, class counsel’s billing records and other evidence fully support the requested fee award, and Defendants have not shown otherwise.

### 3. Class Counsel Appropriately Staffed the Case

This case required a large team. This case alone—to say nothing of the related *Kirwa*, *Calixto*, and *Miriyeva* cases<sup>15</sup>—involved dozens of motions, approximately 30 hearings, and scores of Court-ordered reports that counsel had to review and respond to concerning Defendants’ changing policies and practices. *See generally* Mot. at 8-11; Wollenberg Decl. I ¶ 8. As discussed above, to effectively represent the class of more than 2,000 soldiers, counsel communicated extensively with the MAVNIs to advise them of their rights under the Court’s orders and the challenged, rapidly evolving government policies, and to obtain information about Defendants’

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<sup>15</sup> To date, class counsel have devoted more than 24,000 hours to the four related MAVNI cases, only a fraction of which is at issue in the Motion. *See* Wollenberg Decl. I ¶ 13. *Calixto* is ongoing before the Court, and *Miriyeva* is pending before the D.C. Circuit.

repeated failure to abide by the Court's orders, Defendants' representations to the Court, and the law. Wollenberg Decl. I ¶¶ 9-10. Hundreds of filings, dozens of hearings, thousands of communications with the government, and tens of thousands of communications with the class required a sizeable team.

Given its size and scope, class counsel's staffing of the case was more than reasonable. The two lead partners on the case devoted almost 7,000 combined hours to representing the class. *See* Ex. 5; Baruch Decl. ¶ 23. One associate devoted more than 2,000 hours, and another partner and eight associates devoted more than 300 hours each. *Id.*; *see also* Wollenberg Decl. I ¶¶ 21, 25 (noting that Plaintiffs do not seek fees for numerous timekeepers). Concentrating an enormous amount of work onto a relatively small team also was highly efficient; the job that Ms. Wollenberg did in 5,000 hours could not have been done by five people working 1,000 hours each.

Defendants allege that some unspecified amount of time is not compensable because Plaintiffs "consistently overstaffed and overbilled for hearings, status conferences, and meetings." *Opp.* at 51. No evidence supports that claim. Defendants offer a single example where they claim Plaintiffs billed 133.3 hours and \$124,000 for eight people's participation in a 2.5-hour status conference on January 23, 2018. *Id.* at 51-52. But Defendants do not say how they arrived at those numbers, and neither the Court nor Plaintiffs are obligated to reverse engineer Defendants' unsubstantiated claims. *KeyCorp*, 2017 WL 606617, at \*7. Plaintiffs' entire case team billed 53.5 hours on January 23, 2018 for the hearing, *plus* all other *Nio* work that day; it is unclear where Defendants came up with the higher number. *See* Pl. Ex. 7 at 61-62; Wollenberg Decl. II ¶ 6. The claim that Plaintiffs billed \$124,000 for the hearing is also misleading in that it apparently is based on counsel's standard billing rates, not the significantly lower hourly rates that Plaintiffs seek here. *See* Wollenberg Decl. II ¶ 6.

Further, Defendants cannot credibly criticize Plaintiffs for having eight team members attend the important January 23, 2018 motion to dismiss hearing when Defendants brought seven people to the same hearing. *See* Jan. 23, 2018 Tr. at 3:12-17; *see also, e.g.*, July 19, 2017 Tr. at 3:16-4:12 (8 government attorneys); Aug. 23, 2017 Tr. at 3:13-4:1 (9 government attorneys and representatives); Oct. 27, 2017 Tr. at 3:11-25 (8 government attorneys and representatives); Apr. 11, 2018 Tr. at 3:15-4:11 (11 government attorneys and representatives). Defendants have failed to prove even one example of overstaffing, much less that Plaintiffs “consistently” did so.

### **B. Hourly Rate**

It is undisputed that the Court may award market rate fees under § 2412(b) if it finds bad faith. And Defendants cannot dispute that § 2412(d)(2)(A) also authorizes the Court to award market rate fees under a special factor enhancement theory. Defendants’ citation to *Haselwander v. McHugh*, 797 F.3d 1 (D.C. Cir. 2015), is unavailing. Although not warranted on the facts of that particular case, the *Haselwander* court acknowledged that “[t]he court may adjust the rate upwards for cost of living and ‘special-factor enhancement[s].’” *Id.* at 3 (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 968 (D.C. Cir. 2004)).

Section 2412(d)(2)(A)(ii) authorizes an upward departure from the EAJA statutory rate where “the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” Defendants overread *Pierce*’s construction of this language, and argue that a special factor enhancement is available only where no “other qualified attorneys . . . exist.” *Op.* at 48 (citing *Pierce*, 487 U.S. at 573). That cannot be what *Pierce* means. The Supreme Court focused on the term “qualified” and read the phrase “limited availability of qualified attorneys” to refer to the limited availability of “attorneys having some distinctive knowledge or specialized skill needful for the litigation in question,” which could include “an identifiable practice specialty such as patent

law, or knowledge of foreign law or language.” *Pierce*, 487 U.S. at 572. In a world where patent lawyers, foreign law specialists, and multi-lingual attorneys are common, *Pierce* cannot be read to limit the special factor enhancement only to situations where no other theoretically capable attorneys *exist*. The limited availability of “qualified attorneys” is only one non-limiting example of the types of “special factor[s]” that might justify a higher fee. *See Pierce*, 487 U.S. at 573 (recognizing that other “special factor[s]” can support higher fees, and declining to catalogue them). The practical unavailability of other counsel can, and here does, justify a higher fee.

In this unusual case, the practical reality was that no other attorneys were able and willing to dedicate the enormous resources necessary to successfully litigate this pro bono case. As Plaintiffs have explained, when Lt. Col. Margaret Stock—the leading national expert in the intersection of military and immigration law, and the military officer who originally spearheaded the MAVNI program—came to realize that DoD and USCIS were collaborating to prevent eligible MAVNI soldiers from naturalizing, it was clear to her that a large, highly complex class action litigation likely was necessary. Despite extensive outreach, Ms. Stock was unable to identify any firm, legal services organization, or even law school clinic with the resources and ability to take on the case until class counsel did so. Mot. at 39-41; Stock Decl. ¶¶ 16-29.

A team of 18 lawyers and two paralegals devoted more than 15,000 hours to this case, or \$13.7 million worth of time. Pl. Ex. 5. Team members took hundreds—and in some cases thousands—of hours away from their billable practices to represent the class pro bono. *Id.* (Wollenberg 5,000+ hours; Raol, 2000+ hours; Baruch, 1,700+ hours; seven additional lawyers with 400+ hours). Even the largest of law firms and best-resourced legal services organizations could not or would not make the predictably large investment necessary to litigate this case. Stock Decl. ¶ 23-25. Put simply, for Plaintiffs, it was class counsel or nobody. Defendants have no

response to this evidence, except to fall back on their erroneous claim that a special factor enhancement is only available where no other qualified attorneys exist. Opp. at 48.

The size, complexity, and resources needed to vindicate the classes' rights in the face of government intransigence, and the demonstrated unavailability of other counsel willing to take on the case pro bono, constitute a special factor that warrants the award of market rate fees.

If the Court awards fees under § 2412(b) based on Defendants' bad faith or finds that a special factor enhancement is warranted under §2412(d), those fees should be calculated using the LSI-*Laffey* Matrix rates. Mot. at 41-43. As the D.C. Circuit has found, the LSI-*Laffey* Matrix rates are an appropriate estimate of the cost of complex federal litigation services in the Washington, D.C. area. *Salazar v. Dist. of Columbia*, 809 F.3d 58, 65 (D.C. Cir. 2015); *see also DL v. Dist. of Columbia*, 924 F.3d 585 (2019) (finding that the district court erred to rely on the USAO rate matrix); Mot. at 42-43 (citing several recent decisions in which different judges of this Court awarded fees using the LSI *Laffey* Matrix rates).<sup>16</sup>

The question before the Court is not whether the LSI-*Laffey* Matrix is a *perfect* statement of Washington, D.C. rates; market rates are a range, not a static number. The question is whether the LSI-*Laffey* Matrix is a *reasonable* statement of market rates determined with a "fair degree of accuracy." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982). Moreover, "[e]vidence submitted by attorney fee applicants in prior cases may also be relied on in compiling an attorney fee application. There is no requirement that each attorney develop all of the evidence for the hourly rate he seeks from scratch." *Id.* at 1326.

The evidence shows that the LSI *Laffey* Matrix rates are a reasonable statement of rates in

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<sup>16</sup> Defendants' assertion that Plaintiffs have not provided information about rates awarded in other cases is puzzling because this is exactly the information provided in the cited cases. Mot. at 41-43.

this market. Mot. at 41-43. If anything, they are significantly *lower* than true Washington, D.C. market rates. The D.C. Circuit acknowledged this in *Salazar*, 809 F.3d at 65, and the evidence here bears that out. *See* Pl. Ex. 20 (the LSI *Laffey* Matrix rates are approximately 30% less than counsel’s standard rates); Pl. Ex. 21 (in 2018 the LSI *Laffey* Matrix rates were on average 87% of actual median rates as reported by the Real Rate Report<sup>®</sup> survey, and 83% of 2019 rates); Pl. Ex. 15 (2020 LSI *Laffey* Matrix rates were lower than median rates as reported by Peer Monitor<sup>®</sup> survey); *see also generally* Baruch Decl. (ECF 319-3) ¶¶ 28-52 (discussing rate evidence in detail).

Although Defendants offer several criticisms of Plaintiffs’ evidence, none of their punches land. Defendants suggest, for example, that Plaintiffs’ Exhibit 21 should compare the LSI-*Laffey* Matrix rates to Real Rate Report data on firms with 201-500 lawyers. Opp. at 38. The idea, apparently, is that the smaller firms typically have lower rates, which would make the LSI *Laffey* Matrix rates look better. But Fried Frank (an AmLaw 100 firm of approximately 500 attorneys) is not typical of those medium-sized firms, either in terms of its rates or its ability and willingness to marshal enormous resources to litigate this matter pro bono. Defendants offer no reason why rates that are roughly half of counsel’s actual, market-driven 2018 rates are more relevant. Nor would it make sense to evaluate fees for “Employment and Labor: Immigration” or “Government Relations,” as Defendants suggest, because both are non-litigation practice areas. *See* Pl. Ex. 52; *see also* Baruch Decl. ¶ 44 (“commercial law” category includes “disputes,” i.e., litigation). Data from the Peer Monitor<sup>®</sup> service also confirms that the LSI *Laffey* Matrix rates are lower than prevailing rates in the Washington, D.C. area. *See* Pl. Ex. 15. Although Defendants correctly note that Peer Monitor includes some rate information from late 2019, because the evidence shows rates consistently trending upward, the inclusion of two months of 2019 data suggests, if anything, that true Washington, D.C. market rates for 2020 are slightly higher than reported, and the difference

between them and the lower LSI-*Laffey* Matrix rates is even greater.

All of this evidence is consistent with the previous findings of numerous judges of this Court that the LSI *Laffey* Matrix is a reasonable, if low, statement of Washington, D.C. market rates. This Court, too, should calculate its award based on the LSI *Laffey* Matrix.<sup>17</sup>

### C. Costs and Expenses

The D.C. Circuit has never held that only costs under 28 U.S.C. § 1920 are recoverable in an EAJA case, and the statute is clear that expenses other than “costs” may be reimbursed. 28 U.S.C. § 2412(d); *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Lab.*, 962 F. Supp. 191, 199 (D.D.C. 1997) (“Items routinely billed to a client are recoverable under the EAJA.”). Defendants’ effort to import § 1920(2)’s additional requirements into the EAJA is misplaced. It is undisputed that Plaintiffs may recover \$1,072.92 in copying costs. *Opp.* at 54. Plaintiffs also should be reimbursed for court reporting costs (\$6,234.44), electronic research regarding related cases (\$13,574.28), filing fees (\$1,645.38), website costs (\$621.12) and Westlaw (\$10,586.83), for a total award of \$31,920.61 in costs and expenses. (Plaintiffs withdraw their request for reimbursement of courier services, postage, and teleconferencing, a total of \$412.25.)

Defendants object to transcript costs on the ground that Plaintiffs purportedly have not shown they were necessarily obtained for the case. Even assuming this additional requirement of § 1920(2) applies, Defendants can hardly dispute that the transcripts were necessary when they cite no fewer than 18 hearing transcripts in their Opposition.

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<sup>17</sup> If the Court awards fees under § 2412(d), but is not inclined to grant award of market rate fees, the parties agree that the EAJA rate should be adjusted to reflect cost of living increases, and they agree on what that adjusted rate is. *See* Mot. at 43-44; Wollenberg Decl. I ¶¶ 44-50; Ex. 2 7 (ECF 319-32); *Opp.* at 42 (same total EAJA amount identified); ECF 326-17 (same). As noted above, Plaintiffs have somewhat revised the number of hours for which they seek fees. *See supra* at 20. In light of these adjustments, at the EAJA adjusted rate, counsel’s 15,319.7 hours are valued at \$3,180,415. *See* Wollenberg Decl. II ¶ 11.

Defendants acknowledge that legal research costs are reimbursable under the EAJA, Opp. at 56, recognize that this case was long and complex, *id.* at 57, and affirmatively argue that it presented novel legal issues, *id.* at 17. This more than justifies the Westlaw costs requested, which average less than \$275 for every month of the 39 months between the filing of the complaint and entry of judgment. *See Role Models*, 353 F.3d at 975 (awarding \$9,448.89 in Westlaw expenses).

Plaintiffs' expenses for monitoring relevant cases also are reimbursable. For example, Plaintiffs monitored *Tiwari v. Mattis*, in which the government admitted that no MAVNI soldier had ever been denaturalized, thus undermining any purported national security justifications raised here. *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1169 (W.D. Wash. 2019). Plaintiffs also monitored certain cases filed by individual class members, where the Government argued that those class members could not exercise their rights because of the *Nio* case while, at the same time, arguing in the *Nio* case that individual's rights should not be addressed.

#### **IV. CONCLUSION**

For the foregoing reasons, and those set forth in Plaintiff's opening brief, Plaintiffs respectfully request that the Court grant the Motion and award them \$9,753,756 in fees as well as \$33,734 in costs and other expenses, for a total award of \$9,787,490.

Dated: July 1, 2021

Respectfully submitted,

By: /s/ Jennifer M. Wollenberg

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*Counsel for Plaintiffs and the Certified Class*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 1:17-cv-998-PLF

**DECLARATION OF NEAHA RAOL**

I, Neaha Raol, declare:

1. I am an associate attorney with Morgan, Lewis & Bockius LLP (“Morgan Lewis”) resident in the firm’s Washington, D.C. office and a member of the Litigation Practice Group. I am a member in good standing of the bar of the District of Columbia Court of Appeals, the bar of the Commonwealth of Virginia, and the bar of this Court. I have personal knowledge of the facts stated herein, except those stated on information and belief, and, if called upon, could and would testify competently to them. I submit this declaration in support of Plaintiffs’ Reply in Support of Motion for Attorney’s Fees, Expenses, and Costs Pursuant to the Equal Access to Justice Act filed in the above-captioned case.

2. Defendants assert that:

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.

Opp. at 51. Neither of these quotes in fact appears in Defendants’ Exhibit 19. These snippets

instead appear to be taken from my October 2 and October 4, 2018 time entries. *See* Pl. Ex. 7 (ECF 319-12) at 127 & 128. On October 2, 2018, I spent 2.4 hours on the following tasks: “Confer with class members; confer with K. Kaplan re: constitutional claims/SJM reply brief; review material re: Army Aug. 15 memo and confer with D. Baruch, J. Wollenberg re: same; *review/revise filing in Nio, Kirwa, Calixto cases.*” *Id.* at 127 (emphasis added). On that same day, class counsel filed in all three related cases a single Plaintiffs’ Notice To The Court Of (1) Proposed Protective Order Language And (2) Updates For October 3 Conference. *See Nio* ECF 194; *Kirwa* ECF 117; *Calixto* ECF 34.

3. At a hearing the following day, Judge Huvelle discussed the protective order issues with the parties at length, *see* Oct. 3, 2018 Tr. at 8:24-14:20, 27:18-30:15, 49:2-50:21, 53:8-56:21, 58:8-12, and directed Class Counsel to prepare and submit a draft proposed order reflecting her rulings, *id.* at 67:6-23. On October 4, 2018, I billed 3.1 hours to *Nio* for the following work: “Confer with class members; *confer with various team members including J. Wollenberg, M. Kiziltay re: draft proposed orders for Nio, Kirwa, Calixto*; confer with J. Wollenberg, B. McNamara re: administrative record/motion to strike and underlying docs; review transcript; confer with D. Baruch, J. Wollenberg re: plaintiff and fact research re: same.” Pl. Ex. 7 at 128 (emphasis added). The next day, October 5, 2018, the Court issued a single protective order cross-captioned for each of the *Nio*, *Kirwa*, and *Calixto* cases. *See Nio* ECF 199, *Kirwa* ECF 121, *Calixto* ECF 40.

4. I have reviewed Defendants’ Opposition as well as my time entries. I recorded all my time for the October 2 filing to the *Nio* case, which I judged to be appropriate, efficient and reasonable for two primary reasons: (1) because the order was applicable to *Nio* and involved no additional work that was specific to only *Kirwa* and *Calixto*; and (2) because of the small amount

of time involved. With respect to the October 4 entry regarding drafting the proposed orders for all three cases as ordered by the Court, I recorded my time for this task by allocating my total time between the three cases. I estimate that of the 5.5 hours I billed to *Nio* on October 2 and 4, no more than 0.5 hours—and likely less—was devoted to the protective order issue.

5. Defendants confuse the *Nio* email inbox that Class Counsel used to communicate with class members, with the different email inbox that the government set up for Class Counsel to communicate with Defendants regarding *Nio* class members' individual issues. *See Opp.* at 51. The "*Nio* inbox" referred to in my time records, is the *Nio* email inbox set up by Class Counsel. I am informed and believe that the references to the "*Nio* inbox" in other team members time records also refer to this same email inbox.

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

Dated: July 1, 2021

By:   
Neaha Raol

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Defendants.

Civil Action No. 1:17-cv-998-PLF

**SUPPLEMENTAL DECLARATION OF JENNIFER M. WOLLENBERG**

I, Jennifer M. Wollenberg:

1. I am a partner of Morgan, Lewis & Bockius LLP (“Morgan Lewis”) resident in the firm’s Washington, D.C. office and a member of the Litigation Practice Group. I am a member in good standing of the bar of the District of Columbia Court of Appeals, the bar of the State of New York, and the bar of this Court. I have personal knowledge of the facts stated herein, except those stated on information and belief, and, if called upon, could and would testify competently to them. I submit this declaration as a supplement to my April 9, 2021 declaration filed in this case and in further support of Plaintiffs’ Motions for Attorney’s Fees, Expenses, and Costs Pursuant to the Equal Access to Justice Act filed in the above-captioned case.

2. As discussed in my April 9, 2021 declaration (“Wollenberg Decl. I”) at ¶¶ 9(a) & 55, Class Counsel has used the website [DCFederalCourtMAVNIClassLitigation.org](http://DCFederalCourtMAVNIClassLitigation.org) to communicate with *Nio* class members and potential class members during the litigation. To provide notice to the class of Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Expenses Pursuant to the Equal Access to Justice Act, the case team created an “Attorneys’ Fees Notice” page on the MAVNI litigation website where Class Counsel have posted relevant filings in the *Nio* and *Kirwa*

cases. That page was created and available publicly weeks prior to Defendants' Opposition being filed in this case. For *Nio*, the webpage includes the complete Motion for Attorney's Fees, Expenses, and Costs Pursuant to the Equal Access to Justice Act (ECF 319), excepting only those documents filed under seal, as well as Plaintiffs' Notice of Errata (ECF 323), Defendants' Unopposed Motion to Expand Page-Limitations And Modify Filing Deadlines (ECF 324), the Court's Order granting Defendants' Motion (ECF 325), and Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Cost, and Expenses Pursuant to the Equal Access to Justice Act (ECF 326). Class counsel also plan to post on the website a complete copy of their reply in support of the Motion, as well as any additional relevant filings or Court orders.

3. A true and correct copy of the webpage available at [https://dcfederalcourtmavniclasslitigation.org/attorneys\\_fees/](https://dcfederalcourtmavniclasslitigation.org/attorneys_fees/) is attached as Exhibit 51.

4. Both Morgan Lewis and Fried Frank require all timekeepers to accurately and concisely record their time, including accurately recording the time spent working on behalf of a client each day. For example, Morgan Lewis policy specifically requires all fee generators to record all time as it is worked on a daily basis, to submit time for every business day, and to use clear, concise, and accurate time descriptions that adequately describe the work performed. Morgan Lewis's time recording policies apply equally to fee generating matters and pro bono matters. Fried Frank similarly requires all timekeepers to contemporaneously and accurately record their time for both billable and pro bono matters, and to clearly, concisely, and accurately describe the work performed.

5. Defendants quote the Ninth Circuit for the proposition that block billing "may increase time by 10 to 30%." Opp. at 52 (quoting *Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1223 (9th Cir. 2010)). There is *no basis whatsoever* to accuse Class Counsel

of overstating their hours. As discussed in the Wollenberg Decl. I at ¶¶ 20-22 and 24-26, I reviewed the itemized statements of services provided by Morgan Lewis (Pl. Ex. 6) and Fried Frank (Pl. Ex. 7) in detail before they were submitted in support of the Motion, and I am satisfied that they accurately reflect the work performed by Morgan Lewis and Fried Frank attorneys, respectively. The MAVNI litigation team and I approach our ethical duties—including our duty to accurately present to the Court the time for which Plaintiffs’ seek fees—with the utmost seriousness. Defendants’ casual suggestion that block billing evidences misconduct is baseless.

6. Defendants offer a single example of alleged overstaffing in which they claim that Plaintiffs billed 133.3 hours and \$124,000 for eight people’s “participation” in a 2.5-hour status conference before Judge Huvelle on January 23, 2018. Opp. at 51-52. Plaintiffs’ counsel has reviewed the billing records, and we have been unable to identify the supposedly relevant time entries. I note, however, that Plaintiffs’ entire case team billed 53.5 hours on January 23, 2018 for the hearing *and* all the other work they did that day. See Pl. Ex. 7 at 61-62. Defendants’ assertion that these 133.3 hours were valued at approximately \$124,000 means the blended average hourly rate for this time is supposedly \$930.23 per hour. In fact, Plaintiffs do not seek that high an hourly rate for any attorney, see Pl. Ex. 53, and the blended average rate Plaintiffs seek in the Motion is approximately \$640 per hour.<sup>1</sup> This high average rate suggests that Defendants likely based the \$124,000 claim on Class Counsel’s standard billing rates,<sup>2</sup> not the significantly lower LSI *Laffey* Matrix hourly rates that Plaintiffs’ seek through the Motion. The LSI *Laffey* Matrix rates Plaintiffs seek are approximately 30% less than class counsels’ standard rates. See Pl. Ex. 20. The 15,000+

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<sup>1</sup>  $\$9,757,453 \text{ total fees requested} \div 15,325.5 \text{ hours} = \$640.44 \text{ per hour}$  (average all timekeepers). See Pl. Ex. 23 (detailing Plaintiffs’ requested fee award).

<sup>2</sup>  $\$13,690,246 \text{ standard rate fees} \div 15,325.5 \text{ hours} = \$893.30 \text{ per hour}$  (average all timekeepers). See Pl. Ex. 11 (Class Counsel’s Hours and Standard Rate Fees).

hours Class Counsel devoted to this case is valued at \$13.7 million at counsel's standard rates—\$3.9 million more than the requested fee award of \$9.7 million. *See* Pl. Exs. 11 (standard rates) & 23 (requested fee award calculated using LSI Laffey Matrix rates).

7. True and correct copies of pages 13 and 17 from the Wolters Kluwer *2020 Real Rate Report* are attached as Exhibit 52 to the Motion. Additional excerpts from the same report are attached as Plaintiffs' Exhibit 17 to the Motion.

8. In the Motion, Plaintiffs requested a fee award of \$9,757,453 in attorney's fees based on 15,325.5 hours of work and \$34,147 recoverable costs and expenses, for a total requested award of \$9,791,600.

9. Plaintiffs have identified a small number of hours related to the appeal that Defendants filed, but later withdrew, in this case. *See* ECF 311, 313, 315. Plaintiffs do not seek fees for any work related to the appeal, and therefore reduce their fee request by 5.8 hours, as shown below. At LSI *Laffey* Matrix rates, this time is valued at \$3,696.60, and at adjusted EAJA rates, the time is valued at \$1,217.30. Plaintiffs therefore revise their fees request to eliminate these amounts.

Date	Timekeeper	Eliminated Hours	Laffey Rate	Laffey Fees	EAJA Rate	EAJA Fees
10/16/2020	K. Kaplan	0.5	\$ 759.00	\$ 379.50	\$ 209.88	\$ 104.94
10/19/2020	K. Kaplan	1	\$ 759.00	\$ 759.00	\$ 209.88	\$ 209.88
10/19/2020	N. Raol	0.5	\$ 759.00	\$ 379.50	\$ 209.88	\$ 104.94
10/22/2020	N. Raol	1.2	\$ 759.00	\$ 910.80	\$ 209.88	\$ 251.86
10/23/2020	B. Mendelson	2.4	\$ 465.00	\$ 1,116.00	\$ 209.88	\$ 503.71
10/29/2020	K. Kaplan	0.2	\$ 759.00	\$ 151.80	\$ 209.88	\$ 41.98
		<b>5.8</b>		<b>\$ 3,696.60</b>		<b>\$ 1,217.30</b>

10. Plaintiffs respectfully request a fee award of \$9,753,756 in attorney's fees based on 15,319.7 hours of work.

11. In the alternative, if the Court awards fees under §2412(d), but is not inclined to

grant award of market rate fees, the Court should calculate the fee award using the EAJA adjusted rate. After subtracting the hours discussed above concerning the appeal, at the adjusted EAJA rate, Plaintiffs 15,319.7 hours of work are appropriately valued at \$3,180,415.

12. Plaintiffs withdraw their request for reimbursement of three categories of expenses: courier services, postage, and teleconferencing, a total of \$412.25. *See* Pl. Ex. 28. Plaintiffs continue to seek reimbursement for copying costs (\$1,072.92), court reporting costs (\$6,234.44), electronic research regarding related cases (\$13,574.28), filing fees (\$1,645.38), website costs (\$621.12) and Westlaw (\$10,586.83), for a total award of \$33,734.97 in costs and expenses.

Cost Type	FF	MLB	Total
Courier Service	\$ 0		\$ 0
Court Reporting	\$ 5,093.70	\$ 1,140.74	\$ 6,234.44
Data Research - Mng Atty	\$ 13,574.28		\$ 13,574.28
Duplicating	\$ 1,072.92		\$ 1,072.92
Filing Fees	\$ 1,645.38		\$ 1,645.38
Postage	\$ 0		\$ 0
Teleconferencing	\$ 0		\$ 0
Website		\$ 621.12	\$ 621.12
Westlaw	\$ 10,122.08	\$ 464.75	\$ 10,586.83
<b>Total</b>	<b>\$31,508.36</b>	<b>\$ 2,226.61</b>	<b>\$33,734.97</b>

13. In sum, Plaintiffs respectfully request an award of \$9,753,756 in attorney's fees based on 15,319.7 hours of work and \$33,734 recoverable costs and expenses, for a total requested award of \$9,787,490.

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

Dated: July 1, 2021




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Jennifer M. Wollenberg

# **EXHIBIT 51**

# Attorneys' Fees Notice

**NOTICE: PLAINTIFFS' COUNSEL ARE  
SEEKING ATTORNEYS' FEES, COSTS,  
AND EXPENSES FROM DEFENDANTS IN  
THE *NIO* AND *KIRWA* CASES**

In the *Nio* case, Plaintiffs have submitted a petition seeking attorneys' fees, costs, and expenses. Defendants' files an opposition n May 29, 2021. Plaintiffs' reply in support of that petition currently is due on or before July 1, 2021. Below is a copy of Plaintiffs' petition, Defendants' opposition, and other relevant documents:

- [Nio Docket 319 – Plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses](#)
- [Nio Docket 319-1 – Plaintiffs' Memorandum in Support of Motion for](#)

## Attorneys' Fees, Costs, and Expenses

- Declarations, Exhibits, and Proposed Order to Plaintiffs' Petition
  - *Nio* Docket 319-2
  - *Nio* Docket 319-3
  - *Nio* Docket 319-4 (see errata at *Nio* Docket 323-1)
  - *Nio* Docket 319-5
  - *Nio* Docket 319-6
  - *Nio* Docket 319-7
  - *Nio* Docket 319-8
  - *Nio* Docket 319-9
  - *Nio* Docket 319-10
  - *Nio* Docket 319-11
  - *Nio* Docket 319-12
  - *Nio* Docket 319-13
  - *Nio* Docket 319-14
  - *Nio* Docket 319-15
  - *Nio* Docket 319-16
  - *Nio* Docket 319-17
  - *Nio* Docket 319-18
  - *Nio* Docket 319-19
  - *Nio* Docket 319-20
  - *Nio* Docket 319-21
  - *Nio* Docket 319-22
  - *Nio* Docket 319-23
  - *Nio* Docket 319-24
  - *Nio* Docket 319-25
  - *Nio* Docket 319-26

- *Nio* Docket 319-27
- *Nio* Docket 319-28
- *Nio* Docket 319-29
- *Nio* Docket 319-30
- *Nio* Docket 319-31
- *Nio* Docket 319-32
- *Nio* Docket 319-33
- *Nio* Docket 319-34
- *Nio* Docket 319-35
- *Nio* Docket 319-36
- *Nio* Docket 319-37
- *Nio* Docket 319-38
- *Nio* Docket 319-39
- *Nio* Docket 319-40
- *Nio* Docket 319-41
- *Nio* Docket 319-42
- *Nio* Docket 319-43
- *Nio* Docket 319-44
- *Nio* Docket 319-45
- *Nio* Docket 319-46
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- *Nio* Docket 319-51
- *Nio* Docket 319-52
- *Nio* Docket 319-53
- *Nio* Docket 319-54
- *Nio* Docket 319-55

- [Nio Docket 319-56](#)
- [Nio Docket 323 Notice of Errata](#)
- [Nio Docket 324 Defendants' Unopposed Motion to Expand Page-Limitations And Modify Filing Deadlines](#)
- [Nio Docket 325 Order](#)
- [Nio Docket 326 Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Cost, and Expenses Pursuant to the Equal Access to Justice Act](#)

In the *Kirwa* case, the parties have reached an agreement with respect to Plaintiffs' claim for fees, expenses, and costs, and have filed a joint motion seeking Court approval of the settlement. Below are the most recent docket entries in the *Kirwa* case related to this:

- [Kirwa Docket 244 – April 16, 2021 Extension Motion for Attorneys' Fees Petition](#)
- [Kirwa Docket 245 – April 16, 2021 Order Extending Attorneys' Fees Petition Deadline](#)
- [Kirwa Docket 251 – May 27, 2021 Jt. Motion to Approve Fees](#)

**Please check back periodically as class counsel for the *Kirwa* class and the *Nio* class will be adding and updating documents and information found on this Site.**

#### **Disclaimer**

This website and the materials provided herein are made available by class counsel to provide publicly available information regarding the Kirwa and Nio class actions. Nothing on this website creates or establishes any attorney client relationships between class counsel and any persons or entities. Your use of the Site is conditioned on your understanding and acknowledgement that (1) the material and information on the Site is not offered as and does not provide legal advice on any matter and should not be used as a substitute for seeking legal advice, and (2) class counsel and site administrators are not and will not be responsible for any errors or omissions on this website or any action or failure to act in reliance upon information on the Site.

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# **EXHIBIT 52**

# *2020 Real Rate Report<sup>®</sup>*

The Industry's  
Leading Analysis  
of Law Firm Rates,  
Trends, and  
Practices

## Section I: High-Level Data Cuts

### Detailed Practice Areas

By Matter Type

2019 -- Real Rates for Partners, Associates, and Paralegals

Trend Analysis (Mean)

Practice Area	Matter Type	Role	n	First Quartile	Median	Third Quartile	2019	2018	2017
Employment and Labor: Compensation and Benefits	Litigation	Partner	53	\$370	\$515	\$660	\$568	\$656	\$601
		Associate	40	\$285	\$290	\$345	\$336	\$406	\$505
		Paralegal	18	\$143	\$159	\$242	\$191	\$208	\$212
	Non-Litigation	Partner	247	\$533	\$648	\$787	\$690	\$672	\$678
		Associate	107	\$313	\$404	\$517	\$419	\$407	\$420
		Paralegal	33	\$180	\$228	\$293	\$239	\$210	\$204
Employment and Labor: Discrimination, Retaliation and Harassment / EEO	Litigation	Partner	306	\$350	\$435	\$531	\$468	\$465	\$424
		Associate	332	\$285	\$315	\$367	\$328	\$332	\$317
		Paralegal	187	\$150	\$183	\$225	\$184	\$179	\$167
	Non-Litigation	Partner	207	\$385	\$450	\$540	\$476	\$474	\$459
		Associate	219	\$289	\$319	\$360	\$330	\$333	\$321
		Paralegal	93	\$154	\$195	\$220	\$194	\$185	\$180
Employment and Labor: Employee Dishonesty/Misconduct	Litigation	Partner	19	\$525	\$845	\$995	\$789	\$605	\$646
		Associate	17	\$370	\$450	\$480	\$443	\$409	\$380
Employment and Labor: ERISA	Litigation	Partner	31	\$480	\$580	\$762	\$687	\$597	\$622
		Associate	12	\$319	\$354	\$496	\$444	\$388	\$395
	Non-Litigation	Partner	75	\$430	\$610	\$799	\$648	\$640	\$614
		Associate	41	\$320	\$400	\$525	\$472	\$427	\$422
		Paralegal	12	\$229	\$270	\$320	\$270	\$244	\$282
Employment and Labor: Immigration	Non-Litigation	Partner	32	\$435	\$566	\$716	\$595	\$558	\$618
		Associate	20	\$300	\$330	\$405	\$357	\$385	\$406
		Paralegal	37	\$169	\$197	\$225	\$195	\$202	\$190
Employment and Labor: OFCCP	Non-Litigation	Partner	14	\$485	\$575	\$663	\$579	\$585	\$605
Employment and Labor: Other	Litigation	Partner	486	\$441	\$585	\$750	\$626	\$625	\$622
		Associate	418	\$302	\$385	\$574	\$437	\$453	\$444
		Paralegal	241	\$170	\$215	\$270	\$219	\$213	\$214
	Non-Litigation	Partner	763	\$428	\$540	\$685	\$589	\$583	\$565
		Associate	571	\$296	\$356	\$447	\$405	\$409	\$387
		Paralegal	167	\$160	\$201	\$265	\$227	\$216	\$206

## Section I: High-Level Data Cuts

### Detailed Practice Areas

By Matter Type

2019 -- Real Rates for Partners, Associates, and Paralegals

Trend Analysis (Mean)

Practice Area	Matter Type	Role	n	First Quartile	Median	Third Quartile	2019	2018	2017
Government Relations	Non-Litigation	Partner	83	\$619	\$768	\$883	\$775	\$781	\$694
		Associate	72	\$392	\$497	\$629	\$538	\$573	\$453
		Paralegal	15	\$258	\$285	\$425	\$323	\$246	\$289
Insurance Defense: Asbestos/Mesothelioma	Litigation	Partner	27	\$160	\$160	\$168	\$182	\$238	\$239
		Paralegal	15	\$83	\$85	\$88	\$92	\$132	\$129
Insurance Defense: Auto and Transportation	Litigation	Partner	555	\$157	\$167	\$175	\$170	\$174	\$180
		Associate	510	\$140	\$150	\$160	\$150	\$152	\$154
		Paralegal	444	\$80	\$89	\$90	\$86	\$85	\$85
Insurance Defense: Errors and Omissions	Litigation	Partner	166	\$175	\$190	\$215	\$201	\$219	\$204
		Associate	89	\$150	\$165	\$185	\$167	\$182	\$177
Insurance Defense: Other	Litigation	Partner	632	\$165	\$175	\$200	\$201	\$211	\$214
		Associate	490	\$149	\$159	\$175	\$177	\$176	\$175
		Paralegal	380	\$80	\$90	\$95	\$95	\$98	\$94
Insurance Defense: Personal Injury/Wrongful Death	Litigation	Partner	272	\$150	\$175	\$200	\$188	\$197	\$195
		Associate	290	\$136	\$150	\$173	\$157	\$167	\$166
		Paralegal	177	\$75	\$85	\$85	\$84	\$89	\$88
Insurance Defense: Product and Product Liability	Litigation	Partner	188	\$170	\$185	\$208	\$198	\$303	\$278
		Associate	164	\$155	\$175	\$180	\$173	\$220	\$191
		Paralegal	98	\$80	\$95	\$100	\$95	\$105	\$100
Insurance Defense: Professional Liability	Litigation	Partner	341	\$180	\$200	\$250	\$234	\$228	\$227
		Associate	220	\$159	\$180	\$215	\$201	\$192	\$194
		Paralegal	131	\$80	\$90	\$113	\$104	\$96	\$97
Insurance Defense: Property Damage	Litigation	Partner	398	\$165	\$185	\$210	\$211	\$212	\$205
		Associate	382	\$150	\$167	\$180	\$178	\$174	\$171
		Paralegal	210	\$80	\$90	\$100	\$95	\$95	\$93
Insurance Defense: Toxic Tort	Litigation	Partner	19	\$168	\$204	\$240	\$218	\$264	\$234
Insurance Policies and Coverage: Policy Coverage Dispute	Litigation	Partner	16	\$315	\$510	\$536	\$479	\$396	\$294
Intellectual Property: Copyrights	Non-Litigation	Partner	11	\$673	\$703	\$872	\$767	\$734	\$695