IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY, *et al.*, Defendants.	**Case No. 1:18-cv-01551-PLF** **HEARING REQUESTED**

PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP") and Rule 23.1(b) of the Local Civil Rules of the U.S. District Court for the District of Columbia, Plaintiffs Wanjing Li, Jingquan Qu, Xiongzhou Zhang, Xi Zhang, Chenhao Qian, Sansiri Suangchomphan, Lei Liu, Wen Si, Yunzheng He, Wendpagnagde Yabre, Sen Li, Fang Lu, Anton Tate, Yue Yin, Sai Krishna Uppugandla, Zehua Bian, Hyunsung Kim, Chengping Yuan, Gunay Miriyeva, Sandeep Mahat, and Shengfan Yang (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby move the Court for certification of the following class:

1. All soldiers who enlisted in the U.S. Army (including Selected Reserve of the Ready Reserve/DTP and Regular Army/DEP soldiers) through the Military Accessions Vital to the National Interest ("MAVNI") program on or prior to September 30, 2016, and

2. Are the subject of an administrative discharge action by the U.S. Army (including the U.S. Army Recruiting Command and/or the U.S. Army Reserve Command, collectively, the "Army"), where such discharge or separation was not or will not be characterized by the Army (including "uncharacterized" and "entry level" discharges or separations), and

3. Where such action is taken without the soldier first being afforded the process due under applicable Army and U.S. Department of Defense ("DOD") regulations and the law – at a minimum, notice, an opportunity to respond, and (because such discharges are being treated by the government

> as other than honorable) an opportunity for a proceeding before a board of officers or like proceeding.

As described in the "Memorandum of Law in Support of Plaintiffs' Renewed Motion for Class Certification and Appointment of Class Counsel" ("Plaintiffs' Memorandum"), Plaintiffs satisfy the requirements set forth in FRCP 23(a). First, the proposed Plaintiff class meets the numerosity standard. Second, the claims of the proposed class members share common facts and the case raises central legal questions that are common to each class member, including questions arising out of Defendants' practice of taking "uncharacterized" discharge action against MAVNI soldiers – which for foreign-born soldiers is harmful and stigmatizing – without adequate process. Third, the named Plaintiffs' claims are typical of the claims of the proposed class as described in Plaintiffs' Memorandum. Fourth, Plaintiffs and their counsel will adequately represent the class and are prepared to vigorously prosecute this action on behalf of the proposed class.

Moreover, certification of the proposed class is warranted under (a) FRCP 23(b)(1) because there is a significant risk that separate actions would result in inconsistent decisions and incompatible standards as to Defendants' contested conduct, acts, omissions, and/or practices, and (b) FRCP 23(b)(2) because the class has been subjected to Defendants' conduct, acts, omissions, and/or practices and Plaintiffs are seeking injunctive and declaratory relief, which is appropriate for the proposed class as a whole.

WHEREFORE, Plaintiffs respectfully move this Court for an Order certifying the proposed class and appointing their attorneys as class counsel.

Dated: November 22, 2021

Respectfully submitted,

/s/ Jennifer M. Wollenberg

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP") and Rule 23.1(b) of the Local Civil Rules of the U.S. District Court for the District of Columbia, Plaintiffs Wanjing Li, Jingquan Qu, Xiongzhou Zhang, Xi Zhang, Chenhao Qian, Sansiri Suangchomphan, Lei Liu, Wen Si, Yunzheng He, Wendpagnagde Yabre, Sen Li, Fang Lu, Anton Tate, Yue Yin, Sai Krishna Uppugandla, Zehua Bian, Hyunsung Kim, Chengping Yuan, Gunay Miriyeva, Sandeep Mahat, and Shengfan Yang (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby submit this Memorandum Of Law In Support Of Plaintiffs' Renewed Motion For Class Certification And Appointment Of Class Counsel ("Plaintiffs' Memorandum"). As established below, the Court should: (1) certify the proposed class; (2) appoint the named Plaintiffs herein as representatives of the proposed class; and (3) appoint the undersigned counsel as class counsel.[1]

INTRODUCTION

Plaintiffs seek certification of a class of soldiers who enlisted with the United States Department of the Army (including the U.S. Army Recruiting Command and/or the U.S. Army Reserve Command, collectively, the "Army") through the Military Accessions Vital to the National Interest ("MAVNI") program but have been or will be denied their rights due to Defendants' arbitrary, illicit, and unconstitutional administrative discharge actions. The Army

[1] Plaintiffs submit that the class as proposed satisfies the requirements of FRCP 23 certification. However, should the Court believe otherwise, Plaintiffs ask for the Court to certify subclasses (as described in the TAC) or otherwise re-shape the class. The Court may "exercise . . . broad discretion to redefine and reshape the proposed class to the point that it qualifies for certification under Rule 23." *See Huisha-Huisha v. Mayorkas*, Case No. 21-100 (EGS), 2021 WL 4206688, at *8 (D.D.C. Sept. 16, 2021) (citing *Wagner v. Taylor*, 836 F.2d 578, 589-90 (D.C. Cir. 1987); *see also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 256 (D.D.C. 2002) (citing *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 683 (N.D. Ga. 1991) ("The act of redefining a class definition is a natural outcome of federal class action practice.")).

recruited these foreign-born soldiers – all lawfully present in the United States at the time – on account of their exceptional qualifications. The soldiers signed enlistment contracts committing years of their lives to serving the United States ("Contracts"), qualifying them for expedited naturalization. However, starting in 2016, post-enlistment, Defendants began subjecting MAVNI soldiers to summary discharge actions in violation of military regulations and law, and characterizing such discharges as "uncharacterized," knowing that, for foreign-born soldiers only, the label would result in their discharges being treated the same as dishonorable discharges and would be disqualifying for naturalization purposes. Defendants undertook these discharge actions without affording class members any of the mandatory process rights attendant to discharges under "other than honorable" conditions. These unlawful actions – which continue notwithstanding the commencement of this action in 2018 and Defendants' announcement of new policies in response to this litigation – have caused tremendous harm to class members, including by impeding and preventing military service in accordance with their Contracts, adversely impacting their naturalization rights, and uniquely leaving these foreign-born soldiers with the unfair stigma of an "other than honorable" discharge.

Many MAVNI soldiers already have obtained relief as a result of this lawsuit and several related lawsuits, in which this Court granted injunctive relief and entered judgment against the government for unlawful policies and actions targeting MAVNI soldiers.[2] Yet, the relief sought

[2] *See Samma v. U.S. Dep't of Def.*, 486 F. Supp. 3d 240 (D.D.C. 2020) (holding DOD violated the Administrative Procedure Act ("APA") by imposing additional service requirements before class of lawful permanent resident and "Regular Army" MAVNI soldiers could obtain Form N-426 certifications of honorable service for naturalization purposes); *Nio v. U.S. Dep't of Homeland Sec.*, 385 F. Supp. 3d 44 (D.D.C. 2019) (holding government violated APA in connection with processing honorable service certifications and naturalization applications of MAVNI Selected Reservist class); *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21 (D.D.C. 2017) (granting provisional class certification to MAVNI Selected Reservists and enjoining DOD from refusing to issue Form N-426 certifications of honorable service for naturalization); *see also Tiwari v. Mattis*,

by this action is required to address the unlawful discharge actions still negatively impacting hundreds of MAVNI soldiers.

BACKGROUND

In 2008, the United States Department of Defense ("DOD") created the MAVNI program pursuant to 10 U.S.C. § 504(b)(2), enabling the enlistment of lawfully present foreign-born persons (*i.e.*, who already passed immigration-related screening) who possess specialized medical training or critical language skills that are "vital to the national interest." *See* Plaintiffs' Third Amended Complaint, Dkt. No. 205 ("TAC"), ¶ 2; *Kirwa*, 285 F. Supp. 3d at 29. In exchange, MAVNI soldiers who serve "honorably," and if discharged were separated "under honorable conditions," are eligible for naturalization as U.S. citizens. *See* 8 U.S.C. § 1440(a).

Indeed, from the MAVNI program's inception until late 2016, approximately ten thousand MAVNI soldiers had been naturalized as U.S. citizens with relative ease, given the coordination between the U.S. military and U.S. immigration officials to facilitate and expedite the naturalization process. *See* TAC, ¶ 83; *Nio*, 385 F. Supp. 3d at 47. Beginning in late 2016, however, DOD and the Army instituted new policies that disrupted the military service and impeded the naturalization of thousands of already-enlisted MAVNI soldiers. On September 30, 2016, DOD issued a memorandum preventing MAVNI soldiers from shipping to basic training until completing and "passing" an "enhanced security screening" process – which was later uncovered to be the equivalent of the process for a Top Secret security clearance plus additional background checks and hurdles. TAC, ¶¶ 4, 84; *Samma*, 486 F. Supp. 3d at 251 (citing AR 114-

363 F. Supp. 3d 1154 (W.D. Wash. 2019) (finding unconstitutional discrimination against naturalized MAVNI soldiers on basis of national origin and permanently enjoining DOD from requiring continuous security monitoring of naturalized MAVNI soldiers absent individualized suspicion). Undersigned counsel litigated the related *Nio* and *Kirwa* class actions through entry of final judgment in favor of the classes in both cases in August and September 2020, respectively.

122). This became an immediate problem for all MAVNI soldiers because the naturalization application and approval process set up by the Army and immigration officials for MAVNI soldiers was dependent on the soldier arriving at basic combat training shortly after enlistment, but the Army and DoD did not have the resources to perform the background checks and adjudications, much less to do so in a timely manner, in order to ship the soldiers to basic combat training. *See* TAC, ¶¶ 85-86; *see also Nio*, Case 1:17-cv-00998-PLF, Dkt. 17-8 at 3 (DOD determined it was "infeasible" to carry out new security screenings for MAVNI soldiers). This left thousands of MAVNI soldiers in immigration limbo, with many of them having jeopardized their pre-existing immigration statuses simply by joining the U.S. Army (which is why the MAVNI program originally had been structured to "expeditiously" move the soldiers to U.S. naturalization).

Central to this litigation is how the Army decided to address the situation it had created. Rather than dedicate the resources necessary to properly conduct the enhanced screenings and adjudications, the Army instead began engaging in a pattern and practice of taking "uncharacterized" discharge actions against MAVNI soldiers, which the Army knew – for this population of foreign-born soldiers – would be viewed and treated the same as "other than honorable" discharges, including for purposes of obtaining naturalization. *See* TAC, ¶¶ 89, 102; *Kirwa*, 285 F. Supp. 3d at 30; *Nio*, Case 1:17-cv-00998-PLF, Dkt. 17-8 at 3 (internal DOD memo proposing mass discharge of MAVNI soldiers in 2017 under purported "Secretarial plenary authority" because the military did not have the resources to conduct the newly-required enhanced background screenings and adjudications). Yet, Defendants failed to provide MAVNI soldiers with the mandatory process associated with any "other than honorable" discharge activity. *See generally* TAC, ¶¶ 5-9, 331-62.

Although Defendants made facially-improved, litigation-driven changes to policy that suggest MAVNI soldiers are to receive notice of some discharges and the opportunity to respond to some discharges, those policies do not address all the MAVNI discharges that are occurring and MAVNI soldiers still do not receive the process necessary for ***any*** discharge to be properly effectuated. *See generally id.*, ¶¶ 19-52. Among other issues, Defendants have failed to appropriately implement those policy changes and MAVNI soldiers are not being provided notification of an impending discharge or the opportunity to challenge the discharge. But, beyond that, the Army's policies and practices for MAVNI soldiers do not even attempt to provide the process required for a soldier to receive a ***derogatory*** discharge, which is the case for these foreign-born MAVNI soldiers' "uncharacterized" discharges that the government treats as "other than honorable" discharges. Those derogatory discharges require additional process, including the opportunity for a proceeding before a board of officers or a like proceeding. *See, e.g.*, *id.*, ¶¶ 349-51. Not one of the MAVNI soldiers subject to an "uncharacterized" discharge action has received anything close to the process that Defendants must provide. Receiving discharges that the U.S. government views as certifications by the Army that a soldier was separated under something other than honorable conditions is harmful and stigmatizing. When due process is not provided in advance of such discharges, or when such discharges affect only foreign-born soldiers in this way, the Army has acted unlawfully.

ARGUMENT

I. The Proposed Class

Plaintiffs seek certification of the following proposed class:

1. All soldiers who enlisted in the U.S. Army (including Selected Reserve of the Ready Reserve/DTP and Regular Army/DEP soldiers) through the MAVNI program on or prior to September 30, 2016, and

2. Are the subject of an administrative discharge action by the U.S. Army (including the U.S. Army Recruiting Command and/or the U.S. Army Reserve Command), where such discharge or separation was not or will not be characterized by the Army (including "uncharacterized" and "entry level" discharges or separations), and

3. Where such action is taken without the soldier first being afforded the process due under applicable Army and DOD regulations and the law – at a minimum, notice, an opportunity to respond, and (because such discharges are being treated by the government as other than honorable) an opportunity for a proceeding before a board of officers or like proceeding.

Class action treatment is warranted here. As described below, the class meets the FRCP 23 standards for numerosity, commonality, and typicality. Indeed, hundreds of MAVNI soldiers are subject to "uncharacterized" separation actions by the Army, as every MAVNI soldier enlisted prior to September 30, 2016 who has not been sent to basic combat training – even though they have served six years with the Army – will not be removed from "entry level status" prior to expiration of their Contracts. And, ***none*** of Defendants' policies or practices with respect to MAVNI soldiers – whether the October 2018 "MSSD" process, the current "ESP" process, or otherwise – even if they addressed all of the MAVNI soldiers' discharges (they do not) and even if they were properly implemented by Defendants (they are not) provides MAVNI soldiers with the process to which they are entitled given that their "uncharacterized" discharges, unlike those of non-foreign-born soldiers, are treated the same as derogatory "other than honorable" discharges.

Thus, certifying the class would avoid separate lawsuits "by permitting an issue potentially affecting every class member to be litigated in an economical manner," the primary purpose of class actions. *Thorpe v. Dist. of Columbia*, 303 F.R.D. 120, 143 (D.D.C. 2014) (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982)).

II. The Rule 23 Standard

FRCP 23 sets forth the requirements for class certification. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006).

FRCP 23(a) provides that the class must satisfy four prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FRCP 23(a)(1)-(4); *see also Wal-Mart*, 564 U.S. at 349 ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.").

Class action certification also requires the purported class action to qualify as one or more of the types defined in FRCP 23(b). *See Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 190 (D.D.C. 2017). FRCP 23(b)(1) is satisfied when separate actions by individual class members "would create a risk of . . . inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class." FRCP 23(b)(1)(A). FRCP 23(b)(2) is satisfied when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FRCP 23(b)(2).

III. Plaintiffs Satisfy Rule 23(a)

A. The Proposed Class Is So Numerous That Joinder of All Members Is Impracticable

FRCP 23(a)(1)'s numerosity factor assesses whether joinder is impracticable due to the size of the class. "Demonstrating impracticability of joinder 'does not mandate that joinder of all parties be impossible – only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate.'" *DL v. Dist. Of Columbia*, 302 F.R.D. 1, 11 (D.D.C.

2013) (citation omitted); *see also Coleman v. Pension Benefit Guar. Corp.*, 196 F.R.D. 193, 198 (D.D.C. 2000) (noting that the numerosity requirement is satisfied where it is clear that joinder would be impracticable). The test for impracticability is not only concerned with the number of plaintiffs, but also examines geographic location, convenience, judicial economy, and the nature of the action. *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 306-07 (D.D.C. 2007).

"Although Plaintiffs need not clear any 'specific threshold,' as a general benchmark, 'courts in this jurisdiction have observed that a class of at least forty members is sufficiently large to meet this requirement.'" *Huisha-Huisha*, 2021 WL 4206688, at *9 (citation omitted); *see also Meijer*, 246 F.R.D. at 306 (finding proposed class consisting of thirty members satisfied numerosity requirement and noting that "as few as 25-30 class members should raise a presumption that joinder would be impracticable, and thus the class should be certified" (citation omitted)).

Plaintiffs do not need to provide an exact number of individuals who fall within the class definition to merit certification. *See, e.g., Nat'l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32, 40 (D.D.C. 2017) (finding class satisfied numerosity requirement "[a]lthough the parties have not presented any precise data about the size of the class"). Indeed, Plaintiffs may satisfy the requirement by estimating the putative class members, "[s]o long as there is a reasonable basis for the estimate provided." *Huisha-Huisha*, 2021 WL 4206688, at *9 (citations omitted).

Plaintiffs satisfy the numerosity requirement of FRCP 23(a). Defendants' own reporting has identified hundreds of class members. *See* TAC, ¶¶ 385-86. For example, last year Defendants informed the Court that over 1,300 MAVNI soldiers (putative class members) were subject to "uncharacterized" discharge actions at that point in time. *See, e.g., Calixto/Nio* June 8, 2020 Status

Conf. Tr. at 26:12-15 (informing Court that 1,010 MSSR notifications were sent to MAVNI soldiers); *id.* at 39:19-24 (acknowledging 350 MAVNI soldiers subject to discharge actions for non-MSSD reasons). While the total number may have decreased slightly since then, hundreds of MAVNI soldiers still remain subject to uncharacterized discharge actions by the Army.

Further, joinder of all proposed class members is impracticable because the proposed class is widely dispersed geographically. *See Meijer*, 246 F.R.D. at 306 ("[C]ourts often take the geographical location of the proposed class members into consideration when deciding whether or not certification is appropriate.") (citation omitted); *Lewis v. Nat'l Football League*, 146 F.R.D. 5, 8-9 (D.D.C. 1992) (finding joinder "clearly impracticable" and numerosity requirement satisfied where proposed class consisted of approximately 250 widely dispersed players). Here, there is widespread geographic diversity among the residency states in which the named Plaintiffs, and proposed class members, reside. *See, e.g.*, TAC ¶¶ 59-79.

Plaintiffs' and class members' limited financial resources also favor finding joinder impracticable. The numerosity factor considers the "financial resources of class members" and "the ability of claimants to institute individual suits." *DL*, 302 F.R.D. at 11 (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). Here, many Plaintiffs and proposed class members have limited financial resources due to their enlistment and attendant immigration status issues. Many also have faced severe restraints on their livelihood and freedom caused by Defendants' misconduct. *See, e.g.*, TAC, ¶ 34 (summarizing various injuries), ¶¶ 140-46 (soon after Plaintiff Xiongzhou Zhang was quoted in a New York Times article about the Army's discharge actions, he was arrested based on revoked immigration status due to discharge, placed into removal proceedings, and still reports weekly to ICE), ¶¶ 254-58 (Plaintiff Yue Yin wrongfully prosecuted

based on supposed false statement regarding discharge status during naturalization interview, lost job and medical insurance, and had to postpone education and career).

Accordingly, based on the foregoing and otherwise on information and belief, the numerosity factor has been met.

B. There Are Common Questions of Both Law and Fact

Plaintiffs also satisfy FRCP 23(a)(2)'s requirement that the claims of class members share common questions of law or fact. There is commonality here because a fundamental question for *all* class members is whether the Army's "uncharacterized" discharge actions against MAVNI soldiers, without the process associated with "other than honorable" discharge actions, is unlawful.

A proposed class passes the commonality test when members' claims depend on a "common contention [that] is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. This inquiry need not be sweeping because "[e]ven a single common question will do" when the court can provide a "common answer." *Thorpe*, 303 F.R.D. at 145. As applicable here, commonality "is usually met when the class members 'challenge policies or practices that apply to all members of the class.'" *Hoyte v. District of Columbia*, 325 F.R.D. 485, 490 (D.D.C. 2017) (quoting 5-23 Moore's Federal Practice – Civil § 23.23 n.7.5.1). Thus, the "inquiry is simplified in cases like the instant one, because, as the D.C. Circuit has explained, a challenge to 'a uniform policy or practice that affects all class members' in the same way clearly gives rise to common questions of fact or law." *Healthy Futures of Tex. v. Dep't of Health & Human Servs.*, 326 F.R.D. 1, 7 (D.D.C. 2018) (quoting *DL v. Dist. of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013)).

Notably, "a uniform policy or practice" may apply to a class even when some class members are "in different procedural postures in their [administrative] proceedings" or may be

subject to different "sources of authority." *Ramirez v. U.S. Immigration and Customs Enforcement*, 338 F. Supp. 3d 1, 45-46 (D.D.C. 2018). What matters is that class members are the subject of some overarching policy or practice, or a common legal obligation with which "Defendants must comply." *Id.* This includes when the "gravamen of plaintiffs' case" is the government's "failure to implement an effective system" subject to its legal obligations, *Thorpe*, 303 F.R.D. at 145-47 (failure to implement integration mandate), or when plaintiffs suffer deprivation of the same right even though some class members "would be affected by the [challenged policy] differently," *O.A. v. Trump*, 404 F. Supp. 3d 109, 156 (D.D.C. 2019) (finding commonality and typicality where immigration rule would deprive all class members of right to seek asylum, even though government argued that class members were "disparate groups of persons whose statutory and constitutional rights are distinct").

In *Ramirez*, for example, former unaccompanied minors successfully argued that their putative class action raised common questions of law or fact regarding, among other things, "whether, as a matter of course, ICE has or does not have policies properly implementing the statutory requirements" of an immigration law that required ICE to consider whether there are alternatives to transferring unaccompanied children to ICE custody when they turn 18 years of age. *Ramirez*, 338 F. Supp. 3d at 45. The government challenged that framing by pointing to "differences in procedural postures and in the authority under which individuals are detained," which supposedly affects such matters as "the process available for contesting" detentions and the availability of alternative remedies for certain detainees. *Id.* at 45-46. But the Court rejected that argument. Either the government was complying with the common legal duty (there, a statutory directive) or it was not. If the same core legal or factual issue supplies a "basis for every class member's injury," regardless of other variables, commonality exists. *Id.* at 46.

That was so in the related *Nio* class action, where this Court certified a class of MAVNI soldiers challenging DHS and DOD policies and practices despite some "factual variations among the class members" which ultimately did not "impact the overarching questions common to the class." *Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28, 32 (D.D.C. 2017). Those common questions included whether the challenged MAVNI soldier naturalization policies and practices were implemented "in accordance with the strictures of the APA" or "otherwise violated the Constitution, the APA, or other applicable law . . . ." *Id.*

Here, Defendants may argue that there are some factual variations among the proposed class members, but the proposed class members all share key factual characteristics: they are (1) U.S. Army MAVNI soldiers, (2) who enlisted on or before September 30, 2016, (3) who are subject to Army discharge actions, (4) that lack a "characterization" by the Army (*e.g.*, "uncharacterized" or "entry level" separations), and (5) who did not receive notice, an opportunity to respond, and a board of officers' proceeding or like proceeding in advance of the discharge actions. And, these factual similarities are intertwined with "overarching" legal issues for all class members no matter what other distinctions Defendants identify. *See Nio*, 323 F.R.D. at 32; *Ramirez*, 338 F. Supp. 3d at 45-46. Plaintiffs seek declaratory, injunctive, and other relief to address Army "uncharacterized" discharge actions that violate the APA, military regulations, and the Constitution and to prevent further unlawful discharge actions. By determining whether these uniform policies and practices are unlawful, and the availability of such relief, the Court would resolve class members' shared claims "in one stroke." *Wal-Mart*, 564 U.S. at 350.[3]

[3] *Cf. Thorpe*, 303 F.R.D. at 146-47 (finding common questions regarding city government's alleged failure to implement de-segregation mandate for those in long-term care to include: "(1) are there deficiencies in the District's existing system of transition assistance? (2) if so, what are those deficiencies? and (3) are the proven deficiencies causing unnecessary segregation?").

Further, under this umbrella there are a plethora of common questions of law or fact that the Court is capable of answering for all proposed class members, including:

- What processes are being provided to MAVNI soldiers in advance of issuing uncharacterized discharges, which are being treated by the government as something other than honorable?
- What processes are required by Army and DoD regulations in advance of issuing an other than honorable discharge?
- Are MAVNI soldiers treated differently than other service members under the challenged policies and practices on the basis of "immutable characteristics like national origin"?[4]
- What level of equal protection scrutiny applies?[5]

Moreover, as described in the Third Amended Complaint, Defendants' retaliatory conduct in violation of the First Amendment also provides commonality by chilling the free speech of all class members. *See* TAC, ¶¶ 363-78, 423-29.

Finally, Defendants' purported grounds for discharging each MAVNI (if any were given) do not negate the core claims of commonality. *Cf. Ramirez*, 338 F. Supp. 3d at 45-46; *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 8 (D.D.C. 2010) ("[F]actual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is

[4] *Tiwari*, 363 F. Supp. 3d at 1172 (holding DOD committed equal protection violations by imposing policy that showed "a general lack of trust and a concomitant desire to monitor MAVNI soldiers without needing to identify a basis for suspicion").

[5] *See id.* at 1162, 1168 (holding that strict scrutiny applies to "continuous monitoring" policy discriminating against naturalized MAVNI soldiers based on "national origin," including because of "DoD's procedural and substantive departures from the protocols applicable to non-MAVNI personnel and the administrative history").

common to all proposed class members." (citation omitted)). All proposed class members are foreign-born U.S. Army soldiers, are subjects of the same type of discharge policies and practices by the Army, and have not been provided with appropriate process in advance of the discharge.

C. Plaintiffs' Claims Are Typical of the Claims of the Class as a Whole

It follows for closely similar reasons that Plaintiffs satisfy the typicality requirement of FRCP 23(a) as well. "[A] class representative's claims are typical of those of the class if 'the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims.'" *Encinas*, 265 F.R.D. at 9 (quoting *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003)). This element "tend[s] to merge" with the commonality inquiry, *Falcon*, 457 U.S. at 157 n.13, because both requirements "serve as 'guideposts'" in determining "whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members," *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (citation omitted). Thus, just as "[c]ommonality is satisfied where there is 'a uniform policy or practice that affects all class members, . . . that principle applies with equal force to the typicality requirement." *O.A.*, 404 F. Supp. 3d at 156 (citation omitted).

Plaintiffs' claims are typical of those of the proposed class members because they all arise from Defendants' unlawful discrimination and refusal to provide legal and due process for "uncharacterized" MAVNI soldier discharges. The Third Amended Complaint buckets named Plaintiffs into categories.[6] These categories are based on the Army's prior binary categorization of discharge grounds in this litigation (*i.e.*, discharge for supposedly unfavorable enhanced background checks or discharge for other reasons, including "time-out" discharges and medical

[6] *See* TAC, ¶¶ 98-220 ("Category 1" plaintiffs), ¶¶ 221-279 ("Category 1 and/or 2" plaintiffs), ¶¶ 280-97 ("Category 2" plaintiffs), ¶¶ 298-329 ("Category 3" plaintiffs).

discharges) and at which stage of "entry level status" the MAVNI soldiers are being subjected to "uncharacterized" discharge actions by the Army (*i.e.*, while in the Delayed Entry or Delayed Training Programs ("DEP" and "DTP") or after having moved out of those programs but not yet being recognized by the Army as having served 180 days of "active duty" service). This bucketing shows that the lack of appropriate process associated with the Army's "uncharacterized" discharges is common and typical regardless of (a) whether a MAVNI soldier enlisted to serve as a member of the Selected Reserve of the Ready Reserve or a member of the "Regular Army," (b) the supposed grounds for the discharge, and (c) the stage of entry level status of a soldier's service (current or former DTP/DEP).[7]

In other words, at bottom, each class member, a foreign-born U.S. Army soldier, is subject to the same unlawful practices and the same types of injuries – a procedurally deficient discharge that has been deemed other than one under "honorable conditions" that results in stigma and other harms. Plaintiffs' and other class members' claims thus seek relief on the same APA, equal protection, and legal and constitutional due process grounds, confirming their typical "nature." *See Hoyte*, 325 F.R.D. at 490 (finding typicality despite availability of partial relief to some class members and "minor factual differences among the putative class representatives" whose property was seized by police without due process, because "the facts and claims of each class member do not have to be identical" for the "nature" of the class representatives' claims to be typical).

To be clear, this lawsuit does *not* seek individualized determinations of whether the Army has a valid ground to discharge any given MAVNI soldier. Rather, Plaintiffs aim to provide relief for and to put an end to the uniform unlawful practices that deprive *all* class members (foreign-

[7] Further, this bucketing leaves no doubt that the Plaintiffs provide more than adequate representation for the proposed class members.

born U.S. Army soldiers who enlisted through the MAVNI program on or before September 30, 2016) of the process rights to which they are entitled in advance of receiving a discharge that is treated as a derogatory, other than honorable separation. Accordingly, Plaintiffs satisfy FRCP 23(a)'s typicality requirement.

D. The Named Plaintiffs Fairly and Adequately Represent the Interests of the Class

Plaintiffs also satisfy the adequacy requirement under FRCP 23(a). In order to meet FRCP 23(a)(4)'s requirement that the named Plaintiffs "fairly and adequately protect the interests of the class," (1) the interests of the named Plaintiffs must not conflict with the interests of the other class members, and (2) the named Plaintiffs – through their counsel – must be prepared to vigorously pursue the class members' interests. *See Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997); *Thorpe*, 303 F.R.D. at 150. "This is not a stringent requirement[.]" *Hoyte*, 325 F.R.D. at 491. Both of these conditions are satisfied here.

First, there is no conflict between the named Plaintiffs and the proposed class members. To the contrary, they share the common goals as described above. As such, the relief sought in this action will benefit all class members. Any argument that individual factors bearing on each MAVNI soldier's suitability to serve may be considered if and when subjected to a proper military review does not impact Plaintiffs' ability to adequately represent the class because "[t]hat . . . is not what this case is about." *O.A.*, 404 F. Supp. 3d at 156. Instead, this case addresses unlawful discharge policies that target all proposed MAVNI soldier class members.

Second, the named Plaintiffs have retained competent counsel who are fully prepared to vigorously represent and pursue the interests of the class. *See* Declaration of Douglas W. Baruch ("Baruch Decl."), ¶¶ 2-10. Plaintiffs' counsel served as appointed class counsel in the related *Kirwa* and *Nio* actions involving MAVNI soldiers – where this Court entered final judgment in

favor of the class in each action. *See id.*, ¶¶ 5-8. As this Court noted in certifying the *Nio* class, "[g]iven counsel's knowledge, experience, resources, and commendable work already done in the case, the Court has no doubt that plaintiffs' counsel can adequately represent the class." *Nio*, 323 F.R.D. at 34. Further, counsel have represented named Plaintiffs in this action for several years and through this litigation already have obtained relief for a significant number of MAVNI soldiers.

IV. Class Certification Is Appropriate Under Rule 23(b)(1) and/or Rule 23(b)(2)

A class action must also fall within one of the categories of cases set forth in FRCP 23(b). This action qualifies for class certification under either FRCP 23(b)(1) or FRCP 23(b)(2). *See Wal-Mart*, 564 U.S. at 361-62 ("Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment – that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class.").

A class action is warranted under FRCP 23(b)(1)(A) when "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." FRCP 23(b)(1)(A). As this Court has held, it is appropriate to certify a class action under FRCP 23(b)(1)(A) "when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class." *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore's Fed. Practice § 23.41[4] (3d ed. 2000)). Plaintiffs satisfy this standard. If the individual class members were to bring separate lawsuits to challenge Defendants' practices with respect to each class member's discharge orders, the adjudication of these actions may result in inconsistent decisions and/or varying standards.

Alternatively, a class action may be certified under FRCP 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FRCP 23(b)(2); *see also Wal-Mart*, 564 U.S. at 360 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (citation omitted). To qualify under FRCP 23(b)(2), "the party opposing the class does not have to act directly against each member of the class. The key is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class." 7A Wright & Miller, Fed. Prac. & Proc. Civ. § 1775 (3d ed.) (citations omitted). That is precisely the case here. The challenged discharge policies and practices targeting MAVNI soldiers apply to all class members, all of whom are subject to "uncharacterized" discharge actions, without regard to the individual circumstances of their cases or any other differences among them.

Fittingly as well, FRCP 23(b)(2) "is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." FRCP 23, Comment to Subdivision (b)(2). Indeed, courts have long recognized that certification under FRCP 23(b)(2) is a particularly important – and appropriate – vehicle for actions challenging the government's policies and practices, as here. *See, e.g.*, *R.I.L-R*, 80 F. Supp. 3d at 182 (certifying class under FRCP 23(b)(2) where plaintiffs challenged DHS policy generally applicable to all class members); *Robidoux*, 987 F.2d at 936 (vacating lower court's denial of class certification in case challenging delays in processing public assistance benefits); *Santillan v. Ashcroft*, Case No. C04-2686-MHP, 2004 WL 2297990, at *12 (N.D. Cal.

Oct. 12, 2004) (certifying class under FRCP 23(b)(2) where plaintiffs challenged government's policy on when it issued documents for lawful permanent status and sought injunctive relief to change "a set of national policies and practices in place for background and security checks").

Moreover, with regard to the class claims and relief sought, class members do not seek "individualized" relief. *Cf. Wal-Mart*, 564 U.S. at 361 (holding that "[p]ermitting the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure of Rule 23(b)"). Plaintiffs seek relief in the form of the Defendants correcting the situation (either through recognition of the treatment of MAVNI soldiers' so-called "entry-level" service and "uncharacterized" discharges as naturalization-qualifying or through reinstatement and the provision of the requisite process associated with the issuance of an other than honorable discharge) and putting an end to the uniform unlawful practices that deprive *all* class members (foreign-born U.S. Army soldiers who enlisted through the MAVNI program on or before September 30, 2016) of the process rights to which they are entitled. Injunctive relief to undo and prevent the harm of illicit summary discharges does not introduce the sort of variability that could defeat class certification. *See Healthy Futures of Tex.*, 326 F.R.D. at 9 (explaining that court order requiring HHS to "accept and process" each application "in the same manner as before" could not "somehow introduce the type of variability with respect to the agency's treatment of the class members that renders the certification of this class under Rule 23(b)(2) improper").

V. The Court Should Designate Plaintiffs' Counsel as Class Counsel

The Court, upon certifying the class, also must appoint class counsel. FRCP 23(c)(1)(B) & 23(g). Under FRCP 23(g), the Court must consider the following four factors:

i. the work counsel has done in identifying or investigating potential claims in the action;

ii. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

iii. counsel's knowledge of the applicable law; and

iv. the resources that counsel will commit to representing the class.

FRCP 23(g)(1)(A)(i)-(iv). As explained above with respect to adequacy, Plaintiffs' counsel satisfy these four factors. *See* Baruch Decl., ¶¶ 2-10.

Counsel are experienced litigators, who have been involved in multiple complex class actions and other important federal court cases against the Government. The most senior lawyers on the trial team are highly experienced litigators, with decades of combined federal court litigation experience. *Id.*, ¶¶ 3-6. Most notably, counsel's experience includes appointment as class counsel in the related *Kirwa* and *Nio* class actions on behalf of MAVNI soldiers, each resulting in final judgment in the class's favor. *Id.*, ¶¶ 5-8. Counsel are knowledgeable about the requirements and provisions of Army and DOD regulations, the APA, and the Constitution.

Counsel also have expended substantial resources and time investigating and researching the issues in this case and in the related *Kirwa* and *Nio* class actions, and they are prepared to commit the resources necessary to successfully and thoroughly prosecute this case. *Id.* For example, counsel extensively researched the claims in this case before filing suit, including performing factual background research and extensive legal research on the legal bases of the claims raised herein, both during the preparation for the actual filing of this case and during their handling of the *Kirwa* and *Nio* class actions. *See, e.g.*, *Greenberg v. Colvin*, 63 F. Supp. 3d 37, 47 (D.D.C. 2014) (noting law firm's "significant history of investigating the claims in this action" in granting the class counsel appointment); *Encinas*, 265 F.R.D. at 9 ("Counsel have already committed substantial time and resources to identifying and investigating potential claims in the action."). Finally, counsel have represented named Plaintiffs in this action for several years and

have obtained relief for a significant number of MAVNI soldiers while this litigation has been pending. Accordingly, Plaintiffs' counsel qualify for class counsel appointment in this case.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Motion be granted.

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Respectfully submitted,

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