UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendants Department of the Army ("Army") and Christine Wormuth, Secretary of the Army, (collectively, "Defendants"), by and through counsel, respectfully submit this memorandum in opposition to Plaintiffs' renewed motion for class certification and appointment of class counsel ("Renewed Mot. for Class Cert.") (ECF No. 213).

INTRODUCTION

The Court should deny Plaintiffs' Renewed Mot. for Class Cert. because Plaintiffs' proposed class encompasses a broad range of dissimilarly situated individuals whose claims are not common, whose injuries are not typical, and who have different factual bases for their claims. As a result, even if Plaintiffs were to prevail in this action, it would be unclear as to which proposed class members would be entitled to the relief sought, if any.

Alternatively, the Court should stay any further proceedings regarding class certification until after the Court has decided the threshold issue at the heart of this case. That is, must the Army provide an opportunity for a proceeding before an administrative separation board of officers or like composition to enlistees or soldiers when the Army intends to discharge an enlistee or

soldier from service without a characterization of service and another Federal agency does not consider uncharacterized discharges as "under honorable conditions" to fulfill a statutory prerequisite for application for naturalization?

The applicable regulations and instructions that apply to the putative class include, at a minimum: Army Regulation ("Army Reg.") 135-178, *Army National Guard and Reserve Enlisted Separations* (Nov. 7, 2017) (ECF No. 101-3); Army Reg. 601-210, R*egular Army and Reserve Components Enlistment Program* (Aug. 31, 2016) (ECF No. 101-4); Army Reg. 635-200, *Active Duty Enlisted Administrative Separations* (December 19, 2016); USAREC Regulation (USAREC Reg.) 601-210, *Enlistment and Accessions Processing* (July 20, 2018) (ECF No. 101-2)*;* Army memorandum*,* SUBJECT: *Resume Separation Actions Pertaining to Members of the Delayed Entry Program (DEP) and Delayed Training Program (DTP) Recruited Through the Military Accessions Vital to the National Interest (MAVNI Pilot Program),* (October 26, 2018) (ECF No. 50-1)*;* and Department of Defense memorandum, SUBJECT: *Application of the Expedited Screening Program* (May 18, 2021) (ECF Nos. 189-2, 198-2).[1]

As has been iteratively briefed in this case, each of these regulations or instructions provides for a certain level of notice, opportunity to respond, and consideration of all information by the approval authority prior to action. And none, other than those associated with the Army's October 2018 memorandum, which articulated specific provisions for the novel Military Service and Suitability Determination process, were applicable only to MAVNI enlistees. All others

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

applied to all Army enlistees or service members.

As outlined in Plaintiffs' expansive Third Amended Complaint and below, the nature, facts, circumstances, and applicable Army regulatory provisions in each of these cases varies widely. In short, these individual cases lack the requisite commonality of fact, law, and remedy for treatment as a class. Therefore, Defendants respectfully request the Court deny certification of the putative class. Alternatively, Defendants respectfully request the Court stay class certification proceedings until after the Court has decided the threshold issues in this case.

ARGUMENT

A. PROPOSED CLASS

Plaintiffs propose 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.

Renewed Mot. for Class Cert. at 1.

Notably, this is a different class definition than alleged within Plaintiffs' Third Amended Complaint. *See* Plaintiffs' Third Amended Complaint, ECF No. 205 at 79, ¶ 379 ("TAC"). Specifically, this proposed definition now excludes a whole prong of its most recent allegations.

Id. The missing prong is, "[w]here the person wants to be reinstated in or remain in the Army." *Id*. The removal of this prong is juxtaposed with at least one variation of Plaintiffs' requested relief of reinstatement of all class members. *Id*. at 84-85, ¶¶ 404, 405. Moreover, it appears that Plaintiffs no longer seek to certify sub-classes 1 and 2 as proposed in the TAC. *See* Renewed Mot. for Class Cert. at 9, n. 1; *compare* TAC, 79-80, ¶ 381. Instead, Plaintiffs acknowledge that refinement of the class definition may be necessary and appropriate at the Court's discretion. *Id*.

B. LEGAL STANDARD

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To fall within the exception, Plaintiffs "must affirmatively demonstrate [their] compliance" with Rule 23 of the Federal Rules of Civil Procedure. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Therefore, Plaintiffs bear the burden to demonstrate that all of the following exist: (1) the proposed class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the named Plaintiffs are typical of the claims or defenses of the class ("typicality"); and (4) the named Plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation"). *See* Fed. R. Civ. P. ("Rule") 23(a).

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350-51 (2011); *Hartman v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994); *Franklin v. Barry*, 909 F. Supp. 21, 30 (D.D.C. 1995); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs allege their claims meet the requirements of either Rule 23(b)(1)(A) or

(b)(2). These rules provide that a class action may be maintained if, "prosecuting separate actions by or against individual class members would create a risk of…inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or … 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." See Fed. R. Civ. P. 23(b)(1)(A) and (b)(2).

C. PLAINTIFFS' PROPOSED CLASS FAILS TO MEET RULE 23'S REQUIREMENTS OF COMMONALITY

The dissimilarities in facts and applicable regulations within the putative class impedes the generation of a common resolution in this case. The Supreme Court has repeatedly held to establish commonality, "[w]hat matters to class certification…is not the raising of common 'questions' – even in droves – but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (Citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (Citation omitted).

1. Dissimilar Facts

Examination of the current statuses of the 21 named Plaintiffs in this case elicits that the facts associated with each named Plaintiff and the members of the putative class vary considerably such that class certification is inappropriate. *See* Exhibit 1, Declaration of Lin H. St. Clair, January 20, 2022. As outlined in the declaration, nine of the named Plaintiffs are currently enlisted in the Army and are not the subject of any ongoing separation action. *Id*. at ¶¶ 4-7, 9, 11, 13-14, 19 (Plaintiffs Li, Qu, Xiongzhou Zhang, Xi Zhang, Suangchomphan, Si, Yabre, Li, and Bian). Two of these nine are enlisted in the Delayed Training Program ("DTP") and seven are enlisted in the

Delayed Entry Program ("DEP"). *Id*. Of the nine, two Plaintiffs have received favorable National Security Determinations ("NSDs"). *Id*. at ¶¶ 5, 13 (Plaintiffs Qu and Yabre). One of these two, Plaintiff Yabre, is currently attending Initial Entry Training, and the other of the two, Plaintiff Qu, is pending coordination with his recruiting station to complete any further actions required to ship, and subsequent shipment, to Initial Entry Training. *Id*. The other seven of these nine named Plaintiffs have completed the Military Service Suitability Determination ("MSSD") or Enhanced Screening Protocol ("ESP") phase of initial entry processing and await NSDs from DOD's Central Adjudication Facility. *Id*. at ¶¶ 4, 6-7, 9, 11, 14, 19 (Plaintiffs Li, Xiongzhou Zhang, Xi Zhang, Suangchomphan, Si, Li, and Bian). Again, none of these individuals are the subject of any ongoing separation action.

Nine other named Plaintiffs have been discharged from the Army. *Id*. at ¶¶ 8, 10, 17-18, 20-24 (Plaintiffs Qian, Liu, Yin, Uppugandla, Kim, Yuan, Miriyeva, Mahat, and Yang). Six of these nine discharged Plaintiffs enlisted into the DEP. *Id*. at ¶¶ 8, 10, 18, 20, 21, 24 (Plaintiffs Qian, Liu, Uppugandla, Kim, Yuan, and Yang). Three enlisted into the DTP. *Id*. at ¶¶ 17, 22-23 (Plaintiffs Yin, Miriyeva, and Mahat). Three of the nine discharged Plaintiffs were discharged in 2017 for reaching the maximum number of days the law allows them to spend in the Army's DEP (270 days). *Id*. at ¶¶ 18, 20-21 (Plaintiffs Uppugandla, Kim, and Yuan). Two of these three enlistees were discharged prior to this litigation and the Army offering MAVNI enlistees the opportunity to extend their contracts. *Id*. at ¶¶ 20-21 (Plaintiffs Kim and Yuan). The third of these three did not affirmatively opt into the extension of her contract. *Id*. at ¶¶ 18 (Plaintiff Uppugandla). Plaintiffs Kim and Uppugandla have applied for reinstatement into the DEP through the Army Review Board Agency and their cases are pending. Exhibit 2 (Application of Hyunsung Kim to the Discharge Review Board) and Exhibit 3 (DA Form 149, Application of Sai Krishna

Uppugandla (excluding exhibits)).

Three others of the nine discharged Plaintiffs were discharged after shipping to Initial Entry Training. Exhibit A, Declaration of Lin H. St. Clair, January 20, 2022, at ¶¶ 22-24 (Plaintiffs Miriyeva, Mahat, and Yang). All three were on active duty participating in Initial Entry Training at the time of their separation action. *Id*. Two of these three Plaintiffs enlisted into the DTP and were ultimately separated in 2018 for medical reasons. *Id*. at ¶¶ 22-23 (Plaintiffs Miriyeva and Mahat).[2] The third of these three Plaintiffs enlisted into the DEP and was separated in 2019 for a performance related reason. *Id*. at ¶ 24 (Plaintiff Yang).

One of the nine discharged named Plaintiffs enlisted in the DTP and was separated in 2017 for unsatisfactory completion of her Counter-Intelligence Focused Security Review paperwork. *Id*. at ¶ 17 (Plaintiff Yin). In 2018, she applied to the ABCMR and was granted partial relief. Exhibit 6 (Application and Decision Memoranda of Yue Yin for the Discharge Review Board). However, her service remains "uncharacterized." *Id*. And two more of the nine discharged named Plaintiffs enlisted in the DEP and were subsequently discharged for unfavorable MSSDs. Exhibit 1, Declaration of Lin H. St. Clair, January 20, 2022, at ¶¶ 8, 10 (Plaintiffs Qian and Liu).

Finally, three of the named Plaintiffs enlisted in the DTP and are pending separation actions based upon unfavorable MSSDs. *Id. at* ¶¶ 12, 15, 16. (Plaintiffs He, Lu, and Tate). These individuals have not been separated to date.

2. <u>Dissimilar Law (Applicable Regulations)</u>

[2] Plaintiffs Miriyeva and Mahat both applied to the Army Review Board Agency requesting changes to their characterization of service at discharge from uncharacterized to honorable or general, under honorable conditions. Exhibit 4 (Application and Decision Memoranda of Gunay Miriyeva for the Discharge Review Board) and Exhibit 5 (Application Memoranda of Sandeep Mahat for the Discharge Review Board). The Army Discharge Review Board denied Plaintiff Miriyeva relief and Plaintiff Mahat's application is pending decision. *Id*.

As has been discussed at many different iterations in this litigation, the Army has different regulations, polices, and provisions that apply to the different named Plaintiffs and the putative class members depending upon their status at the time of any contemplated separation and the nature of the contemplated separation itself. *See generally*, ECF Nos. 89, 92, 101, 109, and 115. These dissimilarities render class certification inappropriate. The most thorough and comprehensive explanation of the Army's application of its own regulations is found in ECF. Nos. 101 and 115.[3] For the ease of the Court, those are summarized below.

At the outset, it is important to understand two concepts. First, MAVNIs are processed for separation for non-MSSD reasons in the exact same manner as every other enlistee in the Army, regardless of the enlistee's mode of accession into the Army. Next, the DEP and the DTP are two distinct modes of accession into the Army. ECF No. 22-1, Declaration of Lin H. St. Clair, ¶ 4. Generally, DEP enlistees are contracted to serve in the Active-Duty Army at some point in the future. On the other hand, DTP enlistees are contracted to serve within the Army Reserve and, upon enlistment, are assigned to Army Reserve Troop Program Unit to attend battle assemblies. Therefore, the enlistees in the two programs are in different statuses and are subject to different provisions relative to separation.

DEPs, who are assigned only to USAREC ("Recruiting Command"), are subject only to USAREC Reg. 601-210, *Enlistment and Accessions Processing* (July 20, 2018). Army Reg. 601-210, 5-28.a. (directing the Commanding General of Recruiting Command to "organize and administer the Army Reserve Control Group (DEP) to which enlistees will be assigned.") DEPs do not fall under the provisions of Army Reg. 135-178, *Army National Guard and Reserve Enlisted*

[3] These are Defendants' filings. Plaintiffs' assertions as to the application of the regulations and associated provisions are found within ECF Nos. 62, 92, and 109.

Administrative Separations (Nov. 7, 2017), which sets forth the enlisted administrative separation procedures for the Army Reserve. DTPs, on the other hand, are assigned to both Recruiting Command and USARC ("Reserve Command"). ECF No. 22-1, Declaration of Lin H. St. Clair, ¶ 4. Accordingly, they are subject to the requirements of both the USAREC Reg. 601-210 and Army Reg. 135-178. *See generally* ECF No. 101-2, USAREC Reg. 601-210, *Enlistment and Accessions Processing* (July 20, 2018); ECF No. 101-3, Army Reg. 135-178, *Army National Guard and Reserve Enlisted Administrative Separations* (Nov. 7, 2017).

As noted, all DEPs and DTPs—including MAVNIs—are processed for separation from Recruiting Command in accordance with USAREC Reg. 601-210, Appendix I. Requests for separation from the DEP or DTP are approved for valid reasons identified in Army Reg. 601-210 and Army Reg. 135-178 and fall into three broad categories: (1) the result of a request from a member of the DEP or DTP; (2) the discovery of an erroneous or fraudulent enlistment; or (3) medical disqualifications. *Id*. ¶ I-2. From these three broad categories, USAREC Reg. 601-210 contemplates at least sixteen specific bases for separation and an additional "other" basis. USAREC Reg. 601-210, Appx. I, Table I-1, ECF No. 101-1 Each basis requires specific documentation and sometimes requires different separation procedures. *See Id*.

The procedures for separating DEPs and DTPs from Recruiting Command for one of the sixteen disqualifying reasons are set forth in USAREC Reg. 601-210, Appendix I, ¶ I-4, ECF No. 101-2 at 67. When a valid reason exists to separate a DEP or DTP from Recruiting Command under Army Reg. 135-178 (as identified in Tables I-1 and I-2), Reserve Command initiates a separation request using USAREC Form ("UF") 601- 210.21 (example at ECF No. 101-1). The UF 601-210.21 must be signed by the DEP/DTP, but if the DEP/DTP is unavailable or refuses to sign, the command is directed to "write 'unavailable for signature' or 'refuses to sign' in the

remarks section of the form." USAREC Reg. 601-210, Appx. I, ¶ I-4.a.(1), ECF No. 101-2 at 68. According to the regulation, Battalion Operations ("Bn Ops") "will cancel the [training] reservation" and "will publish appropriate separation orders within 14 days." *Id*., ¶ I-4.a.(2)-(3). The regulation further clarifies that this provision applies specifically to DEPs/DTPs: "[w]hen a FS [Future Soldier] enlists into DEP/DTP, . . . [t]he [Battalion] publishes the discharge order within 14 days of the cancellation of the reservation." *Id*., ¶ I-4.c.

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

In the case of a DTP, who, again, is assigned to both Recruiting Command and Reserve Command, once Recruiting Command cancels the training reservation and issues the appropriate order, the DTP enlistee's separation action is forwarded to his or her United States Reserve Command Troop Program Unit for further separation processing.[4] This Reserve Command unit follows the provisions of Army Reg. 135-178 for the particular basis upon which separation is contemplated.

Army Reg. 135-178 requires significantly different procedures for separation depending on the basis of the contemplated. To determine if a discharge was processed in accordance with regulation and therefore lawful, any review would have to include assessment of the propriety and lawfulness of the basis for discharge, the pre-notification procedural requirements (including counseling and rehabilitative efforts), the notification requirements, and whether the proper separation authority took action.[5]

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

[5] "Counseling and rehabilitative efforts are a prerequisite to initiation of separation proceedings only as far as expressly set forth under the specific requirements for the separation.

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

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

For example, for a soldier who fails to meet medical procurement standards, the Army is required to follow the pre-notification procedures outlined in Army Reg. 135-178, ¶ 6-6. *See* ECF No. 101-3. Army must obtain a medical finding from the staff surgeon that the "Soldier has a medical condition that –

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

Id.

In contrast to the few pre-notification requirements in ¶ 6-6, a separation for fraudulent enlistment requires extensive pre-notification actions. In accordance with Army Reg. 135-178, ¶

An alleged or established inadequacy in previous rehabilitation efforts does not bar separation. Army Reg. 135-178, ¶2-4, *See* ECF No. 101-3.

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

7-4 (fraudulent enlistments or reenlistments), a soldier may be separated "on the basis of procurement of a fraudulent enlistment or reenlistment through any deliberate material misrepresentation, or concealment of which, if known at the time of the enlistment or reenlistment might have resulted in rejection." *Id*. To establish fraud, the Army must apply one of two tests, appropriately entitled the "first test" or "second test" after completing fact-finding. *Id*. These tests are used to determine if the enlistment or reenlistment was, in fact, fraudulent. The Army command determines if the evidence found substantiates a fraudulent enlistment. If the information found does not amount to a disqualification, if the defect is no longer present, or if the defect is waivable (and a waiver has been obtained by the appropriate authority), then there is not a fraudulent enlistment and separation would not be authorized.

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

Procedures for separating MAVNIs who received unfavorable MSSDs are established in the Army's October 26, 2018, policy memorandum (ECF No. 50-1). That memorandum instructs that when the basis for the involuntary administrative separation is an unfavorable MSSD or NSD, certain provisions of AR 135-178, *Army National Guard and Reserve, Enlisted Administrative Separations*, 7 November 2017, apply. ECF No. 50-1, ¶ 4. Specifically, members of the DEP will

be processed for separation under the provisions of chapter 14-5(c) and the Commanding General, Reserve Command is the separation authority. *Id*., ¶ 4.a.1. Members of the DTP will be processed for separation under the provisions of Chapter 13 and the Assistant Secretary of the Army (Manpower and Reserve Affairs) is the separation authority. *Id*., ¶ 4.a.2. Regardless of whether the enlistee is a member of the DTP or DEP, written notification of separation must be provided under the provisions of Chapter 3 citing the unfavorable MSSD or NSD as the basis for the proposed separation. *Id*., ¶ 4.b. Finally, the policy memorandum provides that service "will be described as uncharacterized if separation processing is initiated while a Soldier is in an entry level status, except in the following circumstances: (1) [w]hen characterization under other than honorable conditions is authorized under the reason for separation and is warranted by the circumstances of the case; or (2) [t]he Secretary of the Army, or the Secretary's designated representative, on a case-by-case basis, determines that characterization of service as honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of military duty." *Id*., ¶ 4.c.

On May 2021, the Department of Defense effectively ended any future MSSDs for MAVNIs.[7] Procedures for separating any enlistee or service member, including MAVNIs, who receive unfavorable Enhanced Screening Protocol results are established in the DOD's Directive-type ("DTM") Memorandum 19-008, "*Expedited Screening Protocol (ESP)*", Attachment 3, paragraph 2.d. (dated July 31, 2019, Incorporating Change 2, Effective November 6, 2020). *See* ECF Nos. 198-1, 198-2. Substantively, these paragraphs reinforce the processes and requirements already specified in the applicable DOD Instructions and Army Regulations for enlisted

[7] Office of the Secretary of Defense Memorandum, Application of Expedited Screening Protocol, May 18, 2021.

separations.

Given the Army's different regulations, polices, and provisions that apply to the different named Plaintiffs and the putative class members depending upon their status at the time of any contemplated separation and the nature of the contemplated separation itself, class certification is inappropriate.

3. The Factual and Legal Dissimilarities Within the Proposed Class Impede the Generation of a Common Answer

Plaintiffs argue, "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. Renewed Mot. Class Cert., ECF No. 213 at 20.

In sum, ultimately, the only factual commonality among the named Plaintiffs as representatives of the putative class is that they all enlisted into the Army prior to September 30, 2016, as a part of the MAVNI Pilot Program. Nine of the named Plaintiffs do not fall into the putative class because they are current DEP or DTP members not pending discharge, and therefore, none of the nine "[a]re the subject of an administrative discharge action by the U.S. Army."[8] Moreover, importantly, while this review of the named Plaintiffs' statuses accounts for some of the factual differences leading to the separation of an enlistee or soldier, such as for medical or entry level performance and conduct related issues, the broadly defined putative class could easily encompass discharges for many other reasons, both voluntary and involuntary, such as pregnancy,

[8] To determine otherwise would mean that every MAVNI who enlisted prior to September 30, 2016, who has not been discharged is a member of the putative class.

failure to meet medical procurement standards, fraudulent enlistment, unsatisfactory performance, misconduct, failure to meet Army body composition standards, declined to ship, refusal to enlist, police record/charge after enlistment, or other reasons. *See generally* Army Reg. 135-178.[9]

Further, without the assertion that a "board of officers' proceeding or like proceeding" is required, the Court would have to delve into the individual facts, circumstances, and regulatory provisions applied to each individual to determine whether sufficient notice and opportunity to respond was granted. Ultimately, these factual dissimilarities lead to the application of different provisions of different regulations by different decision and/or approval authorities in each individual case and over time. As discussed, some of the named Plaintiffs are discharged, some are not. Some have been previously reinstated, some have not. Some are medically fit to serve, some are not. A common solution for all is simply not appropriate.[10]

Moreover, the "common answers" Plaintiffs propose — holding unlawful and setting aside the challenged discharge actions — do not universally resolve the issues in one swoop. Again, the named Plaintiffs and the putative class have been separated, or not, or potentially could have been, or could be, for very different reasons, including: unfavorable MSSDs, declining to ship to training, failing to meet the Army's medical/physical enlistment standards, entry level performance and conduct, apathy/personal problems, refusal to enlist, police record/charge after enlistment, moral/legal reasons, fraudulent enlistment, and pregnancy. *Infra* 11-14. In order to

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[9] For these same reasons, should the Court determine class certification is appropriate at this stage, Defendants, like Plaintiffs, believe that redefining the class is imperative.

[10] It should be noted that Plaintiffs all claim commonality through alleged violations of the First Amendment that resulted in chilling the free speech of all class members. Renewed Mot. for Class Cert., at 21. This overly broad assertion is in no way tied to the proposed definition of the class requiring the Court to determine that every MAVNI who otherwise meets the definition of the class, also experienced chilled speech in violation of the First Amendment. This type of reverse engineering a class in appropriate. *See generally*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

reinstate MAVNI enlistees in the Army, the Army would be required to assess each individual on a case-by-case basis to determine if he or she is still eligible to serve in the Army. If the enlistee was disqualified from serving on the basis of a permanent condition (and was discharged on that basis), then that individual would remain unqualified to serve. While some individuals may be suitable for military service, the "common answer" of setting aside each individual's discharge would not be appropriate.

For all of these reasons, Plaintiffs' proposed class fails to meet Rule 23's requirement of commonality.

D. THE NAMED PLAINTIFFS ARE NOT TYPICAL OF THE CLASS

The typicality requirement of Rule 23(a)(3) ensures that the interests of the named representatives align with the interests of the class. As long as the claims "resemble or exhibit the essential characteristics of those of the representatives," Rule 23(a)(3) will be satisfied. *Kas v. Fin. Gen. Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984). The typicality requirement is not met, however, if the proposed class representatives are subject to unique defenses. *Id*. The typicality requirement is used to ascertain "whether the action can be efficiently maintained as a class and whether the named Plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001) (citations omitted).

Rule 23(a)'s commonality and typicality requirements occasionally merge: "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named Plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc.*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157-58 n.13).

Plaintiffs proposed class lacks typicality for the same reasons its lack commonality: the proposed class is so factually diverse that it fails to present common legal questions or interests typical of all proposed class members. These differences are not academic; rather, the differences render Plaintiffs' legal interests atypical and questions of fact and law uncommon. Because of these differences, the proposed class does not raise common legal questions, and the alleged injuries of the proposed class could not be resolved through a common answer in this lawsuit.

In an effort to highlight the disparate claims, let us start with the simple observation that Plaintiffs' Third Amended Complaint contains 429 paragraphs over 92 pages. Admittedly, synthesizing the allegations for the purposes of assessing commonality and typicality is a difficult task. Nonetheless, it is important to note that 228 of these paragraphs are dedicated to asserting separate, distinct facts, circumstances, and allegations associated with each individual Plaintiff. On their face, these facts and claims are not common. TAC, ECF No. 205, ¶¶ 103-329.

Substantively, the differences in the asserted facts, circumstances, and allegations for each individual are not common, but nonetheless very important. To start with, as mentioned above, the differences matter because the Army has different policies and procedures applicable to all soldiers, not just those who enlisted under the MAVNI Pilot Program, based upon the status of the individual involved. Moreover, to get to resolution of this case, the differences in the individually named Plaintiffs and putative class members matter because their individual circumstances matter as to appropriate relief - injunctive or otherwise.

Many of the named Plaintiffs are not similarly situated because their alleged "injuries" are different, including some have been discharged as a result of unfavorable MSSDs and are now subject to the provisions of the October 26, 2018 policy, while others were discharged for other reasons, such as medical or performance related, and are not subject to the provisions of the

October 26, 2018 policy, while still others are in the military and have not been discharged at all.

With regard to potential remedies to these alleged injuries, what good would class-wide reinstatement do for the named or putative Plaintiffs who are not discharged? Does the potential putative class member who is already naturalized and has long since moved onto other ventures want reinstatement? What indication do we have that any of the putative class members want reinstatement and still want to serve? If a putative class member was separated based upon a medical condition that renders the individual unfit for service, is reinstatement a sufficient remedy for that individual or would that individual desire a different form of injunctive relief? Is reinstatement appropriate for those individuals who have not been separated and are refusing to go to Basic Combat Training?

Like the factual and legal dissimilarities, the potential remedies are so dissimilar that they render common relief inappropriate.

E. THE PROPOSED CLASS DOES NOT SATISFY THE REQUIREMENTS OF RULE 23(B)(1)

Under Rule 23(b)(1), Plaintiffs must demonstrate, 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; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). To attempt to meet this burden, Plaintiffs simply make the proclamation, "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." Renewed Mot. Class Cert., ECF No. 213, at 26. Plaintiffs provide no reasoning or explanation other than this conjecture.

Nonetheless, that is exactly Defendant's point. Each of these separation actions is factually and legally distinct, and each requires individual review and adjudication in order to protect the rights and interests of the individuals involved. That is why the Army has entities such as Army Review Board Agency and its subordinate agencies, the Army Discharge Review Board and the Army Board for the Correction of Military Records – to specifically review discharges, errors, and/or injustices and, as appropriate, correct military records. *See* 10 U.S.C. § 1552. This is not to say application to these agencies is necessary in order to seek relief from the Court. Rather, it is an acknowledgement that individual review and adjudication of each case is available and appropriate.[11] While review of individual cases based upon their own sets of facts, circumstances, and applicable regulatory provisions may return different results for different individuals, there is no indication that the results will be systematically legally inconsistent or varied.

F. THE PROPOSED CLASS DOES NOT SATISFY THE REQUIREMENTS OF RULE 23(B)(2)

Under Rule 23(b)(2), Plaintiffs must demonstrate that Defendants have "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." Fed. R. Civ. P. 23(b)(2). To attempt to meet this burden, Plaintiffs claim that the "[t]he 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

[11] Five named Plaintiffs have sought or are seeking relief through the Army Board for the Correction of Military Records or Army Discharge Review Board. See Exhibit 2-6. (Plaintiffs Kim, Mahat, Yin, Miriyeva, and Uppugndla applications provided without exhibits).

or any other differences among them." Renewed Mot. for Class Cert., ECF No. 213 at 25. Further, Plaintiffs' claim, "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." *Id*. at 26.

For certification under Rule 23(b)(2), Plaintiffs must show "declaratory relief is available to the class as a whole" and that the challenged 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." *Wal-Mart Stores, Inc.*, 564 U.S. at 360. Therefore, Plaintiffs bear the burden of demonstrating that the factual differences in the class are unlikely to bear on any individual's entitlement to relief. *See In re Google AdWords Litig.*, Civ. A. No. C08-3369, 2010 U.S. Dist. LEXIS 146392 (N.D. Cal. Nov. 12, 2010) ("The question of which advertisers among the hundreds of thousands of proposed class members are even entitled to restitution would require individual inquiries."). If the factual differences have the likelihood of changing the outcome of the legal issue, then class certification is not appropriate.

Plaintiffs' allegation that "discharge policies and practices target[ed] MAVNI soldiers" is fundamentally flawed. As previously discussed, MAVNIs are and were processed for separation for non-MSSD reasons in the exact same manner as every other DEP and DTP in the Army, regardless of the enlistee's mode of accession into the Army.

Further, Plaintiffs are unable to show that the factual differences in the class are unlikely to bear on *any individual's* entitlement to relief because individualized consideration of Plaintiffs' cases is unavoidable for two reasons. First, the challenged actions ("summary discharges") would obviously only apply to individuals who have been discharged from the Army and the proposed relief ("reinstatement" in the Army if the enlistee wants to be reinstated) would only apply to those who have not already been reinstated and who indicate a desire to be reinstated. The proposed

relief would not apply to those who have already been reinstated or to those that will never be discharged.

Second, contrary to Plaintiffs' assertion that the Army's alleged practice applies to each proposed class member regardless of their individual circumstances or differences, every discharge or separation from the Army generally, and the MAVNI program specifically, is based upon an assessment of each individual's suitability to serve in the military and the individual circumstances that led to the initiation of discharge or separation procedures. Each individual proposed class member's case presents different circumstances and facts, which must be taken into account when determining suitability to serve in the military and their ability to continue to serve or to be reinstated to serve.

The Army has to make an individual determination as to whether a person can be discharged, and also, whether a person can be reinstated. Every individual (not just MAVNIs) who enters military service must meet certain qualifications. If the individual cannot meet those qualifications, she is ineligible to serve in the Army. The Army would have to review the facts and circumstances of each individual to determine if she meets enlistment qualifications. For example, it is possible that the proposed class members are ineligible to serve for reasons including medical or legal disqualification, inability to meet the Army's height and weight standards, or some other reason for disqualification.[12]

Because Plaintiffs' proposed class encompasses a broad range of dissimilarly situated individuals whose claims are not common, whose injuries are not typical, and who have different factual bases for their claims, the Court should not grant Plaintiffs' request for class certification.

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[12] *See*, *e.g.*, Army Reg. 40-501, Standards of Medical Fitness (Jun. 14, 2017), chapter 2 (listing medical conditions that would disqualify an individual from serving in the Army).

G. RESOLUTION OF THE THRESHOLD ISSUES PRIOR TO CERTIFYING THE CLASS IS APPROPRIATE

In the event the Court is inclined to grant class certification based on Plaintiffs' proposed class definition, Defendants urge the Court to consider the threshold issues in this case prior to certification. Certifying the defined class as is would be premature and approaches deciding the merits of the case in favor of Plaintiffs before the case is litigated.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974), the Supreme Court found "nothing in either the language or history of Rule 23 that gives the Court authority to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative Plaintiff to secure the benefits of the class action without first satisfying the requirements for it." *Id*. The Supreme Court further noted, "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The Court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant." *Id*.

Instead, the Court may "probe behind the pleadings before coming to rest on the certification question," *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 249 (D.C. Cir. 2013), with an understanding that the question of class certification "often involves considerations that are enmeshed in the factual and legal issues comprising the Plaintiff's cause of action," *Steele v. United States*, 159 F. Supp. 3d 73, 80 (D.D.C. 2016), reconsideration granted, 200 F. Supp. 3d 217 (quoting *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 n.5 (D.C. Cir. 2006)). Courts must take care to refrain from engaging in free-ranging merits inquiries, however; instead, they must examine merits questions only to the extent that they are "relevant to

determining whether the Rule 23 prerequisites for class certification are satisfied." *DL v. Dist. of Columbia*, 713 F.3d 120, 126 (D.C. Cir. 2013).

Here, Plaintiffs' proposed class definition includes individuals who were the subject of involuntary administrative discharges, "[w]here such action is taken without the soldier first being afforded the process due under applicable Army and U.S. Department of Defense 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. Renewed Mot. for Class Cert., ECF No. 213 at 1. First, in order for the Court to grant class certification, the Court would have to conclude, prior to the issue being litigated appropriately, that each named Plaintiff (and therefore every similarly situated proposed class member) was discharged without "the process due under applicable Army and DoD regulations." *Id*. Moreover, this proposed definition requires the Court to decide the completely novel legal issue of whether an enlistee is entitled to a "proceeding before a board of officers or like proceeding" prior to receiving an uncharacterized discharge in certain circumstances. No Department of Defense or Army regulation or instruction currently requires a proceeding before a board of officers or like proceeding prior to the issuance of an uncharacterized discharge under any circumstances.

To be clear, Defendants are not asking the Court to conduct a preliminary inquiry into the merits. Instead, Defendants are asking the Court to consider and decide the merits on threshold issues that go directly to the scope and validity of the proposed class prior to certification. Defendants respectfully submit these matters should be decided prior to any certification of the class because to not do so puts an unfair burden on Defendants and benefits Plaintiffs in their efforts to certify without otherwise satisfying the requirements for a class action.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' Motion for Class Certification, or, in the alternative, decide a threshold issue prior to doing so.

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Dated: January 25, 2022
Washington, DC

Respectfully submitted,

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