IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGE SAMMA *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE *et al.*,

Defendants.

Civil Action No. __________________

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs are non-citizens serving in the United States Armed Forces who seek to exercise their statutory right to naturalize as United States citizens based on their honorable service during a period of armed conflict. Before they can apply for naturalization, the Department of Defense ("DoD") must certify the fact of their honorable service using USCIS Form N-426. But Defendants are unlawfully withholding N-426 certifications of honorable service from Plaintiffs and members of the class in this case, thereby preventing their naturalization.

In *Kirwa v. U.S. Department of Defense*, 285 F. Supp. 3d 21 (D.D.C. 2017), this Court preliminarily enjoined the same Defendants from withholding N-426 certifications from a class of non-citizens serving in the Selected Reserve of the Ready Reserve ("Selected Reserve") who enlisted under the "Military Accessions Vital to the National Interest" ("MAVNI") program. Defendants did not appeal the preliminary injunction in *Kirwa*, but they continue to unlawfully withhold N-426 certifications from other non-citizen service members outside the *Kirwa* class, including active duty MAVNI service members as well as lawful permanent residents serving active duty and in the Selected Reserve. This Court should enjoin Defendants' policy of unlawfully withholding N-426 certifications ("N-426 Policy") as applied to Plaintiffs and similarly situated service members so that Defendants cannot continue to unlawfully interfere with their right to seek naturalization.

Federal law expressly provides, in 8 U.S.C. § 1440, that non-citizens who have served honorably in the U.S. military during wartime are eligible for expedited naturalization. This provision further mandates DoD to provide service members with a certification of honorable service so that they can apply for naturalization. For many years, pursuant to the statute, DoD's

practice was to issue such certifications to non-citizens who had served honorably during wartime, without requiring a minimum period of service or fulfillment of any additional criteria. Moreover, a broad range of military personnel with access to an individual's service records could make these certifications, and would typically do so within days of receiving such a request.

As non-citizens who have served and continue to serve honorably during wartime, Plaintiffs are entitled to certifications of honorable service and to apply for naturalization. However, through the N-426 Policy, Defendants have imposed new, unlawful requirements before Plaintiffs and similarly situated service members may obtain such certifications, including a minimum period of service. They have also limited certification authority to only high-ranking military officials. By doing so, Defendants unlawfully refuse to fulfill their ministerial duty to confirm and certify Plaintiffs' honorable service, obstructing Plaintiffs from exercising their statutory right to apply for naturalization.

Plaintiffs are substantially likely to succeed in demonstrating that the N-426 Policy is unlawful for four reasons; this Court has already found that the *Kirwa* plaintiffs were likely to succeed in their challenge to the policy for two of these reasons. *First*, the N-426 Policy violates the Administrative Procedure Act ("APA") because it constitutes agency action that is arbitrary and capricious. *See Kirwa*, 285 F. Supp. 3d at 38–39. It departs from past DoD practice while providing no statement of the basis or purpose of the policy. Moreover, to the extent Defendants seek to rely on a national security justification for the policy, as they did in *Kirwa*, this Court has already determined in *Kirwa* that the policy cannot be justified by any national security concerns. *Id*. at 39.

Second, the N-426 Policy violates the APA because it constitutes agency action

unlawfully withheld or unreasonably delayed. *See id*. at 41–42. 8 U.S.C. § 1440 and its implementing regulations mandate DoD to play a narrow, non-discretionary, and ministerial role in the naturalization process for non-citizens serving during wartime—it must certify whether they have served honorably. Pursuant to the N-426 Policy, Defendants have refused to fulfill this ministerial role and certify the honorable service of Plaintiffs. They have therefore unlawfully withheld or unreasonably delayed agency action that they are required to take.

Third, the N-426 Policy violates the APA because it is in excess of statutory jurisdiction, authority, or limitations. In 8 U.S.C. § 1440, Congress spoke clearly and precisely that non-citizens are only required to have served honorably to obtain certifications of honorable service so that they may apply for naturalization. Section 1440 explicitly demarcates a limited and discrete role for DoD to play in this naturalization process—verifying and certifying whether non-citizens have served honorably, based on their current service records. By establishing additional, non-statutory, substantive criteria that these service members must meet in order to obtain their certifications of honorable service, the N-426 Policy unlawfully exceeds the limited authority bestowed upon DoD by section 1440.

Finally, the N-426 Policy violates the APA because Defendants failed to provide notice and a comment period prior to adopting and implementing the policy. The N-426 Policy constitutes a substantive agency rule and was therefore subject to notice and comment rulemaking. Defendants' failure to adhere to the APA's notice and comment procedures therefore renders the N-426 Policy invalid.

As a result of the N-426 Policy, thousands of service members have been unlawfully deprived of their right to apply for naturalization even as they continue to serve honorably in this nation's military. They cannot enjoy the rights and privileges that accrue with citizenship,

including the right to vote, the right to sponsor immediate family members, and the right to travel with a U.S. passport. For service members who lack lawful immigration status, the N-426 policy has placed them at continuing risk of deportation, despite their ongoing military service. For service members deployed overseas, their lack of U.S. citizenship jeopardizes their safety, for they have no right to U.S. consular services and protections and, as foreign nationals, they may have different rights and vulnerabilities compared to their U.S. citizen counterparts in the countries where they are stationed. The N-426 Policy also prevents non-citizens from advancing in their military careers since many roles in the military, including the more technical and senior roles as well as those requiring a security clearance, necessitate U.S. citizenship.

Each additional day of delay exacerbates the ongoing irreparable harm to these individuals. Absent intervention by this Court, thousands more service members will suffer the same harm. No public interest justifies this delay. Accordingly, the Court should preliminarily enjoin the N-426 Policy.

FACTUAL BACKGROUND

I. Legal Framework Governing Expedited Naturalization Through Military Service

A. Non-Citizen Enlistment in the U.S. Military

Non-citizens who are lawful permanent residents ("LPRs") or persons from the Marshall Islands, Micronesia, and Palau may enlist in the U.S. military. 10 U.S.C. § 504(b)(1)(B)–(C). In addition, the Secretary of Defense and the Secretaries of the military service departments are authorized to enlist persons who do not fall into these categories if their enlistment is "vital to the national interest." *Id*. § 504(b)(2). In November 2008, the Secretary of Defense drew on this authority to authorize the MAVNI program, which permitted certain foreign nationals, who are not LPRs or persons from the Marshall Islands, Micronesia, or Palau, to enlist if they possessed

specialized skills deemed critical to the U.S. military. *See Kirwa*, 285 F. Supp. 3d at 29.

B. Expedited Naturalization Through Military Service

The Immigration and Nationality Act ("INA") provides an expedited path to citizenship to non-citizens serving in the U.S. military during "designated periods of hostilities." 8 U.S.C. § 1440. On July 3, 2002, President George W. Bush issued Executive Order 13269, which designated the period "beginning on September 11, 2001" as a period of hostilities and rendered service members eligible for naturalization pursuant to section 1440 from that date. Exec. Order No. 13269, 67 Fed. Reg. 45,287 (Jul. 8, 2002). The naturalization process currently applicable to non-citizen service members is therefore that set forth in section 1440.

The statute provides that

> *[a]ny person who, while an alien or a noncitizen national of the United States, has served honorably* as a member of the Selected Reserve of the Ready Reserve or in an active duty status in the military, air, or naval forces of the United States during [a designated period of military hostilities] may be naturalized as provided in this section . . . .

8 U.S.C. § 1440(a) (emphasis added). Section 1440 mandates that "[t]he executive department under which" a service member has "served shall determine" and prove "by a duly authenticated certification . . . whether the applicant served honorably." *Id*. § 1440(b)(3), (a); *see also* 8 C.F.R. § 329.4(b). That certification must be made on a "form prescribed by USCIS," which is Form N-426, Request for Certification of Military or Naval Service. 8 C.F.R. § 329.4(a). Once DoD has certified an individual's honorable service using Form N-426, that service member may proceed to apply for naturalization with USCIS.[2] *See* 8 U.S.C. §§ 1429, 1440, 1445; 8 C.F.R. § 310.1(b).

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[2] 8 U.S.C. § 1440 and its implementing regulations ease and expedite the path to citizenship in at least five ways. First, naturalization under 8 U.S.C. § 1440 is available to "[a]ny person who, while an alien or a noncitizen national of the United States" has served honorably during wartime, *id*. § 1440(a), whereas a civilian must be an LPR, 8 U.S.C. § 1429; 8 C.F.R. § 316.2(a)(1)–(4). Second, it waives the requirements that a civilian have "resided continuously within the United States" for "at least five years after having been lawfully admitted for

Citizenship granted pursuant to Section 1440 may be revoked "if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." 8 U.S.C. § 1440(c).

II. The Challenged Policy

On October 13, 2017, DoD issued the N-426 Policy in a memorandum titled "Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization." Memorandum from Off. of Under Sec'y of Def. for Secretaries of Military. Dep'ts & Commandant of Coast Guard, *Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization* (Oct. 13, 2017), Ex. 2. The N-426 Policy subjects Plaintiffs and similarly situated service members to new requirements and a new process before they may obtain their certifications of honorable service in order to apply for naturalization under 8 U.S.C. § 1440.

The N-426 Policy specifies that service members will not be eligible to receive an N-426 certification until they meet the following criteria:

1. Legal and Disciplinary Matters: The Service Member is not the subject of

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permanent residence" and have "been physically present in the United States" for at least half that time. 8 C.F.R. § 316.2(a)(1)–(4). *Compare* 8 U.S.C. § 1440(b)(2), *with id.* § 1427; *see also* U.S. Citizenship & Immigr. Servs., *USCIS Policy Manual*, Vol. 12, Part I, Ch. 3, https://www.uscis.gov/policy-manual, Ex. 5 ("An applicant who files on the basis of military service during hostilities is exempt from the general naturalization requirements of continuous residence and physical presence."). Third, it requires a service member to demonstrate "good moral character" for one year preceding the date of application for naturalization, not the five years required for civilians. *Compare* 8 C.F.R. § 329.2(d), *with* 8 U.S.C. § 1427(e). Fourth, it waives the age requirement (of 18) for civilians and the prohibition against naturalization for persons with deportation orders or in removal proceedings. *Compare* 8 U.S.C. § 1440(b)(1), *with id.* § 1445. Finally, it waives the naturalization application fee, which civilian applicants must pay. *Compare* 8 U.S.C. § 1440(b)(4), *with* 8 C.F.R. § 103.7.

> pending disciplinary action or pending adverse administrative action or proceeding, and is not the subject of a law enforcement or command investigation; AND
>
> 2. Background Investigation and Suitability Vetting: The Service Member has completed applicable screening and suitability requirements . . . ; AND
>
> 3. Military Training and Required Service: The Service Member has served in a capacity, for a period of time, and in a manner that permits an informed determination as to whether the member served honorably, as set forth below.
>
> a. *For Service Members in an Active Component*:
>
> . . .
>
> - Completed at least 180 consecutive days of active duty service, inclusive of the successful completion of basic training . . . .
>
> b. *For Service Members in the Selected Reserve of the Ready Reserve*:
>
> . . .
>
> - Completed at least one year of satisfactory service . . . as a member of the Selected Reserve, inclusive of the member's successful completion of basic training . . . .

Ex. 2 at 2–3. The N-426 Policy also articulates a new process for a service member to obtain the N-426. The N-426 must now be completed by the Secretary of the applicable service, who may delegate this authority "to a commissioned officer serving in the pay grade of O-6 or higher." Ex. 2 at 1. The O-6 pay grade designates a full Colonel in the Army, Air Force, or Marines, and a Captain in the Navy or the Coast Guard. *See* U.S. Dep't of Def., *U.S. Military Rank Insignia*, https://www.defense.gov/Resources/Insignias.

DoD did not provide public notice prior to issuing the N-426 Policy, nor did it solicit, receive, or consider comments from the public regarding the changes made by the policy. DoD also did not provide any statement of the basis or purpose of the changes set forth in the N-426 Policy.

III. Honorable Service Requirement Under 8 U.S.C. § 1440

Under 8 U.S.C. § 1440, non-citizens serving in the U.S. military during wartime must meet a single requirement to obtain N-426 certifications of honorable service so that they may apply for naturalization—they must have "served honorably." Section 1440 imposes no other requirement for a service member to obtain the N-426 certification. Nor does it condition the honorable service requirement upon service of any prescribed length of time.

This plain reading of the statute is supported by its history. The 1968 Senate Committee on the Judiciary Report accompanying amendments to the INA explained that 8 U.S.C. § 1440 provides that a service member "who has served honorably . . . may be naturalized without regard to the requirements concerning age, residence, physical residence, physical presence, court jurisdiction, or *a waiting period*."[3] S. Rep. No. 1268-1292, at 4 (1968), Ex. 3 (emphasis added). The Report further compares section 1440, which governs service during wartime, with section 1439, which governs service during peacetime, and emphasizes that while "[t]he peacetime serviceman must have a minimum of 3 years' service, *the wartime serviceman has no minimum required*."[4] Ex. 3 at 5 (emphasis added). The Report explained the reasoning behind this distinction: "[A] serviceman is afforded an opportunity to acquire a citizenship before he is assigned to active combat, whereas if service in a defined combat zone is a condition to the acquisition of citizenship, the serviceman killed in action could never avail himself of the special benefits provided by his adopted country." Ex. 3 at 13.

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[3] This Report accompanied an amendment to the INA to expand eligibility for expedited naturalization under 8 U.S.C. § 1440 to service members who served during the Vietnam War and those who would serve in future designated periods of military hostilities.

[4] In 2003, Congress amended 8 U.S.C. § 1439, reducing from three years to one year the period of honorable service required to qualify for expedited naturalization through military service during peacetime. *See* National Defense Authorization Act for Fiscal Year 2004 ("NDAA 2003"), Pub. Law No. 108-136, 117 Stat. 1392 (2003).

The Department of Homeland Security ("DHS") has explicitly acknowledged in past rulemaking that 8 U.S.C. § 1440 does not condition honorable service upon a minimum service duration requirement. In a final rule promulgated in 2010 to extend the benefits of 8 U.S.C. § 1440 to service members serving in the Selected Reserve (and not just in an active duty status), DHS stated that prior to the rule, "aliens who served in the U.S. Armed Forces during specific periods of hostilities were eligible for naturalization *without having served for any particular length of time* so long as the service was in an active-duty status." Naturalization for Certain Persons in the Armed Forces, 75 Fed. Reg. 2785 (Jan. 19, 2010), Ex. 4 (emphasis added). It then went on to explain that it was updating its regulations to reflect a 2003 statutory amendment extending that benefit to service members in the Selected Reserve. Ex. 4 (citing NDAA 2003 § 1702).

Volume 12 of the USCIS Policy Manual, USCIS's central repository for its immigration policies, further confirms that service members do not need to meet a minimum service duration threshold to demonstrate honorable service under 8 U.S.C. § 1440. Part I, Chapter 3, which addresses "Military Service during Hostilities," provides: "Members of the U.S. armed forces *who serve honorably for any period of time* during specifically designated periods of hostilities may be eligible to naturalize." Ex. 5 at Part I, Ch. 3 (current as of April 7, 2020) (emphasis added). A prior version of the USCIS Manual also provided: "One day of qualifying service is sufficient in establishing eligibility." U.S. Citizenship & Immigr. Servs., *USCIS Policy Manual*, Vol. 12, Part I, Ch. 3 (current as of August 23, 2017), Ex. 6; *see also Kirwa*, 285 F. Supp. 3d at 28.

USCIS requires service members applying for naturalization under 8 U.S.C. § 1440 to submit Form N-426, which certifies their honorable service. *See* Ex. 5 at Part I, Ch. 5. Form N-

426 itself further reflects that section 1440 establishes that a service member may obtain a certification of honorable service solely upon the demonstration of honorable service. *See* Form N-426 (Exp. 09/30/2021) at 1, Ex. 7 ("To establish eligibility [for naturalization], the law requires the executive department under which such person served to certify whether the service member served honorably . . . ."). In Part 3, it requires the certifying official to indicate the applicant's service start (and where applicable, end) dates. Ex. 7. And in Part 5, it requires the certifying official to indicate whether the applicant has served honorably for each period of military service by checking a "yes" or "no" box. Ex. 7. Form N-426 does not require the certifying official to indicate whether a service member has met a minimum period of service, or any other requirement.

IV. DoD's Ministerial Role in Certifying Honorable Service

The INA charges the Secretary of Homeland Security "with the administration and enforcement of this chapter and all other laws relating to immigration and naturalization of aliens, except insofar as . . . such laws relate to the powers, functions, and duties conferred upon," *inter alia*, the Attorney General. 8 U.S.C. § 1103(a)(1). In 8 U.S.C. § 1421(a), Congress delegated to the Attorney General "[t]he sole authority to naturalize persons as citizens of the United States." The Attorney General has, in turn, authorized USCIS "to perform such acts as are necessary and proper to implement the Attorney General's [naturalization] authority." 8 C.F.R. § 310.1.

8 U.S.C. § 1440 assigns to DoD a narrow, non-discretionary, and ministerial role in the naturalization process for non-citizens serving during wartime—"determin[ing] whether persons have served honorably" by providing "a duly authenticated certification." 8 U.S.C. § 1440(a), (b)(3). Defendants have admitted to this Court in *Nio v. U.S. Department of Homeland Security*

that "DoD serves a ministerial role in determining if an individual is serving honorably." Defs.' Resp. to Pls.' Mot. for Prelim. Inj. at 36, *Nio v. U.S. Dep't of Def.*, No. 17-cv-00998 (D.D.C. Jun. 7, 2017), ECF No. 19; *accord Kirwa*, 285 F. Supp. 3d at 38.

DHS regulations implementing 8 U.S.C. § 1440 further mandate DoD to play a strictly ministerial role in certifying honorable service. Form N-426, which USCIS requires DoD to use in certifying honorable service, instructs DoD to establish the applicant's periods of service and simply designate "yes" or "no" as to whether the applicant has served honorably during each period. Ex. 7. In other words, DoD must indicate whether a service member has served honorably or not, based solely on whether the individual has served honorably as reflected in their service record at the time DoD completes the N-426.

V. DoD's Prior Conforming N-426 Practice

DoD's longstanding practice has been to fulfill the ministerial role assigned to it by Congress in 8 U.S.C. § 1440 by certifying honorable service based solely on whether a non-citizen has served honorably as reflected in their service record at the time DoD completes the N-426. In *Kirwa*, this Court described this practice as "a cursory records check to determine if the enlistee (1) was in the active duty or the Selected Reserves, (2) had valid dates of service, and (3) had no immediately apparent *past* derogatory information in his service record." 285 F. Supp. 3d at 29. The Court concluded that DoD's established "practice was to determine whether a person had served honorably based on an examination of his service record at the time the N-426 was submitted for execution." *Id*. It noted that this conclusion was "further confirmed by the information relevant to the length of time the certification process took for seven of the named *Nio* plaintiffs, each of whom had their N-426s certified within one day after they submitted the forms." *Id*.

DoD's well-established practice of certifying N-426s based solely on whether non-citizens had served honorably at the time DoD checks their service records is reflected in its resources for service members seeking naturalization. From at least 2005 to April 2017, the U.S. Army Human Resources Command published "The Soldier's Guide to Citizenship Application," the purpose of which was to explain "the procedures for Soldiers to apply for citizenship" with "[t]he goal [of] streamlin[ing] and expedit[ing] the handling of their applications." U.S. Army Human Resources Command, *The Soldier's Guide to Citizenship Application* at 4 (2017), Ex. 8; *see also* U.S. Army Human Resources Command, *The Soldier's Guide to Citizenship Application* (2011), Ex. 9; U.S. Army Human Resources Command, *The Soldier's Guide to Citizenship Application* (2005), Ex. 10; *see also Kirwa*, 285 F. Supp. 3d at 28. In the guide, the Army explained:

> As a general rule, a Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier's commander or a court martial, to discharge him/her under less than honorable conditions.
>
> In the rare cases where the character of a Soldier's service is questionable, ONLY the Soldier's commander can decide this issue, and the sole criterion for the decision is: *If the Soldier were being discharged today, based on his/her record, what type of discharge would the Soldier receive? If Honorable or General or Under Honorable Conditions, the character of service on the N-426 will read "honorable."*

Ex. 8 at 11 (emphasis added).

The U.S. Navy's analogous guide similarly emphasizes DoD's ministerial role in certifying the N-426. It instructs that the "certifying officer must complete all pertinent blocks" and "MUST state . . . whether the servicemember is serving honorably." U.S. Navy, *Guide to Naturalization Applications Based Upon Qualifying Military Service* at 4, Ex. 11 (emphasis in original); *see also Kirwa*, 285 F. Supp. 3d at 29. The guide also makes clear that service members do not need to have served honorably for any minimum length of time in order to

receive the N-426 certification. It explicitly distinguishes between those serving during peacetime and those serving during wartime, by emphasizing that the former requires "at least one (1) year of active, honorable service in the US military *at the time of submitting the application*." Ex. 11 at 2 (emphasis in original). By contrast, it articulates no minimum period of honorable service for service members seeking naturalization under 8 U.S.C. § 1440.[5]

The Navy's checklist for those certifying N-426s also confirms its ministerial role by describing the role as "primarily administrative." U.S. Navy Judge Advocate Gen.'s Corps, *Navy JAG Local Service Record Application Processing Procedures* at 1, Ex. 12. And the checklist itself illustrates the administrative nature of the certification process:

> Is the form filled out completely?
> Is each enlistment or extension of military service listed on a separate line?
> Ha[ve] the service dates and derogatory data been verified?
> Has the Certifying Officer marked the block showing what type of service you had?
> Is the Certifying Officer either a member of the same service as you or employed by the same service?
> Has the form been signed and dated . . . and stamped with the Command seal?

That DoD has long understood its role in certifying N-426s to be ministerial is further reflected in the range of persons previously authorized to complete the form. Specifically, DoD advised service members that they could seek N-426 certification from a broad range of military personnel with access to their service records. Thus, in *The Soldier's Guide to Citizenship Application*, which the Army maintained for over a decade prior to the N-426 Policy, the Army represented that an S-1, which is an Administration Officer, the Military Personnel Division, or

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[5] An earlier version of the Navy Military Personnel Manual article MILPERSMAN 5352-010 also indicated that "[o]nly **1 day** of service is required" for a service member seeking to naturalize under 8 U.S.C. § 1440. U.S. Navy, Naval Military Personnel Manual, *Naturalization and Derived Citizenship of Military Personnel*, MILPERSMAN 5352-010(2)(6)(c) (2008), Ex. 13 (emphasis in original).

Military Processing Operations could complete the N-426. Ex. 8 at 11; *accord Kirwa*, 285 F. Supp. 3d at 28 (describing the Army guide as "provid[ing] that the N-426 service data can be verified and the form signed by someone in a Military Personnel Division or Military Personnel Offices"). Likewise, the Navy has maintained that a service member may submit the N-426 "to their local service record holder for completion." Ex. 11 at 4; *accord Kirwa*, 285 F. Supp. 3d at 28–29; Ex. 12 at 1 ("[T]he local service record holder[ ] . . . is responsible for obtaining necessary application materials and submitting the application in a timely manner.").

In practice, DoD's fulfillment of its ministerial role prior to the N-426 Policy meant that it regularly issued N-426 certifications to non-citizens soon after their arrival at basic training, so that they could naturalize by the time they graduated. Thus, a 2016 MAVNI Information Paper instructs that "[t]he Army, along with United States Citizenship and Immigration Services (USCIS) has implemented expedited citizenship processing for *all non-citizens* at each of the Army's Basic Combat Training (BCT) locations" and that "[a]ll documentation including the N-426 will be signed at BCT." MSG Washington, *2016 MAVNI Information Paper* at 5, MAVNI Blog (Apr. 26, 2016), Ex. 14 (emphasis added). The MAVNI Information Paper further states that "[t]he Army's goal is to ensure that *all non-citizen Soldiers take their oath of citizenship prior to or concurrent with graduation from BCT*." Ex. 14 at 6 (emphasis added). In the *Nio* litigation, a DoD official confirmed that MAVNI service members "on receiving a certification of honorable service, may submit their application for citizenship to the U.S. Citizenship and Immigration Service upon arrival at their initial entry training (colloquially, 'boot camp')." Decl. of Stephanie P. Miller in Supp. of Defs' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. ¶ 9, *Nio* (D.D.C. Jul. 7, 2017), ECF No. 19-7, Ex. 15. The official further confirmed that "MAVNI recruits who are approved for citizenship are then typically naturalized during the last week of

initial entry training." Ex. 15. According to these representations, non-citizen service members, including MAVNIs, were therefore previously permitted to both obtain an N-426 certification of honorable service and submit their application for naturalization upon arrival at basic training—— and typically received their citizenship by the time they graduated.[6]

VI. Application of the N-426 Policy to Plaintiffs

Each Plaintiff is a service member who has met the requirements for an N-426 certification of honorable service under 8 U.S.C. § 1440. Each Plaintiff has signed an enlistment contract and taken the Oath of Enlistment. Samma Decl. ¶ 5; Bouomo Decl. ¶ 4; Isiaka Decl. ¶ 9; Perez Decl. ¶ 4; Park Decl. ¶ 4; Lee Decl. ¶ 5. Each Plaintiff is serving during a designated period of military hostilities, and is doing so honorably. Samma Decl. ¶¶ 6, 22; Bouomo Decl. ¶¶ 5, 16; Isiaka Decl. ¶¶ 10, 18; Perez Decl. ¶¶ 5, 17; Park Decl. ¶¶ 5, 16; Lee Decl. ¶¶ 6, 15. Each Plaintiff has requested from the military, some on multiple occasions, an N-426 certification, but has been unsuccessful in obtaining the certification. Samma Decl. ¶¶ 8–16, 20; Bouomo Decl. ¶¶ 7–11, 14; Isiaka Decl. ¶¶ 13, 16; Perez Decl. ¶¶ 7–12, 15; Park Decl. ¶¶ 8–11, 14; Lee Decl. ¶¶ 9, 13.

Plaintiff Ange Samma is a lawful permanent resident who enlisted in the U.S. Army in July 2018 and currently serves on active duty as a Private First Class (E-3). Samma Decl. ¶¶ 5–6. Private Samma first requested his N-426 certification from his drill sergeant at basic combat

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[6] With respect to MAVNIs in the Selected Reserve, the Army has previously instructed that they need only attend a single drill before they could obtain the N-426 certification and apply for naturalization. *See* James Hwang, MD, U.S. Army, *MAVNI Information Session 2013* at 3–4 (2013), Ex. 16 ("**Participate in 1 drill** as a[n] E-4 rank enlisted 'Selected Reserve' Soldier . . . After 1 drill is completed, prepare the citizenship application (USCIS form N-400) and have your USCIS [F]orm N-426 signed by your chain of command; mail your completed citizenship packet to USCIS." (emphasis in original)). There is no indication that DoD maintained a separate prior N-426 practice for LPRs serving in the Selected Reserve.

training. Samma Decl. ¶ 8. His drill sergeant told Private Samma that non-citizens used to be naturalized at basic combat training but that he would be unable to help him obtain the certification. Samma Decl. ¶ 8. Private Samma next requested his N-426 certification from his drill sergeant at advanced individual training. Samma Decl. ¶ 10. His drill sergeant informed him that because he was an active duty soldier, he would need to serve six months before he would be eligible for the N-426 certification. Samma Decl. ¶ 10. Private Samma later requested his N-426 certification again from his drill sergeant at advanced individual training, but his drill sergeant refused to help him obtain the certification. Samma Decl. ¶ 11. Private Samma next requested his N-426 certification from his platoon sergeant, soon after he arrived at his duty station. Samma Decl. ¶ 13.

Because the N-426 requires certification by an officer of pay grade O-6 or higher, it took two to three months for Private Samma to receive his N-426. Samma Decl. ¶¶ 13–14. However, when he submitted his N-426 to USCIS so that he could proceed with his naturalization application, USCIS informed him that his N-426 was incomplete, including the section requiring the certifying official to indicate whether Private Samma had served honorably. Samma Decl. ¶ 15. Private Samma re-submitted his N-426 for certification and received it two months later. Samma Decl. ¶ 16. However, the N-426 he received was the same as the prior N-426, just with the missing information filled in, and USCIS has informed him that it will not accept this N-426 and requires an entirely new N-426 certification. Samma Decl. ¶ 16. Private Samma has still not received his N-426 certification and his naturalization application is therefore on hold. Samma Decl. ¶ 20. It has been 14 months since Private Samma entered service by shipping to basic combat training and he has served honorably at all times since entering service. Samma Decl. ¶¶ 21–22.

Plaintiff Abner Bouomo is a lawful permanent resident who enlisted in the U.S. Army in December 2017 and currently serves on active duty as a Private First Class (E-3). Bouomo Decl. ¶¶ 4–5. Private Bouomo first requested his N-426 certification from a civilian Army employee while undergoing in-processing at basic combat training. Bouomo Decl. ¶ 7. The civilian Army employee refused to help him and gave him a memorandum stating that soldiers have to wait until they report to their duty station to obtain the N-426 certification. Bouomo Decl. ¶ 7, Ex. A. The memorandum also stated that soldiers are required to have the N-426 certified by an officer of 0-6 pay grade or higher in their chain of command. Bouomo Decl. ¶ 7, Ex. A. Private Bouomo next requested his N-426 certification from his drill sergeant at advanced individual training. Bouomo Decl. ¶ 9. On Private Bouomo's graduation from training, his drill sergeant returned his uncompleted N-426 to him and told him he would have to seek his N-426 certification at his duty station. Bouomo Decl. ¶ 9. Private Bouomo next requested his N-426 certification at his duty station from the non-commissioned officer above him in his chain of command. Bouomo Decl. ¶ 11. The S-1 office at his duty station, which is responsible for military personnel matters, subsequently informed Private Bouomo that he would have to serve one year before he would be eligible for the N-426 certification (notwithstanding that the N-426 Policy provides a 180-day service duration requirement for active duty service members). Bouomo Decl. ¶ 11. Private Bouomo has still not received his N-426 certification and he therefore cannot apply for naturalization. Bouomo Decl. ¶ 14. It has been 12 months since Private Bouomo entered service by shipping to basic combat training and he has served honorably at all times since entering service. Bouomo Decl. ¶¶ 15–16.

Plaintiff Ahmad Isiaka is a lawful permanent resident who enlisted in the U.S. Army in January 2020 and currently serves in the Selected Reserve of the U.S. Army Reserve as a Private

Second Class (E-2). Isiaka Decl. ¶¶ 9–10. Private Isiaka began drilling with the 644th Transportation Company in Houston, Texas, in February 2020. Isiaka Decl. ¶ 11. After he began drilling with his company, Private Isiaka requested his N-426 certification from his Unit Administrator. Isiaka Decl. ¶ 13. His Unit Administrator refused to help him obtain the N-426 certification and told Private Isiaka that he had not been serving for enough time and that he would have to attend basic combat and advanced individual training before he could receive his certification. Isiaka Decl. ¶ 13. Private Isiaka has still not received his N-426 certification and he therefore cannot apply for naturalization. Isiaka Decl. ¶ 16. It has been two months since Private Isiaka entered service by participating in Selected Reserve drills with his unit and he has served honorably at all times since entering service. Isiaka Decl. ¶¶ 17–18.

Plaintiff Michael Perez is a lawful permanent resident who enlisted in the U.S. Army in November 2017 and currently serves on active duty as a Private Second Class (E-2). Perez Decl. ¶¶ 4–5. Private Perez first requested his N-426 certification from his drill sergeant at basic combat training. Perez Decl. ¶ 7. His drill sergeant refused to help him obtain the N-426 certification and told him service members were no longer able to obtain the certification while at basic combat training. Perez Decl. ¶ 7. Private Perez next requested his N-426 certification from his drill sergeant at advanced individual training. Perez Decl. ¶ 9. His drill sergeant said he would look into the process but when Private Perez approached him as he was nearing graduation, his drill sergeant told him he would be unable to help him obtain the certification. Perez Decl. ¶ 9. Private Perez next requested his N-426 certification from his platoon sergeant at his duty station. Perez Decl. ¶ 11. His platoon sergeant told Private Perez that he would have to send the N-426 up his chain of command. Perez Decl. ¶ 11. His platoon sergeant subsequently returned Private Perez's uncompleted N-426 to him and told him that he would have to serve one

year in active duty before he would be eligible for the N-426 (notwithstanding that the N-426 Policy requires a 180-day service duration requirement for active duty service members). Perez Decl. ¶ 12. Private Perez has still not received his N-426 certification and he therefore cannot apply for naturalization. Perez Decl. ¶ 15. It has been 12 months since Private Perez entered service by shipping to basic combat training and he has served honorably at all times since entering service. Perez Decl. ¶¶ 16–17.

Plaintiff Sumin Park enlisted in the U.S. Army in January 2017 as a lawful permanent resident and currently serves on active duty as a Private Second Class (E-2). Park Decl. ¶¶ 4–5. Private Park first requested her N-426 certification from her drill sergeant at advanced individual training. Park Decl. ¶ 8. Her drill sergeant refused to help her obtain the N-426 certification because seeking a signature from an officer of O-6 pay grade would take longer than nine weeks, which was the length of her advanced individual training. Park Decl. ¶ 8. Private Park next requested her N-426 certification from her platoon sergeant at her duty station. Park Decl. ¶ 10. Her platoon sergeant told her that he anticipated it would take a long time for the N-426 to reach an officer of O-6 pay grade but could not give her an estimate of how long it would take for her to receive her certification. Park Decl. ¶ 10. Her platoon sergeant subsequently returned her uncompleted N-426 to her and told her that she would have to serve one year in active duty before she would be eligible for the N-426 certification (notwithstanding that the N-426 Policy requires a 180-day service duration requirement for active duty service members). Park Decl. ¶ 11. Private Park has still not received her N-426 certification and she therefore cannot apply for naturalization. Park Decl. ¶ 14. It has been ten months since Private Park entered service by shipping to basic combat training and she has served honorably at all times since entering service. Park Decl. ¶¶ 15–16.

Plaintiff Yu Min Lee enlisted in the U.S. Army through the MAVNI program in July 2016 and currently serves on active duty as a Specialist (E-4). Lee Decl. ¶¶ 5–6. Specialist Lee requested her N-426 certification from her drill sergeant at advanced individual training and continually checked in with her drill sergeant about its progress throughout her training. Lee Decl. ¶ 9. When Specialist Lee approached her drill sergeant about her N-426 certification just before her graduation, her drill sergeant told her he would be unable to help her obtain the certification. Lee Decl. ¶ 9. While Specialist Lee was speaking with her drill sergeant, another drill sergeant came over and informed her drill sergeant that Specialist Lee would need to complete 180 days of service before she could obtain the N-426 certification. Lee Decl. ¶ 9. Specialist Lee has still not received her N-426 certification and she therefore cannot apply for naturalization. It has been seven months since Specialist Lee entered service by shipping to basic combat training and she has served honorably at all times since entering service. Lee Decl. ¶¶ 14–15.

As Plaintiffs attest, they are suffering and will continue to suffer irreparable harm due to Defendants' actions. Defendants' actions deprive Plaintiffs of the opportunity to realize the fundamental rights and benefits that accompany citizenship, including the right to vote, the right to sponsor immediate family members, and the right to travel with a U.S. passport. Samma Decl. ¶¶ 24–26; Bouomo Decl. ¶¶ 19–21; Isiaka Decl. ¶¶ 21–22; Perez Decl. ¶¶ 20–21; Park Decl. ¶ 19; Lee Decl. ¶¶ 19–20. For Plaintiffs who lack lawful immigration status or whose status is in question, such as Plaintiffs Lee and Park, citizenship would afford peace of mind regarding their legal status to remain in the United States and protection from removal proceedings and deportation. Lee Decl. ¶ 18; Park Decl. ¶¶ 20–21. And for service members deployed overseas, such as Plaintiff Samma, citizenship would allow them to access U.S. consular services and

protections and ensure that they will be treated similarly to their U.S. citizen counterparts by the countries where they are stationed. Samma Decl. ¶ 27.

Defendants' actions have also made it more difficult for Plaintiffs to advance in their chosen military careers because many roles in the military, including the more technical and senior roles as well as those requiring a security clearance, necessitate U.S. citizenship. Samma Decl. ¶ 28; Bouomo Decl. ¶ 22; Isiaka Decl. ¶ 23; Perez Decl. ¶ 22; Lee Decl. ¶ 21; *see, e.g.*, U.S. Dep't of Def., *DoD Manual 5200.02, Procedures for the DoD Personnel Security Program (PSP)* § 6.1 (2017), Ex. 17 ("Only U.S. citizens are eligible for access to classified information."); Ex. 14 at 10 ("To become an officer, you must be a U.S. citizen and you must also be eligible to receive a security clearance."). These positions may also correlate with a higher military rank and pay grade, which Plaintiffs are further deprived from obtaining through their inability to obtain an N-426 certification and to seek naturalization. Samma Decl. ¶ 28; Bouomo Decl. ¶ 22; Isiaka Decl. ¶ 23; Perez Decl. ¶ 22; Lee Decl. ¶ 21.

LEGAL STANDARD

In deciding whether to issue a preliminary injunction, a court must consider "whether (1) the plaintiff had a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest." *Sottera, Inc. v. FDA*, 627 F.3d 891, 893 (D.C. Cir. 2010). The D.C. Circuit applies "a sliding scale" approach, whereby if "the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).[7] But a plaintiff "must demonstrate 'at

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[7] In more recent cases, the D.C. Circuit has suggested, without holding, that a likelihood of success on the merits is also an independent, free-standing requirement for a preliminary

least some injury' for a preliminary injunction to issue, for 'the basis of injunctive relief in the federal courts has always been irreparable harm.'" *Id*. Plaintiffs meet each of the requirements for a preliminary injunction to issue and are therefore entitled to such relief under both legal standards.

ARGUMENT

I. Plaintiffs Have a Substantial Likelihood of Succeeding on the Merits.

A. The N-426 Policy Violates the APA.

Plaintiffs have a substantial likelihood of succeeding on the merits of their claims that the N-426 Policy violates the APA because it (1) is arbitrary and capricious and (2) constitutes agency action withheld or unreasonably delayed for the same reasons this Court found the *Kirwa* plaintiffs were likely to succeed on these claims. Plaintiffs are also substantially likely to succeed on the merits of their APA claims that (3) the N-426 Policy exceeds Defendant's statutory jurisdiction, authority, or limitations and (4) Defendants failed to engage in notice and comment rulemaking prior to enacting the N-426 Policy.[8]

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injunction. *See Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

[8] The APA enables courts to review agency action where: (1) review is not precluded by statute; (2) the action is not committed to agency discretion by law; (3) the action is final; and (4) there is no other adequate remedy at law. *See* 5 U.S.C. §§ 701(a)(1)–(2), 704. The INA does not preclude judicial review of the N-426 Policy, nor is the policy committed to agency discretion by law. *See Kirwa*, 285 F. Supp. 3d at 36–37. The N-426 Policy is final agency action because it constitutes "a final and binding determination" of how DoD is to issue certifications of honorable service and has "direct and appreciable legal consequences" for non-citizen service members. *Bennet v. Spear*, 520 U.S. 154, 178 (1997) (citation omitted); *see also Kirwa*, 285 F. Supp. 3d at 38 n.19 ("Defendants do not contest that DOD's current N-426 Policy represents final agency action."). Finally, there is no alternative review mechanism for Plaintiffs seeking to challenge the N-426 Policy, and thus no other adequate remedy at law.

1. The N-426 Policy Violates the APA Because It Is Arbitrary and Capricious.

Under 5 U.S.C. § 706(2), a court is authorized to hold unlawful and set aside final agency action that is arbitrary and capricious. Agency action is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Moreover, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). Accordingly, agency action is "arbitrary and capricious if it departs from agency precedent without explanation." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1090 (D.C. Cir. 2009); *see also Fox Television Stations*, 556 U.S. at 515 ("An agency may not . . . depart from a prior policy *sub silentio*" and "must show that there are good reasons for the new policy.").

The N-426 Policy is arbitrary and capricious because it provides no explanation for upending DoD's longstanding practice of certifying honorable service based solely on whether non-citizens have served honorably at the time DoD completes their N-426. Nor does the policy explain why N-426s must now be certified by the Secretary of the relevant military service (or a commissioned officer of pay grade O-6 or higher designated by the Secretary) when these forms were routinely certified—often within a single day—by a broad range of military personnel with access to an individual's service record. Defendants' failure to provide any justification for

departing from decades-long agency precedent renders the N-426 Policy arbitrary and capricious and it should be set aside for this reason.

This Court's decision to grant a preliminary injunction in *Kirwa* is instructive. There, the Court found "DOD offered no reasoned explanation for this change, thereby suggesting that DoD's decision was an arbitrary and capricious one." *Kirwa*, 285 F. Supp. 3d at 38. The Court also rejected Defendants' post hoc justifications for the policy grounded in national security and an interest in setting standards for the naturalization process. *See id.* at 39. It held that the N-426 Policy "is not justified by any national security concerns," particularly as "DOD fully controls what these enlistees do and have access to before the enhanced security screening is complete." *Id*. The Court further held that "DOD does not control the naturalization process" and therefore its "unfounded attempt to control criteria for naturalization does not constitute a reasoned explanation" for the N-426 Policy. *Id*. Thus, this Court should set aside the N-426 Policy as arbitrary and capricious for the same reasons articulated in *Kirwa*.

2. The N-426 Policy Violates the APA Because It Is Agency Action Unlawfully Withheld or Unreasonably Delayed.

Under 5 U.S.C. § 706(1), a court may "compel agency action unlawfully withheld or unreasonably delayed." A section 706(1) unlawful withholding claim is valid where "a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All*., 542 U.S. 55, 64 (2004). The "legal duty must be 'ministerial or nondiscretionary' and must amount to a 'specific, unequivocal command.'" *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018) (quoting *Norton*, 542 U.S. at 63–64). Agency inaction in the face of such a command may "represent agency recalcitrance . . . of such magnitude that it amounts to an abdication of statutory responsibility." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (quotation marks omitted). "Examples of such clear duties to

act include provisions that require an agency to take specific action when certain preconditions have been met." *Id*.

8 U.S.C. § 1440 expressly mandates DoD to certify the honorable service of non-citizens based solely on their service record at the time it completes the N-426. This duty is required by statute and it is discrete, non-discretionary, and ministerial. Indeed, Defendants admitted to this Court in the *Nio* litigation that "DoD serves a ministerial role in determining if an individual is serving honorably." Defs.' Resp. at 36, *Nio*, ECF No. 19; *accord Kirwa*, 285 F. Supp. 3d at 37.

DHS regulations implementing 8 U.S.C. § 1440 further instruct DoD to play a ministerial role in certifying honorable service. USCIS, the component of DHS responsible for processing and adjudicating naturalization applications, requires DoD to use Form N-426 to certify a service member's honorable service. *See* 8 C.F.R. § 329.4; Ex. 5 at Part I, Ch. 5. The N-426 reflects DoD's ministerial role by instructing DoD to establish the applicant's periods of service and simply designate "yes" or "no" as to whether the applicant has served honorably during each period. Ex. 7. The choice is binary. The form does not permit DoD to refuse to make that choice or to otherwise withhold certification on the basis that a service member has not met a minimum service duration or any other requirement.

For these reasons, in *Kirwa*, this Court came to the conclusion that the N-426 Policy constituted agency action unlawfully withheld because "defendants have a ministerial duty to certify Form N-426s" and that "[u]nder 8 U.S.C. § 1440, certification of Form N-426s is a non-discretionary duty to the extent that it references *past* honorable service." *Kirwa*, 285 F. Supp. 3d at 41. The Court therefore concluded that plaintiffs were likely to succeed in proving that "DoD must expeditiously certify or deny their N-426s based on their existing military records." *Id*. at 42. This determination should extend equally to Plaintiffs here, who are similarly entitled to an

N-426 certification by virtue of their honorable service during wartime, and for whom Defendants continue to refuse to discharge their ministerial duty to certify their N-426s.

3. The N-426 Policy Is in Excess of Statutory Jurisdiction, Authority, or Limitations.

Under 5 U.S.C. § 706(2)(C), a court is authorized to hold unlawful and set aside final agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The courts review agency action challenged under section 706(2)(C) "under the well-known *Chevron* framework." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). At the first step of the *Chevron* inquiry, a court must "ask whether Congress has directly addressed the precise question at issue." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011) (quotation marks omitted); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. However, "if the statute is silent or ambiguous with respect to the specific issue," the analysis shifts to *Chevron* step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

Here, Congress has "directly spoken to the precise question[s] at issue": (1) what is required for a service member to apply for naturalization under 8 U.S.C. § 1440, and (2) what is DoD's role in that process. *Id.* at 842. On the first question, 8 U.S.C. § 1440 clearly establishes that service members must meet a single requirement to obtain a certification of honorable service so that they may apply for naturalization: they must have "served honorably." 8 U.S.C. § 1440(a). Section 1440 imposes no other requirement for a service member to obtain an N-426 certification. Nor does it make provision for DoD or any other agency to add naturalization

eligibility criteria. Congress left no "gap for the agency to fill." *Chevron*, 467 U.S. at 844.

The plain language of 8 U.S.C. § 1440—"served honorably"—is explicit that the honorable service requirement is backwards looking. In other words, service members can obtain N-426 certifications so long as they have "served honorably" at the point the military examines their service records to complete the N-426. This Court has previously held that this language "specifically refers to *past service*, not to DOD's possible future suitability determinations." *Kirwa*, 285 F. Supp. 3d at 36. Thus, a determination of honorable service must rest solely upon an examination of an individual's existing service record at the time the military completes an N-426 and whether that record reflects honorable service to that date.

Finally, 8 U.S.C. § 1440 does not condition the past honorable service requirement upon any prescribed length of time. The statutory scheme makes clear that Congress intended that non-citizens serving during wartime should be eligible for naturalization after honorable service of even a brief period of time. This reading is justified by comparing section 1440 against section 1439, which sets forth the requirements for service members serving in peacetime to apply for expedited naturalization. Section 1439 provides that service members serving during peacetime may apply for naturalization after honorable service "for a period or periods aggregating one year." 8 U.S.C. § 1439(a). Congress's prescription of a particular length of honorable service in section 1439 leads to the presumption that it deliberately omitted any such prescription in section 1440. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration omitted)).

Congress has also spoken expressly on the second precise question at issue here: DoD's

role—or, rather, its lack of one—in implementing or enforcing the naturalization laws of the United States. In the INA, Congress granted the Attorney General "[t]he sole authority to naturalize persons as citizens of the United States," 8 U.S.C. § 1421(a), a power the Attorney General has in turn delegated to USCIS, 8 C.F.R. § 310. DoD therefore has no authority to implement or enforce the naturalization laws of the United States. It is not an agency charged with "administer[ing] a congressionally created . . . program," which "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843.

Rather, section 1440 carves out a limited and discrete role for DoD to play where service members seek to apply for naturalization—it must certify whether they have "served honorably." Section 1440 does not articulate any other role for DoD to play in the naturalization process of service members under this provision. And as established above, Congress has spoken with precision on the honorable service requirement, leaving no ambiguity for DoD to address. For these reasons, the N-426 Policy is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" and the Court should set it aside.[9] 5 U.S.C. § 706(2)(C).

4. The N-426 Policy Violates the APA Because DoD Failed to Engage in Notice and Comment Rulemaking.

The APA requires an agency to adhere to a three-step process when it issues a rule "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of [the] agency." 5 U.S.C. § 551(4). It must (1) issue a

[9] Even if 8 U.S.C. § 1440 were ambiguous, which it is not, DoD's construction of the statute is not permissible under the second step of the *Chevron* inquiry. As discussed above, while Congress has spoken plainly on the precise questions at issue, the broader statutory scheme further confirms that the honorable service requirement is clearly predicated on past honorable service and that DoD's role is narrowly limited to certifying past honorable service.

"[g]eneral notice of proposed rule making," *id*. § 553(b), (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id*. § 553(c), and (3) when promulgating the rule, include in its text, "a concise general statement of [its] basis and purpose." *Id*. The courts generally refer "to the category of rules to which the notice and comment requirements . . . apply as 'legislative rules' or, sometimes, 'substantive rules.'" *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). A legislative rule "does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy." *Id*. "A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Id*.

The N-426 Policy is a legislative rule subject to the notice and comment procedures of the APA. It neither describes DoD's view of the meaning of a regulatory term, nor confirms a preexisting regulatory requirement, nor maintains a prior DoD policy. Rather, it effects a substantive change to the naturalization regime for non-citizens serving during wartime set forth in 8 U.S.C. § 1440. That regime establishes that such service members may obtain a certification of honorable service so that they may apply for naturalization solely by demonstrating that they have "served honorably." The N-426 Policy substantially alters this regime by introducing additional, non-statutory, substantive requirements service members must meet before they may obtain an N-426 certification of honorable service and apply for naturalization. DoD issued the N-426 Policy "effectively immediately" without adhering to the APA's notice and comment procedures. Ex. 2. It therefore failed to observe procedures required by law and the Court should hold unlawful and set aside the N-426 Policy.

II. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

To demonstrate irreparable harm, the moving party must show that the injury is "both certain and great; it must be actual and not theoretical." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (quoting *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). The injury must also be "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id*. (quoting *Wisc. Gas Co.*, 758 F.2d at 674). Finally, the injury "must be beyond remediation" such that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date. in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id*.

Plaintiffs and those similarly situated will suffer irreparable harm without injunctive relief. Their injury is certain, great, and imminent. Defendants' conduct is depriving Plaintiffs of their statutory right to apply for naturalization. This Court has found in both *Kirwa* and *Nio* that delays to an expedited naturalization process guaranteed by statute constitute a form of irreparable harm. *See Kirwa*, 285 F. Supp. 3d at 42 ("As held in *Nio*, delaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm."); *see also Kuang v. U.S. Dep't of Def.*, 340 F. Supp. 3d 873, 921 (N.D. Cal. 2018) (finding "irreparable injury present" where a DoD policy "delays Plaintiffs' ability to obtain citizenship through their military service"); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1200–01 (W.D. Wash. 2008) ("Plaintiffs, each deprived of a naturalization decision within 120 days of their interview, are injured by the delay itself . . . .").

By depriving Plaintiffs of their statutory right to apply for naturalization, Defendants' conduct further deprives Plaintiffs of the rights and benefits that accompany citizenship. The "right to acquire American citizenship is a precious one," *Fedorenko v. United States*, 449 U.S.

490, 505 (1981), and "[c]ourts have long recognized the priceless benefits of United States citizenship," *United States v. Schiffer*, 831 F. Supp. 1166, 1196 (E.D. Pa. 1993). Each Plaintiff is not only eligible for naturalization but also qualifies for citizenship. Samma Decl. ¶ 23; Bouomo Decl. ¶ 17; Isiaka Decl. ¶ 20; Perez Decl. ¶ 19; Park Decl. ¶ 18; Lee Decl. ¶ 17. Each Plaintiff expected that they would have already received their citizenship and had planned to take advantage of the unique and fundamental privileges that citizenship affords, including the right to vote, the right to sponsor immediate family members, and the right to travel with a U.S. passport. Samma Decl. ¶¶ 24–26; Bouomo Decl. ¶¶ 19–21; Isiaka Decl. ¶¶ 21–22; Perez Decl. ¶¶ 20–21; Park Decl. ¶ 19; Lee Decl. ¶¶ 19–20. For service members deployed overseas, like Plaintiff Samma, the lack of U.S. citizenship means they cannot access U.S. consular services and protections and, as foreign nationals, may receive disparate treatment from their U.S. citizen counterparts by the countries where they are stationed. Samma Decl. ¶ 27.

In addition, for some Plaintiffs, such as Plaintiffs Lee and Park, citizenship affords peace of mind regarding their legal status to remain in the United States and protection from removal proceedings and deportation. In fact, Defendants' conduct has placed these Plaintiffs in immigration limbo, clouding them with uncertainty about their ability to legally remain in the United States and preventing them from traveling outside of and returning to this country. DHS officials have stated to this Court that "any alien without legal immigration status in the United States is subject to removal and may be placed in removal proceedings for failing to maintain status or for any other violation of the immigration laws which would make the alien removable." Decl. of Nathalie Asher in Supp. of Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. ¶ 5, *Nio* (D.D.C. Aug. 14, 2017), ECF No. 31-1, Ex. 18. As this Court found in *Kirwa*, the N-426 Policy has resulted in DoD "blocking access to an existing legal avenue for avoiding

removal" and "[b]y preventing plaintiffs from submitting valid naturalization applications to USCIS, defendants are depriving plaintiffs of 'lawful presence' for purposes of ICE enforcement." 285 F. Supp. 3d at 43. This "threat of removal proceedings, which plaintiffs face without certified N-426s, is a serious one." *Id*. at 44.

Plaintiff Lee enlisted in the military through the MAVNI program as a recipient of Deferred Action for Childhood Arrivals ("DACA"). However, her DACA status and work authorization expired during her military service and she has been unable to apply for naturalization based on her military service because DoD has unlawfully withheld her N-426 certification. Because she lacks lawful immigration status in the United States, she lives in fear that she will placed in removal proceedings and deported from this country. Lee Decl. ¶ 18. Plaintiff Lee also wishes to visit her ailing grandmother but fears that doing so would jeopardize her ability to re-enter this country. Lee Decl. ¶ 20. This "[l]oss of . . . ability to travel abroad is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members living abroad." *Vartelas v. Holder*, 566 U.S. 257, 268 (2012).

Plaintiff Park also faces uncertainty about her immigration status due to Defendants' conduct. Plaintiff Park enlisted in the military in 2017 as a conditional permanent resident. Park Decl. ¶¶ 3–4. She subsequently applied to remove the conditions on her permanent resident status and obtain a Permanent Green Card. Park Decl. ¶ 20. In 2019, Plaintiff Park received an interview date for her application to remove the conditions on her permanent resident status. Park Decl. ¶ 20. Because the interview date was just prior to her ship-out date to basic combat training, Plaintiff Park contacted her military recruiter, who informed her that she did not have to attend the interview and that she would obtain her citizenship through the military. Park Decl. ¶ 20. In reliance on her recruiter's statement and in expectation of naturalizing through the

military, Plaintiff Park did not attend her interview and, as a result, did not pursue her application. Park Decl. ¶ 20. However, she is unable to apply for naturalization based on her military service because DoD has unlawfully withheld her N-426 certification. As a result, Plaintiff Park lives in fear of being placed in removal proceedings and deported from this country. Park Decl. ¶ 21.

Finally, Defendants' conduct is depriving Plaintiffs of their ability to meet their professional objectives and of career advancement and better pay in pursuit of those objectives. *See Kuang*, 340 F. Supp. 3d at 920 (finding DoD policy delaying LPR accession into military service as causing irreparable harm because, *inter alia*, plaintiffs had "diminished . . . opportunity to pursue their chosen professions," an injury "particularly acute 'early in their careers'" (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)); *Tiwari v. Mattis*, No. C17-242 TSZ, 2018 WL 1737783, at *7 (W.D. Wa. Apr. 11, 2018) (describing DoD refusal to process MAVNI security clearance requests as causing irreparable harm by precluding "MAVNI soldiers from performing in the roles they were recruited for, prevent[ing] them from advancing in their careers, spoil[ing] the currency of their qualifications and training, and reduc[ing] the amount of pay they are eligible to receive"). Many roles in the military, including the more technical and senior roles as well as those requiring a security clearance, necessitate U.S. citizenship. For example, Plaintiff Lee, who holds a bachelor's degree in linguistics and and possesses linguistic and cultural competencies critical to the military, would like to re-classify her military occupational specialty, which is currently automated logistics specialist, to an intelligence-related role. Lee Decl. ¶ 21. However, intelligence roles require a security clearance, which she cannot obtain without U.S. citizenship. Lee ¶ 21. Plaintiff Isiaka holds a bachelor's degree in electrical and electronics engineering and a master's degree in

subsea engineering. Isiaka Decl. ¶¶ 2–4. He would like to apply to be an officer in the Army, for which he is eligible as a college graduate, but is unable to without U.S. citizenship. Isiaka Decl. ¶ 23. Plaintiff Bouomo holds an associate's degree in computer science but would like to apply to the Army's Green to Gold Active Duty Option Program, which would allow him to obtain his bachelor's degree in this field and earn a commission as an officer in the Army. Bouomo Decl. ¶ 22. However, he is unable to apply to the program without U.S. citizenship. Bouomo Decl. ¶ 22. Plaintiffs Samma and Perez seek to re-classify their military occupational specialties to more specialized roles that would allow them to acquire valuable skills that would benefit both their military and future civilian careers. Samma Decl. ¶ 28; Perez Decl. ¶ 22. However, the roles of interest to them are reserved for U.S. citizens. Samma Decl. ¶ 28; Perez Decl. ¶ 22. Many of the roles Plaintiffs desire would also come with a higher rank and pay grade, which Plaintiffs are further deprived from obtaining through their inability to obtain an N-426 certification and seek naturalization. Samma Decl. ¶ 29; Bouomo Decl. ¶ 22; Isiaka Decl. ¶ 23; Perez Decl. ¶ 22; Lee Decl. ¶ 21.

Plaintiffs have no remedy at law; the harms they are suffering cannot be made whole by damages, nor are damages available to them because of the United States' sovereign immunity. *See Kirwa*, 285 F. Supp. 3d at 42 n.22 (finding delay to statutory right to apply for naturalization is one that "cannot be repaired by damages awarded later or by further adjudication"). For these reasons, the N-426 Policy is causing irreparable harm, entitling Plaintiffs to obtain injunctive relief.

III. The Balance of Harms and the Public Interest Both Favor Injunctive Relief.

Where the government is the non-movant, the balance of equities and public interest considerations "merge into one factor." *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 156 (D.D.C.

2018). "The balance-of equities factor directs the Court 'to balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.'" *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Where an injunction will 'not substantially injure other interested parties,' the balance of equities tips in the movant's favor." *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 123 (D.D.C. 2018) (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)).

The balance of equities tips decidedly in Plaintiffs' favor. In *Kirwa*, this Court determined that the balance of equities favored the *Kirwa* plaintiffs because they "are suffering, and will continue to suffer, irreparable harm due to DoD's inaction, and . . . defendants have not offered sufficient justification for their policy change." 285 F. Supp. 3d at 44. That conclusion is equally compelled here, where Plaintiffs are similarly service members who qualify for a certification of honorable service so that they may apply for naturalization under 8 U.S.C. § 1440 but who remain subject to the N-426 Policy and are suffering irreparable harm as a result. On the other hand, a preliminary injunction would not injure, let alone substantially injure, Defendants who can offer no sufficient justification for the N-426 Policy and who would simply have to revert to the ministerial task of certifying honorable service, which they had carried out for many years prior to the N-426 Policy.

Further, a preliminary injunction would serve the public interest by ensuring Defendants' compliance with a statutory mandate. *See Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (finding that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (recognizing "the general public interest served by

agencies' compliance with the law" in granting preliminary injunction against DHS). Moreover, far from undermining the public interest, honoring the military service of non-citizens during a period of armed conflict by awarding a path to citizenship comports with our history, values, and laws. *See* Compl. ¶¶ 38–61. Without a preliminary injunction, Defendant's unlawful N-426 Policy will continue to frustrate congressional intent in enacting 8 U.S.C. § 1440. Thus, the balance of equities and the public interest weigh decisively in Plaintiffs' favor.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their application for a preliminary injunction.

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Respectfully submitted,

/s/ Jonathan Hafetz

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