

# **Exhibit 2**

to Plaintiffs' Motion for Summary Judgment

Case No.: 20-cv-1104-ESH

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Mahlon Kirwa, et al.,	)	Civil Action
	)	No. CA 17-1793
Plaintiff,	)	
	)	PRELIMINARY INJUNCTION
vs.	)	MOTION HEARING
	)	
United States Department of	)	Washington, DC
Defense, et al.,	)	October 18, 2017
	)	Time: 11:30 A.M.
Defendants.	)	

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TRANSCRIPT OF PRELIMINARY INJUNCTION MOTION HEARING  
HELD BEFORE  
THE HONORABLE JUDGE ELLEN SEGAL HUVELLE  
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

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Court Reporter: Janice E. Dickman, RMR, CRR  
Official Court Reporter  
United States Courthouse, Room 6523  
333 Constitution Avenue, NW  
Washington, DC 20001  
202-354-3267

1 filed this past Monday things that are called MAVNI  
2 information papers. The plaintiffs filed the 2016 version,  
3 I believe, with their complaint. They filed it previously  
4 in this case. They actually signed the 2014 version. And  
5 that paper contains all sorts of information about the risks  
6 that MAVNI soldiers -- except when they show up. And I  
7 think, in capital letters, that document in fact states do  
8 not submit your N -- do not submit your application for  
9 naturalization until you attend basic training. And that's  
10 something that's by design.

11 As I understand it, DoD and DHS actually have  
12 worked it out such that they have USCIS officials present  
13 during basic military training in order to help facilitate  
14 with the paperwork and to have that process move as quickly  
15 as possible. But -- and this is stated in the Miller  
16 declaration as well, the first Miller declaration, I  
17 believe, that DoD has always contemplated that the  
18 application for naturalization will take place simultaneous  
19 with attendance at basic military training.

20 THE COURT: Well, we know for 500 people -- well,  
21 all right, I can't say -- I know the named plaintiffs in Nio  
22 that didn't happen.

23 MR. SWINTON: I would also just like to note, Your  
24 Honor, the language from the enlistment contract you read  
25 isn't in any way inconsistent with the MAVNI information

1 there aren't, in fact, security problems with a particular  
2 individual.

3 THE COURT: We know from our other case that as  
4 soon as they find those in the vetting process, they can put  
5 somebody -- it's not a dishonorable discharge, but it's  
6 another word that means they can't get into the Army.  
7 Uncharacterized, that's a sweet way of saying you don't get  
8 in. Uncharacterized discharge.

9 So they're no longer certifying them as honorable.  
10 And what they've learned, you never know -- I mean, you may  
11 not have found it ever, who knows. I mean, I just -- I  
12 don't -- you've protected yourself, frankly, beyond belief,  
13 against any person. You are subjecting the people to a --  
14 something similar to what you get to have highly -- to have  
15 access to highly classified information, correct?

16 MR. SWINTON: The Tier 5, yes.

17 THE COURT: You've told us in the beginning all of  
18 these people are subject to Tier 5, all MAVNIs, is what you  
19 told me.

20 MR. SWINTON: I think that what's Mr. Fucci said.  
21 And I think that's his understanding of it.

22 THE COURT: Well, that's what the government  
23 represents and that's what I go on. So you're saying all  
24 these people get Tier 5s, regardless of whether or not they  
25 ever touch a piece of classified information, right?

1 MR. SWINTON: Correct.

2 THE COURT: This is what you have chosen,  
3 rationally or irrationally, as a way to protect us against  
4 the few bad apple situations that you discovered that were  
5 reflected in your confidential classified documents, right?

6 MR. SWINTON: Correct.

7 THE COURT: Do you know anywhere in any document  
8 that ties in 426s to national security?

9 MR. SWINTON: I think --

10 THE COURT: I've read those two documents.

11 MR. SWINTON: That's what I understand, Your  
12 Honor. I think we should consider what DoD's role is in  
13 this overall process because the honorable service  
14 determination is, of course, an essential part of the  
15 naturalization application. A MAVNI soldier can't go on  
16 with applying to DHS for naturalization without it.

17 So what DoD is doing, beyond just its own  
18 purposes, is deeming someone as having served honorably, it  
19 is certifying to another agency for purposes to allow  
20 someone to apply for U.S. citizenship, that this person has  
21 served honorably. And it would be very strange if DoD made  
22 that certification, enabling that person to then apply for  
23 citizenship, only to have the results of a background  
24 investigation or security screening come back later, and  
25 maybe in a couple weeks, maybe in a month or two, and reveal --

1 THE COURT: Or 400 days.

2 MR. SWINTON: Well, depending where they are in  
3 the process. To have the results of those screenings come  
4 back and to have it reveal unmitigated derogatory  
5 information that would result in the discharge of this  
6 individual from the military.

7 THE COURT: Well, before the situation was that  
8 they might not have discovered it until after they were  
9 naturalized, and then you didn't want to have to go through  
10 the process of denaturalizing, but that exists. So you're  
11 just saying that we now changed it because it would be  
12 strange for us to do what we did before, which was say,  
13 okay, honorable, and then you could learn things later that  
14 make them not honorable. That happens, probably, in life,  
15 you know. You don't always know everything up front.

16 You've tried to protect yourself with a new policy  
17 about this, but I don't see how this honorable certification  
18 is not really a part of the naturalization process, as  
19 opposed to your worrying about what kind of people you're  
20 taking in the Army and whether somebody is not going to be  
21 loyal to the Army.

22 I just don't see how you can throw them in  
23 together, especially when you've never used the word  
24 "honorable" in a meaningful way until October 13th.

25 MR. SWINTON: It's always been used in a

1 N-426, and that was in April, and the other one was in  
2 March. So, actually, none of them could -- they couldn't  
3 have applied that notion of honorable. He was told you  
4 couldn't certify it unless he was on active duty. That's  
5 what one of them was told. Or, the other one was told the  
6 same thing. He wasn't on active duty. But now you're not  
7 requiring active duty.

8 MR. SWINTON: Correct, for individuals to whom  
9 Section II applies.

10 THE COURT: You can't tell me honestly, sir, that  
11 any of these three people were basically -- they were  
12 applying a notion of honorable to them, that they couldn't  
13 certify as honorable. There's nothing to support that at all.

14 MR. SWINTON: I guess I'm just saying that these  
15 three individuals requested an honorable service  
16 certification and were informed that they could not have it  
17 at that point in time. I think that's what the complaint --  
18 at least the allegations in the complaint state.

19 THE COURT: There's lots of documents that say  
20 sometime after, you know, May or whatever, they put a hold  
21 on the whole thing.

22 MR. SWINTON: That, I think, is the first Miller  
23 declaration from July, Your Honor. And my point in saying  
24 this is, this goes back to our discussion about  
25 retroactivity. I just wanted to make clear the policy from



1 selective reserve who are engaged in this different type of  
2 drilling, I believe there were differing views about what  
3 was sufficient to constitute qualifying service for purposes  
4 of an N-426. And that would have been, I think, a  
5 disagreement regarding what qualifies as active duty  
6 training or active duty service.

7 THE COURT: If the Department of Defense doesn't  
8 know what active duty training is, how is anybody else  
9 supposed to know?

10 MR. SWINTON: I think they are -- my understanding  
11 is -- and it's fairly limited on this specific point -- is  
12 that they are trying to have more of a standardized  
13 understanding throughout the department, and not have any,  
14 sort of, differing views.

15 THE COURT: But if I were to say the policy, you  
16 can't -- under the law, you can't require active duty  
17 training in order to enlist, or to -- I'm sorry, to apply  
18 for naturalization, which I have indicated my feeling about  
19 this, and so your October 13th policy addresses that, that  
20 means that the prior policy, if I say that active duty  
21 training, we can't require somebody to be in active duty  
22 training before they apply for citizenship, because then  
23 you're reading out the "or" of 1440. That means that you  
24 had a policy before that arguably violated the statute, if  
25 you accept my interpretation of the statute, which I'm sure

1       you won't.

2               MR. SWINTON: Correct. We don't read the statute  
3 as imposing -- or, precluding an active duty requirement for  
4 N-426 purposes.

5               THE COURT: For a reservist.

6               MR. SWINTON: Yeah, for any nominee, I assume.  
7 There's only selected reserve and active -- people who  
8 enlist to go into active duty.

9               THE COURT: So the word "reservist" or "active  
10 duty" gets subsumed in active duty, if you are required to  
11 go to basic training to apply for citizenship?

12              MR. SWINTON: The -- in effect, I suppose, Your  
13 Honor. The -- again, there are two other references  
14 specifically to DoD's obligation under 1440(a) and  
15 1440(b)(3) that refer only to active duty training. So I  
16 think, at best, the language of -- the language certainly  
17 does not impose or require DoD to -- or, preclude DoD from  
18 requiring active duty training. You know, if anything, the  
19 language of the statute is ambiguous on that point. And I  
20 think DoD is able to interpret it, especially in light of  
21 the fact that it has discretion to determine what constitutes  
22 honorably and when that certification should be made.  
23 They're able to both establish criteria for what constitutes  
24 honorable service and also to determine the timing of when  
25 to so certify persons. There's nothing in the --

1 THE COURT: So that under your theory, that they  
2 have such wide-ranging discretion that they can make it so  
3 that active duty is a qualification and that a person who's  
4 strictly a reservist is not going to get your blessing in  
5 426, even though that's not what you were doing. But that's  
6 your argument in this thing, that's how one should interpret  
7 the language of 1440?

8 MR. SWINTON: As not precluding DoD from requiring  
9 active duty service. And, of course, that's no longer at  
10 issue in this case in light of the policy from last week.  
11 All three individual plaintiffs in this case now are subject  
12 to the Section II of the new policy, which has no active  
13 duty requirement in order to receive N-426 certification.

14 THE COURT: Because there's going to be this lag  
15 time between the finish getting vetted and -- you can't go  
16 to basics, you have to wait until somebody signs off on your  
17 426.

18 MR. SWINTON: You -- you actually -- the  
19 requirement to go to basic is the completion of the vetting  
20 process set forth, which is the suitability for service  
21 determination.

22 THE COURT: I know. But you can't go to basic  
23 until you get these determinations. And at that point then  
24 you also have to get your 426 before you go to basic.

25 MR. SWINTON: Correct. I don't know if you have

1 THE COURT: ICE does not initiate removal  
2 proceedings against individuals in the military accessions,  
3 but vital to the national interest. That's MAVNI. Program.  
4 If they had no valid immigration status, as long as they can  
5 demonstrate active participation in the MAVNI program, and  
6 have a naturalization application pending with USCIS.

7 They could be removable, I agree. Legally, it's  
8 true. But, they don't -- they say we don't initiate removal  
9 proceedings. Whether it's a matter of priority or what have  
10 you, all I can say, it seems like it's a pretty important  
11 thing to have that naturalization thing pending. And  
12 counterbalance against that, I don't know why it's so  
13 important to you. You just say it seems strange to call  
14 somebody honorable and then find out maybe later on, even  
15 though they're still not in the military, that there's  
16 something derogatory out there. You don't find that to be  
17 an awkward situation for the Army?

18 MR. SWINTON: Because they still would be in the  
19 military at that point in time. They would have to be  
20 discharged, yet would have an honorable service -- a prior  
21 honorable service certification that would enable them to  
22 apply for citizenship.

23 THE COURT: Yeah, but that's the naturalization  
24 process. That's unrelated to the Army. I don't --

25 MR. SWINTON: But Army has an important role in

1 into the reserves?

2 MR. SWINTON: No, although I would believe that  
3 your participation in the reserves would also begin shortly  
4 after enlistment. But no, the initiation of those checks  
5 starts at the time of the enlistment, if not very soon  
6 thereafter.

7 THE COURT: Is there lag time between -- let's  
8 see, I just wanted to clarify this. So the vetting is  
9 triggered by the enlistment?

10 MR. SWINTON: Correct. The initiation of that  
11 background and screening process.

12 THE COURT: Is it still the anticipation that when  
13 you get to basic training, that sometime within about 12  
14 weeks you leave basic as a citizen? Is there anything about  
15 that changed?

16 MR. SWINTON: I don't believe so, Your Honor.  
17 That that is still the intention, is to marry the completion  
18 of the naturalization process with the completion of basic  
19 military training.

20 THE COURT: And do you know if the contract signed  
21 by the Nio people are the same as the Kirwa? I have signed  
22 contracts. The plaintiffs may know the answer, but do you  
23 know?

24 MR. SWINTON: I don't know if the Kirwa plaintiffs  
25 signed contracts or not in the record in this case. They