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. 1:20-cv-01104-ESH

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs are non-citizens serving honorably in the United States Armed Forces during a period of armed conflict. Their military service to this country entitles them, under federal law, to naturalize expeditiously as United States citizens. Before they can apply to naturalize with the Department of Homeland Security ("DHS"), which is responsible for determining eligibility for citizenship, the Department of Defense ("DoD") must first certify their honorable service. This certification is an administrative task, which non-citizens could previously request almost immediately upon entering service and DoD would promptly fulfill. It consists of looking up an individual's service record and verifying honorable service to the present. Now, pursuant to a new policy ("N-426 Policy"), Defendants are unlawfully withholding these certifications from service members until they satisfy Defendants' own onerous preconditions and process for naturalization. As a result, Defendants have effectively blocked thousands of non-citizens serving honorably in this nation's military from the path to expedited citizenship promised to them under federal law.

The sole issues in this case are legal, and familiar to this Court: whether Defendants' new policy of refusing to issue honorable service certifications to non-citizen service members violates their ministerial mandate under 8 U.S.C. § 1440, is arbitrary and capricious, and required public notice and opportunity to comment. This Court has already decided many of these legal questions in Plaintiffs' favor in related litigation in *Kirwa v. U.S. Department of Defense*, No. 17-cv-1793 (D.D.C.). Yet Defendants misconstrue the scope of *Kirwa*, and of this case, in an attempt to escape from the clear application of the Court's prior rulings. In fact, this case is a straightforward extension of *Kirwa*'s legal conclusions to a different category of service members. Both cases are, at their core, about whether Defendants' refusal to certify the

honorable service of non-citizens serving during wartime is unlawful. Both challenge the same N-426 Policy on similar grounds. And both seek nearly identical relief. The only substantive distinction between the cases is that where the *Kirwa* plaintiffs are service members in the Selected Reserve of the Ready Reserve ("Selected Reserve") recruited through the Military Accessions Vital to the National Interest ("MAVNI") program, Plaintiffs and the putative class in this case comprise the thousands of other non-citizen service members who are statutorily entitled to seek expedited naturalization but remain subject to the N-426 Policy.

Defendants try to distinguish *Kirwa* by portraying it as a challenge to "the security screening procedures imposed by the [N-426] policy" and this case as a separate challenge to the "time-in-service requirements" and "O-6 requirement" of the Policy. But the pleadings and the Court's rulings in *Kirwa* make clear that that case is not a narrow challenge to the "security screening procedures" in the N-426 Policy. Rather, *Kirwa* is a challenge to the suite of new requirements contained in the Policy, which service members must now meet before they may obtain an honorable service certification and seek naturalization under 8 U.S.C. § 1440. Likewise, this case challenges the same suite of new requirements.[1]

In seeking summary judgment, Defendants primarily rehash legal arguments this Court has already rejected in *Kirwa*. In particular, Defendants' central theory remains that it has unbridled discretion to dictate when a non-citizen may obtain an honorable service certification in order to apply for naturalization. This Court rejected this argument twice in *Kirwa* and it should reject it here once again. Defendants' claim that the legal landscape has shifted such that

[1] Plaintiffs also challenge the new requirement, which *Kirwa* plaintiffs do not, that an officer of O-6 pay grade or higher complete honorable service certifications on the grounds that it is arbitrary and capricious and, along with the other changes in the N-426 Policy, required notice-and-comment rulemaking under the Administrative Procedure Act.

the Court should revisit these prior rulings is unfounded. No new development disturbs the Court's prior conclusions, which continue to be supported by the express language, structure, and history of 8 U.S.C. § 1440, its regulatory scheme, DoD's own prior practice, and military regulations.

Defendants also fail to establish why they, and not Plaintiffs, are entitled to summary judgment on each of Plaintiffs' claims under the Administrative Procedure Act ("APA"). *First*, Defendants try to escape this Court's clear conclusion in *Kirwa* that they have a ministerial duty to issue honorable service certifications for naturalization purposes—and therefore cannot withhold them from Plaintiffs—by turning a blind eye to the Court's holdings. They turn an equally blind eye to the text, structure, and history of 8 U.S.C. § 1440, all of which lead inexorably to the same conclusion. *Second*, because Defendants have a narrow and limited mandate to issue honorable service certifications to non-citizens seeking naturalization, their continued refusal to do so also exceeds their statutory authority under section 1440. Again, Defendants refuse to engage in the text, structure, and history of the statute, which make clear that they cannot impose the new substantive prerequisites to obtaining an honorable service certification imposed by the N-426 Policy.

Third, on its face, the N-426 Policy does not remotely justify the arduous new preconditions and process to naturalization it imposes on service members before they may obtain an honorable service certification. Nor do Defendants provide any rationale in the record for such a change. *Finally*, Defendants do not dispute that the N-426 Policy is a legislative rule ordinarily subject to notice-and-comment rulemaking under the APA. Rather, they seek to exempt the Policy from these requirements by casting it as one regulating a military function and agency management or personnel matters. The Policy is neither.

The N-426 Policy has caused and continues to cause serious harm to Plaintiffs and to the putative class they represent.[2] It deprives service members of their right to apply for naturalization and to exercise the myriad rights and privileges accompanying citizenship. It forces service members to stall their planned career goals, which depend on military roles reserved for U.S. citizens. And it places some service members at unconscionable peril. Service members without lawful immigration status must bear the constant threat of deportation. Those serving abroad must serve without the comfort and protection of the citizen services offered by U.S. embassies and consulates. Defendants violate the law by withholding honorable service certifications pursuant to the N-426 Policy and dishonor the sacrifice and service of thousands of non-citizens serving in this nation's military. For the reasons stated in their Motion for Summary Judgment and set forth below, Plaintiffs respectfully request that the Court grant their motion for summary judgment and deny Defendants' cross-motion.

BACKGROUND[3]

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

Non-citizens who are lawful permanent residents (*i.e.* "green card" holders) or persons from the Marshall Islands, Micronesia, and Palau may enlist in any branch of the U.S. military. 10 U.S.C. § 504(b)(1)(B)–(C).[4] In addition, the Secretary of Defense may enlist other non-

[2] Defendants contend that five of the six Plaintiffs have now received their honorable-service certifications, but Plaintiffs submit evidence demonstrating that this assertion is untrue.

[3] Defendants cite to Local Rule 7(h)(2) in support of their inclusion of a "Background" section in lieu of a statement of undisputed material facts. However, that Rule applies to "cases in which judicial review is based solely on the administrative record." LCvR7(h)(2). Defendants cite to documents and declarations that they have omitted from the purported administrative record, including the very materials that they attach to their motion. *See, e.g.*, Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. ("Defs.' MSJ"), Ex. 1, ECF No. 19-2 ("Miller Decl."). Accordingly, Plaintiffs do not concede that review here is limited to the Administrative Record.

[4] According to DoD, approximately 7,000 lawful permanent residents enlist every year. *See* SAMMA_0019; SAMMA_0023 n.2. To ease the Court's reference to the Administrative Record,

citizens 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 foreign nationals, who are lawfully present in the United States and fall into certain non-immigrant categories (*e.g.*, F-1 student visa, H-1B worker visa, Deferred Action for Childhood Arrivals), to enlist if they possess specialized skills deemed critical to the U.S. military. *See Kirwa v. Dep't of Def.*, 285 F. Supp. 3d 21, 29 (D.D.C. 2017) ("*Kirwa I*").[5]

B. Non-Citizen Service Members and Expedited Naturalization

The Immigration and Nationality Act ("INA") provides an expedited path to citizenship to any non-citizen who "has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status" during a designated period of military hostilities. 8 U.S.C. § 1440.[6] The Act instructs that honorable service "shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving." *Id*. § 1440(b)(3). U.S. Citizenship & Immigration Services ("USCIS"), the DHS component responsible for adjudicating naturalization applications, has prescribed Form N-426 as the form DoD must use to certify honorable service. *See* 8 C.F.R. § 329.4; U.S. Citizenship & Immigr. Servs., *USCIS Policy Manual*, Vol. 12, Pt. I, Ch. 5, https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5. Service members may apply to USCIS for naturalization once DoD

Plaintiffs use the same citation format to the record as Defendants, which refers to the relevant Bates numbering.

[5] From 2008 to 2016, the MAVNI program recruited 10,400 foreign nationals into the military, many of whom continue to serve. *See* U.S. Gov't Accountability Off., *Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans* 7 (2019), https://www.gao.gov/assets/700/699549.pdf.

[6] For a summary of how 8 U.S.C. § 1440 eases and expedites the path to citizenship for service members during wartime, see Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 5 n.2, ECF No. 4 ("PI Mot.").

has certified their honorable service using Form N-426. *See* 8 C.F.R. § 329.4.

Once an individual applies for naturalization, USCIS must conduct a background investigation, *see* 8 U.S.C. § 1446(a); 8 C.F.R. § 335.1, which includes a full criminal background check by the FBI, *see* 8 C.F.R. § 335.2(b). After completing the background investigation, USCIS must schedule a naturalization examination at which a USCIS officer interviews the applicant. *See id.* § 335.2(a). If the applicant has complied with the requirements for naturalization in the INA and its implementing regulations, USCIS "shall grant the application." *Id*. § 335.3. Citizenship granted pursuant to 8 U.S.C. § 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).

C. DoD's Prior N-426 Practice

DoD's longstanding "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." *Kirwa I*, 285 F. Supp. 3d at 29. This practice involved "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." *Id*. This practice was "further confirmed by . . . the length of time the certification process took for seven of the named . . . plaintiffs [in *Nio v. Dep't of Homeland Sec.*, No. 17-998 (D.D.C.)], each of whom had their N-426s certified within one day after they submitted the forms." *Id*. Moreover, DoD's practice was to authorize a broad range of military personnel with access to a non-citizen's service records to certify the N-426. *Id*. at 28–29.

Plaintiffs' Motion for Summary Judgment describes this well-established practice, which is reflected in DoD's resources for service members seeking naturalization, as well as USCIS

policy and the Form N-426 itself. *See* PI Mot. 9–10, 12–13. Indeed, this Court relied on these very same sources in *Kirwa* in establishing DoD's prior practice. *See Kirwa I*, 285 F. Supp. 3d at 27–29, 36. It noted, for example, that the Army had for many years advised service members that "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" and provided that "the N–426 service data can be verified and the form signed by someone in a Military Personnel Division or Military Personnel Offices." *Id*. at 28. The Court also noted that the USCIS Policy Manual indicated that "[o]ne day of qualifying service is sufficient in establishing eligibility." *Id*.

Consistent with this practice, DoD regularly issued N-426 certifications almost immediately after non-citizens began their service, without requiring them to fulfill the new criteria or process set forth in the N-426 Policy. Thus, for active duty service members, DoD issued N-426s soon after their arrival at basic training, so that they could naturalize by graduation. *See* PI Mot. 14 (citing Ex. 14, at 5 ("The Army . . . has implemented expedited citizenship processing for *all non-citizens* at each of the Army's Basic Combat Training (BCT) locations. . . . All documentation including the N-426 will be signed at BCT." (emphasis added))). For Selected Reservists, DoD issued N-426s after their participation in one or two drills. *See* PI Mot. 15 n.6 (citing Ex. 16, at 3–4 ("Participate in 1 drill as a[n] . . . enlisted 'Selected Reserve' Soldier . . . After 1 drill is completed, prepare the citizenship application . . . and have your USCIS form N-426 signed by your chain of command; mail your completed citizenship packet to USCIS."); *see also* Tony Kurta & Todd R. Lowery, *Military Accessions Vital to the National Interest (MAVNI) Pilot Program* 2 (May 19, 2017), Ex. 1

("Approx. 500 [Selected Reserve] MAVNIs have received command endorsement and applied for naturalization based on having performed . . . two weekend drills.").[7]

D. Changes Made by the Challenged N-426 Policy

DoD issued the N-426 Policy in a memorandum dated October 13, 2017. SAMMA_0002–05. DoD did not provide prior public notice, nor did it solicit, receive, or consider comments from the public regarding the changes made by the Policy. DoD did not include in the N-426 Policy any statement of the basis or purpose for the changes.

Section I of the N-426 Policy applies to service members whose enlistment or accession was on or after October 13, 2017. SAMMA_0003. Section II of the N-426 Policy applies to service members whose enlistment or accession was before October 13, 2017. SAMMA_0004. Both Sections I and II provide that service members may not receive an N-426 until they meet the same three criteria: (1) Legal and Disciplinary Matters, (2) Background Investigation and Suitability Vetting, and (3) Military Training and Required Service. SAMMA_0003–04.

1. The New Background Investigation and Suitability Vetting Requirement

The Background Investigation and Suitability Vetting criterion ("screening and suitability requirement") under Sections I and II of the N-426 Policy are identical. MAVNI service members must complete a National Intelligence Agency Check, Tier 5 Background Investigation, counterintelligence-focused security review, and counterintelligence interview, and they must receive a favorable Military Service Suitability Determination ("MSSD"). SAMMA_0003.[8] Lawful permanent residents must meet the "requirements set forth in

[7] While these sources focus specifically on the practice for Selected Reserve MAVNIs, there is no indication that DoD maintained a separate prior N-426 practice for other non-citizens, such as lawful permanent residents, in the Selected Reserve.

[8] The N-426 Policy actually provides that MAVNIs must complete a "Tier 3 or Tier 5 Background Investigation, as applicable." SAMMA_0003. But Defendants admitted in the

Department of Defense Instruction 1304.26, 'Qualification Standards for Enlistment, Appointment and Induction,' and other applicable DoD or Military Department Policy" as well as receiving a favorable MSSD. DoD Instruction 1304.26 sets forth the basic qualification standards all military enlistees must meet, which include the absence of convictions for certain crimes as well as a favorable determination on the basis of a National Agency Check with Law and Credit. U.S. Dep't of Def., *Instruction No. 1304.26*, at 9–10, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130426p.pdf?ver=2018-10-26-085822-050. Prior to the N-426 Policy, neither MAVNIs nor lawful permanent residents were required to complete the screening and suitability requirement in order to obtain an N-426 certification.

2. The New Military Training and Required Service Requirement

The Military Training and Required Service criterion ("minimum service requirement") in Sections I and II of the N-426 Policy requires service members to serve "in a capacity, for a period of time, and in a manner that permits an informed determination" as to whether they have served honorably. SAMMA_0003–04. Section I further specifies that active duty service members must complete "basic training requirements" and "at least 180 consecutive days of active duty service, inclusive of the successful completion of basic training." SAMMA_0003. Selected Reservists must complete "basic training requirements" and "at least one year of satisfactory service towards non-regular retirement." SAMMA_0004.[9] Prior to the N-426 Policy,

Kirwa litigation that all MAVNIs must complete a Tier 5 investigation. *See* Tr. of Prelim. Inj. Mot. Hr'g 42:23–43:06, *Kirwa*, No. 17-1793 (D.D.C. Oct. 20, 2017), ECF No. 27 ("*Kirwa* Tr."), Ex. 2 ("THE COURT: . . . So you're saying all [MAVNIs] get Tier 5s, regardless of whether or not they ever touch a piece of classified information, right? MR. SWINTON: Correct.").

[9] Section I also provides that a service member—whether active duty or in the Selected Reserve—may fulfil the minimum service requirement by completing "basic training requirements" and "serv[ing] at least one day of active duty service in a location designated as a combat zone." SAMMA_0004.

non-citizen service members were not required to complete a minimum service requirement in order to obtain an N-426 certification.

a. The New Active Duty Requirement

By requiring that Selected Reservists complete "basic training requirements" before they may obtain an N-426 certification, Part I of the N-426 Policy effectively mandates that Selected Reservists serve active duty before they may seek naturalization. That is because Selected Reservists who have otherwise begun their military service by participating in drills may not obtain an N-426 until they ship to and complete basic training, which constitutes active duty. *See, e.g.*, *Kirwa I*, 285 F. Supp. 3d at 32 ("DOD told this Court that it was . . . 'not certifying any new [Selected Reserve] MAVNI N-426s' . . . because it 'viewed [basic] training as a necessary precondition of an honorable service certification.' . . . That left MAVNIs who were currently drilling . . . unable to receive an N–426 and, as a consequence, they are ineligible to apply for naturalization."); Ex. 2, *Kirwa* Tr. 55:09–13 ("THE COURT: So the word "reservist" . . . gets subsumed in active duty, if you are required to go to basic training to apply for citizenship? MR. SWINTON: . . . [I]n effect, I suppose, Your Honor.").[10] Prior to the N-426 Policy, Selected Reservists who had begun their military service by participating in drills were not required to complete basic training (*i.e.* serve active duty) in order to obtain an N-426 certification.

[10] In the *Kirwa* litigation, Defendants asserted that Part II of the N-426 Policy, which does not expressly require Selected Reservists to complete basic training before obtaining an N-426 certification, did not contain an active duty requirement. Ex. 2, *Kirwa* Tr. 49:06–09, ("THE COURT: . . . But now you're not requiring active duty. MR. SWINTON: Correct, for individuals to whom Section II applies."). However, that precondition is explicit in Section I of the Policy and Defendants appear to resurrect their initial position in *Kirwa* that they may impose such a requirement. *See* Defs.' MSJ 33 ("[T]he only criteria imposed by Congress [in 8 U.SC. § 1440] is that the service must have been (1) honorable and (2) in an active-duty status.").

3. The New O-6 Requirement

The N-426 Policy also requires, for the first time, that the N-426 be certified by an "officer serving in the pay grade of O-6 or higher," SAMMA_0002, meaning a full Colonel in the Army, Air Force, or Marines, and a Captain in the Navy or the Coast Guard. *See* Dep't of Def., *U.S. Military Rank Insignia*, https://www.defense.gov/Resources/Insignias. Prior to the N-426 Policy, a broad range of military personnel with access to an individual's service record could certify the N-426.

E. The *Kirwa* Litigation

1. The *Kirwa* Challenge to the N-426 Policy

Defendants fundamentally mischaracterize *Kirwa* as a challenge to "the security screening procedures imposed by the [N-426] policy." Defs' MSJ 10. The pleadings and the Court's rulings in *Kirwa* make clear that *Kirwa* is not so narrowly cabined, but concerns the suite of new requirements contained in the N-426 Policy, which service members must now meet before they may obtain an N-426 certification and apply for naturalization under 8 U.S.C. § 1440. *See, e.g.*, Am. Compl. ¶¶ 7–8, *Kirwa*, No. 17-1793 (D.D.C. Nov. 3, 2017), ECF No. 33 ("[T]he New DoD N-426 Policy specifically imposed pre-conditions to DoD's issuance of N-426s, including an active-duty service requirement, a waiting period requirement, a minimum period of service requirement . . . and other conditions that are contrary to law. . . . These conditions exceed DoD's ministerial duties and functions in the naturalization process pursuant to 8 U.S.C. § 1440 . . . ."); *Kirwa I*, 285 F. Supp. 3d at 34–35 ("[O]n October 13, 2017 . . . , DOD . . . imposed the numerous additional requirements set forth in its October 13th Guidance. In light of this significant and abrupt change by DOD, the case was no longer about a single legal issue."); *id*. at 39–40 ("Now, DOD says that it will certify plaintiffs as having served honorably

only if three new conditions are met . . . . These open-ended requirements will double and possibly even triple the time it takes for plaintiffs to receive N-426s . . . . ").[11]

2. Defendants' Representations in the *Kirwa* Litigation

In their defense of the N-426 Policy in *Kirwa*, Defendants asserted a "national security" justification that, as a result of "counter-intelligence, security, and insider-threat concerns with the MAVNI program," they needed to ensure MAVNIs complete "enhanced security screening . . . prior to their shipment to [basic] training." Defs.' Opp. to Pls' Mot. for Prelim. Inj. at 5, *Kirwa*, No. 17-1793 (D.D.C. Oct. 16, 2017), ECF No. 20 ("*Kirwa* Defs.' PI Opp."). To buttress this point, Defendants repeatedly claimed that their intention was for service members to receive their N-426 certifications and complete the naturalization process at basic training. Thus, at the *Kirwa* preliminary injunction hearing, counsel for Defendants stated that "DoD and DHS actually have worked it out such that they have USCIS officials present during basic military training in order to help facilitate with the paperwork and to have that process move as quickly as possible" and that "DoD *has always contemplated* that the application for naturalization will take place simultaneous with attendance at basic military training."[12] Ex. 2, *Kirwa* Tr. 25:11–19 (emphasis added). Later, when the Court pressed Defendants' counsel on this point—"Is it still the anticipation that when you get to basic training, that sometime within about 12 weeks you

[11] The *Kirwa* plaintiffs did not, however, challenge the new requirement that a designated officer of O-6 pay grade or higher certify N-426s.

[12] Counsel for Defendants appears to be referring here to the USCIS Naturalization at Basic Training Initiative, whose purpose was to expedite the processing of naturalization applications so that non-citizens could obtain citizenship by the time they graduated from basic training. *See Kirwa I*, 285 F. Supp. 3d at 29. In January 2018, just three months after counsel touted this initiative before this Court, USCIS shuttered it, citing to "changes in Department of Defense requirements for certifying honorable service for US service members applying for naturalization." *See* Vera Bergengruen, *The US Army Promised Immigrants a Fast Track for Citizenship. That Fast Track Is Gone*, BuzzFeed, Mar. 5, 2018, https://www.buzzfeednews.com/article/verabergengruen/more-bad-news-for-immigrant-military-recruits-who-were.

leave basic as a citizen? Is there anything about that [that's] changed?"— counsel confirmed that "that is still the intention, to marry the completion of the naturalization process with the completion of basic military training." Ex. 2, *Kirwa* Tr. 64:12–19; *see also Kirwa* Defs.' PI Opp. at 4 ("DoD contemplates that MAVNI recruits will submit their application for naturalization at the time they arrive at [basic] training, following the successful completion of security screening . . . .").[13]

Later, at the motion to dismiss stage in *Kirwa*, Defendants continued to maintain the national security justification that MAVNIs needed to complete enhanced background screening before shipping to basic training. *See, e.g.*, Defs.' Mem. in Supp. of Mot. to Dismiss at 26, *Kirwa*, No. 17-1793 (Nov. 17, 2017), ECF No. 39-1 ("*Kirwa* Defs.' MTD").[14] They couched that rationale within the broader justification that the N-426 Policy reflects "DoD's desire to establish, for the first time, a clear and consistent process for N-426 certifications following a number of years in which the military was applying inconsistent standards for such determinations." *Kirwa* Defs.' MTD at 26. Notably, however, they did not indicate—nor point to any evidence in the record—that their purpose was to align N-426 certifications with service characterizations in other contexts, particularly entry-level separations, which is their primary justification for the N-426 Policy in this case.[15] The Court concluded that "granting defendants' summary judgment motion would be inappropriate," in part because they had failed, yet again, to

[13] These representations have proven illusory as discussed at *infra* pp. 32–33.

[14] Defendants moved to dismiss the complaint, or in the alternative, for summary judgment.

[15] In fact, it was *plaintiffs* in *Kirwa* who first referenced Defendants' policy on entry-level separations. They noted accurately that a federal statute governing such separations for Selected Reservists requires that their service be characterized as "honorable" unless there is a specific finding by a court-martial or other board that the service is other than honorable. *See* Pls.' Opp. to Defs.' Mot. to Dismiss at 8, *Kirwa*, No. 17-1793 (D.D.C. Dec. 1, 2017), ECF No. 49.

proffer an adequate justification for the N-426 Policy. *See Kirwa v. Dep't of Def.*, 285 F. Supp. 3d 257, 269 (D.D.C. 2017) ("*Kirwa II*").

F. Application of the N-426 Policy to Plaintiffs

1. Plaintiffs' N-426 Certifications

Defendants' statement that "five of the six Plaintiffs have received certified N-426s since the Complaint was filed," Defs.' MSJ 13, misrepresents the facts. As Plaintiffs Samma, Bouomo, Perez, Park, and Lee attest, none of them has received their N-426 certifications. Samma Supp. Decl. ¶ 4; Bouomo Supp. Decl. ¶ 4; Perez Supp. Decl. ¶ 4; Park Supp. Decl. ¶ 4; Lee Supp. Decl. ¶ 5. Each of Defendants' Declarations purporting to support the statement that these Plaintiffs have received their N-426 certifications states only that the respective N-426 "was certified" and that a copy is maintained in each Plaintiff's local military personnel record and "will be uploaded" into their official military record. Turpin Decl. ¶¶ 4–5; Turner Decl. ¶ 4; Aubuchon Decl. ¶ 4; Slaughter Decl. ¶ 4. But none of these Declarations indicates that Plaintiffs have actually received their N-426 certifications and indeed, as Plaintiffs declare, they have not. Accordingly, Defendants' statement that these Plaintiffs have "received certified N-426s" is false.

2. Plaintiffs' Claims

Defendants also fundamentally mischaracterize Plaintiffs' claims, which do not challenge only the "time-in-service requirements" and "O-6 requirement" of the policy. Defs' MSJ 7. Rather, like *Kirwa*, this case challenges the suite of new requirements contained in the N-426 Policy. *See* Compl. ¶ 74, ECF No. 1 ("None of the new criteria imposed by the N-426 Policy is permissible under law."). In particular, Plaintiffs claim that the minimum service requirement (which incorporates an active duty requirement) and the screening and suitability requirement

violate 5 U.S.C. § 706(1) because they result in agency action unlawfully withheld and 5 U.S.C. § 706(2) because they are arbitrary and capricious and exceed Defendants' statutory authority under 8 U.S.C. § 1440. Compl. ¶¶ 74, 78, 80, 150–52, 155–57, 160–61.[16] Plaintiffs also claim that the O-6 requirement violates 5 U.S.C. § 706(2) because it is arbitrary and capricious. Compl. ¶¶ 76–78, 160, 164–66. Finally, Plaintiffs claim that all of the new substantive requirements as well as the new O-6 process in the N-426 Policy violate the APA's notice-and-comment rulemaking requirements. Compl. ¶¶ 76–77, 164–66.[17]

3. Section I and Section II Plaintiffs

As Defendants note, during the status conference, counsel for Plaintiffs stated that Plaintiffs were challenging only Section I of the N-426 Policy. *See* Defs.' MSJ, Ex. 2, at 3:03–07. This was a misstatement, as two of the Plaintiffs do fall under Section II of the Policy because they enlisted prior to October 13, 2017. Park Dec. ¶ 4; Lee Decl. ¶ 5. However, this misstatement was harmless because Parts I and II largely overlap with each other and the legal arguments of both parties apply to both Parts with equal force. *See* Defs.' MSJ, Ex. 2, at 11:17–23 ("MR. SWINTON: . . . A lot of this case, as it did in *Kirwa*, boils down to the [discretion] that

[16] Because the parties agree that the N-426 Policy, which includes the active duty and screening and suitability requirements, applies in its entirety to Plaintiffs, Plaintiffs are not required to specifically allege that Defendants have applied each of these requirements to them. Nevertheless, Plaintiff Isiaka, who is a Selected Reservist, asserts that he was informed that he had to first attend and complete basic combat and advanced individual training before he could receive his N-426 certification. Isiaka Decl. ¶ 13. And Plaintiffs Samma, Bouomo, Isiaka, Perez, and Park assert that they have never been told if they have completed their screening and suitability requirement and therefore have no basis to conclude that they do not remain subject to it and that it does not form the basis of the delay for their receipt of their N-426 certifications. Samma Supp. Decl. ¶ 6; Bouomo Supp. Decl. ¶ 6; Isiaka Supp. Decl. ¶ 2; Perez Supp. Decl. ¶ 6; Park Supp. Decl. ¶ 6.

[17] Plaintiffs do not bring a stand-alone claim under the INA as asserted by Defendants. Defs.' MSJ 12 n.7. Rather, because Plaintiffs challenge *agency action* that violates the INA, the cause of action is established by the APA.

the military has in this process. . . . We have a lot of overlap with the legal issues under 706(1) and 706(2) of the APA.").[18]

LEGAL STANDARD

Summary judgment is appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it is capable of affecting the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id*. In an APA action, "[s]ummary judgment is the proper stage for determining whether, as a matter of law, an agency action is supported by the administrative record and is consistent with the APA." *Animal Legal Def. Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15, 20 (D.D.C. 2018) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977)).

ARGUMENT

I. NONE OF THE PLAINTIFFS SHOULD BE DISMISSED BECAUSE NONE OF THEM HAVE RECEIVED THEIR N-426 CERTIFICATIONS.

Defendants claim that "five of the six Plaintiffs lack[ ] standing to bring any claim because they now have certified Form N-426s." Defs.' MSJ 13. But none of the Plaintiffs have received their N-426 certifications. Samma Supp. Decl. ¶ 4; Bouomo Supp. Decl. ¶ 4; Perez Supp. Decl. ¶ 4; Park Supp. Decl. ¶ 4; Lee Supp. Decl. ¶ 5. That Defendants have purportedly "certified" their N-426s or now maintain copies in their files is no matter. Without their

[18] Should the Court determine that Plaintiffs' challenge is limited only to Section I of the N-426 Policy, that would not exclude these two Plaintiffs from such a challenge. Section I applies to service members who enlisted *or were accessed* on or after October 13, 2017. *See* SAMMA_0003. Because both Plaintiffs Park and Lee shipped to basic training after October 13, 2017, they were accessed after the date of the Policy, and Part I therefore also applies to them. Park Decl. ¶ 6; Lee Decl. ¶ 7.

certifications in hand, Plaintiffs cannot submit their naturalization applications to USCIS. PI Mot., Ex. 7, at 1 ("All applicants must submit a completed Form N-426 . . . . Submit this request with Form N-400 . . . ."). Accordingly, these Plaintiffs continue to have standing because they continue to suffer from the N-426 Policy and have not received the relief that they seek.

II. PLAINTIFF ISIAKA HAS STANDING TO CHALLENGE THE O-6 REQUIREMENT.

Defendants contend that Plaintiff Isiaka lacks standing to challenge the O-6 requirement because he "fails to allege anywhere in the Complaint that his purported injury—his inability to obtain a certified N-426—was caused by the O-6 requirement." Defs.' MSJ 15. But the parties agree that the N-426 Policy, which includes the O-6 requirement, applies in its entirety to Plaintiffs. Thus, Plaintiff Isiaka is clearly subject to all of the requirements in the Policy, including the O-6 requirement. Moreover, the reason Plaintiff Isiaka has not made a specific allegation related to the O-6 requirement is because he must first fulfil the substantive criteria of the N-426 Policy, including completing basic combat and advanced individual training, before he can even submit an N-426 for certification by an officer of O-6 pay grade. Isiaka Decl. ¶ 13. According to Defendants' logic, a plaintiff in Plaintiff Isiaka's position must first bring a challenge to the substantive criteria of the Policy and only after he has met those criteria and is subsequently subject to the O-6 requirement can he bring a separate challenge to that process. Defendants' argument is not only illogical but "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 156, 168–69 (1997). Accordingly, Plaintiff Isiaka has standing to challenge the O-6 requirement.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT.

A. DoD's Honorable Service Determinations Under Section 1440 Are Not Committed to Agency Discretion by Law.

The Supreme Court has long recognized a "presumption favoring judicial review of administrative action." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); *accord Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999). In an effort to overcome this presumption, Defendants argue, as they did in *Kirwa*, that they have complete and unreviewable discretion as to when a non-citizen may obtain an N-426 certification and apply for naturalization. *See* Defs' MSJ 17. This Court roundly rejected this argument in *Kirwa*—twice—and it should do so again here. *See Kirwa II*, 285 F. 3d at 266–67; *Kirwa I*, 285 F. Supp. 3d at 35–39. In particular, it held:

> At the preliminary injunction stage, this Court found that DOD's N-426 policy is not committed to agency discretion because there were meaningful standards by which the Court can judge the agency's action and because the granting or denying of an N-426 constituted a ministerial task. In the present motion, defendants repackage arguments made at the preliminary injunction stage, attempt to distinguish the Court's prior reasoning, and suggest that "courts should exercise great caution when adjudicating claims involving sensitive military and national-security matters." Not one of these arguments persuades the Court to reverse course.

Kirwa II, 285 F. Supp. 3d at 266 (citation omitted). Defendants recycle these arguments here; they remain unpersuasive.

Only in limited circumstances does the APA bar judicial review of agency action because it "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court has emphasized that this "is a very narrow exception . . . applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), or where "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v.*

Chaney, 470 U.S. 821, 830 (1985). To determine if this narrow exception applies, the court must "consider both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006).

The language, structure, and history of 8 U.S.C. § 1440 provide a "meaningful standard against which to judge" the N-426 Policy. The statute plainly states that any non-citizen who has "served honorably as a member of the Selected Reserve . . . or in an active-duty status" is eligible to receive an N-426 certification and seek naturalization. 8 U.S.C. § 1440(a). Thus, the statute's express language "refers to *past service*" and is therefore backwards looking. *Kirwa I*, 285 F. Supp. 3d at 36. Accordingly, the N-426 certification cannot be premised on the future completion of a period of service or "DoD's possible future suitability determinations." *Id*. Nor can it be premised solely on active duty status, given the statute's disjunctive language—"served honorably as a member of the Selected Reserve . . . *or* in an active-duty status." *See Nio v. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 60 (D.D.C. 2017) ("DoD's current view, despite what appears to be a clear conflict with the statutory language in 8 U.S.C. § 1440 . . . is that active-duty status is the only way to qualify for a valid N-426.").

Defendants do not engage with the express language of the statute but instead misrepresent that the statute uses the phrase "honorable service," Defs.' MSJ 17, and on that false premise build an argument that they have unreviewable discretion to construe a phrase the statute never uses. Defendants' reliance on *Roberts v. Napolitano*, 792 F. Supp. 2d 67 (D.D.C. 2011), proves Plaintiffs' point. There, a traveler applied for the Global Entry Program; the court concluded that it was "precluded from reviewing the agency's action to deny the plaintiff's application" because the statute authorizing DHS to establish the program also authorized it to

"establish . . . criteria for participation," and was otherwise "silent as to the criteria [DHS] should apply in approving applications for entry." *Id*. at 73–74 (citations omitted). *Roberts* therefore represents the exceptional scenario where there are "no judicially manageable standards . . . for judging how to and when an agency should exercise its discretion." *Id*. at 74 (citing *Heckler*, 470 U.S. at 830). By contrast, section 1440 establishes a clear and single criterion that non-citizens must meet in order to seek naturalization—they must have "served honorably as a member of the Selected Reserve . . . or in an active-duty status." 8 U.S.C. § 1440.

The statutory scheme also makes clear the applicable legal standards for reviewing the N-426 Policy, by illuminating Congress' intent that service members be eligible to apply for naturalization without having to meet the Policy's requirements. Section 1440(b) enumerates the ways in which the statute eases the typical naturalization requirements for service members, including by waiving the residence and physical presence requirements. Congress therefore plainly intended that service members would be subject to more relaxed—not more stringent—requirements than civilian applicants. But under the N-426 Policy, service members must complete a screening and suitability requirement on top of the background investigation USCIS already conducts for all applicants before they can apply for naturalization. *See* 8 U.S.C. § 1446(a); 8 C.F.R. §§ 335.1, 335.2(b).

The statutory scheme similarly renders obvious that any minimum service requirement cannot be reconciled with Congress' intent to expedite naturalization for service members during wartime. 8 U.S.C. § 1439(a) provides that non-citizens 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)).

Defendants argue that comparing section 1440 to section 1439 compels the opposite conclusion—that because section 1439 imposes a one-year service requirement but section 1440 "is silent," Congress intended for Defendants to set whatever requirements they please, including how long non-citizens must serve before obtaining an N-426 certification in wartime. Defs.' MSJ 18. That conclusion is not only illogical, but explicitly belied by the legislative history of section 1440. Specifically, the 1968 Senate Committee on the Judiciary Report accompanying amendments to the INA explains that section 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*." PI Mot., Ex. 3, at 4 (emphasis added). The Report also confirms Plaintiffs' comparative reading of sections 1439 and 1440, emphasizing that while "[t]he peacetime serviceman must have a minimum of [then] 3 years' service, *the wartime serviceman has no minimum required*." PI Mot., Ex. 3, at 5 (emphasis added).[19]

[19] The legislative history also confirms the impropriety of any active duty requirement measured against the meaningful standard set forth in section 1440. In 2003, Congress specifically amended section 1440 to *add* Selected Reserve service as a separate and alternative qualifying service for naturalization purposes. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1693 (2003). By amending the statute, Congress sought to recognize that Selected Reservists serving during wartime share many of the same commitments and risks as active duty service members. For example, during debate on the 2003 amendment, Senator Edward Kennedy noted that "[b]eing a member of the Selected Reserves is nothing less than a continuing commitment to meet very demanding standards, and they deserve recognition for their bravery and sacrifice." 149 Cong. Rec. S7,280–83 (daily ed. June 4, 2003), Ex. 3 (statements of several Senators on behalf of the amendment).

Defendants' position that they have unreviewable discretion to construe "honorable service" also flies in the face of this Court's prior conclusion that 8 U.S.C. § 1440's regulatory regime, DoD's longstanding practice, and military regulations also provide a meaningful standard for evaluating the N-426 Policy. *Kirwa I*, 285 F. Supp. 3d at 36–37. In particular, 10 U.S.C. § 12685 establishes that the service of a Selected Reservist must be characterized as "honorable" unless there is a specific finding by a court-martial or other board that the individual's service is other than honorable, a mandate also reflected in DoD Instruction 1332.14. SAMMA_0090 ("In accordance with section 12685 . . . , an entry-level separation of a [Selected Reservist] . . . will be 'under honorable conditions.'"). In addition, DoD Instruction 1332.14 directs that "[w]ith respect to administrative matters outside this instruction that require a characterization as honorable or general," which clearly applies to N-426 certifications for naturalization purposes, "an entry-level separation will be treated as the required characterization." SAMMA_0089. Critically, Defendants' prior N-426 practice was consistent with both Section 12685 and DoD Instruction 1332.14. Thus, for example, the Army Human Resources Command issued guidance on N-426 certification from at least 2005 to 2017, which provided:

> It is essential for [military personnel] to certify that the character of the Soldier's service is "honorable." *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.*

PI Mot. Ex. 8, at 11 (emphasis added); *see also* PI Mot., Ex. 9, at 10; PI Mot., Ex. 10, at 10.[20]

[20] In their Motion for Summary Judgment, Plaintiffs discussed in particular how DHS's implementing regulations, USCIS policy guidance, and DoD's prior practice make clear that a minimum service requirement cannot be imposed as a prerequisite to obtaining an N-426 certification and applying for naturalization. *See* PI Mot. 9–10, 12–15*; see also Kirwa I*, 285 F. Supp. 3d at 36–37. This Court has already found that this evidence makes this conclusion equally clear for the screening and suitability requirement. *See Kirwa I*, 285 F. Supp. 3d at 36–37. This evidence also supports a similar conclusion with respect to the active duty requirement. *See, e.g.*,

Defendants' position is also at odds with this Court's finding in *Kirwa* that "because it is a ministerial duty, certification of honorable service for purposes of . . . naturalization is unlikely to be committed to DOD's sole discretion or to be otherwise unreviewable." *Kirwa I*, 285 F. Supp. 3d at 37; *see also Kirwa II*, 285 F. Supp. 3d at 266. Precisely because N-426 certification is a ministerial task, it provides a meaningful standard for the Court to evaluate both the substantive criteria and the O-6 requirement established by the N-426 Policy. As Plaintiffs describe in their Motion for Summary Judgment, the ministerial nature of DoD's role was reflected in the range of persons previously authorized to certify N-426s. *See* PI Mot. 13–14. That Defendants now require certification by an officer of O-6 pay grade or higher, who by their own representation is the equivalent of a chief executive officer, Defs.' MSJ 24 n.9, fails to comport with the ministerial task Congress assigned to them. Defendants' contention—that they have unreviewable discretion to determine who can issue N-426 certifications—means that they could even require a three-star general to certify N-426s without fear of intervention by the federal courts. It is plain that such a position is untenable and that the Court may review such agency action.

Defendants also make the broad sweeping argument, as they did in *Kirwa,* that "determinations requiring military expertise are not proper subjects of judicial intervention." Defs.' MSJ 16–17. But the qualifications to apply for *citizenship* are not a matter requiring military expertise; Congress, not the military, has the power to "establish an uniform Rule of naturalization." U.S. Const. art. I § 8. And as this Court held in *Kirwa*, "while courts should

PI Mot., Ex. 4, at 1 ("[T]he [2003] NDAA extended the benefit of naturalization . . . to individuals who have served honorably as members of the Selected Reserve . . . . This final rule updates the regulations to reflect these amendments."); PI Mot., Ex. 5, at 2 ("Qualifying military service is honorable service in the Selected Reserve . . . *or* active duty service . . . .).

exercise caution when adjudicating claims involving matters of military affairs and national security, that caution does not give DOD carte blanche authority to act in contravention of . . . applicable statutes." *Kirwa II*, 285 F. Supp. 3d at 265–66.

Finally, Defendants ask this Court to reverse its prior rulings on reviewability of the N-426 Policy based on *Kuang v. Department of Defense*, 778 F. App'x 418, 419 (9th Cir. 2019), even as they acknowledge that *Kuang* applied the test articulated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and that the D.C. Circuit "has not adopted the *Mindes* test." Defs' MSJ 19 n.8. Indeed, the D.C. Circuit affirmatively rejected that test in *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), because it "erroneously 'intertwines the concept of justiciability with the standards to be applied to the merits of [the] case.'" *Id*. at 1512. Moreover, *Kuang* did not actually hold, as Defendants assert, that "policies that govern determinations about characterizing service are inherently military judgments that are not subject to judicial review." Defs.' MSJ 19. Rather, it concerned a distinct DoD policy governing when lawful permanent residents can ship to basic training.[21]

B. The N-426 Policy Causes the Unlawful Withholding of Agency Action.

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*

[21] This Court should accord no weight to *Kotab v. Department of the Air Force*, No. 2:18-cv-2031-KJD-CWH, 2019 WL 4677020 (D. Nev. Sept. 25, 2019), the other case Defendants cite in an attempt to convince this Court to revisit its prior rulings in *Kirwa*. In *Kotab*, the District Court of Nevada dismissed a case brought by a pro se plaintiff, who sought to enlist in the Air Force, on multiple grounds. While one of those grounds was on the basis that the N-426 Policy is unreviewable under the APA, the court's analysis is flawed in multiple respects, including that it fails to consider the structure or the legislative history of 8 U.S.C. § 1440. *Id*. at *9. The court's reasoning is also riddled with basic error regarding how section 1440 operates, including finding that it requires a non-citizen to have "completed active-duty status, . . . which Plaintiff has not done." *Id*.

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). This Court has already ruled twice that 8 U.S.C. § 1440 imposes a ministerial duty on Defendants to issue N-426 certifications. *Kirwa II*, 285 F. Supp. 3d at 266 ("At the preliminary injunction stage, this Court found that . . . the granting or denying of an N-426 constituted a ministerial task."); *see also Kirwa I*, 285 F. Supp. 3d at 41 ("[D]efendants have a ministerial duty to certify Form N-426s."). Perhaps because they cannot, Defendants challenge none of the grounds supporting the Court's conclusion—the text, structure, and history of 8 U.S.C. § 1440; its accompanying regulatory regime; and a prior DoD admission—which continue to provide an unshakeable foundation for extending that conclusion to this case.

The plain language of 8 U.S.C. § 1440 expressly mandates that DoD certify whether a non-citizen has "served honorably" for purposes of naturalization. It uses the mandatory "shall," instructing that DoD "shall . . . prove[] by a duly authenticated certification from the executive department under which the applicant served . . . whether the applicant served honorably." 8 U.S.C. § 1440(b)(3); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) ("Ordinarily, legislation using 'shall' indicates a mandatory duty while legislation using 'may' grants discretion."). Moreover, the juxtaposition within section 1440 of the mandatory "shall," directed to DoD, and the more permissive "may," directed to DHS, which is responsible for adjudicating naturalization applications ("Any person . . . may be naturalized"), is further evidence that Congress intended to impose upon DoD a ministerial duty. *See Anglers Conservation Network*, 809 F.3d at 671 ("[W]hen a statutory provision uses both 'shall' and 'may,' it is a fair inference that the writers intended the ordinary distinction."). Curiously,

Defendants' cursory discussion of the statutory text also notes this very distinction, pointing out that "[t]he relevant statute states . . . that a service member who 'has served honorably' during a time of war 'may be naturalized,' and that DoD 'shall determine whether' such a service member 'served honorably . . . .'" Defs.' MSJ 21–22 (citing 8 U.S.C. § 1440(a)).

The statutory scheme further confirms that Congress imposed upon Defendants a ministerial duty to certify past honorable service. 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 broad power the Attorney General has in turn delegated to USCIS, *see* 8 C.F.R. § 310, the DHS component responsible for adjudicating naturalization applications. By contrast, section 1440 carves out a limited and discrete role for DoD to play when service members seek to apply for naturalization—it must simply certify whether they have "served honorably." This command is "specific" and "unequivocal." *Zinke*, 892 F.3d at 1241 (D.C. Cir. 2018) (quoting *Norton*, 542 U.S. at 63–64).

The legislative history lends yet further support to the conclusion that Defendants have a ministerial duty to certify past honorable service. As discussed above, the 1968 Senate Judiciary Committee Report illuminates Congress's intent that section 1440 provide that a "noncitizen national who has served honorably . . . be naturalized without regard to . . . a waiting period" and that while the "peacetime serviceman must have a minimum of [then] 3 years' service, the wartime serviceman has no minimum required." PI Mot., Ex. 3, at 4–5. Congress further explained that non-citizens serving during wartime face "dangers and risks inherent in such service . . . because of the ever-present possibility of reassignment to the war zones of operation" and that a service member should be "afforded an opportunity to acquire citizenship before he is assigned to active combat." PI Mot., Ex. 3, at 13. Under Defendants' reading—that Congress

"placed *no limits* in § 1440 on Defendants' ability to ensure that it has a sufficient record upon which to characterize service," Defs.' MSJ 22 (emphasis added)—they would be free to require the same minimum service periods for non-citizens serving during wartime *or* peacetime, or to require service in a combat zone before a service member could obtain an N-426 certification. Indeed, the N-426 Policy reflects that Selected Reservists must serve a minimum of one year just like non-citizens serving during peacetime before they may obtain an N-426.[22] This result defies the text, structure, and purpose of section 1440 and places the thousands of non-citizens serving in the military during wartime at risk of the very danger Congress sought to avoid.[23]

Defendants purport to examine legislative history. But rather than consider the legislative history of 8 U.S.C. § 1440, they cite instead to pre-INA statutes, where they claim to find "Congressional intent to vest discretion in DoD when making honorable service determinations." Defs.' MSJ 22. In particular, they cite to the Nationality Act of 1940 and a 1948 amendment shifting the practice of honorable service certification from the submission of "duly authenticated copies of records of the executive departments" to the submission of "a certified statement from the executive department . . . *affirming* that . . . service was honorable." Defs.' MSJ 23. Defendants assert that this shift reflected Congress' intent that "DoD's role in certifying honorable service rises above the ministerial level." Defs.' MSJ 23. But they cite to no evidence

[22] The part of the N-426 Policy requiring service members to have "[s]atisfactorily served at least one day of active duty service in a location designated as a combat zone" also demonstrates the fallacy of Defendants' argument. SAMMA_0004. Congress made clear its intent for service members to obtain N-426 certifications and apply for naturalization *before* they are ever assigned to a combat zone.

[23] Because Defendants misconstrue the scope of Plaintiffs' case, they confine their analysis to a discussion of why section 1440 imposes no ministerial duty upon DoD "to certify honorable service based on a *de minimus* [sic] amount of service." Defs.' MSJ 21. But as discussed above, the text, structure and history of 8 U.S.C. § 1440 make equally clear that the ministerial role Congress authorized Defendants to play cannot permit them to impose an active duty or screening and suitability requirement. *See supra* pp. 19–20, 21 n.19, 22 n.20.

explaining the reason for this shift, rendering it purely speculative.[24] This shift is just as easily explained by Congress's recognition that it would be far more efficient for military personnel to review a service member's record than to copy and send the whole record to a separate agency. In fact, this reading is more consistent with Congress' indisputable intent in establishing an expedited path to citizenship for non-citizens serving during wartime.[25]

Defendants' reliance on the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2020) ("2020 NDAA"), is equally unavailing. Virtually all of Defendants' discussion addresses whether the 2020 NDAA gives them discretion "to determine 'the appropriate level' for officials who certify" the N-426. Defs.' MSJ 23–24 (citing 2020 NDAA § 524). It does. But discretion does not mean unreviewable discretion, and Plaintiffs challenge the O-6 requirement as arbitrary and capricious and subject, like the rest of the N-426 Policy, to notice-and-comment rulemaking under the APA. Defendants then conclude

[24] Defendants return to the 1948 amendment of the Nationality Act of 1940 several more times in the course of their argument. *See* Defs.' MSJ 23, 36–38, 41–42. Later, Defendants offer as their primary piece of evidence in support of their view of the amendment the case of *In re Fong Chew Chung*, 149 F.2d 904 (9th Cir. 1945). Defs.' MSJ 37. Specifically, Defendants suggest that *Fong* demonstrates that because it was too difficult for the body adjudicating naturalization to interpret service records, Congress vested Defendants with discretion in making honorable service certifications. But *Fong* demonstrates the opposite point. The Court of Appeals indicates that the trial court's error in concluding that a veteran had not served honorably was the result of bias, and not confusion about the meaning of honorable service in the Act: "[P]etitioner had lived in Chinatown, San Francisco, for many years without making any appreciable effort to acquaint himself with American ways, American government and the language commonly in use. . . . The powerful pull of such fact, no doubt, swayed the . . . Judge . . . from the *narrow and painful* course of the enacted law." *Fong*, 149 F.2d at 907 (emphasis added).

[25] Defendants' citations to the legislative history of a 1942 Act, where "the principal draftsman of the legislation specifically rejected the idea that the legislation would 'simply make it mandatory that any one who joins the army *immediately gets citizenship*," Defs.' MSJ 22–23, is also not to the contrary. Plaintiffs have never asserted that they are entitled to (1) citizenship (2) upon enlistment. Rather, they assert that they are entitled to (1) an N-426 certification in order to apply for citizenship (2) based on their honorable service. As Plaintiffs have explained, enlistment is not the same as "entering service." *See* Compl. ¶ 53.

that because Congress "gave DoD discretion to determine 'the appropriate level' for officials who certify the form," the 2020 NDAA must somehow indicate that "Congress views honorable service determinations to have an evaluative component and not simply be ministerial." Defs.' MSJ 24. That conclusion is a leap of logic unsupported by the text, structure, or history of section 1440 as discussed above.

Form N-426 itself also evinces Defendants' ministerial role. The form instructs DoD to record the applicant's periods of service and simply designate "yes" or "no" as to whether the applicant has served honorably during each period. PI Mot., Ex. 7, at 2–3. 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 the requirements in the N-426 Policy, including a minimum service, active duty, or screening and suitability requirement.[26] Defendants do not dispute the administrative role DoD is clearly tasked to play in completing the N-426, but complain that "[w]hat another Executive Branch agency may say about DoD's responsibilities does not determine what responsibilities *Congress* gave to DoD by statute." Defs.' MSJ 25. But Congress gave DHS, *not* DoD, responsibility for enforcing the naturalization laws, including specifically section 1440. Form N-426 is a DHS form, *not* a DoD form. It is therefore DHS's interpretation, not DoD's, that is entitled to deference here. *See, e.g.*, *City of Olmsted Falls v. F.A.A.*, 292 F.3d

[26] The format of Form N-426 also supports the conclusion that the reason Congress determined Defendants should certify honorable service, rather than ship service records to another agency, was so they could undertake the clerical function of examining an applicant's service record and verifying honorable service. Indeed, previous Form N-426 instructions, which expired on July 31, 2019, indicated that it should take no more than "20 minutes" for a certifying official to complete the form, "including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing documents, attaching necessary documentation, and submitting the request." Form N-426 (exp 07/31/2019), at 3, Ex. 4. The current Form N-426 instructions now estimate this time to be 45 minutes. *See* Form N-426 (exp. 09/30/2021), at 3, Ex. 5.

261, 270 (D.C. Cir. 2002) ("[W]hen we are faced with an agency's interpretation of a statute *not* committed to its administration, we give no deference.").

Finally, Defendants should be held to their admission in the *Nio* litigation that "DoD serves a ministerial role in determining if an individual is serving honorably . . . ." Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 36, *Nio*, No. 17-998 (D.D.C. July 7, 2017), ECF No. 19 ("*Nio* Defs.' Opp."). This Court has already held in *Kirwa* that Defendants' admission supports the conclusion that DoD serves only a ministerial role, and that "DoD is arguably judicially estopped from changing its position [as it attempted to do in *Kirwa*] based on a change in litigation interests." *Kirwa I*, 285 F. Supp. 3d at 38 n.18. Nonetheless, Defendants assert that their admission is not binding, because it "was not an essential feature of the Government's argument in *Nio*." Defs.' MSJ 25. But it was. One of the central issues in *Nio* was whether USCIS may place the naturalization applications of MAVNIs on hold pending DoD's completion of the screening and suitability requirement, now contained in the N-426 Policy. *See Nio*, 270 F. Supp. 3d at 53. Defendants specifically argued that the *Nio* plaintiffs had failed to state a claim against USCIS because "the fact that DoD serves a ministerial role in determining if an individual is serving honorably *does not prevent . . . USCIS [from] using its own judgement* [sic] *to determine that it needs . . . specific, additional information from DoD*" in adjudicating naturalization applications. *Nio* Defs.' Opp. at 36 (emphasis added). Accordingly, as this Court already determined in *Kirwa*, Defendants cannot now gain a litigation advantage by retracting this prior admission and pursuing a position incompatible with the one it took in *Nio*.

C. The N-426 Policy is Arbitrary and Capricious.

Defendants fail to explain the purpose behind their radical departure from their long-standing practice of certifying N-426s based solely on past service, without requiring completion

of the new substantive criteria or O-6 requirement in the N-426 Policy. Defendants begin by claiming that there was never any such well-established practice. But, as this Court found in *Kirwa* and the Administrative Record itself demonstrates, for years, DoD routinely certified N-426s based on a non-citizen's service record at the moment of examination, without the prerequisites contained in the N-426 Policy. *See Kirwa I*, 285 F. Supp. 3d at 28–29, 36, 38; SAMMA_0017, 0020 ("This is a change from the current practice of certification of honorable service for the purpose of expedited naturalization after 'one day of service.'"). Moreover, given the administrative nature of N-426 certification, Defendants had long permitted a broad range of military personnel to verify service records and complete the certification. *See Kirwa I*, 285 F. Supp. 3d at 28–29; SAMMA_0169–210. Defendants' failure to even address this body of evidence in the Administrative Record violates their obligation under 5 U.S.C. § 706(2) not to "depart[] from agency precedent without explanation." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1090 (D.C. Cir. 2009).

Instead, Defendants focus on an entirely different policy regarding service characterizations during "entry level separation." Defs.' MSJ 27–29. Whatever the history of *that* policy may be, it was not the policy regarding honorable service certifications for purposes of section 1440 naturalization. Notably, Defendants do not deny that the N-426 Policy effected a change in their specific practice regarding certifications in the section 1440 context. Nor could they, as the whole purpose of the N-426 Policy was to effect that change.[27]

[27] As discussed above, Defendants' own representation of the "entry level separation" policy misrepresents federal law and DoD regulations, which are actually consonant with DoD's prior N-426 practice. *See supra* pp. 22–23. As a matter of federal law, 10 U.S.C. § 12685 establishes that the service of a Selected Reservist must be characterized as "honorable" unless there is a specific finding by a court-martial or other board that the soldier's service is other than honorable. Given the plain terms of this statute, DoD Instruction 1332.14 specifically directs that "[i]n accordance with section 12685," an entry-level separation of a Selected Reservist shall be "under honorable conditions." SAMMA_0090. In addition, the DoD Instruction directs that

Searching the Administrative Record for some explanation, Defendants find a single two-page document reflecting an Army recommendation "that any prospective requirements concerning length of service be tied to commonly used personnel policies concerning characterization of service." SAMMA_0041. But that is just the recommendation of a single service branch, and it obviously cannot explain why Defendants accepted that recommendation. Nor does it explain what "relevant data," if any, prompted Defendants' change in practice, and what the "rational connection" might be between "the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[28]

The purported explanation for the N-426 Policy that Defendants now claim to have found in the Administrative Record is also difficult to reconcile with the explanation they gave in the *Kirwa* litigation. There, Defendants emphasized that their purpose in withholding N-426 certifications from Selected Reserve MAVNIs was to ensure that MAVNIs completed "enhanced security screening . . . prior to their shipment to [basic] training." *Kirwa* Defs.' PI Opp. at 5.[29] To

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"[w]ith respect to administrative matters outside this instruction that require a characterization as honorable or general," which clearly covers the ministerial task of certifying honorable service for naturalization purposes, "an entry-level separation will be treated as the required characterization." SAMMA_0089.

[28] In a footnote, Defendants also cite to a separate document in the Administrative Record in specific support of the one-year service requirement for Selected Reservists. *See* SAMMA_0055. Defendants claim that this document "shows an awareness by DoD that such service members serve in an active-duty capacity less frequently and thus build their service record at a slower rate." Defs.' MSJ 28. As with the document described above, nowhere does it explain the facts undergirding this change in policy or why the change makes sense in light of those facts. Defendants cite to nothing in the Administrative Record that would support the active duty and screening and suitability requirements in the N-426 Policy.

[29] Defendants later couched this rationale within the broader justification that the N-426 Policy reflects "DoD's desire to establish, for the first time, a clear and consistent process for N-426 certifications following a number of years in which the military was applying inconsistent standards for such determinations." *Kirwa* Defs.' MTD at 26. But neither in *Kirwa* nor here have they ever pointed to any evidence in the Administrative Record that this purpose (or more specifically, the alignment of N-426 certifications with the characterization of entry-level

highlight this point, Defendants repeatedly asserted that service members would receive their N-426 certifications and complete the naturalization process at basic training. *See* Ex. 2, *Kirwa* Tr. 25:11–19 ("DoD *has always contemplated* that the application for naturalization will take place simultaneous with attendance at basic military training." (emphasis added)); Ex. 2, *Kirwa* Tr. 64:12–19 ("[T]hat is still the intention, is to marry the completion of the naturalization process with the completion of basic military training."). Defendants have abandoned that explanation here, even though Plaintiffs and the putative class also include MAVNIs and Selected Reservists. This change in Defendants' own characterization of the Administrative Record and what it shows sows significant doubt as to whether the record in fact provides any coherent explanation of the change in policy, as the law requires.

Defendants' attempt to justify the O-6 requirement falls equally flat. Instead of pointing to any support for this change in the Administrative Record, Defendants rely exclusively on a declaration by Stephanie Miller, which was executed two days before Defendants filed their motion for summary judgment. As they did with a similar declaration in the *Kirwa* litigation, Defendants claim that this declaration simply "illuminate[s] reasons [for the challenged policies that are] obscured but implicit in the administrative record." Defs.' MSJ 7 n.5 (quoting *Clifford v. Peña*, 77 F.3d 1414, 1418 (D.C. Cir. 1996)). But as in the *Kirwa* litigation, this declaration is not "merely explanatory" but "purports to offer new justifications for agency action—justifications that find no support in the administrative record compiled by defendants." *Kirwa II*, 285 F. Supp. 3d at 269. The Miller declaration justifies the O-6 requirement on the ground that "these grades [*i.e*. the ranks of officers certifying N-426s] are generally not sufficiently senior to sign performance appraisals in the military . . . ." Miller Decl. ¶ 5. But that explanation is entirely

separations) underlies the N-426 Policy.

post hoc, and finds no support in the Administrative Record, which contains only a sampling of N-426s and an explanation of the role of a Colonel. The foundational *Chenery* doctrine precludes reliance on such created-for-the-litigation explanations. *Sec. & Exch. Comm. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 20 (D.C. Cir. 2019) ("The character of a rule depends on the agency's intent when issuing it, not on counsel's description of the rule during subsequent litigation."). Thus, as it did in *Kirwa*, the Court should find that Defendants' "reliance on the . . . Miller declaration demonstrates why granting defendants' summary judgment motion would be inappropriate." *Kirwa II*, 285 F. Supp. 3d at 269.

Finally, by citing to "[f]urther developments after issuance of the O-6 requirement" in support of this change, Defendants fundamentally misconstrue what 5 U.S.C. § 706(2) requires of them, which is to demonstrate that the N-426 Policy was the product of a reasoned decision. That the 2020 NDAA—which was passed more than three years after the N-426 Policy was implemented—contemplates that DoD may designate "an appropriate level for the certifying officer," cannot explain why DoD decided, three years earlier, that only officers at the O-6 level or above can certify an N-426, after years of contrary practice. 2020 NDAA § 524. The lack of explanation for this change, along with all of the others contained in the N-426 Policy renders the Policy arbitrary and capricious and this Court should therefore set it aside.

D. The N-426 Policy Exceeds Defendants' Statutory Authority.

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). "First, always, is the question whether Congress has directly spoken to the

precise question at issue. 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, Inc. v. Nat. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Here, the *Chevron* analysis ends with the first question. Congress has "directly spoken to the precise question[s] at issue": (1) what is required for a service member to obtain an N-426 certification and apply for naturalization under 8 U.S.C. § 1440, and (2) what is Defendants' role in that process.

On the first question, 8 U.S.C. § 1440 unquestionably establishes that service members must meet a single requirement to obtain an N-426 certification and apply for naturalization: they must have "served honorably." 8 U.S.C. § 1440(a). By speaking "in terms of past service," the statute, "on its face, does not require certification of present military suitability or active honorable service." *Kirwa II*, 285 F. Supp. 3d at 267–68. Nor can it require the completion of some future period of service. Section 1440 imposes none of these requirements and makes no provision for DoD or any other agency to add requirements before service members can obtain N-426 certifications. Congress left no "gap for the agency to fill." *Chevron*, 467 U.S. at 843–44.

Defendants take issue with the proposition that Congress' use of the term "served honorably" is unambiguous, claiming that "[b]ecause Congress did not define what it means to have 'served honorably'" and "the meaning of the term is not self-evident," they are free to decide what it means. Defs.' MSJ 33. But rather than analyzing the text, structure, or history of the statute, Defendants simply cite to broad-sweeping principles—*e.g.*, "Congress knows how to speak in plain terms when it wishes to circumscribe, and in capricious [sic] terms when it wishes

to enlarge, agency discretion;" "an agency 'should normally be allowed to 'exercise its administrative discretion in deciding how . . . to develop the needed evidence' to make necessary agency findings"—and conclude that their minimum service requirement is therefore consonant with the statute. Defs.' MSJ 34–35.[30] In that vein, Defendants brush aside the use of the past tense in "served honorably," without explaining how their interpretation that this "retrospective language . . . supports Defendants' reading that a characterization of 'honorable' must be based on substantial record evidence," Defs.' MSJ 35 n.13, can possibly square with this Court's prior rulings that Defendants "have a duty to certify Form N-426s if the enlistee's service would qualify as honorable 'based on an enlistee's service record as it existed on the day he submitted the N-426.'" *Kirwa II*, 285 F. Supp. 3d at 267 (quoting *Kirwa I*, 285 F. Supp. 3d at 36)).

By contrast, the text, structure, and history of 8 U.S.C. § 1440 clearly establish that the new criteria contained in the N-426 Policy contravene its terms. Thus, with respect to the minimum service requirement, 8 U.S.C. § 1440 imposes no such prerequisite before a service member can obtain an N-426. And its contrast with section 1439, which 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), demonstrates that Congress knew how to include a minimum service requirement when it wanted one, and plainly intended not to

[30] Defendants' citations to *Patterson v. Lamb*, 329 U.S. 539 (1947), and *Gay Veterans Ass'n, Inc. v. Secretary of Defense*, 668 F. Supp. 11 (D.C. Cir. 1987), are irrelevant. *Patterson* held that the Army was authorized by statute—specifically, the Act to authorize the promulgation of the general regulations for the government of the Army, 18 Stat. 337 (1875)—to issue regulations providing for different types of discharges. It also held that the discharge given to Patterson, who was discharged three days after enlisting and before arriving at training, was "within the province of the War Department." 329 U.S. at 545. This case does not challenge DoD's authority to issue different types of discharges. *Gay Veterans* may support the proposition that a "formal characterization of service must be based upon the record of the member's military service." Defs.' MSJ 34. But Plaintiffs do not dispute that an N-426 certification should be based on a service member's record at the time DoD completes the N-426.

impose one upon those willing to serve during wartime. This reading is further confirmed by the legislative history of section 1440, in which Congress indicated its intention to provide, as the statute does, that a service member "who has served honorably . . . may be naturalized without regard to . . . a waiting period." PI Mot., Ex. 3, at 4.

As applied to Selected Reservists, the N-426 Policy's minimum service requirement incorporates an active duty requirement by demanding that these service members "[s]uccessfully complete[] the basic training requirements of the armed forces." SAMMA_0003. Defendants' active duty requirement also contravenes the express language of the statute, which states that any non-citizen who has "served honorably as a member of the Selected Reserve . . . *or* in an active-duty status" may seek naturalization. 8 U.S.C. § 1440(a) (emphasis added). This disjunctive language is unequivocal that honorable service in the Selected Reserve is an independent basis for naturalization. Requiring Selected Reservists to complete basic training before obtaining an N-426 effectively abrogates this alternative statutory path to naturalization for many Reservists. For this reason, this Court noted in *Nio* that DoD's position on this issue "appears to be a clear conflict with the statutory language in 8 U.S.C. § 1440." *Nio*, 270 F. Supp. 3d at 60; *see also* Tr. of Continued Oral Arg. on Prelim. Inj. Mot. 17:05–13, *Nio*, 17-998 (D.D.C. Aug. 23, 2017), Ex. 6 (noting that 8 U.S.C. § 1440 and the implementing regulations "couldn't be clearer" and asking the government "in view of this evidence, what could you possibly argue that a person has to have active duty status?"). And in the *Kirwa* litigation, this Court observed that DoD had appeared to abandon its position "to only permit certification for MAVNI enlistees who were serving in an active-duty status . . . facing the probability that such a policy would be found to violate 8 U.S.C. § 1440(a) . . . ." *Kirwa I*, 285 F. Supp. 3d at 38.

Defendants' screening and suitability requirement equally contravenes the plain language of section 1440. Again, nothing in the statute suggests that satisfactory completion of this requirement can be imposed on service members as a precondition for obtaining an N-426 and applying for naturalization. As discussed above, it is also inconsistent with the statute's clear intent to ease and expedite the path to citizenship for non-citizens serving during wartime. *See supra* p. 20. Congress plainly intended that service members seeking naturalization under section 1440 would be subject to more relaxed—not more stringent— requirements than civilian applicants. But under the N-426 Policy, these service members are subject to onerous extra-statutory background screening not applicable to civilians before they may apply for naturalization.[31]

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), which the Attorney General has in turn delegated to USCIS, *see* 8 C.F.R. § 310. By contrast, section 1440 carves out a narrow, non-discretionary role for DoD to play where service members seek naturalization—it must certify whether they have "served honorably." Defendants contend they have "never professed" to implement or enforce the naturalization laws, but "are merely exercising their obligation under the statute." Defs.' MSJ 36. This argument ignores the clear consequence of the N-426 Policy—requiring service members to meet additional, substantive, non-statutory requirements before they may apply for naturalization. It is USCIS, not DoD, that Congress

[31] Defendants do not address why the active duty or screening and suitability requirements do not also exceed Defendants' statutory authority under 8 U.S.C. § 1440.

authorized to serve as the gatekeeper to citizenship. By requiring service members to clear hurdles of their own devising, Defendants have unlawfully aggrandized the limited role Congress authorized them to play in the section 1440 naturalization process.

Defendants also do not analyze the legislative text or statutory scheme in discussing their role. Rather, they proceed directly to a consideration of the purported legislative history. But Defendants' citation to legislative history does not even consider the history of this specific provision and cites to the same pre-INA statutes they cited previously in support of their argument that they do not have a ministerial duty to certify N-426s. *See* Defs.' MSJ 36–37. Thus, Defendants cite again to the Nationality Act of 1940 and its 1948 amendment for the argument that by requiring the military to certify honorable service for naturalization purposes, Congress intended to vest Defendants with the discretion to establish the preconditions in the N-426 Policy. As discussed above, Defendants offer no support for their interpretation of this shift, which is also explained by efficiency concerns, a reading far more consistent with Congress' indisputable intent in ensuring that non-citizens can seek naturalization expeditiously when serving during wartime. *See supra* p. 28.

Because "the intent of Congress is clear, that is the end of the matter," and Defendants are not entitled to argue that their reading of the statute is justified under *Chevron* step two. *Chevron*, 467 U.S. at 842–43. But even at step two, "agencies must operate 'within the bounds of reasonable interpretation.' . . . Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) (citation omitted). As discussed above, the "design and structure of the statute as a whole" render unreasonable Defendants' reading that they may establish the new substantive requirements in the N-426 Policy before DoD will issue an N-426

so that a service member may seek naturalization. Without engaging in any discussion of the broader structure and purpose of the statute, Defendants simply repeat their generalized assertions that they are at liberty to determine how long a non-citizen must serve before receiving an N-426. *See, e.g.*, Defs.' MSJ 38 ("It is plainly reasonable for the military to require some reasonably substantial record of service on which to characterize service as 'honorable.'").

E. Defendants Failed to Engage in Notice-and-Comment Rulemaking.

Defendants do not dispute that the N-426 Policy is a legislative rule ordinarily subject to the notice and comment procedures of the APA. Rather, they assert that the Policy was exempt from these procedures because it (1) qualifies as "a military . . . function of the United States" and (2) involves "a matter relating to agency management or personnel." 5 U.S.C. § 553. Neither of these arguments has merit.

1. The N-426 Policy Does Not Involve a Military Function.

Although the APA itself "never defines the term . . . its language contemplates that 'military function' has measurable contours'" and the APA's "text strongly suggests that those contours are defined by the specific function being regulated." *Indep. Guard Ass'n of Nev., Local No. 1 v. O'Leary ex rel. U.S. Dep't of Energy*, 57 F.3d 766, 769 (9th Cir. 1995). Thus, the APA "instructs us to look not to whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,' but to the function being regulated." *Id*.; *see also United States v. Ventura-Melendez*, 321 F.3d 230, 232–33 (1st Cir. 2003) (determining whether a rule involved a military function by looking to the function being regulated).[32]

[32] The APA's legislative history also confirms this reading. *See* S. Rep. No. 79-752, at 13 (1945), Ex. 7 (noting its "undeviating policy to deal with types of functions . . . and in no case with administrative agencies" and accordingly, to exempt "certain war and defense functions . . . but not the War or Navy Departments in the performance of their other functions").

The N-426 Policy regulates a civilian not a military function. It alters the criteria service members must meet (and the process they must follow) before they may obtain an N-426 certification and apply for naturalization. It therefore relates entirely to the naturalization process, which falls outside of the purview of the military. *See* Ex. 2, *Kirwa* Tr. 44:16–21 ("I don't see how this honorable certification is not really a part of the naturalization process, as opposed to your worrying about what kind of people you're taking in the Army and whether somebody is not going to be loyal to the Army."); *see* Ex. 2, *Kirwa* Tr. 59:23–24 (observing that certification is part of "the naturalization process. That's unrelated to the Army."). This conclusion is further buttressed by the overall structure of the INA and the specific language of section 1440, which establish that USCIS (delegated by the Attorney General) is responsible for implementing the naturalization laws and leave only a narrow, non-discretionary role for DoD to play in the naturalization process.

In support of their argument, Defendants trot out yet again the Nationality Act of 1940 and its 1948 amendment, which shifted to a practice where the military directly certifies whether a non-citizen had served honorably for purposes of naturalization. Again, without providing any evidence explaining the reason for this shift, Defendants cursorily conclude that "Congress made clear with this amendment that characterizing service under § 1440 is an action exclusively within the province of the military." Defs.' MSJ 42. For the reasons discussed above, Congress did nothing of the sort, *see supra* p. 28, and DoD's role in the naturalization process is cabined to the purely administrative task of certifying whether a non-citizen's service record demonstrates past honorable service. Accordingly, the N-426 Policy does not involve a military function.

2. The N-426 Policy Is Not a Matter Relating to Agency Management or Personnel.

Defendants also claim that the N-426 Policy is exempt from notice-and-comment rulemaking because it involves "a matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2). This argument similarly fails. As discussed above, the N-426 Policy creates additional criteria and establishes a new process that service members must satisfy before they may obtain an N-426 certification and apply for naturalization. As such, it does not "relat[e] solely to the internal management of an agency," *Seaboard World Airlines, Inc. v. Gronouski*, 230 F. Supp. 44, 46 (D.D.C 1964), and goes beyond any action that "fall[s] within the ordinary meaning of personnel matters," *Stewart v. Smith*, 673 F.2d 485, 496 n.38 (D.C. Cir. 1982).

Defendants' reliance on *Stewart* is misplaced. *Stewart* concerned hiring standards, which are quintessential personnel matters. Here, by contrast, the N-426 certification has nothing to do with an individual's current or future service in the military, but rather whether they may apply for citizenship. "Section 553(a)(2) must be narrowly construed," *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1153 n.23 (D.C. Cir. 1977); only the broadest construction could make the ministerial act of filling out a form *for a different agency's use* into a management or personnel matter. Thus, the N-426 Policy does not fall within this exemption and is subject to APA notice-and-comment rulemaking.

IV. PLAINTIFFS ARE ENTITLED TO THE RELIEF THEY SEEK

Defendants argue that even if "Plaintiffs should prevail on any of their APA claims, Plaintiffs would still not be entitled to much of the relief requested in the Complaint." Defs.' MSJ at 43. Defendants also raised this argument in *Kirwa*, but failed to prevail. *See* Am. Order, *Kirwa*, No. 17-1793 (D.D.C. Oct. 27, 2017), ECF No. 32 ("*Kirwa* Am. Order"). It has no greater merit here.

The declaratory and injunctive relief Plaintiffs seek is expressly contemplated by the APA, which provides for "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. § 703. Indeed, the type of injunctive relief Plaintiffs seek has long been an available remedy in APA cases. *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 144 (D.D.C. 2018) ("[T]he government cites no authority to support the proposition that a Court may declare an action unlawful but have no power to prevent that action from violating the rights of the very people it affects. To the contrary, such relief is supported by the APA itself."); *Analysas Corp. v. Bowles*, 827 F. Supp. 20, 21–25 (D.D.C. 2013) (permanently enjoining agency rule on basis it violated notice-and-comment rulemaking); *Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007) (vacating agency rule and permanently enjoining its implementation on basis it was arbitrary and capricious).

Moreover, section 706(2) of the APA provides that "[t]he reviewing court *shall hold unlawful and set aside agency action*, findings, and conclusions found to be arbitrary, capricious, . . . or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C) (emphasis added). As set forth above, the N-426 Policy is arbitrary and capricious and exceeds Defendants' statutory authority under 8 U.S.C. § 1440. Accordingly, Plaintiffs seek an order from the Court to do precisely what Section 706(2) provides: "Declare the N-426 Policy violates the INA and the APA" and "Order Defendants to set aside the N-426 Policy." Compl., Prayer for Relief. *See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that [w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated . . . ." (quotation marks omitted)).

Defendants' attempt to characterize Plaintiffs' prayer for relief as prohibited "specific" relief is, in reality, another attempt to evade their ministerial duty to certify honorable service under section 1440. An order enjoining Defendants from withholding N-426 certifications from Plaintiffs pursuant to the N-426 Policy or from withholding certifications from Plaintiffs who have served honorably for one day or more is nothing more than the inevitable outcome of an order setting aside DoD's unlawful Policy. In addition, Defendants fundamentally mischaracterize Plaintiffs' request for relief as seeking "an order requiring Defendants to certify their service as 'honorable.'" Defs.' MSJ 44. Not so. Plaintiffs have simply requested the Court to order Defendants "to use their best efforts to *certify or deny* Form N-426s within two business days of receipt of the Form N-426." Compl., Prayer for Relief (emphasis added). It is therefore precisely the request for "an honorable service *determination*, not an automatic finding of honorableness" that Defendants agree would accord with a finding that they have unlawfully withheld agency action. Defs.' MSJ 44.

Finally, Defendants' argument is at odds with this Court's preliminary injunction order in *Kirwa*, which was a challenge to the same N-426 Policy on similar grounds. There, the Court

> **ORDERED** that defendants are preliminarily enjoined from refusing to sign and issue Form N-426s to members of the Selected Reserve pursuant to Section II of DOD's October 13, 2017 Guidance; . . .
>
> **ORDERED** that defendants are preliminarily enjoined from refusing to certify MAVNI enlistees who have served for one day or more in the Selected Reserve as having honorable service, except as related to the conduct of an individual plaintiff or class member as reflected in that soldier's service record and based on sufficient grounds generally applicable to all members of the military; [and]
>
> **ORDERED** that, after members of the provisionally-certified class submit or resubmit N-426s . . . , defendants should use their best efforts to certify or deny Form N-426s . . . within two business days of receipt of Form N-426 . . . .

See Kirwa Am. Order at 1–2. The same relief is equally appropriate here.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted and Defendants' cross-motion should be denied.

Dated: May 29, 2020

Respectfully submitted,

/s/ Scarlet Kim

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