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.	No. 1:20-cv-01104-ESH

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

As set forth in their Memorandum of Points and Authorities in Support of their Motion for Class Certification and Appointment of Class Counsel ("Pls.' Mot. for Class Cert."), ECF No. 5, Plaintiffs have demonstrated that the proposed class definition meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, and that class certification is appropriate here. Defendants do not object to class certification but oppose Plaintiffs' proposed class definition, arguing that (a) Plaintiffs lack standing to challenge the N-426 Policy as a whole, (b) the proposed class definition lacks commonality and typicality and is insufficiently definite, and (c) certifying Plaintiffs' proposed class will interfere with existing litigation. All of these arguments fail. Each Plaintiff challenges the N-426 Policy as a whole and four Plaintiffs have live claims. Even if all of the named Plaintiffs' individual claims become moot before class certification, the class should be certified under the relation-back doctrine. The proposed class also satisfies commonality and typicality requirements and is sufficiently definite. Finally, certifying Plaintiffs' proposed class will not interfere with the existing litigation that Defendants cite, which is factually dissimilar to this case in significant ways.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the N-426 Policy in its Entirety.

While apparently conceding that this case should proceed as a class action, Defendants argue that the proposed class should not be certified because (a) five Plaintiffs have received N-426 certifications, (b) the remaining Plaintiff can only challenge Section I, and (c) no Plaintiff can challenge the O-6 requirement. *See* Defs.' Resp. to Pls.' Mot. for Class Cert. 4 ("Defs.' Class Cert. Opp."), ECF No. 23. These arguments misconstrue Plaintiffs' claims: each of the Plaintiffs challenges the legality of the N-426 Policy as a whole, not only certain individual *requirements*. *See* Pls.' Opp. to Defs.' Mot. for Summ. J. 2, 14–15 ("Pls.' MSJ Opp."), ECF No. 21. Four of the named Plaintiffs' claims remain alive at this time, and that is more than sufficient. Further, even

if all the named Plaintiffs' claims become moot before the class is certified, the relation-back doctrine allows class certification because Plaintiffs' claims are inherently transitory.

A. Each Plaintiff Challenges the N-426 Policy as a Whole.

Defendants assert that Plaintiffs only challenge "the time-in-service requirement" and the requirement that "a commissioned officer in the pay grade of O-6 or higher" certify N-426s. Defs.' Class Cert. Opp. 4. That is not correct. Each of the Plaintiffs, including Plaintiff Isiaka, challenges the N-426 Policy as a whole, as they have made clear in the complaint. *See* Compl. ¶ 74, ECF No. 1 ("None of the new criteria imposed by the N-426 Policy is permissible under law."); Pls.' MSJ Opp. 14–15; *see also* Pls.' Mot. for Class Cert. 3 ("The central question is the legality of DoD's policy of refusing to certify the honorable service of non-citizen service members as required by law . . . ."). Moreover, the parties agree that all of the requirements contained in either Section I or Section II of the N-426 Policy, including the O-6 requirement, apply in their entirety to each Plaintiff subject to that particular Section of the Policy.[1] Now, in an attempt to shield their unlawful actions from review, Defendants argue that, in effect, the N-426 Policy is not one policy that, as a whole, prevents Plaintiffs from obtaining certifications of honorable service, but rather a bundle of discrete policies, each of which each Plaintiff must challenge separately. Not so. There is no reason why a plaintiff is limited to challenging only a particular aspect of an allegedly unlawful policy that harms them. Plaintiffs complain of

[1] Section I of the N-426 Policy applies to Plaintiffs Samma, Bouomo, Isiaka, Perez, Gunawan, and Machado because they enlisted after October 13, 2017. Section II of the Policy applies to Plaintiffs Park and Lee because they enlisted before October 13, 2017. Because Plaintiffs' claims are inherently transitory and the relation-back doctrine applies, *see infra* Section I.C., even if the Court concludes that each Plaintiff can only challenge the Section of the Policy that applies to them, Plaintiffs still have standing to challenge both Sections I and II of the Policy.

Defendants' refusal to certify their honorable service. That refusal is caused by the N-426 Policy. That is the policy Plaintiffs challenge.

B. Four Named Plaintiffs Have Standing.

Defendants' assertion that all Plaintiffs except Plaintiff Isiaka have received N-426 certifications is not correct. While Plaintiff Lee received an N-426 certification on May 29, 2020, she was advised by a Navy JAG officer that various errors on the certification may render it invalid, and therefore re-submitted a new N-426 for certification on that date. She has not received that N-426 certification. *See* Suppl. Lee Decl. ¶¶ 2–5, ECF No. 21-13.

Additionally, Plaintiffs have today filed an amended complaint as of right, adding two new Plaintiffs, Timotius Gunawan and Rafael Leal Machado, who have not received their N-426 certifications due to the N-426 Policy. They are also suitable class representatives with live claims. *See* Am. Compl. ¶¶ 130–144.

Accordingly, neither lack of standing nor mootness is an impediment to Class certification.[2]

C. Even if All of the Named Plaintiffs' Claims Become Moot Before a Class Is Certified, the Class Should Be Certified Because Plaintiffs' Claims Relate Back to the Filing of the Complaint.

Even if all of the named Plaintiffs receive N-426 certifications before a class is certified, the Court can and should still certify the proposed class, because the relation-back doctrine allows courts to "'relate [a class] certification motion back' to a date when the individual claims were live." *J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 n.2 (2013)). That is "[b]ecause the class possesses a concrete

[2] Plaintiffs agree that Plaintiffs Samma, Bouomo, Perez, and Park have now received their N-426 certifications.

legal interest," and "the mootness of individual claims does not affect the ability of representatives to litigate a controversy between the defendants and absent class members." *Id*. at 1308 (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). "[W]here a named plaintiff's claim is inherently transitory, and becomes moot prior to certification, a motion for certification may relate back to the filing of the complaint." *Id*. (quoting *Genesis Healthcare*, 569 U.S. at 71 n.2).

When determining whether the "inherently transitory" exception to mootness is appropriate, the D.C. Circuit considers two factors: (1) the extent to which the individual claims are "inherently transitory" and (2) the likelihood that that "some class members will retain a live claim throughout the proceedings." *Azar,* 925 F.3d at 1310. As to the first prong, the district court must determine "whether it is 'by no means certain' that an individual claim will persist long enough for it to adjudicate class certification." *Id*. (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). This inquiry must take into account the "practicalities and prudential considerations" of the class action under review. *Id*. (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980)). As to the second prong, the district court must satisfy itself based on examining the record that "some class members" will have a "'continuing live interest' while the case [is] before it." *Id*. (quoting *Gerstein*, 420 U.S. at 110 n.11). Both factors support class certification here.

First, it is "'by no means certain' that an individual claim will persist long enough for [the Court] to adjudicate class certification." *Azar*, 925 F.3d at 1310 (quoting *Gerstein*, 420 U.S. at 110 n.11). Indeed, rather than "hypothesize[] events that 'may' occur, based on the 'practicalities' of the litigation at issue," *id*. (quoting *Geraghty*, 445 U.S. at 404 n.11), the Court need only look to the facts of this case, which prove the point: Since the complaint was filed, four of the six original Plaintiffs have received their N-426 certifications, and their claims have

become moot. In the nature of the N-426 certification process, every non-citizen service member who wishes to apply for naturalization will eventually have a Form N-426 certified or denied, rendering their individual claim moot. The claims are thus inherently transitory. Moreover, Defendants are in complete control of the timing of certifications and can therefore (as the facts of this case again prove) render moot the claim of any individual plaintiff in an attempt to thwart judicial review of the N-426 Policy.

Second, it is indisputable that some putative class members will retain live claims throughout the proceedings. According to DoD, approximately 7,000 lawful permanent residents enlist every year. *See* SAMMA_0019; SAMMA_0023 n.2.[3] As these and other non-citizens begin their service in the military, they will be subject to the N-426 Policy and will therefore be unable to obtain prompt certifications of honorable service, thus ensuring that at least "some class members" have a "continuing live interest" while the case is adjudicated. *Azar*, 925 F.3d at 1310. Indeed, on any given day, *thousands* of class members will have live claims.

D. Plaintiffs Have Standing to Challenge the O-6 Requirement.

Defendants argue that "*no* named Plaintiff has standing to challenge [the O-6] policy," because the remaining Plaintiffs "fail[] to allege any injury from the O-6 requirement or otherwise describe how it harms [them]." Defs.' Class Cert. Opp. 4. They rely on *LoBue v. Christopher*, 82 F.3d 1081, 1085 (D.C. Cir. 1996), for the proposition that "[i]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."

[3] To ease the Court's reference to the Administrative Record, Plaintiffs refer to the relevant Bates numbering.

That proposition is correct, but it has no relevance here. The N-426 Policy, which includes the O-6 requirement, applies in its entirety to Plaintiffs Isiaka, Lee, Gunawan, and Machado. Each of them remains subject, at this moment, to the O-6 requirement (together with the other requirements of the Policy). None of them can receive an N-426 certification unless and until an O-6 level officer personally certifies their form. Thus, unlike the plaintiffs in *LoBue*, Plaintiffs here do not seek to "overcome their jurisdictional infirmities [ ] by reference to the characteristics of putative class members." *LoBue*, 82 F.3d at 1085. Each of them is personally subject to the very policy they challenge. It defies logic, and principles of judicial efficiency, to require Plaintiffs to challenge each aspect of the N-426 Policy sequentially and only when it is the direct and sole cause of their injury. There is no doubt that Plaintiffs' inability to obtain certificates of honorable service stems from the N-426 Policy, including its O-6 requirement.

II. The Proposed Class Satisfies Commonality and Typicality and is Sufficiently Definite.

Defendants also contend that the proposed class lacks commonality and typicality because "it is not limited to service members who have not yet met the time-in-service requirements." Defs.' Class Cert. Opp. 4, 5. This argument again misconstrues the nature of Plaintiffs' challenge, which is not limited to selective aspects of the N-426 Policy. It is also not supported by the cases Defendants cite. And while Defendants raise a merits question about the definition of "served honorably" under 8 § U.S.C. 1440 to argue that the proposed class is not sufficiently defined, Defs.' Class Cert. Opp. 6, that argument is wrong.

"[E]ven a single [common] question will do" to satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotations and citations omitted); *see also DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013) (commonality is satisfied where there is a single "uniform policy or practice that affects all class members").

"[F]actual variations among the class members will not defeat the commonality." *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003). As Defendants correctly note, the Supreme Court has explained that the touchstone of the commonality requirement is whether the "'determination' of the 'truth or falsity' of the common claim in the case 'will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Defs.' Class Cert. Opp. 5 (quoting *Wal-Mart*, 564 U.S. at 350).

The proposed class satisfies commonality. Here, factual differences among class members are inconsequential because *all* members—including those who have satisfied the minimum service requirement—remain subject to the N-426 Policy until they receive (or are denied) an N-426 certification, and thereupon exit the class. All of the proposed class members' claims arise from the implementation of this "uniform policy," *DL*, 713 F.3d at 128, and all suffer the same injury: inability to obtain a certification of honorable service. Plaintiffs' claims are quintessentially "capable of classwide resolution" because determination of the legality of the N-426 Policy will dispose of all class members' claims "in one stroke." *Wal-Mart*, 564 U.S. at 350. For example, either the N-426 Policy was or was not subject to notice-and-comment rulemaking. If it was, the entire Policy must be set aside.

For similar reasons, the proposed class also satisfies the typicality requirement. Typicality "focuses on whether the representatives of the class suffered a similar injury from the same course of conduct," *Bynum*, 214 F.R.D. at 34, and "is not destroyed merely by factual variations." *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (quotation marks omitted). Plaintiffs' claims are typical of those of the class. Regardless of whether any putative class member may have satisfied the minimum service requirement, or any other requirement, within

the N-426 Policy, all proposed class members are subject to the Policy as a whole: because of the Policy, all of them have been prevented from obtaining a certification of honorable service.

Finally, Defendants are also wrong in asserting that the proposed class is not sufficiently definite because "[a]bsent the challenged policy, Defendants do not currently have another standard set of criteria to use to make honorable service determinations for N-426 certifications." Defs.' Class Cert. Opp. 6. This objection is meritless. Until the promulgation of the challenged N-426 Policy, Defendants made honorable service determinations for hundreds of thousands of N-426 certifications. Plaintiffs are simply asking the Court to order Defendants to return to the "set of criteria" they used for many years.

Moreover, the question of how to interpret "serving honorably" for purposes of N-426 certification under 8 U.S.C. § 1440 is intertwined with the merits question of whether Defendants have a ministerial mandate to issue N-426 certifications. *See* Pls.' MSJ Opp. 24–30. As Plaintiffs have explained, section 1440 makes clear that Defendants have a ministerial duty to issue N-426 certifications and that the determination of honorable service is based on an individual's past service at the time the N-426 is completed. *See* Pls.' MSJ Opp. 24–30; Pls. Mem. in Supp. of Mot. for Prelim. Inj. 10–11, 24–26, ECF No. 4. There is therefore nothing about the proposed class that is not "ascertainable" with reference to "objective criteria." *Thorpe v. District of Columbia*, 303 F.R.D. 120, 139 (D.D.C. 2014).

In any event, how to interpret "serving honorably" for purposes of N-426 certification under 8 U.S.C. § 1440 is irrelevant to class certification. In their prayer for relief, Plaintiffs ask the Court to order Defendants to promptly "certify or deny" class members' Form N-426s. *See* Compl. Prayer for Relief; Am. Compl. Prayer for Relief. Therefore, there is no need to know

whether a service member is or is not serving honorably to ascertain his or her membership in the class.[4]

III. Certifying the Class Will Not Interfere With Existing Litigation.

Defendants further attempt to thwart certification of the proposed class by arguing that doing so would "interfere with litigation from other jurisdictions." Defs.' Class Cert. Opp. 7. This is demonstrably false, and the Court should also reject these arguments.

The two cases that Defendants cite as having "potential overlap with Plaintiffs' proposed class," Defs.' Class Cert. Opp. 7, are factually dissimilar to this case in significant ways. As a result, class certification here would not implicate litigation in those cases. The first case, *Kotab v. U.S. Department of Air Force*, is a *pro se* challenge to, *inter alia*, the N-426 Policy by a lawful permanent resident "who *seeks to join* the Air Force Reserves." No. 2:18-cv-2031-KJD-CWH, 2019 WL 4677020, at *4 (D. Nev. Sept. 25, 2019) (emphasis added). The plaintiff in *Kotab* sought to enlist in the Air Force and apply for expedited naturalization, and alleged that new DoD policies prevented him from doing so. *See id*. Defendants are correct in noting that Kotab would not be a class member in this case—but not because of res judicata. Rather, he would fall outside Plaintiffs' proposed class because he has not yet enlisted or served in the military and the proposed class comprises "non-citizens *serving* . . . in the U.S. military . . . ." Pls.' Mot. for Class. Cert. 1 (emphasis added). Thus, certification of Plaintiffs' proposed class would not "interfere" with litigation in *Kotab*.

[4] Accordingly, the class should be defined as "all individuals who: (a) are non-citizens serving in the U.S. military; (b) have requested but not received a certified Form N-426, and (c) are not Selected Reserve MAVNIs covered by the *Kirwa* lawsuit." Plaintiffs' proposed revision to the class definition is also reflected in their Amended Complaint, filed today. *See* Am. Compl. ¶ 166.

The second case that Defendants point to, *Kuang v. Department of Defense*, No. 18-cv-03698 (N.D. Cal.), is also distinguishable. *Kuang* involves a class action challenge to an entirely different policy issued by Defendants on October 13, 2017 that requires lawful permanent residents ("LPRs") to complete an enhanced background check *before* they can begin their military service. *See Kuang*, 340 F. Supp. 3d 873, 889 (N.D. Cal. 2018) ("The October 13 Memo explained that . . . DoD would require a completed background investigation before an LPR could enter 'Active, Reserve, or Guard Service.'"). While the plaintiffs in *Kuang* also alleged injury to their ability to naturalize expeditiously, this injury stemmed from their inability to *begin* their service—not from the N-426 Policy. *Id*. at 897 ("Here, Plaintiffs are a class of LPRs who allege that, because of the challenged policy, they are subject to delays averaging at least 350 days before they can *enter* military service." (emphasis added)). Thus, there is no overlap between the *Kuang* class and Plaintiffs' proposed class. The *Kuang* class is limited to lawful permanent residents who have not yet entered service. By contrast, Plaintiffs' proposed class consists of non-citizen service members who have already begun their service. Certification of the proposed class here will not disrupt the ruling in *Kuang*.

Finally, it is noteworthy that this Court certified a class in *Nio* while litigation in *Kirwa* was ongoing. Those two cases share many more factual and legal similarities than the present case does with *Kotab* and *Kuang*, including that they concerned a group of service members (*i.e*., Selected Reserve MAVNIs) challenging the same policy. *Compare* Order at 1–2, *Nio v. U.S. Dep't of Homeland Sec.*, No. 17-cv-998 (D.D.C. Oct. 27, 2017), ECF No. 72 (certifying class of (a) Selected Reserve MAVNIs who enlisted prior to October 13, 2017, (b) served honorably, (c) submitted N-400 applications for naturalization, (d) received certified Form N-426s, and (e) had final adjudication of their N-400s withheld or delayed because of, *inter alia*, the N-426 Policy)

with Mem. Op. at 2, *Kirwa v. U.S. Dep't of Def.*, No. 17-cv-1793 (D.D.C. Dec. 1, 2017), ECF No. 47 (certifying class of (1) MAVNI enlistees, (2) who have served in the Selected Reserve, and (3) have not received a completed Form N–426). Yet the Court found these similarities to present no obstacle to granting class certification in both cases.[5] So too here, any similarities with *Kuang* and *Kotab* are immaterial and certifying Plaintiffs' proposed class would in no way "interfere" with litigation in those cases.

CONCLUSION

For the foregoing reasons, the proposed class satisfies all the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(1) and (2). Plaintiffs respectfully request that the Court certify the class as consisting of all individuals who:

(a) are non-citizens serving in the U.S. military;

(b) have requested but not received a certified Form N-426; and

(c) are not Selected Reserve MAVNIs covered by the *Kirwa* lawsuit.

Further, Plaintiffs request that the Court appoint Plaintiffs' counsel as class counsel.

Dated: June 8, 2020

Respectfully submitted,

/s/ Noor Zafar

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[5] Notably, Defendants did not even contest class certification in *Kirwa* because "the Court granted a similar motion for class certification in *Nio*." Defs.' Notice at 1, *Kirwa*, No. 17-cv-1793 (D.D.C. Nov. 28, 2017), ECF No. 40.

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