UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGE SAMMA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE and MARK ESPER, in his official capacity as Secretary of Defense, Defendants.	Civil Action No. 1:20-cv-01104-ESH The Honorable Ellen Segal Huvelle

DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' summary judgment motion and opposition to Defendants' motion is premised on the notion that this case is merely an extension of *Kirwa v. U.S. Department of Defense*. But that is not so. Though alleging the same Administrative Procedure Act ("APA") violations as the *Kirwa* plaintiffs, the Plaintiffs in this case challenge a different requirement set forth in a different section of formal policy guidance issued by Defendants, the Department of Defense ("DoD") and Secretary of Defense Mark Esper, in his official capacity. The Court, moreover, should be reluctant simply to apply its rulings in *Kirwa*—which resolved a preliminary injunction motion and a motion to dismiss—to the case at bar. Since the time of those rulings, both a district judge and a three-judge panel of the Circuit Court for the Ninth Circuit Court of Appeals dismissed challenges to the same or related policies, concluding that judicial review was not available. Most recently, Congress spoke to the issue of honorable service determinations for naturalization purposes in the National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), Pub. L. 116-92, 133 Stat. 1198 ("NDAA 2020"), and it declined to disturb the existing policies and reiterated DoD's discretion when making such determinations.

But Plaintiffs' claims in this case fail on the merits regardless. The Complaint—and representations made by Plaintiffs' counsel in this case—make clear that Plaintiffs are challenging only the time-in-service and O-6 requirements, that only Plaintiff Isiaka has standing to challenge the former, and that no Plaintiff has standing to challenge the latter. Plaintiffs cannot prevail on their challenge under the APA to either requirement: Congress left it to DoD's discretion to determine when a service member has "served honorably," and DoD does not have a ministerial duty to certify service as "honorable." Nor are the challenged policies arbitrary and capricious or outside the bounds of DoD's statutory authority. And Plaintiffs' contention that

DoD was obligated to undertake notice-and-comment rulemaking in order to promulgate the two requirements also fails. Defendants are accordingly entitled to summary judgment.

ARGUMENT

I. PLAINTIFFS CHALLENGE ONLY THE TIME-IN-SERVICE AND O-6 REQUIREMENTS IN SECTION I OF THE POLICY MEMORANDUM

Plaintiffs seek to significantly alter the scope of the issues in this case, claiming that they are challenging "the suite of requirements" in the October 13, 2017 policy memorandum, including both Sections I and II of the memorandum. *See* Pls.' Opp'n to Defs.' Mot. for Summ. J. and Reply in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Opp."), ECF No. 21, at 14-17. These assertions are wrong, and they conflict with Plaintiffs' pleadings and representations made by Plaintiffs' counsel. Plaintiffs cannot reshape their cause of action at this late juncture in an opposition brief.[1] *See, e.g., Mattiaccio v. DHA Grp., Inc*., 293 F.R.D. 229, 233 (D.D.C. 2013) (holding that "the Plaintiff cannot amend his proposed pleading by way of his reply brief").

As an initial matter, Plaintiffs cannot plausibly claim that they are challenging anything more than the time-in-service and O-6 requirements. *See* Pls' Opp. at 14-15. Plaintiffs are "masters of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987), and their Complaint in this case identified *only* the O-6 and time-in-service requirements in the discussion of why Plaintiffs had not yet received N-426 certification, *see* Complaint, ECF No. 1, ¶¶ 85-121; *see also* Pls.' Mot. for Prelim. Inj., ECF No. 4, at 15-20 (discussing alleged harm to the Plaintiffs by operation of the policy). Permitting Plaintiffs to challenge the policy memorandum "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the

[1] At 5:55 p.m. Eastern Standard Time on the date Defendants' reply in support of their Cross-Motion for Summary Judgment was due, Plaintiffs filed an Amended Complaint in this action. *See* Am. Compl., ECF No. 24. Plaintiffs provided Defendants with no advanced notice of this filing. Defendants have not had the opportunity to assess any new allegations made by Plaintiffs but intend to address those new allegations and their implications for this case at a later date.

face of Article III's injury-in-fact requirement." *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). Plaintiffs' counsel, moreover, reaffirmed the scope of the claims at issue during the parties' May 5, 2020 telephonic status conference in the following exchange:

> THE COURT: But as far as you understand, [the screening requirements are] not the reason that they're not getting their N-426s?
>
> MS. KIM: We don't believe so because, for most of them, when they requested the N-426 certifications and had those requests denied, for the most part, the reasons have been either that they had failed to complete the minimum service duration requirement and/or that the O6, a commissioned officer of O6 pay grade or higher needs to sign off on the certification, and was unable to at that time or needs more topic [sic] in order to complete that sign-off.

Tr. of 5/5/20 Teleconference, ECF No. 19-3, at 6:23 – 7:7; *see also id*. at 7:14-19 (THE COURT: "*So far the plaintiffs have made two challenges . . . . One has to do with who signs off on the N-426 and the second one has to do with whether you can require 180 days, or in one instance, it's a year*. So far, I haven't heard much about the background investigation.") (emphasis added).

Yet Plaintiffs now assert that they are challenging "the suite of new requirements" and "all of the new substantive requirements" in the October 13, 2017 policy memorandum. *See* Pls.' Opp. at 14. But those phrases are nowhere to be found in the Complaint, and their Opposition omits discussion of certain requirements.[2] For instance, Plaintiffs make no mention of the memorandum's requirement that service members seeking N-426 certification not be the

[2] Nor was the "suite" of requirements at issue in *Kirwa*. There, plaintiffs alleged harm only from the requirement that the plaintiffs complete active duty service and attend basic training (which they were unable to do until completion of the security screening) before being eligible for N-426 certification. *See* First Am. Compl., *Kirwa v. U.S. Dep't of Def.*, 17-cv-1793, ECF No. 33, ¶¶ 65-73. Moreover, unlike here, only Section II of the policy was at issue in *Kirwa*, *id*. ¶ 60, which does not set forth specific time-in-service requirements. SAMMA_0008. To the extent both *Kirwa* and this case challenge the same set of requirements in the October 13, 2017 policy memoranda, that would be grounds for dismissing this case as impermissible claim-splitting. *See Clayton v. D.C.*, 36 F. Supp. 3d 91, 94 (D.D.C. 2014); *see also Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir.2011) (noting that claim splitting can occur with different plaintiffs so long as there is representation of the same interests).

subject of a pending disciplinary action, adverse administrative action or proceeding, or law enforcement or command investigation, *see* SAMMA_0007, despite the fact that it is part of the "suite" of "substantive requirements" in the memorandum. Also unmentioned is the 30-day turnaround requirement contained in DoD's April 2020 update to the policy, *see* SAMMA_0001.

Plaintiffs' belated attempts to bring a challenge to the "suite" of requirements would transform this case into a moving target, unmoored from the actual Amended Complaint. Indeed, at multiple point in their Opposition, Plaintiffs disingenuously suggest that Defendants have "change[d]" their "characterization of the Administrative Record" from what the Government represented in *Kirwa* and fault Defendants for not addressing the active-duty and security screening aspects of the policy. *See* Pls.' Opp. at 33, 38 n.31. Not so. Defendants simply prepared a motion and certified the Administrative Record to address the claims alleged *in this case*, as plead in the Complaint and as represented by Plaintiffs' counsel. Attempting to litigate new claims on the current AR would cause significant prejudice to Defendants and would constitute plain error.

Relatedly, Plaintiffs' counsel expressly disclaimed any challenge to Section II of the October 13, 2017 policy in the parties' May 5, 2020 teleconference with the Court, *see* 5/5/20 Tr. of Teleconference at 3:4-7 (THE COURT: Is it true that the plaintiffs are challenging section one only? MS. KIM: Of the October 13, 2017 memo, yes, that is the case.), and Defendants prepared their summary judgment motion with that understanding, *see* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. and Opp. to Pls.' Mot. for Summ. J. ("Defs.' Cross-Mot."), ECF No.

19-1, at 12. Plaintiffs shrug off this comment as a "misstatement," yet at no point until they filed their opposition did Plaintiffs seek to correct this misstatement or amend their pleadings.[3]

II. ONLY PLAINTIFF ISIAKA HAS STANDING TO CHALLENGE THE TIME-IN-SERVICE REQUIREMENT AND NO PLAINTIFF HAS STANDING TO CHALLENGE THE O-6 REQUIREMENT

In any event, no Plaintiff would have standing to challenge Section II of the policy. As discussed below, the only Plaintiff who has not received a certified N-426 is Plaintiff Isiaka, and he enlisted in January 2020. *See* Compl. ¶ 21. Section I of the policy accordingly applies to him because he enlisted after the date the policy went into effect. *See* SAMMA_0007.

Plaintiffs' last-ditch effort to maintain standing for five of the six Plaintiffs to challenge the time-in-service requirement should be rejected.[4] Plaintiffs claim a purported lack of receipt by the five Plaintiffs certified prior to Defendants' filing their motion, *see* Pls.' Opp. at 16, 17, but this tactic ignores the fact that signed copies of all five certifications were attached as exhibits to Defendants' motion and that copies of the forms are available in each Plaintiff's local military personnel record. *See, e.g.*, Decl. of Captain Andrew D. Turpin, ECF No. 19-4 ¶¶ 4, 5 (describing location of records for Plaintiffs Perez and Park and attaching copies of the signed forms). Regardless, Defendants have served all five Plaintiffs with their certified N-426 forms, and each Plaintiff's official acknowledgment of receipt is attached with this filing. *See* Decl. of Liam Holland ¶¶ 2-4 (attaching official acknowledgment of receipt for all five Plaintiffs).

[3] Notably, as discussed further below, Plaintiffs (mistakenly) would hold the Government to a statement made by counsel in *Nio v. U.S. Department of Homeland Security* as to whether an N-426 certification was merely ministerial, yet they disclaim any reliance on their own statements to the Court in this case. A critical difference in this instance is that Plaintiffs cannot amend their own pleadings in an Opposition by disregarding the pleading itself, let alone their statements to the Court. *See, e.g.*, *Mattiaccio*, 293 F.R.D. at 233.

[4] Plaintiffs now concede that Perez, Park, Samma, and Bouomo lack standing. *See* Pls.' Reply Mem. in Supp. of Pls.' Mot. for Class Cert., ECF No. 26, at 3 n.2.

It also remains the case that no Plaintiff has standing to challenge the O-6 requirement. *See* Defs.' Cross-Mot. at 15. Given the opportunity to do so, Plaintiffs again fail to articulate how Plaintiff Isiaka will ever be harmed by that requirement. *See* Pls.' Opp. at 17. To the extent Plaintiffs believe the O-6 requirement will delay their ability to receive certification, *see* Compl. ¶¶ 153, 158, 162, 167 (claiming that Plaintiffs suffer "unreasonable delays" in obtaining certification), that concern has been addressed by the 30-day turnaround requirement embodied in the April 2020 update to the policy, *see* SAMMA_0001. Plaintiffs make no mention of this update. Nor do Plaintiffs explain how they can square their challenge to the O-6 requirement here with their desire for an injunction that mirrors that issued in *Kirwa*, which incorporated the O-6 requirement. *See* Am. Order, *Kirwa v. U.S. Dep't of Def.*, 17-cv-1793, ECF No. 32.

III. DEFENDANTS' HONORABLE SERVICE DETERMINATIONS ARE COMMITTED TO AGENCY DISCRETION BY LAW

Plaintiffs cannot prevail on their APA claims because those claims are not subject to judicial review. Although there exists a "presumption favoring judicial review of administrative action," *see Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984), that presumption "runs aground when it encounters concerns of national security," *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988), and military policy, which has "traditionally been committed to agency discretion," *see Heckler v. Chaney*, 470 U.S. 821, 832 (1985). As the APA's draftsmen explained, under the APA "courts would still refuse 'to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action.'" *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (report citation omitted).

In *Saavedra Bruno*, one of the cases cited by Plaintiffs, the State Department denied a visa because of suspected drug trafficking, even though consular officers had *some* law to apply—specifically, "the consular officer 'must have more than a mere suspicion—there must

exist a probability supported by evidence, that the alien is or has been engaged in trafficking.'" 197 F.3d at 1157 (citation omitted). But because "issues about foreign affairs [and] military policy" are "inappropriate for judicial determination," the agency action was unreviewable. *Id*. at 83 (internal citation omitted). Here, Congress's intent to commit characterization of service to the military's discretion is "'fairly discernible' in the detail of the legislative scheme," *see Block*, 467 U.S. at 349, because Congress crafted the relevant statute in 1940s against the backdrop of jurisprudence holding that courts "are wholly without any effective power of review" discretion in characterizing service. *See Davis v. Woodring*, 111 F.2d 523, 525 (D.C. Cir. 1940). There is no indication that Congress intended to alter that tradition. *See Heckler*, 470 U.S. at 832.[5]

Although "[t]he overriding consideration [in the reviewability analysis] is the nature" of the administrative action at issue, *see Saavedra Bruno*, 197 F.3d at 1158, Plaintiffs fail to address meaningfully the nature of characterizing service, *see* Pls.' Opp. at 23-24. Instead, Plaintiffs conflate the military's responsibility for determining honorable service with § 1440's citizenship requirements, the latter of which DoD does not oversee. What DoD does oversee is § 1440's requirement that a service member have served honorably, which is and always has been a question of military policy subject to military expertise. *See United States v. Kelly*, 82 U.S. 34, 36 (1872); *Fong Chew Chung v. United States*, 149 F.2d 904, 906 (9th Cir. 1945).

Characterizing service "involves a complicated balancing of a number of factors which are peculiarly within [military] expertise," *see Heckler*, 470 U.S. at 831, and are not guided by text in the statute. For example, DoD has long considered factors such as "proper military behavior and proficient performance of duty with due consideration for the member's age, *length*

[5] Tellingly, the one case cited by Plaintiffs where the court held that an agency's decision was reviewable involves neither foreign affairs nor military policy. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) (reviewing Secretary of Transportation's administration of the Federal-Aid Highway Act).

of service, grade, and general aptitude." *See, e.g.*, 32 C.F.R. § 41.5(a) (1973); Defs.' Cross-Mot. at 28-29. These evaluations were, as noted, long subject to the military's unreviewable discretion alone.[6] *See Davis*, 111 F.2d at 525 ("Congress having failed to prescribe the form of discharge and having left it to the discretion of the [Executive Branch], we are wholly without any effective power of review.").

Plaintiffs' efforts to dismiss recent case law concerning judicial review for the challenged policies and others like it are without merit. Plaintiffs' primary argument against *Kuang v. U.S. Department of Defense*, 778 F. App'x 418, 419 (9th Cir. 2019), is that the Ninth Circuit applied the *Mindes* test, which has been rejected in this Circuit. Pls.' Opp. at 24. But the D.C. Circuit rejected the *Mindes* test only because it "intertwines the concept of justiciability with the standards to be applied to the merits of the case." *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989) (citation and alteration omitted). That distinction is not relevant here, where the cross-motions concern both justiciability and the merits of the claims. Further, the key point in the *Kuang* court's conclusion—that "military decisions about . . . personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches," *see Kuang*, 778 F. App'x at 421—stemmed from principles of military deference that are not limited to the *Mindes* analysis.

Plaintiffs offer little criticism of *Kotab v. U.S. Dep't of the Air Force*, No. 2:18-cv-2031-KJD-CWH, 2019 WL 4677020 (D. Nev. Sept. 25, 2019), erroneously asserting that the court there "fail[ed] to consider the structure or the legislative history of 8 U.S.C. § 1440." Pls.' Opp.

[6] Omitted from Plaintiffs' Opposition is any reason why DoD's designation of the rank of the certifying officer should ever result in "intervention by the federal courts," Pls.' Opp. at 23, particularly where Defendants remain in compliance with the timeframes established pursuant to the 2020 NDAA.

at 24 n. 21. But the *Kotab* court did precisely that and, based on its review of the statutory language and history, drew the conclusion that § 1440 "sets forth no meaningful standard to evaluate either whether DoD should certify a soldier as having served honorably or when DoD should so certify." 2019 WL 4677020 at *9. The authority relied upon by the *Kotab* court, combined with the additional support identified by Defendants in this case, compel the conclusion that Congress intended to leave to military discretion characterizations of service.[7]

Plaintiffs' remaining arguments concerning related statutory provisions and DoD's policies for characterizing service stray from the inquiry as to judicial reviewability of honorable service determinations but, in any event, lack merit. To start, Plaintiffs have misplaced reliance on 10 U.S.C. § 12685, which provides a specific exception from the military's general discretion in characterizing service and applies to a reservist "*who is separated for cause.*" 10 U.S.C. § 12685 (emphasis added). By its own terms, § 12685 does not apply where, as here, an entry-level reservist has not been separated. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). And because a service member may not leave military service without approval, the section rarely overrides the main military policy requiring entry-level uncharacterized service. *See* SAMMA_0089.[8]

[7] Defendants have never asserted that they may "set whatever requirements they please." Pls.' Opp. at 21. To the contrary, Defendants must administer an effective military within the limits of their statutory and constitutional authority. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring). Indeed, Section 526 of the NDAA is evidence that Congress is paying close attention to Defendants in this area.

[8] Section 12685's legislative history confirms that the provision was enacted for reasons independent of ensuring that entry-level service remains uncharacterized. Instead, the statute addressed Congress's concern about insufficient process under preexisting military policy by "prevent[ing] a man other than in these enlisted conditions from receiving a bad-conduct discharge through the mail without knowledge." *See Reserve Components: Hearings Before the*

Plaintiffs' attempts to discount the standards for entry-level separations in Department of Defense Instruction ("DoDI") 1332.14 similarly lack merit. In fact, Defendants agree that DoDI 1332.14 "directs that 'with 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.'" Pls.' Opp. at 22 (quoting DoDI 1332.14). That is precisely Defendants' point: longstanding DoD policy does not characterize a *de minimis* period of service as "honorable," but instead, "the required characterization" is "entry-level separation." SAMMA_0089. And entry-level separation is "[u]ncharacterized," *see id.*, unless something unique in the service record indicates the service should be characterized as honorable, *see id.* (stating that an entry-level solider may receive characterized service if "on a case-by-case basis, . . . the characterization of service as honorable is clearly warranted by the presence of unusual military duty."). But as explained throughout DoDI 1334.14, characterization of service in a variety of circumstances should be "Honorable, *unless* . . . [a]n entry-level separation is required." SAMMA_0066 (emphasis added) (expiration of service obligation); *id.* at 0067 (same, selected changes in service obligations); *id.* at 0070 (same, disability); *id.* at 0072 (same, defective enlistments and inductions). Above all else, these policies reflect the fact that DoD has always possessed and exercised the discretion to determine what type of characterization is warranted under a given set of circumstances.[9]

H. Comm. on Armed Servs. Pursuant to H.R. 4860, 82nd Cong. 884 (1951) (statement of John G. Adams, legislative counsel for the Sec'y of Defense).

[9] Plaintiffs also cite an April 2017 document from the Army Human Resources Command that says, "[a]s a general rule, a Soldier is considered to be serving honorably." Pls.' Opp. at 22 (emphasis removed). But every "general rule" has exceptions, and the challenged time-in-service requirement applies a limited and reasonable exception from the general rule consistent

IV. DEFENDANTS' ROLE IN CERTIFYING HONORABLE SERVICE IS NOT MINISTERIAL BUT INSTEAD ALLOWS FOR EXCERCISING DISCRETION

Defendants' cross-motion established that they are not unlawfully withholding N-426 certifications because § 1440 contains no "clear legal duty" that Defendants make honorable service certifications within a certain period of time or following a particular set of criteria. *See Citizens for Responsibility & Ethics in Wash. v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)). Plaintiffs place great weight on § 1440's directive that DoD "shall determine" whether foreign and non-citizen soldiers have served honorably in an "active-duty status," *see* Pls.' Opp. at 25, but that phrase is not the dispositive language Plaintiffs seem to suggest. The statute sets forth no time period by which DoD must make an honorable service determination, nor does it set out any criteria that DoD must apply. *Id*; *see also Beshir v. Holder*, 10 F. Supp. 3d 165, 176 (D.D.C. 2014) ("The absence of a congressionally-imposed deadline or timeframe" for an agency to act suggests that Congress left to "administrative discretion" the pace of the agency's decision-making process. (citation omitted); *Kotab*, 2019 WL 4677020, at *9 ("Congress's silence as to what type of conduct should be deemed 'honorable'—which, like 'enlist,' constitutes a military term devoid of qualification—signals that such a determination is left to the prerogative of DoD."). As it always has, Congress left it to DoD to determine what "honorable" means.

Plaintiffs also miss the significance of the 2020 NDAA, the most recent instance where Congress has spoken on the issue of honorable service for immigration purposes. Although

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with characterizations of service for soldiers under DoDI 1332.14's entry-level status. In any event, the Army document pre-dated the October 13, 2017 policy memorandum which consists of DoD's formal guidance on N-426 certifications. Plaintiff Isiaka enlisted years after the current time-in-service requirement has been in place and thus is not someone to whom DoD arguably "represented . . . that they would naturalize . . . shortly after enlistment." *See Kirwa*, 285 F. Supp. 3d at 40.

Plaintiffs concede that, because the 2020 NDAA gives DoD discretion to designate the rank of the certifying official, there can be no § 706(1) claim with respect to the O-6 requirement, *see* Pls.' Opp. at 28, they fail to appreciate other consequences of the legislation. As Defendants discussed in their Cross-Motion, the House proposed codifying DoD's current policy of having N-426s certified by commissioned officers serving in the pay grade of O-6 or higher, ultimately leaving it to DoD's discretion to designate the appropriate rank. *See* Defs.' Cross-Mot. at 24. These officers have attained a senior rank in the military and command units compromised of thousands of troops. *See id.* Plaintiffs offer no explanation for why Congress would contemplate having such a senior officer be the certifying authority if the task truly was ministerial rather than evaluative in nature. *Id.* Congress, moreover, "is presumed to be aware of established practices and authoritative interpretations of the coordinate branches" when it passes legislation. *United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002). At the time the 2020 NDAA was passed, DoD's time-in-service requirement had been in place for more than two years. Had Congress believed any requirement was improper, Congress could have made that clear in the NDAA. Instead, Congress did the opposite, fortifying DoD's discretion over the process. *See* 2020 NDAA.

Plaintiffs rely on legislative history from 1968—more than twenty-five years after the 1942 Congress enacted the text and policy at issue in this case—to insist further that "Defendants have a ministerial duty to certify past honorable service." Pls.' Opp. at 26-27. But the cited language primarily repeats the statutory text, indicating that USCIS may not subject a "noncitizen national *who has served honorably* . . . to a waiting period." *Id.* at 26 (emphasis added) (quoting Pls.' Mot. for Prelim. Inj., ECF No. 4, Ex. 3, at 4-5). Nothing in that statutory language indicates that a solider with a *de minimis* record is entitled to an "honorable" service

characterization. The Committee's report further reflects a desire to afford service members an expedited path to citizenship given "the ever-present possibility of reassignment to the war zones of operation." Pls.' Mot. for Prelim. Inj. Ex 3 at 13. But even during times of war, a service member cannot be assigned to active duty service outside of the United States prior to completion of a minimum twelve weeks of basic training, *see* 10 U.S.C. § 671(a)-(b), which gives DoD time to ensure that there exists a sufficiently developed service record before certifying honorable service.

Regardless, the 1968 Senate report constitutes subsequent legislative history, and "[a]rguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring). Congress amended § 1440 in 1968, but it did so only in order to expand qualifying periods of war. *See* Pub. L. 90-633, 82 Stat. 1343 (1968). Nothing in the 1968 amendments altered Congress's and DoD's longstanding understanding about the statute's honorable service requirement, which had been debated and enacted by Congresses long before. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (concluding that subsequent legislative history was not "entitled to much weight" and warning that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (citation omitted)). Instead, the issue of service characterizations was addressed by Congress in 1942 and 1948. *See* Defs.' Cross-Mot. at 5-6, 22-23; *see also Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (holding that legislative history from 1985 reenactment of text from 1980 statute was not authoritative "because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that

Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.").[10]

Plaintiffs misrepresent the 1942 legislative history, claiming that they "have never asserted that they are entitled to . . . citizenship upon enlistment." Pls. Opp. at 28 n. 25. But, as the draftsman explained to the Committee, the *reason* § 1440 does not permit citizenship shortly after entering service is because a soldier's "service must be honorable." *See Hearing on H.R. 6073, H.R. 6416, and H. R. 6439*, 77th Cong. 12 (1942) (statement of Dr. Henry B. Hazard). Sufficient time, in other words, is necessary to characterize service.

Lastly, the Court should similarly resist making a § 706(1) determination in this case based on an isolated phrase from a lengthy brief in *Nio*. Plaintiffs' persistence in pressing this point is notable, in light of their effort to distance themselves from representations Plaintiffs' counsel has made about this case. *See* Part I. As Defendants previously explained, the Government's passing reference in that case to a "ministerial duty" was not a central feature of the Government's argument and was not relied upon by the Court in ruling on the *Nio* plaintiffs' motion for a preliminary injunction. *See* Defs.' Cross-Mot. at 25. Nor did the Court in *Kirwa* "determine" that the statement in *Nio* could serve as the basis of a § 706(1) claim. Although the Court in *Kirwa* stated at the preliminary injunction stage that the Government was "arguably judicially estopped" from deviating from the statement in *Nio*, *see Kirwa v. U.S. Dep't of Def.* ("*Kirwa I*"), 285 F. Supp. 3d 21, 38 n.18 (D.D.C. 2017), the Court made no mention of the

[10] In a footnote, Plaintiffs argue that this Court should erase the "active-duty" provision in the statute, claiming that the "legislative history . . . confirms the impropriety of any active duty requirement." Pls.' Opp. at 21 n. 19. But the statute says that the military "shall determine whether persons have served honorably in active-duty status." 10 U.S.C. § 1440. There is no exception for reservists. And courts "won't allow 'ambiguous legislative history to muddy clear statutory language.'" *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)).

statement in its ruling on the Government's subsequent motion to dismiss, even though the point was again raised in the parties' briefing, *see Kirwa v. U.S. Dep't of Def.* ("*Kirwa II*"), 285 F. Supp. 3d 257, 267-68 (D.D.C. 2018).

Furthermore, the Government's brief in *Nio* demonstrates that the reference to "ministerial" was intended to emphasize USCIS's responsibility to exercise its own judgment when making naturalization decisions, not to diminish or eliminate DoD's statutorily-imposed role in the process. *See* Defs.' Cross-Mot. at 25. Plaintiffs' reliance on this passing reference to "ministerial obligation" falls well short of establishing a § 706(1) violation here. *See Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 309 (6th Cir. 1988) (holding that statements in briefs did not constitute the concession of a particular issue because "briefs prepared for oral argument are not pleadings").

V. THE TIME-IN-SERVICE AND O-6 REQUIREMENTS WERE THE PRODUCTS OF REASONED DECISION MAKING

Defendants' Cross-Motion explained the reasons why the time-in-service and O-6 requirements fell well "within the bounds of reasoned decisionmaking" and thus must be upheld under § 706(2). *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983). Plaintiffs' arguments to the contrary are meritless and should be rejected.

Plaintiffs again point to this Court's decision in *Kirwa* to suggest that DoD had a "long-standing" practice of certifying N-426s after *de minimis* time in service. But the Court in *Kirwa* simply referred to a "past practice" without characterizing it as "longstanding." *Kirwa I*, 285 F. Supp. 3d at 29. In any event, the only evidence cited by the Court for the existence of such practice were seven completed N-426 certifications attached as exhibits to the plaintiffs' preliminary injunction motion in *Nio*, which had been certified within one day after submission. *See id.* (citing *Nio v. U.S. Dep't of Homeland Sec.*, Pls.' Mot. for Prelim. Inj., ECF No. 19, at

36). Additionally, because *Kirwa* concerned only soldiers in the Selected Reserve of the Army Ready Reserve who enlisted via the Military Accessions Vital to the National Interest ("MAVNI") program, there is no basis to extend the reach of the Court's limited observations: the Court did not make any observations about N-426 practices that may have existed for active-duty service member, may have existed in other services, or may have existed for Lawful Permanent Residents ("LPRs"). At most, the Court's discussion of DoD practices extends back only until 2009, which is when the MAVNI program began accepting enlistees.[11] *See* SAMMA_0019. Rather than the limited review the Court was able to conduct in *Kirwa*, the most fulsome picture of DoD's practices for making honorable service determinations encompasses the relevant legislative history, case law discussing those practices, and DoD's regulations, all of which reflect a consistent desire to ensure that a service member has a sufficiently developed record. *See* Defs.' Cross-Mot. at 22-24, 28-29.

Equally without merit are Plaintiffs' challenges to the soundness of the time-in-service and O-6 requirements. The Administrative Record shows that both of the challenged requirements stemmed from DoD's desire to create consistency and "formal guidance" for N-426 certifications. *See* SAMMA_0006. A thorough review of the MAVNI program in 2016 revealed inconsistencies with the N-426 certification process, especially with respect to the security screening. *See* SAMMA_0019, 51. Following this and other reviews, DoD began developing

[11] Plaintiffs' assertion that DoD "long permitted a broad range of military personnel to verify service records and complete the certification," *see* Pls.' Opp. at 31, is wholly unsupported. Plaintiffs cite two authorities for this proposition: the Court's decision in *Kirwa*, which had no discussion of the rank of the certifying official, and the certified N-426s included in the certified Administrative Record in this case, *see* SAMMA_0169-210, all of which were completed in 2016-17, *see* Decl. of Stephanie Miller, ECF No. 19-2, ¶ 5. And it was DoD's review of the certified N-426s that revealed a departure from the intended standard. *See* Miller Decl. ¶ 5. Plaintiffs have no grounds to argue that there existed a long-standing practice with respect to the rank of the certifying official.

formal guidance for N-426 certification, including clarifying the requisite amounts of time in service.[12] *See* Miller Decl. ¶ 7; SAMMA_0041-42. DoD selected the time-in-service requirement in Section I to align honorable service determinations for N-426 purposes with the standards for characterizing service for entry-level separations. *See* SAMMA_0041-42. The Administrative Record in this case thus evidences a discernable path between the problem DoD identified—inconsistent standards for N-426 certification—and the policy choice made to address that problem: consistency throughout all of DoD for characterizing service. Plaintiffs' may disagree with the outcome, but because "the agency's path may reasonably be discerned" in this case, Plaintiffs' arbitrary and capricious claim should fail. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citation and internal quotation marks omitted).

Plaintiffs mistakenly suggest that DoD's position here is in tension with the desire asserted by DoD in *Kirwa* to align N-426 certification with the completion of basic military training. *See* Pls.' Opp. at 32-33. The *Kirwa* plaintiffs all enlisted prior to the date of the October 13, 2017 policy memorandum, *see Kirwa I*, 285 F. Supp. 3d at 33, and were accordingly governed by Section II of the memorandum. With respect to time in service, Section II requires only that a service member have served "for a period of time, and in a manner that permits an informed determination that the member has served honorably," *see* SAMMA_0008, thereby permitting an honorable service determination to be made at the conclusion of basic training. In this case, only Section I is at issue, and that section requires both completion of basic training requirements and a specified amount of time in service, depending on the type of service. Any

[12] As Defendants pointed out in their Cross-Motion, DoD's review of the MAVNI program informed its judgment as to the policies applicable for LPR honorable service determinations. *See* Defs.' Cross-Mot. at 6-7.

tension perceived by Plaintiffs concerning the two cases stems from the fact that different sections of the policy were at issue in the cases.

Plaintiffs' challenge to the O-6 requirement likewise misses the mark. Plaintiffs portray the Declaration of Stephanie Miller as a post hoc justification for the requirement. *See* Pls.' Opp. at 33-34. But an agency may provide a declaration in order to "illuminate the reasons that are already implicit in the internal materials." *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524 (D.C. Cir. 2019) (citation and internal brackets omitted). Here, the Administrative Record shows that, against a backdrop of DoD's desire to establish uniform guidance for N-426 certifications, DoD's review of more than 700 certified forms revealed that the rank of certifying official greatly varied. *See* SAMMA_0169-210; Miller Decl. ¶ 5 (describing review of certified forms). The Administrative Record further shows that the rank ultimately chosen by DoD to be the certifying authority—commissioned officers in the pay grade of O-6 or higher—serve as unit commanders who "are the final authority on everything that occurs in units they hold charge of" and who "are responsible for everything their units do or fail to do." *See* SAMMA_0165. DoD's designation of an O-6 officer (or higher) also reflects its intent to align the N-426 certification process with that for service characterizations under DoDI 1332.14, which assigns the responsibility for such determinations to "a commanding officer in grade O-5 or above." *See* SAMMA_0094. The Miller Declaration thus simply explains the meaning that DoD derived from the relevant materials in the Administrative Record.

Plaintiffs also seek to minimize the importance of the 2020 NDAA as irrelevant to the O-6 requirement. *See* Pls.' Opp. at 34. But the NDAA is relevant here. "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to

Congress' attention through legislation specifically designed to supplant it." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 137 (1985). Congress was plainly aware of the O-6 policy when it passed the 2020 NDAA, debated designating the rank of the certifying official itself, and ultimately decided to leave that designation to DoD's unfettered discretion. *See* Defs.' Cross-Mot. at 31. The 2020 NDAA therefore signals Congress's view that the O-6 requirement is not an arbitrary exercise of DoD's statutory authority.

VI. DOD HAS NOT EXCEEDED ITS STATUTORY AUTHORITY

Plaintiffs' claim that DoD exceeded its authority with respect to the time-in-service and O-6 requirements under § 1440 also is meritless. To start, Plaintiffs do not meaningfully address the 2020 NDAA, which directed DoD to issue regulations concerning the rank of the certifying official. Plaintiffs fail to explain how DoD exceeded its statutory authority when it performed the specific action that Congress required. The 2020 NDAA further evinces Congress's belief that N-426 certifications have an evaluative component. *See* Defs.' Cross-Mot. at 24.

Nor do Plaintiffs meaningfully address *Patterson v. Lamb*, which holds that the military may decline to characterize service for those soldiers who had served for only a *de minimis* time period because the "honorable" characterization of service is reserved for "soldiers who had performed military service after having become fully and finally absorbed into that service." 329 U.S. at 542. Plaintiffs claim that *Patterson* does not apply because "[t]his case does not challenge DoD's authority to issue different types of discharges." Pls. Opp. at 36 n. 30. But this attempt to distinguish *Patterson* falls short: by referencing an honorable characterization of

service in §§ 1439 and 1440, Congress invoked the military's longstanding system of making service characterizations, a system that has primarily been used in separations from service.[13]

Plaintiffs' analysis under *Chevron, Inc. v. Nat. Def. Council, Inc*, 467 U.S. 837, 862 (1984), is equally flawed. With respect to step one of that analysis, Plaintiffs argue that § 1440 is unambiguous as to the time-in-service and O-6 requirements. But the key text at issue—"served honorably"—is the "antithesis of a *Chevron* step one statutory directive," *see Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1164 (D.C. Cir. 2015), and instead exactly the type of quintessential "illustrative term[] [that] was intended to enlarge, rather than to confine, the scope of [an] agency's" discretionary authority, *see Chevron*, 467 U.S. at 862.

To be sure, § 1440 "'refers to *past service*' and is therefore backwards looking," *see* Pls.' Opp. at 19 (quoting *Kirwa I*, 285 F. Supp. 3d at 36), but the time-in-service requirement simply ensures that—upon a retrospective review—an insufficiently developed service record is properly "uncharacterized," *see Patterson*, 329 U.S. at 542. And Plaintiffs' Opposition fails to address the consequence of their reading of the statute: that a *de minimis* amount of service is sufficient for honorable service determinations, contrary to basic principles of administrative law requiring agency findings to be based on substantial evidence. *See* Defs.' Cross-Mot. at 34-35, 39; *see also Patterson*, 329 U.S. at 542; *Gay Veterans Ass'n v. Sec'y of Def.*, 850 F.2d 764, 768 (D.C. Cir. 1988) (holding that characterizations of military service must be "based on substantial evidence" (citation and internal quotation marks omitted). If service characterizations must be made based on a developed service record, so too must N-426 certifications.

[13] Section 1440 itself equates characterization of service for those service members still serving with characterization of service at separation. *See* 8 U.S.C. § 1440(a) (requiring the defendants to "determine whether persons have served honorably in an active-duty status, and whether separations from such service was under honorable conditions").

Plaintiffs' reliance on the one-year time-in-service requirement in § 1439 to define the meaning of § 1440, *see* Pls.' Opp at 20, 36, fares no better. The fact that another statutory provision includes a specific time-in-service requirement does not render § 1440's silence a statutory prohibition on any such requirement. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009) (It "surely proves too much" to argue that "the mere fact that [a statute] does not expressly authorize cost-benefit analysis for a[n EPA-administered statutory test] . . . though it does so for two of the other tests, displays an intent to forbid its use."). That is especially true where, as here, § 1439's time-in-service requirement is a prerequisite *to naturalization*, but the challenged policy applies generally to any solider seeking what § 1440 requires: an honorable characterization of service. *See id*. ("It is eminently reasonable to conclude that [statute's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether [a distinct statutory requirement] should be used, and if so to what degree."). Nothing in the plain language of either section indicates that Congress intended disparate characterization of service standards for aliens seeking citizenship under those provisions than the military's generally applicable standards.[14] By depriving "honorably" of evaluative content, Plaintiffs' argument that

[14] The statutory history also indicates that § 1439's minimum service period does not implicitly deprive the military of authority to require a brief period of military service on which to establish a characterization of service. Congress originally prescribed a three-year minimum period of honorable service for naturalization. Pub. L. 76-853, 54 Stat. 1137 (1940); Pub L. 82-414, 66 Stat. 163, § 328 (1952). In 1942, Congress eliminated the prescribed three-year minimum period for naturalization of World War II soldiers, which was later expanded to other wars, but still required honorable service. Pub L. 77-507, 56 Stat. 176 (1942). In 2003, Congress reduced the mandatory service requirement for naturalization of soldiers during peacetime from three years of honorable service to one year of honorable service. Pub L. 108-136, 117 Stat. 1691 (2003). Even if, in doing so, Congress narrowed the difference between the period of service required for the characterization of service as "honorable" and the minimum peacetime service period required for naturalization, that decision did not repeal, explicitly or by implication, the military's longstanding policy of requiring more than a *de minimis* service record on which to establish an honorable characterization of service. *See Morton v. Mancari*, 417 U.S. 535, 550

§ 1439's prescription implicitly controls the military's characterization of service standards is nothing more than an argument that "the text of the statute [is] less important than . . . the statute's broader 'spirit and basic policy,'" but courts may not "rewrite a statute's plain text to correspond to its supposed purposes." *Landstar Exp. Am., Inc v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009). If Congress intended Plaintiffs' reading, it would have said so.

Plaintiffs' only argument based on the text of § 1440 is that the statute imposes no such time-in-service or O-6 prerequisites before a service member can obtain an N-426. *See* Pls.' Opp. at 36-37. But statutory silence as to the permissibility of these requirements does not lead to the conclusion that DoD was without authority to establish them. Rather, "[i]f a statute is silent or ambiguous, a court may assume that Congress implicitly delegated the interpretive function to the agency." *Wash. Hosp. Ctr. v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986); *see also Entergy Corp.*, 556 U.S. at 222; *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005).

Plaintiffs claim that, because the relevant statutory provisions at issue here were reenacted and recodified as part of the Immigration and Nationality Act of 1952, the Court should disregard legislative history explaining the meaning of the text at issue from when that text was first drafted, debated, and enacted in 1942 and 1948. *See* Pls.' Opp. at 39. That reasoning makes little sense. "[T]here is no indication whatever in the text or even the legislative history of the [1952] reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting" the earlier legislation. *Pierce*, 487 U.S. at 566. Indeed, the 1952 legislative history explicitly states that Congress simply "carried forward substantially the provisions of existing law." Defs.' Cross-Mot. at 6 (quoting H. R. No. Rep. 82-1365 at 79 (1952)).

(1974) ("[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

VII. THE CHALLENGED POLICIES ARE EXEMPT FROM NOTICE-AND-COMMENT RULEMAKING

Defendants' Cross-Motion established that the challenged policies are exempt from notice-and-comment rulemaking, and Plaintiffs' Opposition does nothing to alter that conclusion. Plaintiffs devote much of their argument downplaying the quintessentially military nature of characterizing service. *See* Pls.' Opp. at 41-42. But, as discussed above, the fact that Congress conditioned an immigration benefit on receipt of certified honorable service does not alter the fundamental nature of the characterization. To the contrary, determining whether a solider has established an "honorable" characterization is a military personnel evaluation—a military function related to its personnel—regardless of what USCIS or the soldier then does with that determination. *See United States v. Kelly*, 82 U.S. 34, 36 (1872) (noting that service characterizations are "a formal . . . judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had . . . [served] in a *status* of honor"); *see also* Bonfield, Military and Foreign Affairs Function Rule-Making Under the APA, 71 Mich. L. Rev. 222, 240 (1972) (defining "military" using contemporaneous dictionary definition: "of or relating to soldiers, arms, or war . . ." (citation omitted)). If characterizing service under § 1440 was a civilian function, DoD's involvement in the process would be unnecessary and Congress could simply permit USCIS to certify honorable service. *See* Defs.' Cross-Mot. at 41-42. Notably, Plaintiffs identify no authority in support of their assertion that an honorable service determination is not a "military" function.

Plaintiffs also attempt to find significance in the fact that the military typically certifies service under § 1440 by using USCIS's N-426 Form. *See* Pls.' Opp. at 42. But Plaintiffs fail to explain why that is relevant to finding the challenged policy to be "a matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2). As Sections 5 and 7 of the N-426 Form make

clear, the certifying official must determine if "the requester served honorably," consistent with the statute, "for each period of military service the requester served." Pls.' Mot. for Prelim. Inj., Ex. 7 at 3-4. And the challenged policy ensures that this military service determination is made based on a sufficient record of military service. *See* SAMMA_0089. Nor do Plaintiffs dispute that the challenged policy affects only service members who are serving or who have served in the military and seek a characterization of their service, which makes honorable service characterizations quintessential military personnel matters.[15] *See* Defs.' Opp. at 42-43. *See also Davis*, 111 F.2d at 525 (describing service characterizations as part of "the internal management of the War Department"); Bonfield, *supra* at 317 (defining "[p]ersonnel" using contemporaneous dictionary definition: "a body of employees that is a factor in business administration esp. with respect to efficiency, selection, training, service, and health"); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 570 (2011) (observing that "the common and congressional meaning of personnel file is the file 'showing, for example . . . evaluations of his work performance" (citation and internal quotation marks omitted)).

VIII. PLAINTIFFS HAVE NOT ESTABLISHED THEY ARE ENTITLED TO THE RELIEF THEY SEEK

Lastly, Plaintiffs continue to pursue relief that would *de facto* redefine the meaning of the phrase "honorable service," in contravention of § 1440's dictates and more than one hundred years of practice showing that to be a military determination. Because Plaintiffs seek an order to vacate the time-in-service requirements, Defendants would not be able both comply with such an order and still ensure honorable characterization of service are for soldiers "fully and finally

[15] At no point in their brief do Plaintiffs suggest that Defendants must go through notice-and-comment rulemaking in order to designate O-6 or higher as the appropriate rank of the certifying official or any other aspect of the policy memorandum they purport to be challenging. *See* Pls.' Opp. at 40-42.

absorbed into [military] service," *Patterson*, 329 U.S. at 542, effectively redefining the meaning of honorable service as a characterization *not* reserved for soldiers "fully and finally absorbed," *id*. Nor is vacating the O-6 requirement necessary to ensure *any* of Plaintiffs' arguable rights are effectuated.

For the first time, Plaintiffs suggest that they *only* request that Defendants "*certify or deny* Form N-426s within" a brief time period. Pls.' Opp. at 44 (emphasis in original). To the extent Plaintiffs imply that they would be satisfied with a "den[ial]" of their request for an honorable service characterization on a completed N-426 Form explaining that their service is uncharacterized pursuant to the time-in-service requirement, they have not alleged that they are harmed by failure to receive such an individualized denial. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 406-07 (2009).

Nor should the Court enter an order requiring Defendants to process N-426 Forms "within two business days of receipt of the Form N-426." *See* Pls.' Opp. at 44. The 2020 NDAA left this timeframe to DoD and DoD accordingly updated its October 13, 2017 policy and required a thirty-day turnaround time. *See* SAMMA_0001. An order requiring a two-day turnaround time would frustrate the will of Congress.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Defendants' Memorandum in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, the Court should grant Defendants' motion and deny Plaintiffs' motion.

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Respectfully submitted,

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